No. _____

In the Supreme Court of the United States

DONALD BROADNAX,
Petitioner,

v.

COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

APPENDIX

CHRISTINE A. FREEMAN
EXECUTIVE DIRECTOR
JOHN ANTHONY PALOMBI
Counsel of Record
LESLIE S. SMITH
SPENCER J. HAHN
FEDERAL DEFENDERS FOR THE
MIDDLE DISTRICT OF ALABAMA
817 S. COURT STREET
MONTGOMERY, ALABAMA 36104
(334) 834-2099
John_Palombi@fd.org

November 8, 2021

USCA11 Case: 20-12600 Date Filed: 05/07/2021 Page: 1 of 43

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-12600

D.C. Docket No. 2:13-cv-01142-AKK

DONALD BROADNAX,

Petitioner - Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

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

(May 7, 2021)

Before WILSON, MARTIN, and JILL PRYOR, Circuit Judges.

MARTIN, Circuit Judge:

Donald Broadnax, an Alabama death row prisoner, appeals the District Court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. Mr.

Broadnax raises three issues in this appeal. First, he says trial counsel was ineffective for failing to investigate his alibi for the time of the crime. Second, Mr. Broadnax argues that Alabama's application of its hearsay rules to exclude testimony at his state habeas evidentiary hearing violated his due process rights. Finally, he argues the prosecutor engaged in misconduct by shifting the burden of proof from the state to Mr. Broadnax. After careful consideration, and with the benefit of oral argument, we affirm the denial of Mr. Broadnax's habeas petition.

I. BACKGROUND AND PROCEDURAL HISTORY

A. TRIAL AND OFFENSE CONDUCT

In April 1996, Mr. Broadnax was serving a sentence of 99 years' imprisonment and lived at a prison work release center in Alexander City, Alabama. Broadnax v. State ("Broadnax I"), 825 So. 2d 134, 150 (Ala. Crim. App. 2000). He was assigned to work at Wellborn Forest Products, also in Alexander City.[1] Id. Wellborn made wooden furniture like cabinets, doors, and other items. Mr. Broadnax was married to Hector Jan Stamps Broadnax, and Jan would on occasion have dinner with Broadnax while he was on his break at Wellborn. Id. One of these occasions was April 25, 1996. See id.

[1] Different courts have used two different spellings of Wellborn—"Welborn" and "Wellborn." This opinion will use the latter spelling.

At around 6:00 p.m. that day, Jan brought her three-year-old grandson, DeAngelo Stamps, with her to Wellborn to visit Mr. Broadnax and bring him dinner. Id. at 150, 201. A few hours later, around 8:50 p.m., Jan's car was discovered in Birmingham, Alabama. Id. at 150–51. Jan and DeAngelo were found beaten to death in the vehicle's locked trunk. Id. at 151. The evidence shows that Alexander City, where Mr. Broadnax lived and worked, is about an hour and a half drive from Birmingham where Jan and DeAngelo were found.

The next day, Birmingham detectives questioned Mr. Broadnax at the Alexander City work release center. Mr. Broadnax told detectives he last saw Jan and DeAngelo at around 8:20 p.m. the previous night, when they left after bringing him some food. Mr. Broadnax said that after Jan and DeAngelo left, he remained at Wellborn, working and making at least one phone call. He denied going to Birmingham and denied any involvement in the murders. Nevertheless, Mr. Broadnax was arrested for the murders a few days later.

Trial began in June 1997. Mr. Broadnax was represented by William Brower and Darryl Bender, two lawyers appointed to represent him. The state's theory of the case was that Jan did not know Mr. Broadnax was serving a prison sentence for murder until he was turned down for parole. After she learned the truth, the state said, she planned to divorce Mr. Broadnax and stop helping him in

his efforts to obtain parole. The state said this was the reason Mr. Broadnax killed her.

The state's evidence was circumstantial, but three witnesses were called to testify about what they saw at Wellborn that night. Johnny Baker, a prisoner at the Alexander City work release center who was Mr. Broadnax's coworker at Wellborn, testified that he saw Broadnax driving Jan's car at Wellborn on the evening of April 25, 1996. Broadnax I, 825 So. 2d at 150. According to Mr. Baker, Mr. Broadnax stopped to talk and Baker saw a child in the backseat. Id. Mr. Baker testified that he was "pretty sure" the child was alive when he spoke with Mr. Broadnax. Id.

Next, the state offered witnesses that tended to show Mr. Broadnax was seen returning to Wellborn within a time window that would have permitted him to drive to Birmingham and back. Mark Chastain, a security guard at Wellborn, and Mark's wife Kathy, testified they saw Mr. Broadnax at Wellborn between 10:30 and 10:45 p.m. that night. Id. Mark was in charge of locking the building and setting the alarm system for the night. After he set the alarm, Mark saw someone run past him in the shop. Mark asked the person who they were, and the person "called back . . . 'It's me, Donald.'" Mark told Mr. Broadnax they needed to hurry and get out before the alarm sounded, so the two men left the building. Once they

were outside, Mr. Broadnax asked Mark to call the work release center van for him. Mark couldn't go back into Wellborn to use the phone, so he stopped at a gas station a mile down the road and called the work release center and told them to come get Mr. Broadnax.

Meanwhile, Kathy Chastain had been in the Wellborn parking lot waiting to pick up Mark. As Kathy was waiting, she saw a white truck pull into the parking lot. A man got out and entered Wellborn carrying a small cooler.[2] A few minutes later, Mark came out with the same person Kathy had seen going inside.

The jury also heard testimony about physical evidence from detectives and crime scene analysts. Two pieces of evidence were found at the Alexander City work release center: a work uniform that said "Donald" on the shirt and a pair of Red Wing brand boots. Broadnax I, 825 So. 2d at 151. There was blood on both items. Id. DNA tests performed on the shirt indicated the blood belonged to Jan and DeAngelo. Id. Another piece of evidence was found at Wellborn a few days later. Employees turned in an earring, which was found outside the back door near where employees would take their breaks. Id. The Wellborn earring matched an earring found on the rear floorboard of Jan's car in Birmingham. Id. Finally, a

[2] The jury heard testimony that when Jan left her house on April 25, she took plastic containers full of food to bring to Mr. Broadnax. Officers later collected the containers, with the food still inside, from Wellborn.

detective testified that Mr. Broadnax had time to travel from Wellborn in Alexander City to where Jan's car was found in Birmingham within the time frame indicated by the state's evidence. Id.

Mr. Broadnax's attorneys did not present any evidence to rebut the state's case. They did, however, emphasize the absence of evidence directly implicating Mr. Broadnax, and cross-examine witnesses to undermine the state's circumstantial evidence. Trial counsel also argued that Mr. Broadnax had an alibi and that he could not have driven from Alexander City to Birmingham and back within the relevant time frame.

On June 6, 1997, after deliberating for less than two hours, the jury returned with its verdict. Mr. Broadnax was convicted of four counts of capital murder for the deaths of Jan and DeAngelo. Broadnax v. State ("Broadnax III"), 130 So. 3d 1232, 1236 (Ala. Ct. Crim. App. 2013). The penalty phase began immediately after the jury's verdict. The state relied on the evidence it presented during the guilt phase. Mr. Broadnax presented only the testimony of his sister, Dorothy McKinstry. Dorothy told the jury about Mr. Broadnax's childhood. Essentially, he "didn't have a childhood."

After deliberating for 24 minutes, the jury unanimously recommended Mr. Broadnax be sentenced to death. Broadnax III, 130 So. 3d at 1236. The trial court

followed the jury's recommendation. Id. In its sentencing order, the trial court said it found four aggravating circumstances. The trial court did not find any statutory mitigating circumstances. Even when taking Dorothy McKinstry's testimony into account, the trial court found "beyond a reasonable doubt and to a moral certainty that the aggravating circumstances outweigh the mitigating circumstances and [are] sufficient to uphold the jury's recommendation of punishment at death." See Broadnax I, 825 So. 2d at 233 (Appendix A, corrected sentencing order).

The Alabama Court of Criminal Appeals ("CCA") ultimately affirmed Mr. Broadnax's convictions and sentence. See Broadnax I, 825 So. 2d at 222 (affirming conviction); see id. at 226 (affirming sentence following remand). The Alabama Supreme Court granted certiorari and affirmed the CCA's decision. Ex parte Broadnax, 825 So. 2d 233, 235, 237 (Ala. 2001). The United States Supreme Court denied certiorari. Broadnax v. Alabama, 536 U.S. 964, 122 S. Ct. 2675 (2002) (Mem.).

B. STATE POSTCONVICTION

On June 25, 2003, Mr. Broadnax timely filed a state postconviction motion under Alabama Rule of Criminal Procedure 32, which challenged his convictions and sentence. Broadnax III, 130 So. 3d at 1239. The first of two evidentiary

hearings was held on May 23, 2005. Id. at 1240. Mr. Broadnax presented testimony from eight witnesses. Relevant to his claims in this appeal, Mr. Bender and Mr. Brower, Mr. Broadnax's trial counsel, testified about their work on Broadnax's case.

The Rule 32 court found that the performance of Mr. Broadnax's trial counsel was not deficient. The court also found Mr. Broadnax could not show prejudice. On June 14, 2005, the Rule 32 court issued a final order denying Mr. Broadnax's Rule 32 petition.

Mr. Broadnax appealed this decision to the CCA, which reversed the Rule 32 court, saying that the court made a procedural error. The CCA remanded Mr. Broadnax's case for further proceedings. Broadnax III, 130 So. 3d at 1240; see Broadnax v. State ("Broadnax II"), 987 So. 2d 631, 642 (Ala. Ct. Crim. App. 2007). Back before the Rule 32 court, Mr. Broadnax filed an amended petition asserting additional claims. The Rule 32 court ordered a second evidentiary hearing limited to issues of ineffective assistance of counsel in the guilt and penalty phases of trial. The second hearing was held on March 14 and 15, 2011. Mr. Broadnax presented the testimony of an additional eight witnesses. In pertinent part, Mr. Broadnax raised a new guilt-phase theory, arguing that trial counsel were ineffective for failing to investigate his alibi. He claimed he was at

the work release center in Alexander City between 9:00 and 10:00 p.m. on the night of the murders and therefore could not have possibly been in Birmingham around 8:50 p.m. to abandon the car containing Jan's and DeAngelo's bodies. In support of this theory, Mr. Broadnax presented witnesses who said they saw him at the work release center and offered a document that prisoners used to log the time they left the center and the time they returned. The prisoner sign-in log indicated that Mr. Broadnax left the work release center at 5:30 a.m. for the "c. shop," or cabinet shop (meaning Wellborn), and returned at 9:00 p.m. Mr. Broadnax also offered evidence to show counsel did not properly investigate mitigating evidence for sentencing. This evidence included, among other things, testimony from Dr. Kenneth Benedict, an expert in psychology, about intellectual disability tests he administered to Mr. Broadnax.

The state introduced two exhibits to rebut Mr. Broadnax's alibi evidence. First, the state offered Mr. Broadnax's original statement he gave to police the day after the murders. In this statement, he told police he stayed at Wellborn after his shift because Jan was bringing him food. He tried calling Jan around 10:30 p.m. to make sure she got home safe when a man named Mark turned off the lights and told Mr. Broadnax they had to hurry and get out of the building because the alarm was set. The second exhibit was the Alexander City work release center log of

prisoners' comings and goings. This log was kept by the officers and indicated Mr. Broadnax returned to the work release center at 11:50 p.m.

On May 6, 2011, the Rule 32 court issued its final order denying relief on Mr. Broadnax's petition. He appealed and the CCA affirmed the denial of relief on February 15, 2013. Broadnax III, 130 So. 3d at 1268.

C. FEDERAL HABEAS

Mr. Broadnax filed his federal habeas petition on June 17, 2013. Relevant to this appeal, he raised three claims. First, Mr. Broadnax raised a guilt-phase ineffective assistance claim. He said that trial counsel did not conduct a reasonable investigation related to the guilt phase because counsel did not speak with anyone at the Alexander City work release center. He said the CCA placed an improper burden of proof on him by imposing "an outcome-determinative burden . . . to establish his innocence" to meet the prejudice requirement under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). Second, he said Alabama's evidentiary rule prohibiting hearsay evidence during Rule 32 hearings—specifically, in relation to the background information Dr. Benedict would have discussed—violated his due process rights. Finally, Mr. Broadnax argued that the state shifted the burden of proof from it to him by asking whether he presented any evidence or explanation of what happened.

The District Court denied the federal petition, and denied Mr. Broadnax's Rule 59 motion to reconsider the final judgment. Mr. Broadnax timely appealed.

II. STANDARD OF REVIEW

We review de novo a district court's denial of a habeas corpus petition. Ward v. Hall, 592 F.3d 1144, 1155 (11th Cir. 2010). A petitioner is entitled to habeas relief only if his claim is meritorious and the state court's resolution of that claim was contrary to, or an unreasonable application of, clearly established Supreme Court precedent, or was based on an unreasonable determination of the facts presented in the state court proceeding. 28 U.S.C. § 2254(d).

III. DISCUSSION

A. THE CCA'S DENIAL OF MR. BROADNAX'S GUILT-PHASE INEFFECTIVE ASSISTANCE CLAIM WAS NOT AN UNREASONABLE DETERMINATION OF THE FACTS OR CONTRARY TO CLEARLY ESTABLISHED LAW

The CCA upheld the Rule 32 court's three findings resulting in the denial of this ineffective assistance claim. Broadnax III, 130 So. 3d at 1255–60. First, the CCA agreed with the Rule 32 court that because Mr. Broadnax failed to call either Mr. Brower or Mr. Bender to testify at the second evidentiary hearing, the record was silent as to trial counsel's reasons for their alleged failure to investigate and present evidence showing Broadnax was at the work release center at 9:00 p.m. Id. at 1255–56. Second, the CCA upheld the Rule 32 court's finding that Mr.

Broadnax failed to prove counsel's performance was deficient, because neither Mr. Brower nor Mr. Bender "had any reason whatsoever to think that an investigation into the possibility that Broadnax was somewhere other than Welborn at 9:00 p.m." was necessary, based on Broadnax's statements that he was at Wellborn until around 10:45 p.m. Id. at 1256–58. Finally, the CCA agreed that the testimony at the second evidentiary hearing "failed to prove that [Broadnax] was at the work-release facility at 9:00 p.m.," such that Mr. Broadnax failed to prove he was prejudiced by counsel's conduct. Id. at 1258–60.

Mr. Broadnax argues that the CCA's decisions were objectively unreasonable. First, he claims the CCA misapplied Strickland because Strickland does not limit proof of counsel's deficient performance to counsel's own testimony. Second, he says the CCA's ruling that counsel properly limited the scope of their investigation based on his statements misapplies Strickland, because that precedent "requires that counsel undertake reasonable investigations." Finally, Mr. Broadnax argues that the CCA improperly discounted the evidence he provided to support his alibi.

1. Legal Standard

To prevail on an ineffective assistance of counsel claim, a habeas petitioner must show both that his counsel's performance was deficient and that counsel's

deficient performance prejudiced him. See Strickland, 466 U.S. at 687, 104 S. Ct. at 2064. A petitioner must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." Id. at 689, 104 S. Ct. at 2065 (quotation marks omitted). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," but "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Id. at 690–91, 104 S. Ct. at 2066.

To establish prejudice, a petitioner must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. The inquiry into prejudice at the guilt phase still "requires us to evaluate the totality of the evidence—both that adduced at trial, and the evidence adduced in the habeas proceedings." Reaves v. Sec'y, Fla. Dep't of Corr., 717 F.3d 886, 901 (11th Cir. 2013) (quotation marks omitted) (analyzing guilt-phase ineffective assistance claim).

2. Trial Counsel's Performance

Mr. Broadnax first argues the CCA unreasonably applied Strickland by presuming counsel was competent "absent more specific questioning about why counsel had not offered evidence to support a particular alibi." Although this argument seems persuasive at first glance, it ultimately fails because Mr. Broadnax has offered no evidence to show counsel should have investigated an alibi that contradicted the alibi Broadnax told the police and counsel in the beginning.

On this record, we cannot conclude the CCA unreasonably applied Strickland by finding counsel's performance was not deficient. However, it is first worth noting the CCA improperly emphasized the fact that trial counsel "were never specifically questioned" about their failure to investigate an alibi defense. See Broadnax III, 130 So. 3d at 1255–56. Mr. Broadnax did not raise the claim that trial counsel were ineffective for failing to investigate an alibi until he filed his second amended Rule 32 petition. Id. at 1255. And he made this filing only after the first evidentiary hearing when Mr. Brower and Mr. Bender testified. See id. Because the lawyers were not called as witnesses at the second evidentiary hearing, they were never asked about their investigation into this alibi. Nevertheless, the record is not completely silent about their investigation, and counsel's lack of investigation is troubling. For example, counsel filed no motions, including the

motion for funds to hire an investigator, until May 9, 1997. The court granted the motion for funds on May 14. This was mere weeks before voir dire began on June 2. Beyond that, counsel did not appear to investigate Mr. Broadnax's statement that he was speaking with someone on the phone at Wellborn around 9:00 p.m., because the state surprised defense counsel with phone records (which showed no call was placed) on the last day of trial.[3] Troubling though this lack of investigation may be, Mr. Broadnax does not make these arguments here in this appeal because they do not further the alibi he asserted before the Rule 32 court.

In relation to the specific alibi claim before us, this record does not support the conclusion that the CCA unreasonably determined "the record is ambiguous" and presumed counsel exercised reasonable professional judgment. See Broadnax III, 130 So. 3d at 1256. Even though counsel did not officially retain an investigator until mere weeks before trial, Mr. Bender testified that the investigator probably began to work on Mr. Broadnax's case before the motion for funds to hire an investigator was granted. Mr. Brower testified that the investigator "started fairly quickly after the preliminary hearing," and the reason they waited to file pretrial motions until May was "[b]ecause that's when the judge asked us to file

[3] Trial counsel objected at trial on the grounds that they did not receive the phone records until the week of trial at the earliest, and the morning of the day before the verdict, at the latest.

them." The record also indicates that counsel instructed the investigator "to talk to people in the Elyton Village area who may have seen any part of the crime, . . . and to talk to people at the work release center" or at Wellborn. This record is silent as to any failure on the investigator's part, and the only evidence appears to show there simply was no exculpatory evidence to discover. Mr. Bender said the investigation was "[n]ot a whole lot" of assistance "because there was just so little to what we could find relative to this particular crime. It happened in a confined setting. And so the people involved were, the number was restricted." Based on these facts, we cannot conclude counsel's investigation was unreasonable. Thus, the CCA reasonably presumed counsel's performance was not deficient. See Strickland, 466 U.S. at 689, 104 S. Ct. at 2065 (explaining that courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance").

Second, the CCA did not make an unreasonable determination of the facts when it found Mr. Broadnax failed to prove counsel's alibi investigation was deficient. See Broadnax III, 130 So. 3d at 1256–58. The CCA upheld the Rule 32 court's findings that Mr. Broadnax's new alibi was inconsistent with the alibi he offered at trial, so counsel merely performed a reasonable investigation based on the information Broadnax supplied. See id. at 1249, 1256–57. At trial, the defense

theory was that Mr. Broadnax was present at Wellborn the whole night. The defense theory now proffered is that Mr. Broadnax was back at the work release center around 9:00 p.m. See id. at 1258. The CCA said that based on Mr. Broadnax's statements to police and to counsel, "neither Brower nor Bender had any reason whatsoever to think that an investigation into the possibility that Broadnax was somewhere other than Welborn at 9:00 p.m. the night of the murders was necessary." Id. This seems right to us.

The information provided by a defendant with regard to any possible defenses is relevant to the scope of counsel's investigation. Pooler v. Sec'y, Fla. Dep't of Corr., 702 F.3d 1252, 1269–70 (11th Cir. 2012) (citing Strickland, 466 U.S. at 691, 104 S. Ct. at 2066). Because Broadnax did "not mention" he was at the work release center at the time of the murders, his "lawyer[s] [were] not ineffective for failing to discover or to offer [such] evidence." Newland v. Hall, 527 F.3d 1162, 1202 (11th Cir. 2008) (quotation marks omitted); see also Callahan v. Campbell, 427 F.3d 897, 934–35 (11th Cir. 2005) (holding counsel's investigation was reasonable when defendant did not tell counsel he was abused and there was no documentation of abuse in records counsel obtained). And, to the extent Mr. Broadnax argues that a reasonable investigation required counsel to at

least interview people at the work release center or seek records there, Broadnax cannot show prejudice, as described below.

3. Prejudice

Mr. Broadnax argues that the CCA's finding that he "failed to prove" he was actually at the work release center at 9:00 p.m. is objectively unreasonable because (1) that finding fixated on 9:00 p.m. to the exclusion of other relevant evidence; (2) factual inconsistencies in the trial and postconviction evidence do not foreclose the existence of reasonable doubt; and (3) the Rule 32 court made "wholly speculative and adverse credibility assessments" about whether jurors would have believed Broadnax's exculpatory evidence.

Mr. Broadnax's first argument fails. The only "relevant alibi evidence" he specifically points to as being excluded is the affidavit of Phillip Holsemback, who was also incarcerated at the Alexander City work release center. Mr. Holsemback did say he saw Mr. Broadnax in the sergeant's office before 10:00 p.m. on April 25, 1996. But most of the affidavits Mr. Broadnax offered, including Mr. Holsemback's affidavit, were only proffered to the Rule 32 court and never entered into evidence. Mr. Broadnax did not challenge this evidentiary ruling on appeal to the CCA. See Broadnax III, 130 So. 3d at 1250 n.15. Neither has he argued—before us or the District Court—that the state courts erred by not considering the

affidavits on appeal. We simply cannot consider the affidavits for the first time now.

Mr. Broadnax also takes issue with the CCA's finding that the prisoner sign-in log, which indicates Broadnax signed into the work release center at 9:00 p.m., could have been altered. He says this finding "pretermitted consideration of several material facts" in witnesses' testimony. But this argument fails because the function of a trial court is to weigh inconsistencies in the evidence. And this is what the Rule 32 court (as affirmed by the CCA) did. Broadnax III, 130 So. 3d at 1258–59. The CCA held that none of the witness testimony "indicated that anyone saw Broadnax at the work-release facility at 9:00 p.m." Id. at 1259.

This finding is not unreasonable. Marcus Whetstone, an officer, testified he remembered seeing Mr. Broadnax on April 25, 1996, sometime before he conducted the last head count, which was around 11:00 p.m. or midnight. James Smith, a prisoner, remembers seeing Mr. Broadnax around 11:00 p.m. in the sergeant's office as the sergeant told him the news about Jan. Floyd Cumbie, an officer, did not see Mr. Broadnax but remembered the head count conducted around 9:00 p.m. cleared and no prisoners were missing. Yet Mr. Cumbie also admitted that if Mr. Broadnax requested to work late (as he claimed before the Rule 32 court), it was possible Broadnax would not have been deemed missing at

the 9:00 p.m. head count. Mr. Broadnax points to Donald Bowden's testimony—that Mr. Bowden picked Broadnax up at Wellborn between 9:00 and 10:00 p.m.—as hard evidence contradicting the state's trial theory. But the CCA upheld the Rule 32 court's finding that Mr. Bowden's testimony conflicted with the work release log, which showed Bowden made only one trip at 9:00 p.m., and Mr. Broadnax was not listed on the work release log as being present on that trip. Broadnax III, 130 So. 3d at 1258–59. Rather, the log shows Mr. Bowden left with three prisoners at 9:00 p.m. (and presumably dropped them somewhere), picked up Roger Stolz and an R. Williams, and returned with Stolz and Williams at 10:45 p.m. The log also shows Mr. Bowden going out "to C. shop" at 11:12 and returning with Mr. Broadnax and another prisoner at 11:50 p.m.

Based on this evidence, the CCA held that Mr. Broadnax failed to prove that he was "at the work-release center 'at a time which would have made it impossible for him to have committed a murder in Birmingham' as he alleges." Broadnax III, 130 So. 3d at 1260. This also shows that although the CCA looked at the 9:00 p.m. mark based on Mr. Broadnax's Rule 32 theory, it did not "fixate" on that time to the exclusion of other evidence. We therefore cannot disagree with the CCA's decision to uphold the Rule 32 court's resolution of conflicting testimony and evidence. See Nejad v. Att'y Gen., State of Ga., 830 F.3d 1280, 1292 (11th Cir.

2016) (holding that when a state court is "presented with squarely conflicting testimony on [a] critical factual dispute," we are "powerless to revisit [the state court's determination] on federal habeas review" absent "clear and convincing evidence in the record to rebut this credibility judgment").

Second, Mr. Broadnax says that factual inconsistencies in the trial and postconviction evidence do not foreclose the existence of reasonable doubt. But, as explained above, we are bound by the Rule 32 court's findings after it weighed the evidence. Neither did the CCA obviously misstate the prejudice standard. It looked at whether the Rule 32 evidence refuted or contradicted the state's theory that Mr. Broadnax could make it to Birmingham and back within the timeframe reflected by the evidence, such that the jury would have a reasonable doubt respecting guilt. See Broadnax III, 130 So. 3d at 1260 (holding that because Mr. Broadnax failed to prove he was at the work release center at 9:00 p.m., he failed to show it was "impossible for him to have committed a murder in Birmingham").

Mr. Broadnax's third argument, that the Rule 32 court made "wholly speculative and adverse credibility assessments" about whether jurors would have believed Broadnax's exculpatory evidence, fares no better. Mr. Broadnax points to the CCA's decision to uphold the findings that (1) Mr. Bowden was not credible; and (2) the "infer[ence]" that "the jury surely would have" reached based on the

inconsistencies between the work release and prisoner sign-in logs is that "when Broadnax returned to the center at 11:50 p.m. he simply wrote down '9:00.'" Broadnax III, 130 So. 3d at 1259. But again, we must defer to the Rule 32 court's credibility determinations unless they are clearly erroneous. See Consalvo v. Sec'y for Dep't of Corr., 664 F.3d 842, 845 (11th Cir. 2011) (per curiam) ("Determining the credibility of witnesses is the province and function of the state [postconviction] courts . . . ."); see Landers v. Warden, 776 F.3d 1288, 1294 (11th Cir. 2015). Mr. Broadnax has not argued that those findings are unreasonable determinations of the facts, and we see no basis in this Circuit's precedent to conclude that the CCA's decision is contrary to clearly established law. In sum, Mr. Broadnax has not established prejudice.

* * *

Because Mr. Broadnax has failed to show the CCA's denial of his guilt-phase ineffective assistance claim was based on an unreasonable determination of the facts, or was contrary to, or an unreasonable application of, clearly established federal law, we must affirm the District Court's denial of this claim.

B. FEDERAL LAW DOES NOT CLEARLY ESTABLISH THAT ALABAMA'S HEARSAY RULES CREATE A DUE PROCESS VIOLATION

Mr. Broadnax also argues the CCA unreasonably rejected his argument that the Rule 32 court violated his due process rights when, citing hearsay grounds, it

prohibited Dr. Benedict from testifying about statements from Broadnax and Broadnax's family. At the second evidentiary hearing before the Rule 32 court, Mr. Broadnax called Dr. Benedict as an expert witness to testify about intellectual disability tests Benedict administered to Broadnax.

Before Dr. Benedict was asked about Mr. Broadnax's test results, the state moved to prevent Benedict from testifying to hearsay evidence under Waldrop v. State, 987 So. 2d 1186 (Ala. Crim. App. 2007). In Waldrop, the CCA confirmed that because the Alabama Rules of Evidence apply to Rule 32 proceedings, hearsay testimony must be excluded even though it would have been admissible if offered during the penalty phase of trial. Id. at 1190; see also Whatley v. State, 146 So. 3d 437, 486 (Ala. Ct. Crim. App. 2010) ("The Rules of Evidence to not apply to sentencing hearings." (citing Ala. R. Evid. 1101(b)(3)). The state said that because information Dr. Benedict gained from speaking with Mr. Broadnax and his family members is not subject to cross-examination, Broadnax could not "back door hearsay in through this psychologist."

Ultimately, the court agreed that although Dr. Benedict could have testified about what he learned at sentencing, Rule 32 evidentiary rules prohibited any information Benedict learned from Mr. Broadnax's family members, because that was hearsay testimony. Postconviction counsel thus proffered what Dr. Benedict

learned about Mr. Broadnax's history,[4] but the Rule 32 court considered the proffered evidence only to find that Broadnax could not show prejudice on an alternative ground.[5]

In this appeal, Mr. Broadnax argues that both the CCA and the District Court misapplied Sears v. Upton, 561 U.S. 945, 130 S. Ct. 3259 (2010) (per curiam), and Green v. Georgia, 442 U.S. 95, 99 S. Ct. 2150 (1979) (per curiam), which he says require reliable hearsay evidence to be introduced where there are "substantial reasons" to assume its reliability.

In Green, the defendant appealed his capital sentence for murder. 442 U.S. at 95–96, 99 S. Ct. at 2151. Mr. Green was indicted with Carzell Moore. Id. The evidence at trial showed that Mr. Moore and Mr. Green, "acting either in concert or separately," raped and murdered the victim. Id. at 96, 99 S. Ct. at 2151. At the

---

[4] Counsel proffered the following facts: Mr. Broadnax's mother was fourteen when she married her first husband; his mother suffered from social phobia and rarely left the house; his father was emotionally and physically absent during Broadnax's childhood and had a gambling addiction; his sister struggled with "disabling anxiety" like Broadnax; he was raped at age 12; at 13, he was hit by a car and pinned between the car and a brick wall; he witnessed the shooting and killing of a good friend; he was beaten by his mother; he started drinking alcohol and "made a serious attempt on his life by taking [his sister Dorothy's] pain medication"; he faced bullying, ridicule, and knife attacks from gang members (which counsel believed led to Broadnax's first murder conviction); his father suffered a stroke and Broadnax became his father's primary caretaker until he died when Broadnax was 16; and when incarcerated for murder at 17, he fended off several sexual assaults.

[5] The Rule 32 court found that "it is not reasonably probable" that Dr. Benedict's diagnosis of post-traumatic stress disorder based on Mr. Broadnax's childhood sexual assault, which "occurred more than twenty years earlier," would have had any impact whatsoever on the jury's decision to sentence Broadnax to death.

penalty phase of trial, Mr. Green tried to introduce the testimony of Thomas Pasby, who would have testified that Mr. Moore told Pasby he killed the victim after ordering Green to run an errand. Id. The trial court refused to allow Mr. Pasby to testify, citing Georgia's hearsay rules. Id. The Supreme Court reversed and vacated Mr. Green's sentence, holding that under these facts, the exclusion of Mr. Pasby's testimony constituted a due process violation. Id. at 97, 99 S. Ct. at 2151. It cited two considerations: (1) "[t]he excluded testimony was highly relevant to a critical issue" in the penalty phase, and (2) there were several reasons to assume the statement was reliable. Id. Therefore, in those "unique circumstances, the hearsay rule may not be applied mechanistically to defeat the ends of justice." Id. at 97, 99 S. Ct. at 2151–52 (quotation marks omitted).

In Sears, the petitioner appealed Georgia's denial of postconviction relief. 561 U.S. at 946, 130 S. Ct. at 3261. Mr. Sears claimed trial counsel was ineffective for failing to present mitigating evidence. Id. at 947–48, 130 S. Ct. at 3261–62. That evidence would have shown that Mr. Sears had an abusive home life, was sexually abused, suffered from substantial deficits in cognition, and that Sears's brother introduced him to a life of crime. Id. at 948–50, 130 S. Ct. at 3262–63. In holding that the state court misapplied Strickland's prejudice prong, the Supreme Court mentioned that "the fact that some of [the mitigating] evidence

may have been 'hearsay' does not necessarily undermine its value—or its admissibility—for penalty phase purposes." Id. at 950, 130 S. Ct. at 3263. In a footnote, the court cited Green for the principle that reliable, relevant hearsay evidence "should not be excluded by rote application of a state hearsay rule." Id. at 950 n.6, 130 S. Ct. at 3263 n.6.

First, assuming that Green and Sears do stand for the premise that mitigating hearsay evidence is always admissible at the postconviction stage, Mr. Broadnax has not persuaded us that the testimony from Dr. Benedict would have met Green's reliability prong. Mr. Broadnax says the interviews "were corroborated by testing" and, vice-versa, that the interviews corroborated the results of the psychological tests. But corroboration was just one of several reasons the Green court held that Mr. Pasby's testimony was reliable. See id. at 97, 99 S. Ct. at 2151. Unlike in Green, Mr. Broadnax relies only on the mutual corroboration of the interviews and testing, and no other reliability considerations. Further, the type of corroboration Mr. Broadnax offers is different than what was present in Green. Mr. Broadnax's postconviction counsel did not introduce evidence at the Rule 32 hearing to corroborate each piece of evidence proffered to the Rule 32 judge. See Chambers v. Mississippi, 410 U.S. 284, 300–01, 93 S. Ct. 1038, 1048 (1973) (holding that each hearsay statement "was corroborated by some other evidence in the case").

Thus the CCA's decision was not contrary to clearly established Supreme Court precedent. Cf. Randolph v. McNeil, 590 F.3d 1273, 1277 (11th Cir. 2009) (per curiam) (holding that petitioner could not overcome AEDPA deference to show a due process violation).

And, although questions of admissibility under Alabama's hearsay rule, regarding exclusion or admission, are subject to constitutional requirements (including due process), see Ala. R. Evid. 802 advisory committee's note, there is no precedent that clearly establishes Mr. Broadnax was deprived of a fair postconviction proceeding. That is because Mr. Broadnax was not prevented from calling other witnesses to testify firsthand about the information Dr. Benedict learned. Cf. Chambers, 410 U.S. at 298–303, 93 S. Ct. at 1047–50 (holding that petitioner was denied a fair trial when the court refused to allow him to introduce hearsay testimony and refused to permit him to call other witnesses); see also Broadnax III, 130 So. 3d at 1245 ("[N]othing prevented Broadnax from calling his family members to testify or from testifying himself regarding the same information that had allegedly been provided to Dr. Benedict." (footnote omitted)). Postconviction counsel, for whatever reason, chose not to call the corroborating witnesses. The CCA did not unreasonably determine Mr. Broadnax was not denied due process. See Broadnax III, 130 So. 3d at 1245–46.

C. THE CCA'S DETERMINATION THAT THE PROSECUTOR DID NOT SHIFT THE BURDEN OF PROOF TO MR. BROADNAX WAS NEITHER UNREASONABLE NOR CONTRARY TO CLEARLY ESTABLISHED LAW

In a criminal proceeding, the government has the burden of proving every element of the charged offense beyond a reasonable doubt. United States v. Nerey, 877 F.3d 956, 970 (11th Cir. 2017). As a result, "prosecutors must refrain from making arguments that improperly shift the burden of proof to the defendant." Id. Mr. Broadnax says that during closing arguments, the prosecutor told the jurors they should consider whether Broadnax's counsel is giving them "another reasonable explanation" for Jan's and DeAngelo's murders. The prosecutor said, in full, that Mr. Broadnax had two fine attorneys and:

> [W]hat I want you to be thinking the whole time they're up here is: Are they giving me another reasonable explanation for all of this? Are they explaining this in a reasonable way? Does it make sense, or is it like that little boy with the cookie stains on his mouth saying that Martians beamed into the kitchen and took that bite out of the cookie? . . . Look at whether they provide you with a reasonable explanation.

Mr. Broadnax argues that these statements shifted the burden of proof to him, and that the CCA's and the District Court's rejection of this claim is contrary to the

Supreme Court's decision in Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450 (1979).[6]

Because the CCA rejected this claim on direct appeal, we look to Broadnax I as "the last reasoned decision of the state courts" on this claim. See Lee v. Comm'r, Ala. Dep't of Corr., 726 F.3d 1172, 1203 (11th Cir. 2013). The CCA held that the prosecutor's argument did "no[t] suggest[] . . . that Broadnax had an obligation to produce any evidence or to prove his innocence"; rather, the prosecutor "merely asked the jury to consider the evidence presented" and determine whether there was a reasonable doubt as to Broadnax's guilt. Broadnax I, 825 So. 2d at 185. The CCA also said no reasonable juror would have construed the prosecutor's comments to mean Mr. Broadnax had any burden of proof because the trial court instructed the jury regarding the state's burden of proof and Broadnax's presumption of innocence. Id. The District Court agreed, finding that "the prosecutor directed his statement at defense counsel and their offered explanations for the circumstantial evidence." The court also agreed with the CCA

[6] Sandstrom held that a jury instruction—"the law presumes that a person intends the ordinary consequences of his voluntary acts"—shifted the burden of proof to the defendant because the jury could have interpreted the "presum[ption]" as requiring the defendant offer some proof of a lack of intent. 442 U.S. at 513, 517, 99 S. Ct. at 2453, 2456 (alteration adopted). Mr. Broadnax places great weight on Sandstrom, but because he is not arguing about the instructions given to the jury, we rely on more factually similar cases.

that any possible prejudice to Mr. Broadnax was cured by the jury instructions regarding the burden of proof.

"Prosecutorial misconduct requires a new trial only if we find the remarks (1) were improper and (2) prejudiced the defendant's substantive rights." United States v. Hernandez, 145 F.3d 1433, 1438 (11th Cir. 1998) (quotation marks omitted). The first element is determined by looking to four factors: "(1) the degree to which the challenged remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether they are isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the competent proof to establish the guilt of the accused." Nerey, 877 F.3d at 970 (quotation marks omitted). The second element, prejudice, is shown "when a reasonable probability arises that, but for the remarks, the outcome of the trial would have been different." United States v. Merrill, 513 F.3d 1293, 1307 (11th Cir. 2008) (quotation marks omitted). Where there is "sufficient independent evidence of guilt," a defendant cannot show he was prejudiced by any misconduct by the prosecutor. See id. (quotation marks omitted).

In reviewing the prosecutor's comment in context, we cannot say the CCA's finding was unreasonable. Though "perhaps improper," the prosecutor's closing argument comments did not shift the burden of proof to Mr. Broadnax. Nerey, 877

F.3d at 971. Rather, the prosecutor's comments "appeared to concern the failure of the defense to counter the evidence presented by the government," not Mr. Broadnax's failure to show evidence of his innocence. See United States v. Watson, 866 F.2d 381, 386 (11th Cir. 1989) (finding proper prosecutor's comment in response to defense counsel's argument that the government failed to disprove alternative explanations). When "the prosecutor merely emphasize[s] the defense's failure to produce" evidence to rebut the government's argument, "such an argument [is] permissible." Hernandez, 145 F.3d at 1439 (emphasis omitted).

That is what happened here. During voir dire, the prosecutor asked potential jurors whether they would have an issue with convicting a defendant based only on circumstantial evidence. The prosecutor explained circumstantial evidence by telling the jury to picture a snowy front yard:

> And when you went to bed that Friday night and you looked out and you saw the snow falling, you saw a fresh coat [of] undisturbed . . . white snow on your yard. You got up early the next morning and you saw some dog prints through the snow. Now, you did not see that dog walking across your yard in the snow, but from the prints left behind you could reasonably conclude that a dog had crossed your yard and left those prints there in the snow. That, ladies and gentlemen, is circumstantial evidence.

Trial counsel for Mr. Broadnax referenced this instruction in his opening statement, and said "those tracks don't tell you which dog went across there. It

might tell you if it was a big dog or a little dog, but it's not going to tell you whether it was a hound dog or a hunting dog or a poodle. That's for y'all to determine." Counsel also told the jurors he would "question the evidence" and try to show them "that it means something besides what the State says it does." These remarks by the defense were the lead-in to the prosecutor's closing argument comment about what other "reasonable explanation" there could possibly be for the evidence at trial.

And even though this case was based on circumstantial evidence, the evidence tended to show that Mr. Broadnax was the only person who knew Jan and DeAngelo, was seen with Jan and DeAngelo around 8:00 p.m., and who returned around 10:45 p.m. in a vehicle driven by an unidentified person. Thus there was other evidence that tended to show Mr. Broadnax's guilt, which weighs against a showing of both prosecutorial misconduct elements. See Nerey, 877 F.3d at 970; Merrill, 513 F.3d at 1307.

In sum, the CCA's finding that the prosecutor did not shift the burden of proof to Mr. Broadnax was neither unreasonable nor contrary to clearly established Supreme Court precedent.

IV. CONCLUSION

We affirm the District Court's denial of Mr. Broadnax's federal habeas petition. The Rule 32 court's determinations that Mr. Broadnax's trial counsel's performance was not deficient, and that Broadnax could not show prejudice, were not unreasonable. Neither can we hold that Alabama's application of its hearsay rules to exclude testimony at his state habeas evidentiary hearing violated his due process rights under clearly established federal law. Finally, the CCA's finding that the prosecutor did not improperly shift the burden of proof to Mr. Broadnax was not unreasonable, nor was it contrary to clearly established federal law.

AFFIRMED.

MARTIN, Circuit Judge, joined by JILL PRYOR, Circuit Judge, concurring:

Donald Broadnax is an Alabama prisoner sentenced to die for his crimes. Throughout his state habeas proceedings, Mr. Broadnax's attempt to prove the ineffectiveness of his trial counsel was met with notable resistance. Relying on Alabama's evidentiary rules, the Rule 32 court prevented Mr. Broadnax's expert from testifying about background information the expert relied on in reaching his opinion. The Rule 32 court also repeatedly discounted and dismissed witnesses' testimony offered to show that there were mitigating circumstances in Mr. Broadnax's life that the jury should have heard at sentencing. I write separately about these two details, because they may have determined the outcome of Mr. Broadnax's claim.

I.

I first write to observe how a seemingly small difference in the Alabama Rule of Evidence may have had a monumental impact on Mr. Broadnax's chances for postconviction relief.

In 2010, Alabama's rule did not allow an expert to base an opinion on testimony that was inadmissible. Under that version of Alabama Rule of Evidence 703 in effect from 1996 to September 30, 2013, an expert could base his opinion only on "[t]he facts or data in the particular case" that are "perceived by or made

known to the expert at or before the hearing." Ala. R. Evid. 703 (1996); see also Craft v. State, 90 So. 3d 197, 217 n.3 (Ala. Crim. App. 2011) (quoting 1996 rule). Thus, under the old rule, an expert generally could not consider inadmissible hearsay in reaching his opinion. See Ala. R. Evid. 703 (1996) advisory committee's note.

However, the current version of Alabama's Rule 703 adds a second and third sentence that brings it into line with Federal Rule of Evidence 703:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Ala. R. Evid. 703 & advisory committee's note to 2013 amendment. That means, if Mr. Broadnax brought his Rule 32 petition today, Dr. Benedict would be permitted to testify about the background evidence the Rule 32 court excluded in 2011. See Knight through Kerr v. Miami-Dade Cnty., 856 F.3d 795, 809 (11th Cir. 2017) (applying Federal Rule of Evidence 703 to hold that "as we have long

recognized, an expert may rely on hearsay evidence as part of the foundation for his opinion so long as the hearsay evidence is the type of evidence reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject" (quotation marks omitted)).

For the reasons set out in the main opinion, the standards of review imposed by the Anti-Terrorism and Effective Death Penalty Act of 1996 allow no relief to Mr. Broadnax for the exclusion of Dr. Benedict's testimony that relied partly on hearsay. Still, it strikes me as wrong to deprive mental health experts, retained by habeas petitioners under a sentence of death, of any ability to rely on family interviews. After all, expert witnesses routinely rely on hearsay in every other context I am aware of. See, e.g., Raulerson v. Warden, 928 F.3d 987, 992–93, 997–98 (11th Cir. 2019) (upholding Georgia state court's denial of ineffective assistance claim where trial counsel retained five mental health experts who opined, based in part on family interviews, that Raulerson was intellectually disabled).

At the oral argument of this case, I was able to ask Alabama's counsel whether, if Mr. Broadnax's case were before the Rule 32 court today, and assuming there is no reason to think the reports from Broadnax's family were unreliable, Dr. Benedict could have testified about what he learned from those

family members. I believe the obvious answer to this question is "yes," but Alabama's counsel did not seem to agree. See Oral Argument at 38:34–40:30 (State: "A psychiatrist might rely on that [the fact that a child was raped], but that doesn't necessarily mean that a court should allow that fact to come in in a manner that's untested."); see also id. at 50:59–51:59 (acknowledging that today, the state's motion in limine may "potentially" be denied). But certainly, the hearsay evidence Dr. Benedict relied on is the "type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Ala. R. Evid. 703. That means Dr. Benedict would have been permitted to describe the evidence he gained from the family interviews he conducted. This record reflects that Dr. Benedict relied on significant historical and psychosocial factors to conclude that, in addition to a cognitive disorder, not otherwise specified, Mr. Broadnax suffered from panic disorder with agoraphobia and posttraumatic stress disorder. And we know that historical and psychosocial factors are of the type of evidence reasonably relied on by psychologists in forming their opinions. Cf. Rompilla v. Beard, 545 U.S. 374, 392, 125 S. Ct. 2456, 2469 (2005) (explaining that postconviction experts, "alerted by information from school, medical, and prison records . . . , found plenty of 'red flags' pointing up a need to test further," which led them to opine on Rompilla's impairments).

With regard to showing prejudice,[1] evidence of a defendant's difficult childhood, poverty, mental problems, and other similar background evidence is sufficient to establish prejudice if that evidence "might well have influenced the jury's appraisal of his moral culpability." Williams v. Taylor, 529 U.S. 362, 398, 120 S. Ct. 1495, 1515 (2000). If the CCA had been allowed to consider the evidence we now know to exist as to Mr. Broadnax's penalty-phase ineffective assistance claim, that Court may well have found that the Rule 32 court unreasonably discounted the evidence of the abuse Broadnax suffered. See Broadnax v. State, 130 So. 3d 1232, 1261 (Ala. Ct. Crim. App. 2013) (declining to consider Dr. Benedict's inadmissible hearsay evidence proffered at the Rule 32 hearing). I certainly would have.

Notably, the Rule 32 court made the alternative finding that Dr. Benedict's diagnosis of PTSD based on Mr. Broadnax's childhood sexual assault would have had zero impact on the jury's decision to sentence Broadnax to death, because it "occurred more than twenty years earlier." This is plainly contrary to Supreme Court precedent. See Porter v. McCollum, 558 U.S. 30, 43, 130 S. Ct. 447, 455 (2009) (per curiam) (holding that it "is unreasonable to discount to irrelevance the

[1] Here, I do not address Mr. Broadnax's showing of deficient performance.

evidence of [a petitioner's] abusive childhood, especially when that kind of history may have particular salience for a jury" evaluating the petitioner's interpersonal relationships).

Thus, if Mr. Broadnax had appealed his penalty-phase ineffective assistance claim, and if we were able to look at the evidence Dr. Benedict relied on, I believe a de novo review would have been proper. The jury had no knowledge of all the mitigating evidence now in the record. Had the jury heard the background evidence Dr. Benedict relied on, it seems to me there is a reasonable probability that the result of the penalty phase of Mr. Broadnax's trial would have been different. Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068 (1984).

II.

It is also important to remember that the universe of evidence that may be considered mitigating is vast and the sentencer is entitled to hear that evidence. At several points in Mr. Broadnax's Rule 32 proceedings, the court appeared to think otherwise.

For example, when Mr. Broadnax's postconviction counsel asked Broadnax's sister, Annette McKinstry, about Broadnax's relationship with her children, the Rule 32 court interrupted to ask, "Why is this important?" The court

accepted Annette's testimony as proffered testimony only, and then said it had heard all it needed to hear about Mr. Broadnax's home life. This effectively dismissed all remaining testimony on this topic. Next, during another witness's testimony, postconviction counsel attempted to ask questions to rebut the state's theory that Jan was going to divorce Mr. Broadnax. The Rule 32 court said, "I'm not dealing with that today," and counsel ended the direct examination. In yet another instance, during Mr. Broadnax's nephew's testimony about what a good influence Broadnax was on him, the Rule 32 court said:

> I'm not trying a trial, guys, you know. I'm not the trial judge. This is a Rule 32 hearing. The allegation was that he had ineffective assistance of counsel and was therefore denied a fair trial. . . . That's all I want to hear about, evidence towards that. I don't want to hear about what a nice guy he is over there. I don't need to hear that.

Finally, when postconviction counsel attempted to present testimony to corroborate the fact that Mr. Broadnax grew up in an impoverished environment where gang activity was present, the Rule 32 court sustained the state's relevance objection. In response to that ruling, Mr. Broadnax's counsel tried to create a record to show this witness grew up near Broadnax's childhood home, but the Rule 32 court dismissed the testimony because "[e]verybody knows" that area of town. And finally, when counsel attempted to show Mr. Broadnax grew up impoverished and without any

structure from his parents in a housing project, the Rule 32 court again dismissed the testimony, saying:

> [F]or the record, I grew[]up in that same neighborhood on 2nd Street North. Not two blocks from Elyton Village. Judge Houston Brown grew[]up three blocks from Elyton Village, right there off Center Street. And Judge Helen Shores Lee, also a Circuit Judge, grew up across the street from Judge Brown. And numerous other doctors, and other professionals grew up out of that same community, and went on to be successful, facing whatever influences was in that area. And I would, if I had to guess -- Well, I won't do that. . . . [P]eople have to be responsible for their own behavior[.]

"'The purpose of [mitigation] investigation is to find witnesses to help humanize the defendant, given that a jury has found him guilty of a capital offense.'" Hardwick v. Crosby, 320 F.3d 1127, 1163 (11th Cir. 2003) (quoting Strickland, 466 U.S. at 691, 104 S. Ct. at 2066). In other words, "[t]he purpose of mitigating evidence is precisely to show that the defendant is a good person." Chandler v. United States, 218 F.3d 1305, 1353 (11th Cir. 2000) (en banc) (Barkett, J., dissenting). As a result, mitigating evidence may include "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604, 98 S. Ct. 2954, 2965 (1978).

But when "[a] process . . . accords no significance to relevant facets of the character and record of the individual offender," it excludes from the sentencer's consideration "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." Woodson v. North Carolina, 428 U.S. 280, 304, 96 S. Ct. 2978, 2991 (1976). Preventing the jury from hearing—and on postconviction review, the petitioner from presenting—relevant mitigating evidence results in treating the defendant as one member of "a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." Id.; see also Eddings v. Oklahoma, 455 U.S. 104, 114–15, 102 S. Ct. 869, 876–77 (1982) (holding that the sentencer and a reviewing court may determine the weight to be given relevant mitigating evidence, but may not give it no weight by excluding such evidence from consideration). It is by now well established that because imposition of a death sentence means the State will be taking a life, "the sentencer in capital cases must be permitted to consider any relevant mitigating evidence." Abdul-Kabir v. Quarterman, 550 U.S. 233, 248, 127 S. Ct. 1654, 1665 (2007) (quotation marks omitted).

I believe the Rule 32 court made consequential mistakes here, albeit not mistakes that federal courts are allowed to address in the habeas context. The evidence that Mr. Broadnax's postconviction counsel sought to present was

indisputably relevant mitigating evidence. See Eddings, 455 U.S. at 115, 102 S. Ct. at 877 ("Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation."). But the Rule 32 court repeatedly hindered counsel from presenting—and at times even excluded—this relevant evidence. Doing so is contrary to the clearly established precedent described above.

* * *

Had it not been for the application of a now obsolete evidentiary rule and the Rule 32 court's skewed view of what qualifies as mitigating evidence, Mr. Broadnax may well have met success in pursuing his habeas claims. Although the standard of review that governs here requires us to affirm the denial of the claims Mr. Broadnax has raised on appeal, I recognize that Broadnax faced burdens throughout his habeas proceedings in putting forth evidence that would have impacted his ineffective assistance claims, and as a result, the resulting sentence he now faces.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-12600-P

DONALD BROADNAX,

Petitioner - Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

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

BEFORE: WILSON, MARTIN, and JILL PRYOR, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Donald Broadnax is DENIED.

ORD-41

FILED
2020 Jun-08 PM 01:33
U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

DONALD BROADNAX,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**CASE NO. 2:13-CV-1142-AKK**
	)	
JEFFERSON S. DUNN, Commissioner, Alabama Department of Corrections,	)	
	)	
	)	
Respondent.	)	

MEMORANDUM OPINION

This case is before the court on Donald Broadnax's Rule 59(e) Motion to Reconsider, Alter, or Amend the Court's Final Judgment. Doc. 22. After careful consideration, the motion is due to be denied.

I.

"The only grounds for granting [a Rule 59] motion are newly-discovered evidence or manifest errors of law or fact. A Rule 59(e) motion cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007). Broadnax's motion "is not based on newly-discovered evidence;" therefore, "the only basis for granting it would be a manifest error of law or fact." *Barber v. Dunn*, No.

5:16-CV-00473-RDP, 2019 WL 1979433, *1 (N.D. Ala. May 3, 2019), *appeal filed* No. 19-12133 (11th Cir. May 31, 2019).

"A 'manifest error' is not just any error but one 'that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record.'" *Id*. (quoting *Error*, Black's Law Dictionary (10th ed. 2014)).

> ["]Manifest error["] does not mean that one does not like the outcome of a case, or that one believes the court did not properly weigh the evidence. *See Hutchinson v. Staton*, 994 F.2d 1076, 1082 (4th Cir. 1993) (noting that "mere disagreement does not support a Rule 59(e) motion"). Rather, manifest error is an "error that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record." Error, Black's Law Dictionary (9th ed. 2009). [Plaintiff] has offered nothing even to suggest any error of this magnitude; he simply believes this court got it wrong the first time. Any litigant who so believes may, of course, seek appellate review. But such a litigant will find no relief under Rule 59(e).

Daughtry v. Army Fleet Support, LLC, No. 1:11CV153-MHT, 2014 WL 466100, *2 (M.D. Ala. Feb. 5, 2014). The Eleventh Circuit has "reject[ed] any argument that to err legally always equates to a 'manifest disregard of the law.'" *Montes v. Shearson Lehman Bros.*, 128 F.3d 1456, 1461 (11th Cir. 1997). Therefore,

> Because [Broadnax] must show that the court made manifest errors of law or fact in denying his § 2254 habeas petition, his burden is especially high. That is so because, under § 2254(d)(1), federal habeas relief is precluded if "fairminded jurists could disagree" about the

> correctness of the state court's decision to deny [Broadnax] relief. *Harrington v. Richter*, 562 U.S. 86, 101-02 (2011). As the Supreme Court has repeatedly explained, to obtain federal habeas relief, a habeas petitioner must show that the state court's adjudication of his claims was not merely "incorrect or erroneous" but "objectively unreasonable" – such that no fairminded jurist could agree with the state court's disposition of his claims under clearly established Supreme Court precedent. *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003); *see also Harrington*, 562 U.S. at 101-02. Thus, to succeed on his Rule 59(e) motion, [Broadnax] must show that this court completely disregarded controlling law or credible record evidence in concluding that the state court's adjudication of [Broadnax's] claims did not transgress § 2254's highly deferential standard of review. That is a high burden indeed, and one that [Broadnax] has not come close to carrying.

Barber, 2019 WL 1979433, at *1.

II.

Broadnax raises two issues in support of his motion: (1) that the denial of his "claim that his trial counsel were ineffective for failing to investigate his alibi is based on manifest errors of the law governing ineffective assistance of counsel;" and (2) that the finding that he "was not denied due process of law because the state court refused to allow admissible evidence to be presented during state post-conviction proceedings is manifestly erroneous and fails to take into account relevant Supreme Court precedent." Doc. 22 at 2, 15. These two contentions fail to show the existence of a manifest disregard of the law.

A.

Broadnax's first contention is related to his alibi defense. As Broadnax puts it, "[d]uring state post-conviction proceedings, [he] presented unrefuted evidence establishing that he was present and accounted for at the work release center [WRC] at 9:00 p.m." Doc. 22 at 3. Broadnax overlooks however that the evidence he presented at his second post-conviction hearing that he was purportedly at the WRC on the night of the murders is *not* undisputed.

To begin, Broadnax's claimed alibi is disputed by his own statements to law enforcement officers shortly after the murders. In two statements he made to police officers, contrary to his contention now about being at the WRC, Broadnax claimed "he had been at Welborn the entire day and evening of the murders, until approximately 10:45 p.m., and that he had telephoned his brother from Welborn at approximately 9:00 p.m." *Broadnax v. State*, 130 So. 3d 1232, 1239 (Ala. Crim. App. 2013). And Broadnax relayed the same information to his attorneys, and only raised the purported WRC alibi for the first time 12 years later.[1] Moreover, Broadnax also

[1]The Alabama Court of Criminal Appeals noted that this claim of ineffective assistance of counsel was –

> based on an alibi defense that directly contradicts the alibi defense presented at Broadnax's trial. In his statements to police, in his statements to his trial attorneys . . . , and at trial, Broadnax claimed that he was at Welborn, not at the work-release facility, until about 10:45 p.m. the night of the murders. Indeed, from all that appears, Broadnax continued claiming to have been at Welborn that night for many

asserted in verified post-conviction pleadings that he was at Welborn on the night of the murders.[2] Finally, two witnesses testified at trial that Broadnax was seen at Welborn at or about 10:45 on the night of the murders.[3] In short, the record belies

---

> years after his convictions and sentence. Even in both his original petition, filed in 2003, and his first amended petition, filed in 2004, Broadnax continued in his assertion that he was at Welborn the night of the murders. It was not until 2008, 12 years after the crime, and after this Court had reversed the judgment denying his first amended petition and Broadnax had obtained new Rule 32 counsel to represent him, that Broadnax suddenly changed his story regarding his whereabouts the night of the murders and asserted that he was not at Welborn, as he had alleged for 12 years, but was at the Alexander City work-release facility at 9:00 p.m. the night of the murders.

Broadnax, 130 So. 3d at 1249.

[2]*See* Ala. R. Crim. P. 32.6 ("A proceeding under this rule is commenced by filing a petition, verified by the petitioner or the petitioner's attorney, with the clerk of the court."); Ala. R. Crim. P. App. to 32 (The form used to file a Rule 32 petition states, in pertinent part, "This petition must be legibly handwritten or typewritten, and must be signed by the petitioner or petitioner's attorney under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury.").

[3]In relevant part, the witnesses testified:

> "At approximately 10:45 p.m. [on the night of the murders], Mark Chastain, a [leadman] at Welborn, found Broadnax inside a building while securing the building for the night. Chastain testified that he told Broadnax that the alarm had been set and that they had to exit the building. According to Chastain, when he asked Broadnax why he was still in the building, Broadnax stated that the work release van had dropped him off . . . ."
>
> "Kathy Chastain, Mark Chastain's wife, testified that while she was outside the building waiting for her husband to secure the building, she saw an individual matching Broadnax's description get out of a [white king-cab pickup truck] and run into the building."

Broadnax v. Dunn, No. 2:13-CV-1142-AKK, 2019 WL 6829995, at *2 (N.D. Ala. Dec. 13, 2019) (quoting *Broadnax v. State*, 825 So. 2d 134, 150-51 (Ala. Crim. App. 2000)).

Broadnax's contention twelve years later that he was at the WRC, instead of at Welborn as he had previously and consistently stated, and as witnesses had testified.

In denying his claim, this court held:

> To succeed on his claim, Broadnax must show that no reasonable lawyer, in light of information "already in hand" at the time of trial, *see Strickland*, 466 U.S. at 699, would have neglected to investigate whether Broadnax was at the WRC on the night of the murders. *See Wiggins v. Smith*, 539 U.S. 510, 527 (2003)("In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further."). Broadnax has failed to make this showing. In particular, Broadnax has not shown that counsel knew or had reason to suspect that Broadnax was at the WRC at the time of the murders.

Broadnax, 2019 WL 6829995, *13. Although Broadnax argues that had counsel investigated whether he was at the WRC at 9:00 on the night of the murders they would have discovered his post-conviction evidence, he has not alleged any facts – other than the fact that Broadnax was a prisoner living at the WRC – establishing "the quantum of evidence already known to counsel," and whether this "known evidence would lead a reasonable attorney to investigate further." *See Wiggins v. Smith*, 539 U.S. at 527.

Instead, Broadnax appears to argue counsel had a bright-line duty to investigate his presence at the WRC, stating "even if the [Welborn] alibi was suggested by Mr. Broadnax, counsel could not neglect to investigate both the possible alibi and

alternative defenses," based on ABA Guidelines. Doc. 22 at 9 and n.29 (quoting *Bemore v. Chappell*, 788 F.3d 1151, 1164 (9th Cir. 2015)(quotations and alterations omitted).[4] The Supreme Court, however, has never established a bright-line duty to investigate other possible alibis or alternative defenses. Rather, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 688 (1984).[5] Moreover, the Court

---

[4]He states:

> The Supreme Court held in *Rompilla v. Beard*[, 545 U.S. 374 (2005),] that a defendant's unhelpfulness respecting his case does not negate counsel's independent duty to investigate. In *Rompilla*, counsel conducted some mitigation investigation, but declined to review prior conviction records they knew the prosecution would use at sentencing. "If the defense lawyers had looked in the file on Rompilla's prior conviction, it is uncontested they would have found a range of mitigation leads that no other source had opened up." [*Id*. at 390.]
>
> "Rompilla's own contributions to any mitigation case were minimal" and "[t]here were times when Rompilla was even actively obstructive by sending counsel off on false leads." [*Id*. at 381.] Indeed, the Third Circuit found that "neither Rompilla himself nor any family member even hinted at the problems on which Rompilla's ineffective assistance claim is based." [*Rompilla v. Horn*, 355 F.3d 233, 241 (3d Cir. 2004); *rev'd* 545 U.S. at 374.] Nonetheless, the Supreme Court held that "failure to examine Rompilla's prior conviction file fell below the level of reasonable performance." [*Rompilla*, 545 U.S. at 383.] In doing so, it quoted the 1982 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.), affirming, in relevant part, "[t]he duty to investigate exists regardless of the accused's admissions or statements to the lawyer . . . ." [*Id*. at 387.]

Doc. 22 at 9-10.

[5]As the Eleventh Circuit explained:

> [Petitioner] argues . . . that the state habeas court's decision cannot be squared with *Strickland*'s holding as the Supreme Court has applied the holding in several later cases: *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Porter v. McCollum*, 558 U.S. 30

has held that ABA Guidelines cannot be substituted for local and contemporaneous professional standards: "Restatements of professional standards, we have recognized, can be useful as 'guides' to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place." *Bobby v. Van Hook*, 558 U.S. 4, 7 (2009). And, "[b]eyond the general requirement of reasonableness, 'specific guidelines are not appropriate.'" *Cullen v. Pinholster*, 563 U.S. 170, 195 (2011)(quoting *Strickland*, 466 U.S. at 688). Indeed, "[i]t is '[r]are' that constitutionally competent representation will require 'any one technique or approach.'" *Id*. (quoting *Harrington v. Richter*, 562 U.S. 86,106 (2009)). "[T]he Strickland test of necessity requires a case-by-case examination of the evidence." *Id*. at 196 n.17 (citations and internal quotations omitted).

> (2009); and *Sears v. Upton*, 561 U.S. 945 (2010). The [Eleventh Circuit] Court notes initially that "these [cases] are . . . relevant only to the extent they might demonstrate that [petitioner's] counsel, confronted with circumstances like those presented at the time and place of [his] trial, failed to adhere to the standard of reasonable representation." *Anderson v. Sec'y, Fla. Dep't of Corr.*, 752 F.3d 881, 904 (11th Cir. 2014). The Supreme Court has faulted lower courts for reading these cases to establish "a 'constitutional duty to investigate' capital cases in a particular, prescribed way." *Id.* at 906 (quoting *Pinholster*, 131 S. Ct. at 1406). They do not create any "mechanistic rules of law at all for investigation or for presentation of evidence in capital cases." *Chandler*, 218 F.3d at 1317 n.21. Nor can any of these cases "command the outcome for this case" because the facts here are "materially different, allowing for different outcomes under *Strickland*." *Id*.

Butts v. GDCP Warden, 850 F.3d 1201, 1243-45 (11th Cir. 2017)(alterations added; footnote, original alterations, and parallel citations omitted).

Here, Broadnax asserts that federal law clearly established that counsel had a duty to investigate his alibi "regardless of any admission or statement by [him] concerning facts constituting guilt." *See* doc. 22 at 10-11 (citations omitted). And, Broadnax argues that "[t]he clearest illustration of this Court's manifestly erroneous legal conclusions is its acceptance of the ACCA's wholly incorrect view that Mr. Broadnax was required to provide all of the information to his lawyers, and his failure to do so meant that they did not perform deficiently." *Id*. at 14 (footnote omitted). The court's opinion, according to Broadnax, "squarely contradicts *Rompilla* and is manifestly erroneous." *Id*. at 15. These contentions are unavailing.

To begin, no clearly established law has set forth such a specific duty on counsel. Addressing a similar issue, the Eleventh Circuit held:

> [P]etitioner implies that his failure to inform Manning [petitioner's attorney] about his abusive childhood should have no bearing on our analysis of his claim [based on a deficient investigation].
>
> This argument misstates the holdings in *Rompilla* and *Wiggins*. In *Rompilla*, the defendant's "own contributions to any mitigation case were minimal," but this was irrelevant to the [Supreme] Court's decision on effectiveness. 545 U.S. at 381. The Court held counsel ineffective because they failed to examine a readily available file containing information about Rompilla's prior conviction for rape and assault, despite knowing that the prosecutor was planning on using Rompilla's prior conviction as an aggravating factor in seeking a death sentence. *Id*. at 383. The [Supreme] Court never fully addressed the significance of Rompilla's lack of cooperation. *Id.* ("There is no need to say more [regarding whether counsel should have further investigated Rompilla's background], however, for a further point is clear and dispositive: the

> lawyers were deficient in failing to examine the court file on Rompilla's prior conviction.").
>
> In *Wiggins*, the defendant never informed counsel about the sexual abuse he suffered as a child, but did describe his own background as "disgusting" in a pre-sentence investigation report, to which counsel had access. 539 U.S. at 523. In addition, the Court never directly addressed the significance of Wiggins's failure to inform counsel about his sexual abuse, because counsel had sufficient information from available records to encourage further investigation into Wiggins's upbringing, independent of any information provided by Wiggins. *Id*. at 524. For purposes of our review under section 2254(d)(1), federal law consists of the holdings of Supreme Court cases, not the dicta, and petitioner is not even relying on dicta; these cases simply say nothing about the significance of Rompilla's or Wiggins's failure to provide information to counsel. *See Gore* [*v. Sec'y for Dep't of Corr.*, 492 F.3d [1273,] 1294 [(11th Cir. 2007)]. ("Section 2254(d)(1) explicitly establishes Supreme Court precedent as the *vel non* of 'clearly established federal law.' Our basis for comparison, therefore, is the holdings – not the dicta – of Supreme Court decisions at the time the Florida Supreme Court issued its opinion.")(citation omitted).

Newland v. Hall, 527 F.3d 1162, 1204–05 (11th Cir. 2008). Moreover, Broadnax's statements – which consistently insisted for twelve years following the murders that he was at Welborn – was a fact considered by this court and the state appellate court in determining whether reasonable counsel would have investigated whether Broadnax was somewhere other than Welborn on the night of the murders as he claimed.

> Finally, Broadnax's case –
>
> is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face, *cf.*

> *Wiggins*, 539 U.S. at 525, or would have been apparent from documents any reasonable attorney would have obtained, *cf. Rompilla v. Beard*, 545 U.S. 374, 389–393.[6] It is instead a case, like *Strickland* itself, in which defense counsel's "decision not to seek more" mitigating evidence from the defendant's background "than was already in hand" fell "well within the range of professionally reasonable judgments." 466 U.S., at 699.

Bobby, 558 U.S. at 11-12 (parallel citations omitted and footnote added). As this court held, "[r]elevant to the court's inquiry, although Broadnax presented evidence at the 2011 Rule 32 hearing that he was at the WRC by 9:00 p.m. on the night of the murders, he did not present any evidence that his trial attorneys had this information or that they had any reason to suspect that he was at the WRC, rather than at Welborn as he had told them and as witnesses at trial had confirmed." *Broadnax*, 2019 WL 6829995, at *12.[7]

---

[6]The *Rompilla* court noted that the criminal file at issue contained "mitigation evidence or red flags" that counsel "could not reasonably have ignored . . . simply because they were unexpected." *Rompilla*, 545 U.S. at 391 n.8. However, the Court did not find a duty to search for this mitigation evidence simply because the evidence was there; the duty to search further was the product of the suggestion of the evidence's existence contained in the criminal file.

[7]As the court noted in denying his claim:

> . . . Broadnax has not shown that counsel knew or had reason to suspect that Broadnax was at the WRC at the time of the murders.
>
> "[T]he duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Rompilla v. Beard*, 545 U.S. 374, 383 (2005). Therefore, "[i]n assessing the reasonableness of an attorney's investigation, . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. at 527. This "known evidence" includes defendant's statements and actions, and, indeed, "[t]he reasonableness of counsel's actions may be determined or substantially influenced

Put simply, neither the Supreme Court nor the Eleventh Circuit has held that counsel have an independent duty to pursue a potential alibi that is different from the one a client repeatedly asserted and one the client and others never even mentioned or insinuated exited. Broadnax's assertions to the contrary – i.e. that the facts and circumstances existing at the time of trial – including his own statements – are irrelevant to the reasonableness of his counsel's investigation into an alternative alibi – do not demonstrate a manifest error of law sufficient to grant his motion.

B.

Broadnax's second contention of alleged error is related to the suitability of hearsay evidence at post-conviction proceedings. As Broadnax puts it:

---

by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691. As *Strickland* notes:

> Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

Id.

Broadnax, 2019 WL 6829995, at *13.

> At Mr. Broadnax's post-conviction hearing, his expert, Dr. Ken Benedict, was not permitted to testify to hearsay information he obtained while working on Mr. Broadnax's case. There is no dispute that had Dr. Benedict testified at trial, he would have been permitted to testify in full. This Court agreed with the Alabama Courts that Mr. Broadnax was not denied due process of law. That conclusion is manifestly erroneous.

Doc. 22 at 15. To support this contention, Broadnax notes that the Supreme Court has held that reliable hearsay evidence is admissible during the penalty phase of a death-penalty trial. *See* doc. 22 at 16 and n.57.[8] Indeed, as it relates to the penalty phase, the Court held, "the fact that some of [Sear's] evidence may have been 'hearsay' does

---

[8]He states:

> In *Sears* [*v. Upton*, the Supreme Court held that "we have also recognized that reliable hearsay evidence that is relevant to a capital defendant's mitigation defense should not be excluded by rote application of a state hearsay rule." [Footnote 57] *Sears* does not contain [an] "unless the defendant can provide the information in a different manner" exception.
>
> [Footnote 57] 561 U.S. at 950, n.3.

Doc. 22 at 16 and n.57.

This quote from *Sears* is found in footnote 6 at page 950. Footnote 3 of the dissent, cited on page 950 of the majority opinion, notes, in pertinent part:

> In *Green*, we held it violated constitutional due process to exclude testimony regarding a co-conspirator's confession that he alone committed the capital murder with which the defendant was charged. Our holding depended on "th[e] unique circumstances" of the case: the testimony to be used at sentencing was "highly relevant" and "substantial[ly]" reliable as a statement against penal interest made to a close friend; it was corroborated by "ample" evidence and was used by the State to obtain a conviction in a separate trial against the co-conspirator. 442 U.S., at 97, 99 S. Ct. 2150. Here there are no such circumstances. The testimony is uncorroborated second-hand reporting from self-interested witnesses that is unreliable and therefore likely inadmissible.

Sears, 561 U.S. at 961 n.3 (Scalia, J., dissenting).

not necessarily undermine its value – or its admissibility – for penalty phase purposes." *Sears v. Upton*, 561 U.S. 945, 950 (2010). As the Court noted:

> Like Georgia's "necessity exception" to its hearsay rules, see Ga. Code Ann. § 24-3-1(b) (2006), we have also recognized that reliable hearsay evidence that is relevant to a capital defendant's mitigation defense should not be excluded by rote application of a state hearsay rule. *See Green v. Georgia*, 442 U.S. 95, 97 (1979) (per curiam) ("Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause . . . . The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial"); *see also Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) ("In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice"). We take no view on whether the evidence at issue would satisfy the considerations we set forth in *Green*, or would be otherwise admissible under Georgia law.

Id. at 950 n.6 (parallel citations omitted).

Critically, however, neither *Sears* nor the cases cited therein establish a right to the presentation of inadmissible hearsay evidence during the state-court post-judgment hearing. In addressing the merits of Broadnax's due-process issue, this court held that the exclusion of Dr. Benedict's hearsay testimony pursuant to state evidentiary rules did not violate Broadnax's right to due process: "Simply arguing that hearsay statements are admissible in the penalty phase proceedings is insufficient to establish that exclusion of hearsay testimony made the Rule 32 proceeding so fundamentally unfair that it violated his right to due process." *Broadnax*, 2019 WL

6829995, at *19. There is no clearly established federal law holding that a defendant's due process rights are violated by the exclusion of hearsay testimony, pursuant to state law, during a state post-conviction proceeding. Consequently, as to this issue, Broadnax has failed also to prove that this court's decision constituted a manifest disregard of the law.

III.

In light of his failure to show that this court completely disregarded controlling law or credible record evidence in rejecting his claims, Broadnax's Rule 59(e) Motion to Reconsider, Alter, or Amend the Court's Final Judgment, doc. 22, will be denied.

DONE and **ORDERED** this 8th day of June, 2020.

ABDUL K. KALLON
UNITED STATES DISTRICT JUDGE

REL: 12/14/2012

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2012-2013

CR-10-1481

Donald Broadnax

v.

State of Alabama

Appeal from Jefferson Circuit Court
(CC-96-5162.82)

KELLUM, Judge.

Donald Broadnax appeals the circuit court's denial of his petition for postconviction relief filed pursuant to Rule 32, Ala. R. Crim. P.

CR-10-1481

In 1997, Broadnax was convicted of four counts of capital murder for the beating deaths of his wife, Hector Jan Stamps Broadnax, and her four-year-old grandson, DeAngelo Stamps. The murders were made capital (1) because two or more persons were murdered pursuant to one scheme or course of conduct, see § 13A-5-40(a)(10), Ala. Code 1975; (2) because Broadnax had been convicted of another murder in the 20 years preceding those murders, see § 13A-5-40(a)(13), Ala. Code 1975; (3) because the murders were committed during the course of a kidnapping, see § 13A-5-40(a)(1), Ala. Code 1975; and (4) because DeAngelo Stamps was under 14 years of age at the time of his death, see § 13A-5-40(a)(15), Ala. Code 1975. The jury unanimously recommended that Broadnax be sentenced to death for his convictions, and the trial court followed the jury's recommendation and sentenced Broadnax to death. This Court affirmed Broadnax's convictions and sentence on appeal, Broadnax v. State, 825 So. 2d 134 (Ala. Crim. App. 2000),[1] and the Alabama Supreme Court affirmed this Court's judgment, Ex parte Broadnax, 825 So. 2d 233 (Ala. 2001). This Court issued

[1]This Court may take judicial notice of our own records, and we do so in this case. See Nettles v. State, 731 So. 2d 626, 629 (Ala. Crim. App. 1998).

a certificate of judgment on January 16, 2002. The United States Supreme Court denied certiorari review on June 28, 2002. Broadnax v. Alabama, 536 U.S. 964 (2002).

In this Court's opinion affirming Broadnax's convictions and sentence, we set out the facts of the crimes as follows:

> "The evidence tended to show the following. In April 1996, Donald Broadnax, who had been convicted in 1978 for murder and who was serving a sentence of 99 years' imprisonment, was residing at a work release center in Alexander City and working at Welborn Forest Products in Alexander City. In 1995 Broadnax married Hector Jan Stamps Broadnax, who at the time of the marriage had a three-year-old grandson, DeAngelo Stamps. Broadnax and Jan were having marital problems and Broadnax believed that Jan was partially responsible for a recent denial of parole. The evidence indicated that after 6:00 p.m. on April 25, 1996, Jan and DeAngelo delivered food to Broadnax at his workplace. Johnny Baker, an inmate at the work release center and Broadnax's coworker at Welborn, testified that he saw Broadnax driving Jan's car at Welborn that evening.[2] According to Baker, Broadnax stopped to talk with him and he saw a child in a child's safety seat in the backseat. Baker testified that he was 'pretty sure' the child was alive when he talked with Broadnax.[3]

---

[2]Baker said that it was still daylight when he saw Broadnax driving the car, although he did not know the exact time.

[3]Baker also testified that Broadnax was shaking and sweating and appeared nervous and that Broadnax said that his wife, Jan, was at Russell Hospital in Alexander City.

"At approximately 10:45 p.m. that same night, Mark Chastain, a [supervisor] at Welborn, found Broadnax inside a building while securing the building for the night. Chastain testified that he told Broadnax that the alarm had been set and that they had to exit the building. According to Chastain, when he asked Broadnax why he was still in the building, Broadnax stated that the work release van had dropped him off. ...[4]

"Kathy Chastain, Mark Chastain's wife, testified that while she was outside the building waiting for her husband to secure the building, she saw an individual matching Broadnax's description get out of a [white King-cab pickup truck] and run into the building.

"On April 25, 1996, Robert Williams and his wife were living across the street from a house in Birmingham that had in the past been used as a 'crack-house' and for prostitution. On that evening as Williams and his wife left their house at approximately 8:20 p.m., they noticed no cars were parked at the house across the street. When they returned at approximately 8:50 p.m., they saw a white Dodge Aries automobile parked behind the house. Because of the previous illegal activities occurring at the house, Williams telephoned the police and reported the presence of the car.

"Alondo McCurdy and Donna Smith, officers for the Birmingham Police Department, responded to the call and arrived at the residence at approximately 9:00 p.m. When they approached the parked car, they noticed blood on the ground behind the car and on the bumper. Based on their observations, they immediately radioed their supervisor and the

---

[4]Chastain testified that he left Broadnax at Welborn, but stopped at a Krystal fast-food restaurant on his way home to telephone the work-release center to have the work-release van pick up Broadnax.

paramedics, and secured the scene. It was later determined that the car belonged to Jan Broadnax.

"When the paramedics arrived, they opened the locked trunk and found the bodies of Jan and DeAngelo in the trunk. Both Jan and DeAngelo had been beaten. According to Dr. Robert Brissie, the forensic pathologist who performed the autopsies on the victims, blunt-force trauma, which could have been caused by the use of a piece of lumber such as the one found in the trunk with the bodies, caused the deaths of Jan and DeAngelo.[5]

"On April 27, 1996, Lawrence Hardnette, an inmate resident at the work release center in Alexander City, found a work uniform that did not belong to him stuffed under his bunk. At about the same time, James Smith, another inmate resident of the work release center, found a pair of Red Wing brand work boots under his bunk. The uniform and the boots were turned over to the supervisors and were later identified as belonging to Broadnax. Broadnax was the only one at the work center who wore Red Wing work boots; there were also identifying marks on the work uniforms indicating that the uniforms had been issued to Broadnax. When the work uniform and the boots were examined, bloodstains were found on the uniform [and the boots]. The analysis of the bloodstains [on the uniform] indicated that the deoxyribonucleic acid ('DNA') in these bloodstains matched the DNA of Jan and DeAngelo.[6]

"On the grounds at Welborn near a finishing products storage facility, employees found an earring that matched an earring found on the rear

---

[5]There was no evidence at trial indicating that the piece of wood found in the trunk was, in fact, the murder weapon.

[6]No DNA testing was performed on the bloodstains found on the boots.

> floorboard of Jan's car. The evidence appeared to indicate that Jan was killed at Broadnax's workplace in Alexander City, that her body was placed in the trunk of the car, and that the car was driven to Birmingham. Officer Vince Cunningham of the Birmingham Police Department testified that while conducting the investigation, he traveled from the location where the bodies were found in Birmingham to Broadnax's workplace in Alexander City [several times and determined that the drive time was no more than one and one-half hours]. [Thus, a]ccording to Cunningham, Broadnax could have easily traveled the distance between the two locations within the time frame set out by the evidence."

825 So. 2d at 150-51.

In addition to the above, the State presented evidence at trial indicating that the piece of lumber found in the trunk of the vehicle with the victims was similar to the lumber used at Welborn, and that a blue cloth similar to cloth used at Welborn was also found in the trunk of the vehicle. The State also presented evidence indicating that the blood spatter on the rear of the vehicle was consistent with a beating. The State presented testimony that a few days before the murders Broadnax had told a fellow employee at Welborn that he was upset with Jan regarding the denial of his parole, which had occurred on April 15, 1996, and that he was planning to kill Jan. The State also presented testimony regarding two statements made by Broadnax to the police. In his statements,

Broadnax said that Jan had brought him dinner at Welborn the night of the murders and that she had left Welborn at approximately 8:20 p.m. Broadnax also said that he had been at Welborn the entire day and evening of the murders, until approximately 10:45 p.m., and that he had telephoned his brother from Welborn at approximately 9:00 p.m. However, the State introduced telephone records indicating that no telephone call had been made to Broadnax's brother's house the night of April 25, 1996. When questioned specifically about the bloody boots and the Welborn work uniform belonging to him that were found in the work-release facility, Broadnax stated that he had sold the boots to another inmate, although he could not identify that inmate, approximately a year earlier and that the uniform had been stolen about two months earlier. Broadnax also said that he had reported the theft of his uniform to the company who made and rented the uniforms to Welborn; however, the State presented testimony at trial that no report of a stolen uniform had been made to the uniform company.

The State's theory of the case was that between approximately 6:30 p.m. and 10:30 p.m. the night of April 25,

1996, Broadnax brutally beat to death his wife, Jan, at Welborn; put Jan's body in the trunk of her car; drove the car with Jan's grandson, DeAngelo, in the backseat, to Birmingham to a location near Elyton Village where Broadnax had grown up and presumably had friends; brutally beat DeAngelo to death in that location; placed DeAngelo's body in the trunk of the car with Jan's body; and found someone to drive him back to Welborn, where Mark and Kathy Chastain saw Broadnax around 10:30 p.m.

The defense's theory of the case was that Broadnax had been at Welborn all day and all evening on April 25, 1996 -- as Broadnax had said in his statements to police -- and that the State's evidence was insufficient to prove that Broadnax had committed the murders. Although the defense called no witnesses, they vigorously cross-examined the State's witnesses and called into question the State's time line of events as well as the credibility of the State's witnesses, some of whom were inmates themselves.

On June 25, 2003, Broadnax, through counsel, filed a timely Rule 32 petition, raising numerous claims.[7] On

[7]Rule 32.2(c) was amended effective August 1, 2002, to reduce the limitations period for filing a Rule 32 petition

September 24, 2003, the State responded to the petition. On September 26, 2003, the circuit court summarily dismissed several of the claims in Broadnax's petition, and ordered Broadnax to amend several other claims to comply with the pleading requirements in Rule 32.3 and Rule 32.6(b). After obtaining multiple extensions, Broadnax filed his first amended petition on January 16, 2004, in which he incorporated all the claims from his original petition and expanded on some of those claims. On March 8, 2004, and March 10, 2004, respectively, the State responded to the first amended petition. On March 23, 2004, the circuit court summarily dismissed several of the claims in Broadnax's petition and scheduled an evidentiary hearing on the remaining claims.

On April 8, 2005, Broadnax filed a motion for leave to amend his petition; a motion for funds for a psychological evaluation and a sociological report; and a motion for discovery. On April 15, 2005, the State filed oppositions to all of Broadnax's motions, and the circuit court held a

---

from two years to one year. Because Broadnax's case became final between August 1, 2001, and July 31, 2002, Broadnax had until August 1, 2003, to file his petition. See Court Comment of January 27, 2004, to Amendment to Rule 32.2 Effective August 1, 2002.

hearing on the motions the same day, after which it denied the motions. The circuit court held an evidentiary hearing on the remaining claims in Broadnax's first amended petition on May 23, 2005. On June 14, 2005, the circuit court issued an order denying the remaining claims in the first amended petition, and Broadnax appealed.

On appeal, this Court reversed the circuit court's judgment and remanded the case for further proceedings on the ground that the circuit court had erred in denying Broadnax's April 8, 2005, motion to amend his petition. Broadnax v. State, 987 So. 2d 631 (Ala. Crim. App. 2007). The Alabama Supreme Court denied the State's petition for certiorari review, and this Court issued a certificate of judgment on December 21, 2007. On May 12, 2008, Broadnax filed in the circuit court a second amended petition, wherein he expanded on a few of the claims from his first amended petition and raised several new claims that had not previously been raised. On July 7, 2008, the State filed an answer and a motion for summary dismissal of Broadnax's second amended petition, in which it requested summary dismissal of all of Broadnax's claims on the grounds that the claims were precluded, that

they were insufficiently pleaded, that they were meritless, or that they failed to state a material issue of fact or law.

After a lengthy discovery process and several status conferences, the circuit court conducted an evidentiary hearing on Broadnax's second amended petition on March 14, 2011. The circuit court accepted post-hearing briefs from the parties, and on May 6, 2011, the circuit court issued a thorough order denying Broadnax's second amended petition. This appeal followed.[8]

Standard of Review

"[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

[8]Citations to the record from Broadnax's direct appeal will be to "DA" followed by the appropriate page number or numbers. Citations to the record from Broadnax's appeal from the denial of his first amended Rule 32 petition will be to "R32" followed by the appropriate page number or numbers.

1113, 1122 (Ala. Crim. App. 2003) (quoting Elliott v. State, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992)). "When conflicting evidence is presented ... a presumption of correctness is applied to the court's factual determinations." State v. Hamlet, 913 So. 2d 493, 497 (Ala. Crim. App. 2005). As explained in Brooks v. State, 929 So. 2d 491 (Ala. Crim. App. 2005):

> "'The resolution of ... factual issue[s] required the trial judge to weigh the credibility of the witnesses. His determination is entitled to great weight on appeal.... "When there is conflicting testimony as to a factual matter ..., the question of the credibility of the witnesses is within the sound discretion of the trier of fact. His factual determinations are entitled to great weight and will not be disturbed unless clearly contrary to the evidence."'
>
> "Calhoun v. State, 460 So. 2d 268, 269-70 (Ala. Crim. App. 1984) (quoting State v. Klar, 400 So. 2d 610, 613 (La. 1981))."

929 So. 2d at 495-96.

Moreover:

> "'The 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.'"

Wilkerson v. State, 70 So. 3d 442, 451 (Ala. Crim. App. 2011).

I.

Broadnax contends that the circuit court erred in adopting verbatim the State's proposed order denying his second amended petition. Relying on Ex parte Ingram, 51 So. 3d 1119 (Ala. 2010), he argues that the order "contains patently erroneous statements that undermine any confidence that [the] order is the product of the trial judge's independent judgment." (Broadax's brief, at 57.) However, Broadnax cites only one statement in the circuit court's order, albeit a statement made repeatedly throughout the order, that he believes was erroneous -- that Broadnax did not call his two trial attorneys to testify at the Rule 32 hearing. According to Broadnax, because he did call both of his trial attorneys to testify at the hearing on his first amended petition, held on May 23, 2005, this statement by the circuit court was erroneous and reflects that the findings in

the order are not the independent findings of the circuit court.

The record reflects that Broadnax did not raise this issue in the circuit court, by way of postjudgment motion, or otherwise. Cf., Loggins v. State, 910 So. 2d 146, 149 (Ala. Crim. App. 2005) (recognizing a motion to reconsider as a valid postjudgment motion in the Rule 32 context). It is well settled that "[t]he general rules of preservation apply to Rule 32 proceedings." Boyd v. State, 913 So. 2d 1113, 1123 (Ala. Crim. App. 2003). See also Slaton v. State, 902 So. 2d 102, 107-08 (Ala. Crim. App. 2003) (holding that claim that the circuit court erred in adopting State's proposed order was not preserved for review when it was never presented to the circuit court). Therefore, this issue was not properly preserved for this Court's review and will not be considered.

II.

Broadnax also contends that the circuit court erred when, over his objection, it prohibited Dr. Kenneth Benedict, a neuropsychologist who had performed a psychological evaluation of him for the Rule 32 proceedings, from testifying at the March 14, 2011, hearing on his second amended Rule 32 petition

to the substance of statements made to Dr. Benedict by Broadnax and Broadnax's family members regarding Broadnax's allegedly troubled childhood. He argues that the information Dr. Benedict received from him and from his family members about his childhood, although hearsay, was necessary for Dr. Benedict's psychological evaluation of him and would have been admissible at the penalty phase of his trial as mitigation evidence. Thus, Broadnax concludes, he should have been allowed to present the information regarding his allegedly troubled childhood through the testimony of Dr. Benedict at the Rule 32 hearing in order to prove the claim in his petition that his trial counsel were ineffective for not seeking a psychological evaluation of him for mitigation purposes. (See Part III.B. of this opinion.)

In Waldrop v. State, 987 So. 2d 1186 (Ala. Crim. App. 2007), this Court addressed a similar issue as follows:

> "Waldrop argues that the circuit court erred in excluding hearsay mitigating evidence at his Rule 32 evidentiary hearing. He argues that because hearsay evidence is admissible at a sentencing hearing in a capital-murder trial, it is also admissible at a postconviction proceeding attacking a death sentence.
>
> "However, Waldrop's argument is inconsistent with prior cases of this Court. As we stated in

Hunt v. State[, 940 So. 2d 1041 (Ala. Crim. App. 2005)]:

> "'The Alabama Rules of Evidence apply to Rule 32 proceedings. Rule 804, Ala. R. Evid., specifically excludes hearsay evidence. We addressed this identical issue in Giles v. State, 906 So. 2d 963 (Ala. Crim. App. 2004), overruled on other grounds, Ex parte Jenkins, 972 So. 2d 159 (Ala. 2005), and stated:
>
> > "'"Giles specifically argues that the circuit court erroneously failed to consider the hearsay testimony of two witnesses as to what Giles told them about a drug relationship between him and Carl Nelson. Giles argues that the circuit court misapplied the evidentiary rules governing capital sentencing because hearsay evidence is admissible at the sentencing portion of a capital-murder trial.
> >
> > "'"However, what Giles fails to consider is whether the Rules of Evidence apply to Rule 32 proceedings. See Rule 101, Ala. R. Evid., and Rule 1101(a), Ala. R. Evid., which states, in part, 'these rules of evidence apply in all proceedings in the Courts of Alabama....' Rule 1101(b), Ala. R. Evid., lists the proceedings exempt from application of the Rules of Evidence. Those proceedings include proceedings concerning preliminary questions of fact, grand jury proceedings,

> extradition proceedings, preliminary hearings in criminal cases, sentencing or probation revocation hearings, proceedings related to the issuance of a warrant of arrest, criminal summonses, or search warrants, bail proceedings, and contempt proceedings.
>
> "'"The Rules of Evidence apply to postconviction proceedings. See DeBruce v. State, 890 So. 2d 1068 (Ala. Crim. App. 2003). Rule 804, Ala. R. Evid., specifically excludes hearsay evidence. The circuit court correctly applied existing law and excluded the hearsay statements presented concerning an alleged drug relationship between Giles and one of the victims. After excluding the hearsay evidence, the circuit court was left with no lawful evidence to support this contention. Relief was correctly denied on this ground. See DeBruce, supra."
>
> "'906 So. 2d at 985-86. The circuit court committed no error in excluding the affidavits and the hearsay testimony....'
>
> "940 So. 2d at 1051."

987 So. 2d at 1190. See also McWhorter v. State, [Ms. CR-09-1129, September 30, 2011] ___ So. 3d ___, ___ (Ala. Crim. App. 2011) ("[T]he rules of evidence apply to postconviction

proceedings, and the circuit court should exclude inadmissible hearsay."); and Davis v. State, 9 So. 3d 514, 530 (Ala. Crim. App. 2006), rev'd on other grounds, 9 So. 3d 537 (Ala. 2007) ("The Alabama Rules of Evidence do not apply to sentencing hearings, but do apply to Rule 32 proceedings."). Therefore, the circuit court properly refused to allow Broadnax to present hearsay evidence at the Rule 32 hearing.

III.

Broadnax also contends that the circuit court erred in denying two of the claims of ineffective assistance of trial counsel raised in his second amended petition, specifically, the claims that his trial counsel, Bill Brower and Darryl Bender, were ineffective for not adequately investigating and presenting at the guilt phase of the trial the alibi that he was at the Alexander City work-release facility at 9 p.m. on the night of the murders and for not obtaining a psychological evaluation of him for purposes of mitigation.

> "'In order to prevail on a claim of ineffective assistance of counsel, a defendant must meet the two-pronged test articulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984):

> "'"First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."
>
> "'466 U.S. at 687, 104 S.Ct. at 2064.

"'"The performance component outlined in Strickland is an objective one: that is, whether counsel's assistance, judged under 'prevailing professional norms,' was 'reasonable considering all the circumstances.'" Daniels v. State, 650 So. 2d 544, 552 (Ala. Cr. App. 1994), cert. denied, [514 U.S. 1024, 115 S.Ct. 1375, 131 L.Ed.2d 230 (1995)], quoting Strickland, 466 U.S. at 688, 104 S.Ct. at 2065. "A court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

"'The claimant alleging ineffective assistance of counsel has the burden of showing that counsel's assistance was ineffective. Ex parte Baldwin, 456 So. 2d 129 (Ala. 1984), aff'd, 472 U.S. 372, 105 S.Ct. 2727, 86 L.Ed.2d 300 (1985). "Once a petitioner has identified the specific acts or omissions that he alleges were not the result of reasonable professional judgment on counsel's part, the court must determine whether those acts or omissions fall 'outside the wide range of professionally competent assistance.' [Strickland,] 466 U.S. at 690, 104 S.Ct. at 2066." Daniels, 650 So. 2d at 552. When reviewing a claim of ineffective assistance of counsel, this court indulges a strong presumption that counsel's conduct was appropriate and reasonable. Hallford v. State, 629 So. 2d 6 (Ala. Cr. App. 1992), cert. denied, 511 U.S. 1100, 114 S.Ct. 1870, 128 L.Ed.2d 491 (1994); Luke v. State, 484 So. 2d 531 (Ala. Cr. App. 1985). "This court must avoid using 'hindsight' to evaluate the performance of counsel. We must evaluate all the circumstances surrounding the case at the time of counsel's actions before determining whether counsel rendered ineffective assistance." Hallford, 629 So. 2d at 9. See also, e.g., Cartwright v. State, 645 So. 2d 326 (Ala. Cr. App. 1994).

> "'"Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved

> unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way."

"'Strickland, 466 U.S. at 689, 104 S.Ct. at 2065 (citations omitted). See Ex parte Lawley, 512 So. 2d 1370, 1372 (Ala. 1987).

> "'"Even if an attorney's performance is determined to be deficient, the petitioner is not entitled to relief unless he establishes that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

CR-10-1481

> proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Strickland,] 466 U.S. at 694, 104 S.Ct. at 2068."
>
> "'Daniels, 650 So.2d at 552.
>
> > "'"When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."
> >
> > "'Strickland, 466 U.S. at 697, 104 S.Ct. at 2069, quoted in Thompson v. State, 615 So. 2d 129, 132 (Ala. Cr. App. 1992), cert. denied, 510 U.S. 976, 114 S.Ct. 467, 126 L.Ed.2d 418 (1993).
> >
> > "'....'
>
> "Bui v. State, 717 So. 2d 6, 12-13 (Ala. Cr. App. 1997), cert. denied, 717 So. 2d 6 (Ala. 1998)."

Dobyne v. State, 805 So. 2d 733, 742-44 (Ala. Crim. App. 2000), aff'd, 805 So. 2d 763 (Ala. 2001).

With respect to counsel's duty to investigate, this Court has explained:

CR-10-1481

> "While counsel has a duty to investigate in an attempt to locate evidence favorable to the defendant, 'this duty only requires a reasonable investigation.' Singleton v. Thigpen, 847 F.2d 668, 669 (11th Cir. (Ala.) 1988), cert. denied, 488 U.S. 1019, 109 S.Ct. 822, 102 L.Ed.2d 812 (1989) (emphasis added). See Strickland, 466 U.S. at 691, 104 S.Ct. at 2066; Morrison v. State, 551 So. 2d 435 (Ala. Cr. App. 1989), cert. denied, 495 U.S. 911, 110 S.Ct. 1938, 109 L.Ed.2d 301 (1990). Counsel's obligation is to conduct a 'substantial investigation into each of the plausible lines of defense.' Strickland, 466 U.S. at 681, 104 S.Ct. at 2061 (emphasis added). 'A substantial investigation is just what the term implies; it does not demand that counsel discover every shred of evidence but that a reasonable inquiry into all plausible defenses be made.' Id., 466 U.S. at 686, 104 S.Ct. at 2063."

Jones v. State, 753 So. 2d 1174, 1191 (Ala. Crim. App. 1999).

> "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."

Strickland v. Washington, 466 U.S. 668, 690-91 (1984).

"The reasonableness of the investigation involves 'not only the quantum of evidence already known to counsel, but

also whether the known evidence would lead a reasonable attorney to investigate further.'" St. Aubin v. Quarterman, 470 F.3d 1096, 1101 (5th Cir. 2006) (quoting Wiggins v. Smith, 539 U.S. 510, 527 (2003)). "[B]efore we can assess the reasonableness of counsel's investigatory efforts, we must first determine the nature and extent of the investigation that took place...." Lewis v. Horn, 581 F.3d 92, 115 (3d Cir. 2009). Thus, "[a]lthough [the] claim is that his trial counsel should have done something more, we [must] first look at what the lawyer did in fact." Chandler v. United States, 218 F.3d 1305, 1320 (11th Cir. 2000). Finally:

> "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation

> decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. See United States v. Decoster, [199 U.S. App. D.C. 359,] 372-373, 624 F.2d [196,] 209-210 [(D.C. 1976)]."

Strickland, 466 U.S. at 691.

With these principles in mind, we address each of Broadnax's claims in turn.

A.

First, Broadnax argues on appeal, as he did in his second amended petition, that Brower and Bender were ineffective for not adequately investigating and presenting at the guilt phase of the trial an alibi defense that he was at the Alexander City work-release facility at 9:00 p.m. on the night of the murders. Specifically, he argues that a proper and adequate investigation would have resulted in the discovery of witnesses from the work-release facility, witnesses who testified at the Rule 32 hearing, who saw him at the facility the night of the murders at 9:00 p.m., "a time which would have made it impossible for him to have committed" the murders and dumped the bodies in Birmingham, a one and one-half hour drive from Alexander City, between 8:20 p.m. and 8:55 p.m., as

the State's evidence at trial indicated. (Broadnax's brief, at 28-29.)[9]

Before addressing this claim, we first point out the obvious: This claim is based on an alibi defense that is in direct contradiction to the alibi defense presented at Broadnax's trial. In his statements to police, in his statements to his trial attorneys (see discussion below), and at trial, Broadnax claimed that he was at Welborn, not at the work-release facility, until about 10:45 p.m. the night of the

[9]As part of this claim, Broadnax also argues that counsel did not adequately investigate and attack several other parts of the State's case against him. Broadnax essentially argues that counsel was required to conduct an exhaustive investigation into virtually every piece of circumstantial evidence the State had against him and that, when combined with a proper and adequate investigation into his allegedly having been at the work-release facility at 9:00 p.m. on the night of the murders, counsel would have been able to raise reasonable doubt in the minds of the jurors. (Broadnax's reply brief, at 5: "counsel failed to allocate adequate time for an exhaustive factual investigation"). However, because the crux of Broadnax's claim of counsel's alleged failure to investigate is his assertion of alibi and, as explained below, Broadnax failed to prove that claim, we find it unnecessary to specifically address in this opinion Broadnax's peripheral arguments. Suffice it to say, after thoroughly reviewing the record from Broadnax's direct appeal, the record from Broadnax's appeal from the denial of his first amended petition, and the record before this Court in this appeal, we have no trouble concluding that Broadnax's extraneous arguments are meritless.

murders. Indeed, from all that appears, Broadnax continued claiming to have been at Welborn that night for many years after his conviction and sentence. Even in both his original petition, filed in 2003, and in his first amended petition, filed in 2004, Broadnax continued in his assertion that he was at Welborn the night of the murders. It was not until 2008, 12 years after the crime, and after this Court had reversed the denial of his first amended petition and Broadnax had obtained new Rule 32 counsel to represent him, that Broadnax suddenly changed his story regarding his whereabouts the night of the murders and assert that he was not at Welborn, as he had alleged for 12 years, but was at the Alexander City work-release facility at 9:00 p.m. the night of the murders. Although we review this claim under the same principles of law as any other ineffective-assistance-of-counsel claim, we do so with caution, keeping in mind that it is based entirely on a newfound defense.

In support of this claim, Broadnax introduced into evidence at the March 14, 2011, hearing (hereinafter "the 2011 hearing") a "Daily Sign In and Out Log" (hereinafter "inmate log") from the Alexander City work-release facility for April

25, 1996, the day of the murders. (C. 902.) Testimony at the 2011 hearing indicated that when an inmate left the facility, he was required to sign his name next to his assigned bed number on the inmate log, write the time he was leaving the facility, and write his destination. When an inmate returned to the facility, he was required to again sign his name next to his assigned bed number and write the time he returned to the facility. Although the inmate log was kept by the facility, near the front office, the inmates were not specifically supervised when signing in and out to determine whether the times and locations written by the inmates were accurate.[10]

Testimony indicated that the inmate log was used by the correctional officers at the facility to verify head counts conducted periodically throughout the day and night. Specifically, the officers would conduct a head count of the inmates physically present in the facility and then compare that count to the inmate log to determine who was supposed to be in the facility at the time of the head count. If an

[10]Indeed, there was testimony that inmates could, and sometimes did, sign each other in and out of the facility.

inmate who was absent during the head count had not signed in on the inmate log as having returned from work, then the inmate was considered to have been properly away from the facility and, thus accounted for. If, on the other hand, an inmate who was absent during the head count had signed in on the inmate log, then the inmate was considered to be unaccounted for, and the officers would know that the inmate may have escaped. The inmate log for the night of the murders contains Broadnax's name next to bed no. 69, a departure time of 5:30 a.m. to the "C. Shop"[11] and a return time of 9:00 p.m. (C. 904.)

To rebut the inmate log, the State introduced into evidence at the 2011 hearing a "Work Release Center Log" maintained by correctional officers (hereinafter "the officer log"), from the Alexander City work-release facility. (C. 894.) Testimony at the 2011 hearing indicated that the officer log contained notations by the correctional officers at the facility regarding the activities of any given day, including the comings and goings of the inmates as well as the

[11]Testimony indicated that the inmates often referred to Welborn as the cabinet shop or C-shop.

various duties performed by the correctional officers. Testimony at the 2011 hearing indicated that when inmates returned from their jobs in the work-release vans (the facility had more than one van) one correctional officer would watch each inmate get out of the van and call out that inmate's name so that another correctional officer could then write in the officer log the name of the returning inmate and the time of the inmate's return. The officer log for April 25, 1996, the night of the murders, contains a notation that Broadnax returned to the work-release facility at 11:50 p.m., not 9:00 p.m. as Broadnax wrote on the inmate log.

Broadnax also called to testify at the 2011 hearing four witnesses to support this claim -- Macarthur Whetstone and Floyd Cumbie, former correctional officers who had worked at the Alexander City work-release facility and who knew Broadnax, and Donald Jerome Bowden and James A. Smith, inmates formerly housed at the Alexander City work-release facility who knew Broadnax. He further introduced into evidence an affidavit from Roger A. Stolz Jr., also an inmate formerly housed at the Alexander City work-release facility who knew Broadnax, in an attempt to support his claim that he was at

the work-release facility at 9:00 p.m. on the night of the murders.[12] All five witnesses stated that they had never been contacted by defense counsel or by a defense investigator before Broadnax's trial.

Whetstone testified that he worked the third shift, from 10:00 p.m. to 6:00 a.m., at the work-release facility the night of the murders, April 25, 1996. Whetstone said that for the third shift he normally arrives at the facility around 9:30 p.m. and conducts a head count of the inmates at the beginning of his shift. However, Whetstone said that on April 25, 1996, the night of the murders, he did not conduct his first head count until "12, 12 something that night." (R1. 29.)[13] Despite Rule 32 counsel's repeated attempts to get

---

[12]Broadnax also attempted to introduce into evidence four additional affidavits -- from Jerry Lane, Johnny Baker, and Phillip Holsemback, inmates formerly housed at the Alexander City work-release facility, and Ernest Ledger, a former inmate housed at the Alexander City work-release facility. The circuit court refused to accept these affidavits, and Broadnax does not challenge that ruling on appeal. Because these affidavits were not admitted into evidence, we do not consider them.

[13]The record reflects that there was a change in court reporters during the 2011 hearing. As a result, the transcript of the hearing is in three sections, and each section is paginated separately. Citations to the first section of the hearing will be to "R1" followed by the

Whetstone to change his testimony in this regard, Whetstone refused to do so. Whetstone also testified that he had seen Broadnax the night of the murders. Whetstone initially said that he had seen Broadnax at approximately 11:00 p.m., when Broadnax had asked to withdraw money from his prison account, but he later changed his testimony, stating that he had seen Broadnax "between 11 and sometime ... I'm not sure."[14] (R1. 47.) Whetstone made clear, however, that Broadnax had asked to withdraw money just before Whetstone conducted the head count, which was, as noted, sometime after midnight.

Cumbie testified that he worked the second shift, from 2:00 p.m. to 10:00 p.m., the day of April 25, 1996. According

---

appropriate page number or numbers, citations to the second section of the hearing will be to "R2" followed by the appropriate page number or numbers, and citations to the third section of the hearing will be to "R3" followed by the appropriate page number or numbers.

[14]As the State correctly points out in its brief to this Court, Whetstone consistently had difficulty stating the times that events had occurred, often equivocated and changed his testimony about those times, and in some cases stated times that were inconsistent with the documentary evidence. For example, Whetstone testified that he believed the facility was notified about the murders of Jan and DeAngelo at approximately 11:00 p.m. that night; however, the incident report prepared that night, which was introduced into evidence at the 2011 hearing, reflects that the facility was not notified of the murders until midnight.

to Cumbie, he normally did his last head count of the shift around 9:00 p.m. The last head count he conducted that night, Cumbie said, initially did not "clear," meaning an inmate was not accounted for, but when he conducted the head count again, it did "clear," meaning that all inmates were accounted for. Cumbie testified, however, that he never saw Broadnax on April 25, 1996.

Bowden testified that he drove one of the work-release vans for the Alexander City work-release facility and that he remembered picking up Broadnax at Welborn the night of the murders. Bowden said that he "probably" picked up Broadnax "between 9 and 10" p.m. and that it took approximately 20 minutes to drive from Welborn to the work-release facility. (R1. 84.) However, he admitted that if the officer log from the facility showed that Broadnax did not return to the facility in the work-release van until 11:50 p.m. that night, he "couldn't argue with an officer." (R1. 102.) Smith testified that when he arrived back at the work-release facility from his job the night of April 25, 1996, he saw Broadnax crying in the office of one of the correctional officers. Smith said that he believed that he had seen

Broadnax "around 11" p.m. or "sometime in there" because he normally worked second shift, from 2:00 p.m. to 10:00 p.m., and would arrive back at the facility by about 11:00 p.m. (R2. 6.) We note, however, that both the officer log and the inmate log indicate that Smith did not arrive back at the work-release facility until 12:05 a.m.

In his affidavit, Stolz said that on April 25, 1996, he worked the second shift, from 2:00 p.m. until 10:00 p.m., at Welborn. According to Stolz, he remembered seeing Broadnax at Welborn at approximately 5:00 p.m. that day talking on the telephone. Stolz also stated that he knew both Mark Chastain and Kathy Chastain because both of them worked at Welborn and he had trained Kathy at Welborn and had dated Kathy's sister. Stolz said that the night of the murders, he, not Broadnax, was the person in the building when Mark Chastain set the alarm, and that it was he, and not Broadnax, who spoke with Mark and Kathy outside Welborn at approximately 10:45 p.m. that night before he returned to the work-release facility. Stolz also said that he was the only passenger on the work-release van that night. We note, however, that the officer log reflects that Stolz arrived back at the work-release

facility at 10:45 p.m. the night of the murders, and the inmate log reflects that Stolz wrote down that he had arrived at the work-release facility at 10:45 p.m. Given the testimony, introduced by Broadnax himself, that it took approximately 20 minutes to drive from Welborn to the work-release facility, it would have been impossible for Stolz to have been at Welborn talking with Mark and Kathy Chastain and at the work-release facility at the same time, i.e., at 10:45 p.m.[15]

Broadnax did not call his trial counsel to testify at the 2011 hearing. Rather, he relied solely on the testimony they had provided at the hearing held on his first amended petition on May 23, 2005 (hereinafter "the 2005 hearing"). At the 2005 hearing, Brower, who had acted as lead defense counsel, testified that he had graduated from law school in 1985, and that, at the time he was appointed to represent Broadnax in 1996, approximately 90% of his practice was criminal defense. He had also participated in 18 capital-murder trials before he represented Broadnax. Brower testified that he began to

[15]Because Stolz's testimony was introduced by affidavit, the State did not have the opportunity to question Stolz about this discrepancy.

investigate Broadnax's case "[a]lmost immediately after the preliminary hearing." (R32, R. 104.) Brower said that he spent a "lot" of hours on Broadnax's case and that he had met with Broadnax a "substantial number" of times before trial, although he could not provide exact numbers. (R32, R. 138.) Brower stated that the district attorney's office had an open-file policy regarding discovery and that he and cocounsel Bender received the bulk of discovery very quickly after being appointed. Brower also testified that he and Bender hired an investigator to help them investigate the case; specifically, they hired Steve Sexton, who Brower said was "known around the courthouse." (R32, R. 105.) Brower also said that he believed that he and Bender asked Sexton to interview witnesses and specifically to go to the Alexander City work-release facility. However, Brower was never questioned about the specifics of the investigation Sexton actually conducted for the guilt phase of the trial, such as whom at the Alexander City work-release facility Sexton spoke to, or about the results of that investigation.

According to Brower, he had a good relationship with Broadnax, he liked Broadnax, and he believed Broadnax when

Broadnax said that he had not committed the murders. Brower also said that Broadnax was very cooperative and told him and Bender his side of story. Specifically, Brower said that Broadnax told them that he was at Welborn the entire day and evening of the murders, although Broadnax was unable to provide a single alibi witness who had seen him at Welborn after approximately 6:30 p.m.[16] In addition, Brower testified that Broadnax had said that he was on the telephone with Wanda Broadnax, his sister-in-law, at the approximate time the bodies were left in Birmingham, but that telephone records obtained by the State did not support the assertion and there was no other corroboration. As a result, Brower said, he and Bender could not present evidence that Broadnax was on the telephone at Welborn at approximately 9:00 p.m. the night of the murders without calling Broadnax himself to testify, which in Brower's opinion would have been harmful to the defense.

[16]As noted above, Johnny Baker testified that he had seen Broadnax the night of the murders, driving Jan's vehicle with DeAngelo in the backseat. Baker said that he did not know what time he saw Broadnax, but that it was still daylight. The State's theory of the case was that Baker saw Broadnax at approximately 6:30 p.m.

CR-10-1481

Bender testified at the 2005 hearing that when he was appointed in 1996 to represent Broadnax on the capital-murder charges, he had been practicing law since 1993, and that during those three years, his practice was 65-70% criminal defense. He also said that he had previously been involved in four or five capital-murder cases before representing Broadnax. Bender testified that he spent "significant time" investigating and preparing Broadnax's case. (R32, R. 84.) Bender said that he and Brower retained Steve Sexton as an investigator to help them with the case and that they met with Sexton many times and communicated with Sexton "quite often." (R32, R. 18.) According to Bender, Sexton's investigation was not helpful, but not because "he didn't do quality work or adequate work. It was just because there was just so little to what we could find relative to this particular crime." (R32, R. 18.) Specifically, Bender said, because the crime occurred "in a confined setting," the number of people involved "was restricted" and, thus, "[a] lot of the investigation was for the mitigation phase" and not for the guilt phase. (R32, R. 18-19.) Bender stated that he did not remember asking Sexton to contact Broadnax's family members

because, he said, Bender "was in constant communications with his family members." (R32, R. 22.) Bender explained:

> "I think my primary concern for Mr. Sexton was to talk to people in the Elyton Village area who may have seen any part of the crime, who may have known Mr. Broadnax when he was a child and to talk to people at the work release center or the Welborn Farms wood factory."

(R32, R. 22-23.)

Bender testified that Broadnax always denied committing the murders and that because Broadnax always maintained that "he didn't know anything about it, what he could offer us or what he could help us with was limited." (R32, R. 32.) Bender also said that Broadnax claimed that he was at Welborn during the time of the murders but that Broadnax was unable to provide counsel with anyone who had seen him at Welborn after 6:30 p.m. that night. As a result, there were no witnesses to subpoena on Broadnax's behalf who could place Broadnax at Welborn at the critical times. Broadnax also told Bender that he had been on the telephone that evening with his brother, Larry. Bender said that he did investigate Broadnax's claim that he was on the telephone because it "was at the heart of the case," but that he could not find anything to support it. (R32, R. 86.) Indeed, according to Bender, Larry's telephone

records showed no calls from Welborn the night of the murders.

When asked what defense theory he and Brower pursued, Bender explained:

> "Based on -- you know, as a lawyer, you have to take obviously what your client tells you, take what the evidence is and sort of formulate a defense. ... But Donald told us that he didn't have anything to do with it. And I told him, 'Well, Donald, they found your work boots with both victims' blood on them.' And he explained that away. He said, 'I sold those boots to another inmate.' All right. So right away if that's correct and if that's to be believed, that sort of explains why he wasn't wearing his boots, which were his, used to be his, with blood on them. The victims' blood was on his uniforms that they found. He told us that some of his uniforms had been stolen. And we checked with the work release director. And I think they did, in fact, indicate that he had made a report of some sort that some of his uniforms had been stolen. And so as far as I was concerned, that fit sort of in line with what he was saying; he didn't do it. So it very well could have been someone else. ... But our defense was based on what he told us, which was he didn't do it and what the evidence was or lack of evidence. And in this case, there wasn't a lack of evidence. There was quite a bit of evidence in this case.
>
> "....
>
> "... [H]e was in the work release center. So he should have been at certain places at certain times.
>
> "....
>
> "The evidence though was that he wasn't. The evidence was that he was up at Elyton Village at 11:00 o'clock at night hitchhiking a ride back down to the work release center when he should have been

CR-10-1481

> in the bed at 6:00 o'clock. And so even though he explained to us how and why it couldn't have been him, the evidence in this matter couldn't be changed; those facts that couldn't be changed suggest that it had to be him.
>
> "....
>
> "Well, what we tried to do is, there was a time, what we called a time line involved in this case. The time frame was from which there were -- there was one man who saw him -- there was nobody who actually saw him beat his wife to death and put her in the trunk. But there was one inmate who saw him in the car driving away from the work release -- I mean, from Welborn Farms with a kid in the backseat. And obviously, on work release, he does not have any right to be driving. But there was an individual who saw him driving away. And then the evidence was that he drove, you know, came up to Elyton Village and that he hitchhiked back down to the work release center after all of this had happened. He got back, I think it was like 10:30 or 11:00 o'clock at night, unexplained. And there's no reason why an inmate on work release should not be reporting back to his work site, I mean, the camp site at a specific time. They pick them up in vans at a specific time and deliver them at a specific time. So there was no reason why he shouldn't have been there when he should have. He got back at 10:30, 11:00 o'clock at night which was way beyond the time frame that he should have been. And we couldn't explain that away. You know, as a lawyer, you can explain some things away. That we couldn't explain away. And there were people and records that indicate he got back there that night."

(R32, R. 51-55.)

In denying this claim in its order, the circuit court made three findings. First, the court made a general finding

that because Broadnax had failed to call Brower or Bender to testify about this claim at the 2011 hearing, the silent record required a presumption that counsel's actions were reasonable and, thus, that Broadnax had necessarily failed to prove this claim.[17] We agree.

As noted, although both Brower and Bender testified at the 2005 hearing on Broadnax's first amended petition, neither were recalled to testify at the 2011 hearing on Broadnax's second amended petition. This is important because Broadnax's specific claim that Brower and Bender were ineffective for not adequately investigating and presenting evidence showing that Broadnax was at the work-release facility at 9:00 p.m. the night of the murders was not raised in Broadnax's original petition or first amended petition -- it was raised for the first time in Broadnax's second amended petition, filed three years after the first hearing at which

[17]In its order, the court stated that Broadnax "did not call Brower [or] Bender ... to testify at the Rule 32 evidentiary hearing." (C. 61.) Although at first blush, this may appear to indicate that neither Brower nor Bender ever testified in the postconviction proceedings, which is incorrect, when read in context of the court's entire order, it is clear that the circuit court was simply referring here to Broadnax's failure to recall Brower and Bender at the 2011 hearing.

Brower and Bender testified. Although Broadnax did raise a claim in his original petition and first amended petition that Brower and Bender were ineffective for allegedly not investigating and discovering that Wanda Broadnax, Broadnax's sister-in-law, had spoken to Broadnax "during the times the crimes were committed" (R32, C. 202), that claim was based on Broadnax's own statements, to police and to his attorneys, that the night of the murders at approximately 9:00 p.m., he had telephoned his brother, Larry Broadnax, from Welborn. At no point did Broadnax argue in his original or first amended petition that Bender and Brower did not properly investigate the possibility that he was at the work-release facility at the time of the murders. Because this specific claim was not raised before Brower and Bender testified, they obviously were never specifically questioned about this claim.

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. Indeed, "trial counsel should ordinarily be afforded an opportunity to explain his actions

CR-10-1481

before being denounced as ineffective." Rylander v. State, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003). This is so because it is presumed that counsel acted reasonably:

> "The presumption impacts on the burden of proof and continues throughout the case, not dropping out just because some conflicting evidence is introduced. 'Counsel's competence ... is presumed, and the [petitioner] must rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy.' Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 2588, 91 L.Ed.2d 305 (1986) (emphasis added) (citations omitted). An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption. Therefore, 'where the record is incomplete or unclear about [counsel]'s actions, we will presume that he did what he should have done, and that he exercised reasonable professional judgment.' Williams [v. Head,] 185 F.3d [1223,] 1228 [(11th Cir. 1999)]; see also Waters [v. Thomas,] 46 F.3d [1506,] 1516 [(11th Cir. 1995)] (en banc) (noting that even though testimony at habeas evidentiary hearing was ambiguous, acts at trial indicate that counsel exercised sound professional judgment)."

Chandler v. United States, 218 F.3d 1305, 1314 n.15 (11th Cir. 2000). "'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.'" Dunaway v. State, [Ms. CR-06-0996, December

18, 2009] ___ So. 3d ___, ___ (Ala. Crim. App. 2009) (quoting Howard v. State, 239 S.W.3d 359, 367 (Tex. App. 2007).

In this case, neither Bender nor Brower was ever questioned about whether he had investigated the possibility of an alibi defense based on Broadnax's being at the work-release facility at 9:00 p.m. the night of the murders, much less about why he did not pursue that defense, as opposed to the alibi defense that counsel did pursue, i.e., that Broadnax was at Welborn at 9:00 p.m. the night of the murders. Because the record is ambiguous as to the basis of Brower and Bender's decision in this regard, we must presume that they exercised reasonable professional judgment. See Whitson v. State, [Ms. CR-11-0887, August 24, 2012] ___ So. 3d ___ (Ala. Crim. App. 2012) (Rule 32 petitioner failed to prove that appellate counsel was ineffective where, although petitioner called appellate counsel to testify at hearing, petitioner did not question appellate counsel about the ineffective-assistance claims raised in the petition). Thus, the circuit court correctly found that Broadnax, by failing to question his

CR-10-1481

attorneys about this specific claim, failed to overcome the presumption that counsel acted reasonably.[18]

Second, the circuit court found that Broadnax had failed to prove that his counsel's performance was deficient. The court explained:

> "As demonstrated by his statement given the morning after the murder and by his statements to trial counsel, Broadnax initially claimed that his alibi was that he was at the Welborn Forest Products facility from the beginning of his shift until approximately 10:45 p.m. that evening. Yet the claims in his Second Amended Petition are based on a theory that he returned to the Alexander City Work Release facility at 9:00 p.m.[3] This new alibi theory

---

[18]We note that Broadnax argues vigorously against this finding in his reply brief, stating that "Mr. Broadnax cannot be faulted for choosing not to have counsel testify twice about what they said well enough the first time." (Broadnax's reply brief, at 4.) However, later in his reply brief, Broadnax then relies on his own failure to call his attorneys to testify about this claim at the 2011 hearing as evidence that he proved that his counsel were ineffective. He argues that "[c]ounsel offered no reason for failing to call any defense witness." (Broadnax's reply brief, at 12.) Clearly, counsel never offered a reason for not calling any of the witnesses presented at the 2011 hearing as defense witnesses at trial only because Broadax failed to call counsel to testify at the 2011 hearing and to question counsel about those witnesses. Broadnax cannot fail to question counsel about a specific claim of ineffective assistance and then rely on counsel's failure to testify about that claim as proof that counsel was ineffective. That is akin to invited error and will not be permitted. See Fountain v. State, 586 So. 2d 277, 282 (Ala. Crim. App. 1991) ("A defendant cannot invite error by his conduct and later profit by the error.").

CR-10-1481

is inconsistent with what Broadnax told trial counsel. As the Supreme Court held in Strickland:

> "'The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. ... And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.'

"Strickland, 466 U.S. 668, 691 (emphasis added). Trial counsel performed a reasonable investigation based upon the information supplied by their client. The Court finds that Broadnax has failed to show deficient performance. Thus, this claim is denied.

"_____

"[3]Broadnax's claim is based upon the inmate sign-in log from the Alexander City Work Release facility, which was admitted into evidence at the evidentiary hearing. The log is intended to document the time at which inmates checked out from the facility and checked back in. Broadnax's entry in the log indicates a return time of '9:00.' However, the testimony at the evidentiary hearing did not establish that inmates were monitored during sign-in."

(C. 62-63.) These findings are supported by the record.

CR-10-1481

As noted previously, Broadnax gave two statements to police, and testimony regarding both statements was presented at trial. In his statements, Broadnax said that Jan had brought him dinner at Welborn the night of the murders and that she had left Welborn at approximately 8:20 p.m. He also said that he was at Welborn the entire day and evening of the murders and that he had telephoned his brother, Larry, from Welborn at approximately 9:00 p.m. When questioned specifically about the bloody boots and bloody Welborn work uniform belonging to him that were found in the work-release facility, Broadnax stated that he had sold the boots to another inmate, although he could not identify the inmate, approximately a year earlier, and that the uniform had been stolen about two months earlier. Broadnax also said that he had reported the theft of his uniform to the company who made and rented the uniforms to Welborn.

However, the State presented testimony at trial that no report of a stolen uniform had been made to the uniform company; it introduced into evidence at trial telephone records indicating that no telephone call had been made to Broadnax's brother's house from Welborn the night of April 25,

1996; and it established that the bodies of Jan and DeAngelo had been left in Birmingham, an hour and a half drive from Welborn, sometime between 8:20 p.m. and 8:55 p.m., thus making it impossible for Jan to have been at Welborn until 8:20 p.m. as Broadnax said in his statements. Accordingly, the State's evidence clearly established that Broadnax had lied to the police in his statements at least three times.

Broadnax now argues, essentially, that his trial counsel should have investigated and presented evidence to the jury that Broadnax had lied to the police a fourth time -- when he had said that he was at Welborn until 10:45 p.m. the night of the murders.[19] "[W]hen the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated

[19]He also argues that "[n]either defense counsel asserted that this strategy turned on Mr. Broadnax's statement" and, thus, that counsel's decision not to pursue such an investigation cannot be considered sound trial strategy. (Broadnax's brief, at 32.) However, contrary to Broadnax's contention, as can be seen from the above summary of the their testimony, both Brower and Bender made it very clear that their investigation and defense theory were based in large part on Broadnax's statements to police and on what Broadnax had told them.

altogether." Strickland, 466 U.S. at 691. An attorney's decision regarding investigation depends "critically" on information received from his or her client. Id. at 691. In this case, neither Brower nor Bender had any reason whatsoever to think that an investigation into the possibility that Broadnax was somewhere other than at Welborn at 9:00 p.m. the night of the murders was necessary. Broadnax told the police, and both Brower and Bender, that he was at Welborn at 9:00 p.m. the night of the murders, not at the work-release facility. "Trial counsel's performance cannot be deemed ineffective for failing to locate alibi witnesses whose existence was not brought to his attention." Adkins v. State, 280 Ga. 761, 762, 632 S.E.2d 650, 653 (2006). See also Davis v. State, 9 So. 3d 539 (Ala. Crim. App. 2008).

More importantly, even if counsel had some basis for possibly thinking that Broadnax had lied to them and to the police and may have, in fact, been at the work-release facility at 9:00 p.m., given that it was clear that Broadnax had lied to the police regarding other things, we cannot say that any decision to forgo attempting to further impugn their client's credibility by presenting additional evidence of

Broadnax's lying to the police was unreasonable. See, e.g., Traylor v. State, 466 So. 2d 185, 189 (Ala. Crim. App. 1985) (Rule 32 petitioner's claim that counsel was ineffective for not calling to testify a witness who could have provided an alibi was meritless where alibi witness's testimony would have contradicted petitioner's own testimony at trial). Therefore, the circuit court correctly found that Broadnax failed to prove that his counsel's performance in this regard was deficient.

Third, the circuit court found that Broadnax had failed to prove that he was prejudiced by counsel's conduct:

> "The evidence and testimony offered at the evidentiary hearing failed to establish that there was any credible evidence to support Broadnax's claim that he returned to the Alexander City Work Release facility at 9:00 p.m. Broadnax did not present testimony from a single witness who testified that he saw Broadnax at the facility at 9:00 p.m. The only witness whose testimony conflicted with the State's theory at trial was Donald Bowden. Bowden testified that he picked Broadnax up at Welborn between 9:00 and 10:00 p.m.
>
> "However, Bowden's testimony is contradicted by the documentary evidence admitted at the evidentiary hearing. The work release officer's log shows that Bowden made only one trip between 9:00 and 10:00 p.m. On that trip he left the center with three inmates at 9:00 p.m., picked up Roger Stolz at Welborn, and returned to the center with Stolz and R. Williams at 10:45 p.m. The log indicates that

CR-10-1481

> Bowden left the center again at 11:15 p.m., and returned with Broadnax and a 'J. Samuels' at 11:50 p.m.
>
> "Moreover, the inmate sign-in sheet corroborates the officer's log. Both Roger Stolz and R. Williams signed in at 10:45, consistent with the time that the officer's log shows Bowden returning with both men. Likewise, a 'Jeppie' or 'Jessie' Samuel signed in at 11:50, consistent with the officer's log entry showing the return of 'J. Samuels' at 11:50 p.m. The only inconsistent entry is Broadnax's. The Court heard evidence that the inmate sign-in log was not closely monitored and infers, as the jury surely would have, that when Broadnax returned to the center at 11:50 p.m. he simply wrote down '9:00.' Considering the evidence and testimony, the Court finds that Donald Bowden's testimony was not credible. Further, the Court finds that his testimony did not raise a reasonable probability that the result of Broadnax's trial would have been different had it been presented by trial counsel. Consequently, this claim is denied."

(C. 63-64; citations omitted.) Again, these findings are supported by the record.

Broadnax failed to prove that he was at the work-release facility at 9:00 p.m. the night of the murders. Despite Broadnax's attempts in his brief on appeal to characterize the testimony of the "witnesses at the Rule 32 hearing" as "indicating that Mr. Broadnax was at the Alexander City Work Release Center at a time which would have made it impossible for him to have committed a murder in Birmingham" (Broadnax's

brief, at 28-29), none of the testimony presented by those witnesses, as summarized above, indicated that anyone saw Broadnax at the work-release facility at 9:00 p.m on that night. Cumbie specifically testified that he never saw Broadax at all on April 25, 1996. Whetstone's testimony established that he did not see Broadnax the night of April 25, 1996, until midnight or after. Although Smith testified that he thought he had seen Broadnax when he first arrived back at the work-release facility around 11 p.m. or shortly after, both the inmate log and the officer log reflect that Smith did not arrive back at the work-release facility until after midnight the night of the murders. Similarly, although Bowden testified that he picked up Broadnax at Welborn between 9:00 p.m. and 10:00 p.m., the officer log, which Bowden said he would not disagree with, reflects that Bowden did not even leave the work-release facility to pick up Broadnax until after 11:00 p.m. and that he did not arrive back at the facility with Broadnax until 11:50 p.m.

We also note that Broadnax's heavy reliance on the inmate log as evidence that he was at the work-release facility at 9:00 p.m. is misplaced. Broadnax argues repeatedly on appeal

that if he was not at the work-release facility at 9:00 p.m. as written on the inmate log, then none of the head counts conducted at the facility after that time would have "cleared," i.e., he would have been unaccounted for. However, this argument is clearly wrong based on the testimony presented by Broadnax himself at the 2011 hearing. If Broadnax had returned to the facility at 11:50 p.m., as he had told the police and as he had told his trial attorneys, and as the officer log clearly shows, and he then simply wrote down, when he arrived at 11:50 p.m., that he had arrived at 9:00 p.m., this would not, in any way, have affected any head count conducted at or about 9:00 p.m. because at 9:00 p.m., the inmate log would not have had Broadnax's signature or the time "9:00" written on it. Based on the testimony at the Rule 32 hearing, it is very clear that a head count conducted at 9:00 p.m. or shortly thereafter would have shown Broadnax to be absent from the facility at that time, but when the officers compared that count to the inmate log, as it appeared at 9:00 p.m., they would have seen that Broadnax had left the facility early that morning to go to work (because the log would have had his signature and the time he left) and had not yet signed

back in and, therefore, they would have concluded that Broadnax was accounted for, i.e., still at work, and the head count would have "cleared." A much more reasonable interpretation of, and likely explanation for, the inmate log is that Broadnax arrived at the facility at 11:50 p.m. but simply lied when he wrote down 9:00 p.m. in an effort to cover up his involvement in the murders.

In other words, the testimony and evidence at the 2011 hearing established that Broadnax did not arrive at the work-release facility until almost midnight the night of the murders, giving Broadnax ample time to have committed the murders, to have dumped the bodies in Birmingham, and to have traveled back to Alexander City. Clearly then, Broadnax failed to prove by a preponderance of the evidence that he was, in fact, at the work-release center "at a time which would have made it impossible for him to have committed a murder in Birmingham" as he alleges. (Broadnax's brief, at 28-29.) Because Broadnax failed to prove that he was actually at the work-release facility at 9:00 p.m. the night of the murders, we conclude, as did the circuit court, that he failed to prove that he was prejudiced by counsel's not pursuing an

obviously fruitless investigation. See, e.g., James v. State, 61 So. 3d 357, 367 (Ala. Crim. App. 2010) (Rule 32 petitioner failed to prove claim that counsel was ineffective for not investigating his assertion that he was out of town the day before the murder to undermine the testimony of a State's witness that he was outside the victim's apartment with a gun the day before the murder where petitioner failed to present evidence at the Rule 32 hearing that he was, in fact, out of town the day before the murder).

For these reasons, the circuit court properly denied this claim of ineffective assistance of counsel.

B.

Broadnax also argues on appeal, as he did in his second amended petition, that his trial counsel were ineffective for not seeking a psychological evaluation of him for purposes of mitigation.[20] He maintains that had counsel obtained such an

[20]We note that, in his brief on appeal, Broadnax also argues that his counsel should have obtained a psychological evaluation of him for purposes of the guilt phase of the trial in order to establish that he "lacked the mental facility to plan a complex escapade that required pinpoint timing." (Broadnax's reply brief, at 23.) However, Broadnax did not raise a claim in his original petition, first amended petition, or second amended petition that his trial counsel were ineffective for not having a psychological evaluation

evaluation, "they would have learned about the history of mental illness in Mr. Broadnax's family, the closed head trauma he suffered due to a car accident when he was a teenager, the trauma from the sexual abuse he suffered when he was younger, as well as his deficits in intellectual and executive functioning." (Broadnax's brief, at 42.) He also asserts that a proper evaluation and the background investigation that a psychologist would have conducted would have revealed his "psychological history including his victimization, rape, physical assaults, sexual assaults, traumatic exposure to violence, and physical trauma." (Broadnax's brief, at 46.) All this evidence, Broadnax

---

performed for the guilt phase of the trial. The only claims in his petitions of ineffective-assistance at the guilt-phase relating to experts were that his counsel were ineffective for not hiring a "juristic psychologist" to assist in jury selection (C. 327) and for not hiring "an independent DNA expert." (C. 328.) Therefore, Broadnax's argument, raised for the first time on appeal, that his trial counsel were ineffective for not obtaining a psychological evaluation of him for purposes of the guilt-phase of the trial is not properly before this Court and will not be considered. 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.").

concludes, would have been powerful mitigating evidence at the penalty phase of his trial.

Before addressing the merits of this claim, we make two observations regarding the limitations on our review. First, in his second amended petition, Broadnax raised a very broad claim that his "counsel were ineffective during the penalty phase of trial." (C. 337.) He then divided this broad claim into several subclaims. See, e.g., Washington v. State, 95 So. 3d 26, 58 (Ala. Crim. App. 2012), and Coral v. State, 900 So. 2d 1274, 1284 (Ala. Crim. App. 2004), overruled on other grounds by Ex parte Jenkins, 972 So. 2d 159 (Ala. 2005) (both recognizing that a claim of ineffective assistance of counsel is a general claim that often consists of subcategories or subclaims and that each subcategory or subclaim is considered an "independent claim"). Those subclaims included counsel's alleged failure to investigate possible mitigation witnesses, counsel's alleged failure "to obtain vital records" (C. 356), counsel's alleged failure to object to erroneous jury instructions, counsel's alleged failure to retain "a professional social worker" (C. 366), and counsel's alleged failure to seek a psychological evaluation of Broadnax. In

his brief on appeal, Broadnax pursues only the very narrow subclaim that his counsel were ineffective for not seeking a psychological evaluation of him. Therefore, our review is confined to that limited issue.

Second, we note that much of Broadnax's argument on appeal is based on information that was never introduced into evidence. As explained in Part II of this opinion, at the 2011 hearing, Broadnax attempted to present hearsay evidence, through the testimony of Dr. Kenneth Benedict, regarding various events that had occurred in his childhood -- such as the alleged car accident, the alleged rape, and the alleged physical assaults referenced above -- as well as about the alleged history of mental illness in his family. The circuit court refused to allow this hearsay evidence,[21] but permitted

[21]We also note that what evidence Broadnax presented at the 2005 hearing did not support, but refuted, several of Broadnax's allegations about his childhood. For example, in his original petition, Broadnax alleged that, when he lived with his older sister, Dorothy McKinstry, in Michigan for a year when he was a teenager, his sister and brother-in-law physically abused him and starved him. He also alleged in his second amended petition that while living in Michigan he attempted to commit suicide. However, at the 2005 hearing, Dorothy testified that neither she nor her husband physically abused Broadnax and that he was well-fed while he lived with them. She also said that Broadnax's alleged suicide attempt was not, in fact, a suicide attempt, but was an accidental

Broadnax to make a proffer of the hearsay evidence Dr. Benedict would have testified to had he been allowed. As already explained, the circuit court properly refused to consider inadmissible hearsay evidence at a Rule 32 hearing. Therefore, in reviewing this claim, we consider only the evidence that was properly admitted at the Rule 32 hearings.

As noted above, at the 2005 hearing, both Brower and Bender testified. With respect to mitigation, Brower said that he spoke with Broadnax as well as several members of Broadnax's family, although he could not remember exactly who he had spoken to, and that he had also personally "met with a number of family members" regarding mitigation. (R32, R. 111.) According to Brower, Broadnax provided no names of people who could possibly offer mitigation evidence, other than family members, and he received more information regarding Broadnax's history from Broadnax's eldest sister,

---

overdose from a mixture of alcohol and pain medication Broadnax had stolen from her. Broadnax also alleged in his original petition and second amended petition that he was physically abused by his mother. However, at the 2005 hearing, Broadnax's younger sister, Annette McKinstry, testified that, although Broadnax was punished with "whippings" with a switch or a belt whenever he got into trouble, he was not punished excessively. (R32, R. 149.)

Dorothy McKinstry, than from Broadnax himself. Brower stated that there was "not a lot of mitigation evidence present." (R32, R. 142.)

Brower testified that he did not seek a psychological evaluation of Broadnax because he did not believe, based on his interactions with Broadnax, that such an evaluation was necessary. Specifically, Brower said that "Mr. Broadnax did not strike me as being someone who needed a psychological evaluation at the time. And it's always been my practice not to file motions such as a psychological evaluation unless I can support them with some articulable reason." (R32, R. 109.) Brower said that he had no reason to believe that a psychological evaluation would have been helpful, especially given that he truly believed that Broadnax was innocent. Brower also said that, even after the jury returned a guilty verdict after the guilt phase of the trial (which, he said, was a shock to him) he "still didn't think that a psychological evaluation of Mr. Broadnax was warranted." (R32, R. 113.)

Bender testified that he did "quite a bit" of mitigation investigation, but could find little mitigating evidence.

(R32, R. 38.) As a result, only Broadnax's sister, Dorothy, was called to testify as a mitigation witness. Bender stated that he prepared Dorothy for her testimony and that he and Brower "discussed her testimony with her before she went on the, before she went on the stand in the mitigation phase." (R32, R. 135.)

Bender said that he went to Welborn and personally spoke "to those individuals down there," but that all he discovered was that Broadnax was "just the average guy working in their facility" and that there was "nothing different or special about him." (R32, R. 67.) Bender also testified that he spoke with Broadnax's family members, including Broadnax's two sisters, brother-in-law, and mother, "quite often" about mitigation. (R32, R. 39.) Bender also personally went to Elyton Village, where Broadnax had grown up, and spoke with as many people as he could as part of the mitigation investigation, but the people there simply "couldn't remember" because Broadnax had been in prison, and away from Elyton Village, for almost 20 years. (R32, R. 40.) Indeed, Bender said that the only person he found who actually remembered Broadnax from Elyton Village was Vince Cunningham, the

Birmingham police detective who investigated the murders of Jan and DeAngelo and who testified for the State at Broadnax's trial.

Bender also testified that he explained to Broadnax the purpose of mitigation, explained the type of evidence that could be presented as mitigation, and gave Broadnax "ideas about what I was looking for as far as mitigation." (R32, R. 33.) Indeed, he said "that's what most of those visits were about." (R32, R. 91.) Bender said that Broadnax clearly understood the concept of mitigation because "[h]e's a bright guy," but was unable to provide Bender with any possible mitigating evidence. (R32, R. 91.) In fact, Bender said that even though Broadnax's "parents and family told me that he was abused as a child," Broadnax denied any such abuse, claiming that he had gotten into trouble a lot and "was just sort of a tough kid," so the family "had to sort of be tough on him." (R32, R. 92.) In addition, according to Bender, Broadnax's family said that when he was growing up Broadax was "normal for the area" and that only after his father died did Broadnax "sort of g[et] out of control" by getting involved in criminal activity and eventually committing murder and going

to prison. (R32, R. 36.) Bender said that he spoke with both Broadnax and his family members about this time in Broadnax's life, before he went to prison, and even specifically asked Broadnax's mother about any "health issues that he may have had" (R32, R. 50) but that neither "[h]e nor his family members ever told me anything about any kind of medical history that he's had, any issues with drugs. They never told me about him being hit by a car. ... [T]his is the first I'm hearing it." (R32, R. 36.) Bender also testified that a suicide attempt in Broadnax's past would "certainly" have resulted in his seeking a psychological evaluation of Broadnax, but that neither Broadnax nor any member of his family told Bender that Broadnax had attempted suicide. (R32, R. 49.) Indeed, Bender said that despite speaking with Dorothy McKinstry numerous times by telephone, Dorothy did not even mention to him before trial that Broadnax had lived with her for a year; Dorothy said only that Broadnax had visited her in the summers and on special occasions.

When questioned about the decision not to seek a psychological evaluation of Broadnax, Bender explained:

> "My basis, and Mr. Brower and I discussed this, was this: Obviously, once you meet your client, you

> have a chance to talk to him -- him or her -- see them on an occasion or two. And if there are things about the person's demeanor, if there are things about the person's conversation, if there are things about the persons's behavior that would suggest to you that they're not stable, then obviously you want to have them evaluated. It was just the opposite with Mr. Broadnax.
>
> "....
>
> "Mr. Broadnax was, in my opinion, in having dealt with, up to that point, having dealt with a lot of people who were in prison and who had committed crimes, he was a bright person. He was very fluent in his conversation. He was eloquent to a degree. He had -- his handwriting was magnificent. He explained -- those things that he explained to us, he explained them to me in really sort of, a good sort of common sense. He had ideas. As I explained the facts to him as we knew them, he had ideas to sort of explain why these things couldn't be, why this couldn't be this way. And so there was absolutely nothing about him, his demeanor, his conversation, his behavior, his hygiene. You know, hygiene is one of those things you can normally look at and tell whether a person has mental or emotional issues. He had none of those things. So there was no reason, in my opinion, to have him evaluated. The fact that he was charged with this really horrendous crime is not a basis just to have him evaluated, especially when he tells you he didn't have anything to do with it. And to be honest with you, I believed him."

(R32, R. 29-31.) Bender also described Broadnax as "[w]ell spoken" and "mild mannered" and said that Broadnax "could write" and that he "conversed well." (R32, R. 97.) He further said that Broadnax was very cooperative, "as

cooperative as any individual I probably ever represented before that and even since that." (R32, R. 32.) He also said that Broadnax was clearly capable both mentally and emotionally to assist in his defense.

At the 2011 hearing, Dr. Kenneth Benedict, a psychologist specializing in neuropsychology, testified that he began evaluating Broadnax in 2006. He met with Broadnax seven times, spoke with Broadnax's two sisters, his brother-in-law, and his mother, reviewed medical records, school records, and records from Broadnax's first murder trial in the 1970s, and considered information from investigators. Dr. Benedict stated that it is essential in any psychological evaluation to consider information from collateral sources. Dr. Benedict also conducted a battery of intelligence, achievement, and neuropsychological tests. Dr. Benedict said that when he first met with Broadnax, he believed that Broadnax was experiencing an acute anxiety attack, but that after he helped Broadnax manage his anxiety, Broadnax was cordial and cooperative.

Dr. Benedict said that Broadnax was not mentally retarded or even intellectually impaired, and that his IQ score was

"well above" the mentally retarded range, in the average to low average range. (R2. 57.) Dr. Benedict said that Broadnax read at a third-grade level and that the speed at which he read was at a first-grade level. Dr. Benedict also said that Broadnax performed significantly better on visual-based or motor-based tests than he did on language-based or verbal-based tests, and that Broadnax's visual memory was even above average.

According to Dr. Benedict, the difference between Broadnax's performance on visual-based tests and verbal-based tests indicated that there "were some definite anomalies in his cognitive functioning," such as a developmental disability or learning disability or possibly "some type of acquired injury to the brain." (R2. 58-59.) In addition, Dr. Benedict stated that Broadnax had difficulty remembering words, had difficulty with his "fine motor skills" and "reaction times," and had difficulty "making decisions under novel problem-solving conditions." (R2. 59-60.) Broadnax also, according to Dr. Benedict, had "great difficulties transitioning without confusion and considerable help from others." (R2. 79.) Dr. Benedict admitted, however, that he was never informed that

Broadnax had successfully been on work-release for three years before he committed the murders.

As a result of his evaluation and testing, Dr. Benedict concluded that Broadnax had "significant cognitive problems that are not explainable by mental retardation or delirious state." (R2. 69.) Dr. Benedict diagnosed Broadnax with a cognitive disorder, not otherwise specified, receptive-expressive language disorder, reading disorder, and disorder of written expression. However, Dr. Benedict admitted that Broadnax met only "part of the criteria" for a learning disorder and a cognitive disorder. (R2. 69.)

In its order, the circuit court found that Broadnax had failed to prove either that his counsel's decision not to seek a psychological evaluation of him was deficient or that counsel's decision prejudiced Broadnax. The court made the following findings of fact:

> "The decision not to seek a psychological evaluation was reasonably based on trial counsel's experience and on the fact that Broadnax did not display any indications of mental illness. Similarly, in Cochran v. State, 548 So. 2d 1062, 1073 (Ala. Cr. App, 1989), overruled on other grounds, Ex parte Rhone, 900 So. 2d 455 (Ala. 2004) the Court of Criminal Appeals held as follows:

CR-10-1481

> "'Cochran's defense counsel did not request a mental evaluation because there was no reasonable indication that such an evaluation would have been beneficial to Cochran's defense at trial or that it would have supplied mitigating evidence at sentencing. A tactical decision had been made to emphasize the weakness of the State's case.'

"Cochran, 548 So. 2d at 1073; see also Bush v. Singletary, 988 F.2d 1082, 1091—1092 (11th Cir. 1993) (counsel acted within the 'wide range of reasonable professional judgment' in deciding not to have petitioner examined by a psychologist or to investigate psychological mitigation). Broadnax has failed to show that trial counsel did not act within the wide range of reasonable professional judgment when they determined that a psychological evaluation was not necessary.

"Because Broadnax failed to show deficient performance, it is not necessary for the Court to consider whether he has demonstrated prejudice. However, the Court finds that Broadnax has also failed to demonstrate prejudice.

"To support his claim that he was prejudiced by the absence of psychological testimony, Broadnax offered the testimony of Dr. Kenneth Benedict, a psychologist practicing in North Carolina. Dr. Benedict testified regarding a number of tests he administered to Broadnax, including an 'I.Q.' test that showed Broadnax to be in the average to low average intelligence range. Dr. Benedict opined that Broadnax suffered from several psychological problems: Cognitive Disorder Not Otherwise Specified, Expressive Language Disorder, Reading Disorder, and Disorder of Written Expression.

"The State offered evidence of four aggravating circumstances at the penalty phase and the jury in

CR-10-1481

> this case unanimously recommended the death penalty. There is no reasonable probability that testimony that Broadnax suffers from 'Cognitive Disorder Not Otherwise Specified' and language disorders would have led to a different result in this case. Similarly, the Court finds that the test results testified to by Dr. Benedict do not give rise to a reasonable probability that the result of his trial would have been different had trial counsel presented them. As such, Broadnax has failed to demonstrate either deficient performance or prejudice as required by Strickland. Therefore, this claim is denied."

(C. 79-81.)[22] These findings are supported by the record.

Counsel is not per se ineffective for not seeking a psychological evaluation of a client. And this is not a case, as Broadnax claims, where counsel made the decision not to seek an evaluation after no investigation. Broadnax's reliance on Ferrell v. Hall, 640 F.3d 1199 (11th Cir. 2011), and Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991), is misplaced. In both Ferrell and Blanco, counsel was found to

[22]The circuit court also noted in its order that it had excluded certain hearsay evidence offered through Dr. Benedict at the 2011 hearing but had nonetheless allowed Broadnax to make a proffer of that excluded evidence. In its order, the circuit court made an alternative finding, considering the proffered evidence, and still found that Broadnax had failed to prove prejudice. Because, as already explained, the circuit court properly excluded the hearsay evidence from the 2011 hearing, we find it unnecessary to address the court's alternative finding.

be ineffective for failing to pursue an investigation of the petitioner's mental health and to seek a mental evaluation. However, both Ferrell and Blanco are examples of counsel egregiously overlooking obvious mental-health problems of their clients.

In Ferrell, the petitioner manifested obvious mental problems, including blank, glazed looks; extreme religious beliefs; hearing voices from God; and exhibiting strange and inappropriate demeanor and behavior at trial, such as laughing and smiling inappropriately. In addition, the petitioner's mother had a history of mental illness, and most tellingly, "during the trial itself, [the petitioner] had a seizure, causing him to fall onto the floor, shake and speak gibberish." 640 F.3d at 1228. In the face of such direct evidence of mental instability, the United States Court of Appeals for the Eleventh Circuit found that trial counsel was ineffective, even though counsel had had the petitioner evaluated, where counsel limited the evaluation solely to whether the petitioner was mentally retarded and whether he had the ability to waive his rights under Miranda v. Arizona, 384 U.S. 436 (1966), and counsel did not seek an evaluation to

determine the existence of any other mental defects. In Blanco, the petitioner also manifested obvious signs of mental impairment, including being uncommunicative and unresponsive, being "easily angered," appearing depressed and morose, and being irrational. 943 F.2d at 1502. Yet counsel in that case conducted no mitigation investigation at all and even admitted at the conclusion of the guilt phase of the trial that he was unprepared for the penalty phase and, thus, was found to be ineffective.

The circumstances of this case are in stark contrast with those in Ferrell and Blanco. In this case, Broadnax exhibited no signs of mental instability. To the contrary, counsel indicated that Broadnax was intelligent, well-spoken, and very cooperative. Indeed, Broadnax had "an answer for everything," so to speak, in that he proffered to counsel reasonable and logical explanations for each piece of evidence against him. In addition, counsel here, unlike counsel in Blanco, conducted a mitigation investigation, speaking extensively and repeatedly with Broadnax himself as well as with several members of Broadnax's family, and searching the area where Broadnax grew up. However, neither the discussions nor the

search resulted in any "red flags" suggesting that Broadnax was mentally impaired. Rather, according to counsel's testimony, his discussions with Broadnax and his family produced nothing fruitful with respect to mitigation, but indicated that Broadnax had had no health issues or serious problems in his childhood, and that he was simply an average kid who got in trouble a lot and got out of control after his father died.[23] Simply put, counsel knew nothing at the time that would have led a reasonable attorney to believe that a psychological evaluation would have been beneficial.

Therefore, we agree with the circuit court that Broadnax failed to prove that his counsel's decision not to seek a psychological evaluation was deficient performance. See,

---

[23]Although Broadnax presented testimony from several family members at the 2005 hearing regarding his childhood, as explained in note 21, supra, that evidence actually contradicted several of the allegations he had made in his petitions, and it certainly did not indicate that Broadnax had any mental-health issues. Moreover, counsel's testimony establishes that very little of that evidence was ever provided to counsel. See, e.g., Williams v. Head, 185 F.3d 1223, 1237 (11th Cir. 1999) ("An attorney does not render ineffective assistance by failing to discover and develop evidence of childhood abuse that his client does not mention to him."); and Murphy v. Sirmons, 497 F.Supp.2d 1257, 1270 (E.D. Okla. 2007) ("[C]ounsel cannot be deemed ineffective where potential witnesses, including family members, change their stories after trial.").

e.g., Cochran v. State, 548 So. 2d 1062, 1072-74 (Ala. Crim. App. 1989) (holding that postconviction petitioner had failed to prove counsel was ineffective for not seeking a mental evaluation of him for purposes of mitigation), overruled on other grounds by Ex parte Rhone, 900 So. 2d 455 (Ala. 2004); Horsley v. State, 527 So. 2d 1355, 1362 (Ala. Crim. App. 1988) (holding that failure to seek psychiatric assistance did not render counsel's assistance ineffective where counsel had no reason to suspect that the accused suffered from a mental deficiency); Mayes v. Gibson, 210 F.3d 1284, 1289 n.3 (10th Cir. 2000) (holding that counsel was not ineffective for not requesting a mental evaluation where there was nothing to indicate to a reasonable attorney that the petitioner's mental condition "was a potentially mitigating factor"); Williams v. Head, 185 F.3d 1223, 1239 (11th Cir. 1999) (holding that counsel was not ineffective for failing to pursue mental-health investigation and request a mental evaluation where counsel had no problems communicating with the petitioner; found the petitioner to be intelligent, attentive, cooperative, polite, and interested in what was happening; and found that petitioner asked intelligent questions and

responded intelligently to counsel's questions); Smith v. Gibson, 197 F.3d 454, 462-63 (10th Cir. 1999) (holding that counsel was not ineffective for failing to request a mental evaluation where counsel saw nothing suggesting that petitioner had mental deficits); Baldwin v. Johnson, 152 F.3d 1304, 1314-15 (11th Cir. 1998) (holding that counsel was not ineffective for failing to request a mental evaluation where counsel had no problems communicating with the petitioner and petitioner did not say or do anything that indicated mental problems); Thompson v. Cain, 161 F.3d 802, 813 (5th Cir. 1998) (holding that counsel was not ineffective for not requesting a mental evaluation where petitioner's "mental stability was never in question"); and Bush v. Singletary, 988 F.2d 1082, 1091-92 (11th Cir. 1993) (holding that counsel was not ineffective for failing to request a mental evaluation where counsel had no problems communicating with the petitioner, petitioner did not say or do anything that indicated mental problems, petitioner appeared to be intelligent, and counsel discussed what he knew about petitioner with a psychiatrist who indicated that he could not assist in the defense).

CR-10-1481

Furthermore, as explained above, "'[i]n a challenge to the imposition of a death sentence, the prejudice prong of the Strickland inquiry focuses on whether 'the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" Daniels v. State, 650 So. 2d 544, 568 (Ala. Crim. App. 1994) (quoting Stevens v. Zant, 968 F.2d 1076, 1081 (11th Cir. 1992)). As the circuit court noted, at trial the State proved, and the trial court found, the existence of four aggravating circumstances: (1) that the murders were committed by a person under a sentence of imprisonment, see § 13A-5-49(1), Ala. Code 1975; (2) that Broadnax had previously been convicted of a felony involving the use or threat of violence to a person, see § 13A-5-49(2), Ala. Code 1975; (3) that the murders were committed during the course of a kidnapping, see § 13A-5-49(4), Ala. Code 1975; and (4) that the murders were especially heinous, atrocious, or cruel when compared to other capital offenses, see § 13A-5-49(8), Ala. Code 1975. We have thoroughly reviewed the record from Broadnax's direct appeal, and we agree with the circuit court that even if evidence had been presented to the jury that Broadnax had a cognitive disorder, not otherwise

specified, a receptive-expressive language disorder, a reading disorder, and a disorder of written expression, such evidence would not have altered the balance of aggravating and mitigating circumstances in this case. Therefore, the circuit court also correctly found that Broadnax failed to prove that he was prejudiced by his counsel's decision not to have him evaluated.

For these reasons, the circuit court properly denied this claim of ineffective assistance of counsel.

IV.

In his original, first amended, and second amended petitions, Broadnax also raised numerous additional claims. However, he does not pursue in his brief on appeal any of those other claims raised in his petitions. Therefore, those claims are deemed abandoned and will not be considered by this Court. See Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995) ("We will not review issues not listed and argued in brief.").

Based on the foregoing, the judgment of the circuit court denying Broadnax's Rule 32 petition is affirmed.

AFFIRMED.

Windom, P.J., and Welch, Burke, and Joiner, JJ., concur.