PETITION APPENDIX
VOLUME II
PART I

TABLE OF APPENDICES

VOLUME I

APPENDIX A: Opinion Affirming In Part and Reversing In Part the U.S. District for the Northern District of Alabama's Decision Granting In Part and Denying In Part Gavin's Petition for Federal Habeas Relief, *Gavin v. Comm'r, Ala. Dep't of Corr.*, No. 20-11271 (11th Cir. July 14, 2022) 1a

APPENDIX B: Amended Opinion Granting In Part and Denying In Part Gavin's Petition for Federal Habeas Relief, *Gavin v. Comm'r, Ala. Dep't of Corr.*, No. 4:16-cv-00273-KOB (N.D. Ala. Mar. 27, 2020)..... 54a

APPENDIX C: Order Denying a Timely-Filed Petition for Rehearing En Banc, *Gavin v. Comm'r, Ala. Dep't of Corr.*, No. 20-11271 (11th Cir. Aug. 26, 2022) 233a

APPENDIX D: Judgment, *Gavin v. Comm'r, Ala. Dep't of Corr.*, No. 20-11271 (11th Cir. Oct. 4, 2022)..... 235a

APPENDIX E: Amended Judgment, *Gavin v. Comm'r, Ala. Dep't of Corr.*, No. 4:16-cv-00273-KOB (N.D. Ala. June 4, 2020) 238a

APPENDIX F: Original Judgment, *Gavin v. Comm'r, Ala. Dep't of Corr.*, No. 4:16-cv-00273-KOB (N.D. Ala. Mar. 17, 2020)..... 240a

APPENDIX G: Order Denying Gavin's Motion for Certificate of Appealability, *Gavin v. Comm'r, Ala. Dep't of Corr.*, No. 20-11271 (11th Cir. Oct. 23, 2020)..... 242a

VOLUME II

APPENDIX H: Opinion Affirming the Dismissal of Gavin's Petition for Post-Conviction Relief, *Gavin v. Alabama*, No. CR-10-1313 (Ala. Crim. App. Aug. 22, 2014)..... 244a

APPENDIX I: Order Denying Gavin's Application for Rehearing, *Gavin v. Alabama*, No. CR-10-1313 (Ala. Crim. App. Mar. 20, 2015)..... 292a

APPENDIX J: Opinion Denying Gavin's Petition for Writ of Certiorari, *Alabama v. Gavin*, No. CC-1998-061.60, CC-1998-062.60 (Ala. Cherokee County Cir. Ct. Apr. 18, 2011) 293a

APPENDIX K: Order Denying Gavin's Petition for Writ of Certiorari, *Gavin v. Alabama*, Ala Crim. App. No. CR-10-1313 (Ala. Oct. 23, 2015) 336a

APPENDIX L: Certificate of Judgment, *Gavin v. Alabama*, No. CR-10-1313 (Ala. Crim. App. Oct. 23, 2015) 337a

APPENDIX M: Gavin's Second Amended Petition for Relief from Judgment, *Gavin v. Alabama*, No. CC-1998-061.60, CC-1998-062.60 (Ala. Cherokee County Cir. Ct. Apr. 2, 2010) 338a

APPENDIX N: Transcript of Penalty-Phase Trial, *Gavin v. Alabama*, No. CR-99-1127, CR-00-0133 (Ala. Crim. App. Nov. 8, 1999) 406a

APPENDIX H

REL: 08/22/2014

Court of Criminal Appeals

State of Alabama
Judicial Building, 300 Dexter Avenue
P. O. Box 301555
Montgomery, AL 36130-1555

MARY BECKER WINDOM
Presiding Judge
SAMUEL HENRY WELCH
J. ELIZABETH KELLUM
LILES C. BURKE
J. MICHAEL JOINER
Judges

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MEMORANDUM

CR-10-1313 Cherokee Circuit Court CC-98-61.60; CC-98-62.60

Keith Gavin v. State of Alabama

JOINER, Judge.

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

In November 1999, Gavin was convicted of two counts of murder for the death of William Clinton Clayton, Jr., made capital because (1) the murder was committed during the course of a robbery in the first degree, see § 13A-5-40(a)(2), Ala. Code 1975, and (2) Gavin had been convicted of another murder within the 20 years preceding the murder of Clayton, see § 13A-5-40(a)(13), Ala. Code 1975. Gavin was also convicted of

one count of attempted murder for having fired a shot at a law-enforcement officer. The jury recommended, by a vote of 10 to 2, that Gavin be sentenced to death. The circuit court followed the jury's recommendation and sentenced Gavin to death. Gavin's convictions and sentences were affirmed on direct appeal. See Gavin v. State, 891 So. 2d 907 (Ala. Crim. App. 2003), cert. denied, 543 U.S. 1123 (2005). We issued the certificate of judgment, making Gavin's direct appeal final, on May 28, 2004.

In May 2005, Gavin timely filed a petition for postconviction relief attacking his convictions and death sentence. The circuit court returned Gavin's petition because Gavin had not filed it in the proper form and permitted Gavin to re-file his petition in July 2005. In June 2006 the circuit court issued an order in which it dismissed many of Gavin's claims and granted him leave to file an amended petition regarding his claims of ineffective assistance of counsel.

Gavin filed an amended petition in August 2006, and, in January 2007, the circuit court dismissed all claims in the petition except those in which Gavin had pleaded ineffective assistance of counsel. The circuit court held an evidentiary hearing on the remaining claims in February 2010. Gavin filed a second amended petition in April 2010, and, in April 2011, the circuit court denied the claims presented at the evidentiary hearing. Gavin appealed to this Court. See Rule 32.10, Ala. R. Crim. P.

In this Court's opinion on direct appeal, we stated the following facts surrounding the underlying murder of Clayton:

> "A little after 6:30 p.m. on March 6, 1998, Clayton, a contract courier for Corporate Express Delivery Systems, Inc., was shot and killed while sitting in a Corporate Express van outside the Regions Bank in downtown Centre. Clayton had finished his deliveries for the day and had stopped at Regions Bank to obtain money from the ATM in order to take his wife to dinner.
>
> "There were four eyewitnesses to the crime, two of whom positively identified Gavin as the shooter.

Ronald Baker and Richard Henry, Jr., testified that they were stopped at a traffic light near the Regions Bank and the courthouse in downtown Centre at the time of the shooting. According to Baker and Henry, they saw a man get out of a vehicle, walk to a van parked on the street, and shoot the driver of the van. Upon hearing the gunshots, Baker and Henry immediately fled the scene; neither could identify the shooter.

"Larry Twilley testified that he, too, was stopped at a traffic light by the Regions Bank in downtown Centre at the time of the shooting. Twilley testified that while he was stopped at the light, he heard a loud noise, turned, and saw a man with a gun open the driver's side door of a van parked on the street and shoot the driver of the van two times. According to Twilley, the shooter then pushed the driver to the passenger's side, got in the driver's seat, and drove away. Twilley testified that when he first saw the shooter, he noticed something black and red around his head, but that after the shooter got in the van and drove away, the shooter no longer had anything on his head; at that point, Twilley said, he noticed that the shooter had very little hair. At trial, Twilley positively identified Gavin as the shooter.

"Dewayne Meeks, Gavin's cousin and an employee of the Illinois Department of Corrections, testified that in early February 1998, he and Gavin traveled from Chicago, Illinois, where they were living, to Cherokee County, Alabama '[t]o pick up some girls ... and just to really get away.' (R. 651.) Meeks said that they stayed for a weekend and then returned to Chicago. In early March 1998, Meeks said, Gavin wanted to return to Alabama to find a woman he had met in February. Meeks testified that Gavin told him that if he drove Gavin to Chattanooga, Tennessee, to meet the woman, the woman would reimburse him for the travel expenses. Meeks said that he agreed to drive Gavin to Tennessee and that Meeks's wife and three-year-old son also accompanied them.

"Meeks testified that they left Chicago on the night of March 5, 1998, arrived in Chattanooga on the morning of March 6, 1998, and checked into a Super 8 Motel. Meeks said that he rented two rooms at the motel, one for him and his family, and one for Gavin. After they arrived, Meeks said, Gavin made a telephone call, and he and Gavin then drove to a nearby gasoline service station to wait for the woman Gavin had come to see. According to Meeks, the woman did not show up and Gavin then asked him to drive to Fort Payne, Alabama, so that Gavin could find the woman. Meeks agreed and they drove to Fort Payne, but they were again unsuccessful at locating the woman. After they failed to locate the woman in Fort Payne, Meeks said, they drove to Centre to find the woman.

"Meeks testified that at approximately 6:30 p.m. on March 6, 1998, he and Gavin arrived in downtown Centre. When they stopped at the intersection near the courthouse and the Regions Bank, Meeks said, Gavin got out of Meeks's vehicle and approached a van that was parked nearby. According to Meeks, he thought Gavin was going to ask the driver of the van for directions. However, when Meeks looked up, he saw that the driver's side door of the van was open, and Gavin was holding a gun. Meeks stated that he watched as Gavin fired two shots at the driver of the van. According to Meeks, immediately after seeing Gavin shoot the driver of the van, he fled the scene, and Gavin got in the van and followed him. Meeks testified that Gavin honked the horn of the van and flashed the lights in an attempt to get Meeks to stop. However, Meeks refused to stop because, he said, he was scared. Meeks stated that he drove back to Chattanooga and told his wife what had happened. He and his wife and child then checked out of the motel and drove back to Chicago.

"Meeks testified that when he arrived in Chicago, he immediately informed several of his friends who were in law enforcement about the shooting. As a result of his conversations with friends, Meeks said, he realized the gun used by

Gavin was probably the gun that had been issued to him by the Illinois Department of Corrections. Meeks said that he then checked his home and determined that his gun was, in fact, missing. According to Meeks, he kept the gun in a drawer at home and he had not seen the gun for approximately two weeks before the shooting. Meeks testified that he immediately reported the gun as missing to law enforcement. Meeks admitted that he did not mention to law enforcement when he reported the missing gun that he believed the gun had been used in a shooting in Alabama, but he said that he did inform his boss at the Illinois Department of Corrections that he believed the gun had been used in the shooting. After reporting the gun missing and discussing the shooting with several friends, Meeks said, he then contacted Alabama law enforcement to inform them of his knowledge of the shooting. On March 9, 1998, and again on April 6, 1998, Meeks was interviewed in Chicago by investigators from Alabama. After the interviews, Meeks said, he was indicted for capital murder in connection with the murder of Clayton; that charge was subsequently dismissed.

"Danny Smith, an investigator with the District Attorney's Office for the Ninth Judicial Circuit, testified that on the evening of March 6, 1998, he was returning to Centre from Fort Payne when he heard over the radio that there had been a shooting and that both the shooter and the victim were traveling in a white van with lettering on the outside. As he proceeded toward Centre, Investigator Smith said, he saw a van matching the description given out over the radio, and he followed it. According to Investigator Smith, the van was traveling approximately 75 miles per hour and the driver was driving erratically. Investigator Smith testified that he was speaking on the radio with various law-enforcement personnel regarding stopping the van when the van turned on its blinker and stopped on the side of the road. When he pulled in behind the van, Investigator Smith said, the van abruptly pulled back onto the road and sped away. Investigator Smith said that he

continued pursuing the van and that, after he turned on his emergency lights, the van stopped in the middle of the road, near the intersection of Highways 68 and 48. Investigator Smith testified that when the van stopped, the driver got out of the vehicle, turned, fired a shot at him, ran in front of the van, turned and fired another shot at him, and then ran into nearby woods. Investigator Smith testified that the driver of the van was black, and that he was wearing a maroon or wine-colored shirt, blue jeans, and some type of toboggan or other type of cap. At trial, Investigator Smith positively identified Gavin as the person who had gotten out of the van and shot at him.

"After Gavin fled into the woods, Investigator Smith said, he went to the van and checked the victim. According to Investigator Smith, the victim was still alive, but barely, and he radioed for an ambulance. Investigator Smith testified that when he first went to the van, he saw blood between the two front bucket seats and on the passenger seat; however, there was 'very little blood' on the driver's seat. (R. 567.) Investigator Smith said that when emergency personnel removed the victim from the van, blood was transferred to the driver's seat by the personnel who had to enter the van to secure the victim and remove him.

"Investigator Smith also testified that, within minutes of Gavin's fleeing into the woods, several law-enforcement officers arrived at the intersection of Highways 48 and 68, and the wooded area into which Gavin had fled was encircled and sealed off so that 'no one could come out and cross the road without being seen.' (R. 563.) Members of several different law-enforcement agencies then conducted a search for Gavin.

"At approximately 9:45 p.m., Tony Holladay, a dog handler for the Limestone Correctional Facility, arrived at the scene with his beagle. Holladay testified that when he first arrived, he obtained information indicating that Investigator Smith had

chased the suspect for approximately 20 yards, but had stopped short of the woods. At that point, Holladay said, he had Investigator Smith show him the exact spot he had stopped the pursuit so that the dog would not track Investigator Smith's trail from the roadway but would track the trail of the person who had entered the woods. Holladay testified that he then carried his dog to that spot and put him down. Holladay said that the dog immediately picked up a scent and tracked it into the woods to a creek. Holladay testified that he saw a man, whom he positively identified at trial as Gavin, standing in the creek under a bush, and that when Gavin saw him, Gavin attempted to flee. Holladay stated that he ordered Gavin to stop, but that Gavin did not stop until Holladay fired a shot over Gavin's shoulder.

"Gavin was then handcuffed and several law-enforcement officers assisted in maneuvering Gavin out of the creek, up the embankment, and through the woods to the roadway. Kevin Ware, a deputy with the Cherokee County Sheriff's Department, testified that he participated in the search for Gavin and that he was present as Gavin was brought out of the creek. Deputy Ware stated that he heard Gavin say 'I hadn't shot anybody and I don't have a gun.' (R. 780.) The evidence indicated that from the time Gavin was discovered by Holladay to the time he made the statement in Deputy Ware's presence, no one had had any conversation with Gavin regarding the shooting or why he was being arrested.

"The record reflects that Clayton was pronounced dead upon arrival at the hospital. A subsequent autopsy revealed three gunshot wounds to his body caused by two bullets. Stephen Pustilnik, a medical examiner with the Alabama Department of Forensic Sciences, testified that one bullet passed through Clayton's left arm, entered his chest on the left side damaging both of Clayton's lungs and his heart, and exited the right side of the chest. The record reflects that that bullet was later found lodged in

the passenger-side door of the van. The second bullet, Dr. Pustilnik said, entered Clayton's left hip and lodged in his back. ....

"The record reflects that no 'usable' fingerprints were found in the van and that no bloodstains were found on Gavin's clothing. (R. 926.) However, the State presented evidence indicating that a motel-room key was found in Gavin's pants pocket after his arrest; the key fit room 113 at the Super 8 Motel in Chattanooga where Meeks and Gavin had rented rooms. In addition, two .40 caliber shell casings were found in the street outside the Regions Bank in downtown Centre, one .40 caliber shell casing was found in the roadway at the intersection of Highways 48 and 68, and a red and black toboggan cap was found near the woods by the intersection of Highways 48 and 68. The bullet found lodged in the passenger-side door of the van and the bullet in Clayton's back were also determined to be .40 caliber. Although law enforcement was unable to find the murder weapon on the night of the crime, several days later, on March 13, 1998, a .40 caliber Glock pistol was found near the woods where Gavin had been discovered. The evidence indicated that the three shell casings and the two bullets had been fired from the pistol, and that the pistol belonged to Dewayne Meeks. The State also presented evidence indicating that in 1982, Gavin had been convicted of murder in Cook County, Illinois. Gavin had served approximately 17 years of a 34-year sentence and had been released on parole only a short time before Clayton's murder.

"The State also presented the testimony of Barbara Genovese, a supervisor at the Cherokee County jail. Genovese testified that in April 1998, both Gavin and Meeks were incarcerated at the jail, in separate cells. At one point, Genovese said, when she got Meeks and another inmate out of their cells to take them outside for exercise, Gavin called out to her from his cell and asked if he could go outside and exercise with Meeks and the other inmate. Genovese said that she told Gavin

that he could not go outside with Meeks, and that Gavin asked her why. According to Genovese, she told Gavin that he could not go outside with Meeks because when Meeks had initially been brought to the jail, Gavin had become loud and unruly, 'screaming and yelling and banging on the doors.' (R. 1001.) At that point, Genovese said, Gavin said 'Dewayne didn't do anything ... I did it' and 'Dewayne should not be in here.' (R. 1002.) Genovese testified that she did not know what Gavin was referring to when he said 'I did it.' (R. 1002.)"

891 So. 2d at 927-30.

Standard of Review

Gavin appeals the circuit court's denial of his petition for postconviction relief filed pursuant to Rule 32, Ala. R. Crim. P., a proceeding he initiated to challenge his convictions and sentence of death. Gavin has the burden of pleading and proving his claims. As Rule 32.2, Ala. R. Crim. P. provides:

> "The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief. The state shall have the burden of pleading any ground of preclusion, but once a ground of preclusion has been pleaded, the petitioner shall have the burden of disproving its existence by a preponderance of the evidence."

We have explained:

> "'"The standard of review this Court uses in evaluating the rulings made by the trial court [in a postconviction proceeding] is whether the trial court abused its discretion." Hunt v. State, 940 So. 2d 1041, 1049 (Ala. Crim. App. 2005). However, "when the facts are undisputed and an appellate court is presented with

pure questions of law, [our] review in a Rule 32 proceeding is de novo." Ex parte White, 792 So. 2d 1097, 1098 (Ala. 2001). "[W]e may affirm a circuit court's ruling on a postconviction petition if it is correct for any reason." Smith v. State, [122] So. 3d [224], [227] (Ala. Crim. App. 2011).

"'As stated above, [some] of the claims raised by [Gavin] were summarily dismissed based on defects in the pleadings and the application of the procedural bars in Rule 32.2, Ala. R. Crim. P. When discussing the pleading requirements for postconviction petitions, we have stated:

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

> 883 So. 2d 724 (Ala. Crim. App. 2003)."

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

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

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

death penalty has been imposed." Burgess v. State, 962 So. 2d 272, 277 (Ala. Crim. App. 2005).

"'Some of [Gavin's] claims were also dismissed based on his failure to comply with Rule 32.7(d), Ala. R. Crim. P. In discussing the application of this rule we have stated:

> "'"[A] circuit court may, in some circumstances, summarily dismiss a postconviction petition based on the merits of the claims raised therein. Rule 32.7(d), Ala. R. Crim. P., provides:
>
> > "'"'If the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any

> further proceedings, the court may either dismiss the petition or grant leave to file an amended petition. Leave to amend shall be freely granted. Otherwise, the court shall direct that the proceedings continue and set a date for hearing.'
>
> "'"'"Where a simple reading of the petition for post-conviction relief shows that, assuming every allegation of the petition to be true, it is obviously without merit or is precluded, the circuit court [may] summarily dismiss that petition."' Bishop v. State, 608 So. 2d 345, 347-48 (Ala. 1992) (emphasis added) (quoting Bishop v. State, 592 So. 2d 664, 667 (Ala. Crim. App. 1991) (Bowen, J., dissenting)). See also Hodges v. State, [Ms. CR-04-1226, March 23, 2007] ___ So. 3d ___,

___ (Ala. Crim. App. 2007) (a postconviction claim is 'due to be summarily dismissed [when] it is meritless on its face')[, rev'd on other grounds, Ex parte Hodges, [Ms. 1100112, Aug. 26, 2011] ___ So. 3d ___ (Ala. 2011)]."

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

"Washington v. State, 95 So. 3d 26, 38-39 (Ala. Crim. App. 2012).

"[Gavin's] remaining claims were denied by the circuit court after [Gavin] was afforded the opportunity to prove those claims at an evidentiary hearing. See Rule 32.9(a), Ala. R. Crim. P.

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

> postconviction proceeding and the circuit court resolves those disputed facts, "[t]he standard of review on appeal ... is whether the trial judge abused his discretion when he denied the petition."' Boyd v. State, 913 So. 2d 1113, 1122 (Ala. Crim. App. 2003) (quoting Elliott v. State, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992)).
>
> "Finally, '[a]lthough on direct appeal we reviewed [Gavin's] capital-murder conviction for plain error, the plain-error standard of review does not apply when an appellate court is reviewing the denial of a postconviction petition attacking a death sentence.' James v. State, 61 So. 3d 357, 362 (Ala. Crim. App. 2010) (citing Ex parte Dobyne, 805 So. 2d 763 (Ala. 2001))."

Marshall v. State, [Ms. CR-10-0696, May 2, 2014] ___ So. 3d ___, ___ (Ala. Crim. App. 2014).

> "[O]ur caselaw recognizes that if the judge presiding over the Rule 32 petition is the same judge who presided over the petitioner's trial, the judge may use his personal knowledge of the facts underlying the claim to deny that claim if the judge 'states the reasons for the denial in a written order.'"[1]

Musgrove v. State, [Ms. CR-07-1528, November 2, 2012] ___ So. 3d ___, ___ n.6 (Ala. Crim. App. 2012) (quoting Sheats v. State, 556 So. 2d 1094, 1095 (Ala. Crim. App. 1989)). With these principles in mind, we review the claims Gavin raises on appeal.

I.

Gavin argues that his attorneys were ineffective during both the guilt phase and penalty phase of his trial.[2]

---

[1]The judge who presided over Gavin's Rule 32 petition was the same judge who presided over Gavin's trial.

[2]Bayne Smith, Gavin's lead trial attorney, died in the time between Gavin's trial and the evidentiary hearing held on

"'To prevail on a claim of ineffective assistance of counsel, the petitioner must show (1) that counsel's performance was deficient and (2) that the petitioner was prejudiced by the deficient performance. See Strickland v. Washington, 466 U.S. 668 (1984).

> "'"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

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Gavin's petition.

effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way."

"'Strickland, 466 U.S. at 689.

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

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

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

"Yeomans v. State, [Ms. CR-10-0095, March 29, 2013] ___ So. 3d ___, ___ (Ala. Crim. App. 2013). Additionally, '"[w]hen courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger."' Ray v. State, 80 So. 3d 965, 977 n.2 (Ala. Crim. App. 2011) (quoting Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000)).

"We also recognize that when reviewing claims of ineffective assistance of counsel 'the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.' Strickland v. Washington, 466 U.S. 668, 698, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). This Court, however, has held that when the same judge presides over both the original trial and the postconviction proceeding--as is the case here--and finds that, under the second prong of Strickland, trial counsel's errors would not have resulted in prejudice, '[w]e afford the experienced judge's ruling "considerable weight."' Washington v. State, 95 So. 3d 26, 53 (Ala. Crim. App. 2012) (emphasis added) (affirming the circuit court's denial of Washington's postconviction ineffective-assistance-of-counsel claim by applying the 'considerable weight' standard). See also State v. Gamble, 63 So. 3d 707, 721 (Ala. Crim. App. 2010) (affirming the circuit court's granting of Gamble's postconviction ineffective-assistance-of-counsel claim by applying the 'considerable weight' standard) (citing Francis

v. State, 529 So. 2d 670, 673 n.9 (Fla. 1988) ('Postconviction relief motions are not abstract exercises to be conducted in a vacuum, and this finding is entitled to considerable weight.'))."

Marshall, __ So. 3d at ___.

A. Guilt-Phase Ineffective-Assistance-Of-Counsel Claims

1.

Gavin argues that his trial counsel were ineffective because, he says, they failed to investigate and impeach State witness Dwayne Meeks.

a.

Gavin asserts that his "counsel failed to conduct even a minimal investigation that would have enabled him to effectively cross-examine Meeks or impeach many of Meeks' statements through other witnesses or documents." (Gavin's brief, p. 40.) Gavin also contends that his trial counsel failed to investigate and cross-examine Meeks regarding "the murder weapon and its connection to [Meeks]." (Gavin's brief, p. 41.)

Following the evidentiary hearing, the circuit court denied this claim, stating:

> "The Defendant has presented nothing to indicate that the Defendant's trial attorneys knew or should have known prior to trial that Meeks would offer testimony relating to where he got the murder weapon, or that he would testify that the weapon was state issued. The Defendant's trial attorneys had absolutely no reason to investigate where Meeks got the weapon.
>
> "Because the evidence overwhelmingly establishes that the Defendant shot and killed Mr. Clayton, the Defendant's trial attorneys appropriately concentrated on trying to impeach Meeks with respect to what Meeks said about how the Defendant got the weapon. In this regard the Defendant's trial

attorneys sought to prove that Meeks and the Defendant were on a joint venture when they came to Alabama, and that Meeks was responsible, in whole or in part, for the weapon being accessible or available for use in this crime.

"While Meeks attempted to disassociate himself from the weapon by claiming to be unaware that it was in the vehicle, the Defendant's attorneys attempted to discredit him by pointing out the improbability of this testimony. Meeks' own self contradiction about where the weapon was kept added to the suggestion of culpability.

"Because it was undisputed that Meeks and the Defendant came to Alabama in an unwholesome alliance, the Defendant's trial attorneys made a reasonably convincing argument by direct and circumstantial evidence that Meeks was complicit in the course of conduct which resulted in Mr. Clayton's tragic death.

"The Defendant's trial attorneys were not ineffective in attempting to implicate Meeks. At most, however, Meeks was complicit. There is no evidence that Meeks was the shooter. Indeed, the evidence is overwhelming that the Defendant was the shooter, and mere proof that Meeks lied about the gun being IDOC [Illinois Department of Corrections] issued would not change that fact."

(C. 3493-94.)

We have explained:

> "'"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, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (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).'

"Broadnax v. State, [Ms. CR-10-1481, February 15, 2013] ___ So.3d ___, ___ (Ala. Crim. App. 2013).

"'"A defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial."' Nelson v. Hargett, 989 F.2d 847, 850 (5th Cir. 1993) (quoting United States v. Green, 882 F.2d 999, 1003 (5th Cir. 1989)). '[C]laims of failure to investigate must show with specificity what information would have been obtained with investigation, and whether, assuming the evidence is admissible, its admission would have produced a

different result.' Thomas v. State, 766 So. 2d 860, 892 (Ala. Crim. App. 1998) (citing Nelson, supra), aff'd, 766 So. 2d 975 (Ala. 2000), overruled on other grounds by Ex parte Taylor, 10 So. 3d 1075 (Ala. 2005)."

Mashburn v. State, [Ms. CR-11-0321, July 12, 2013] ___ So. 3d ___, ___ (Ala. Crim. App. 2013).

"'"An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption [of effective representation]. 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.'" Chandler v. United States, 218 F.3d 1305, 1314 n.15 (11th Cir. 2000) (en banc) (quoting Williams v. Head, 185 F.3d 1223, 1228 (11th Cir. 1999)).'"

Davis, 9 So. 3d at 546 (quoting Grayson v. Thompson, 257 F.3d 1194, 1218 (11th Cir. 2001)).

Gavin argues that "there is no record that trial counsel performed [an investigation of the murder weapon and its connection to Meeks]." (Gavin's brief, p. 41-42.) As the circuit court noted, however, Gavin failed to establish how such an investigation regarding the firearm would have altered the outcome of Gavin's trial. Therefore, Gavin failed to satisfy his burden of proof, and the circuit court did not err in denying this claim.

b.

Gavin contends that his "trial counsel also failed to impeach Meeks on many inaccuracies and inconsistencies in his testimony beyond those relating to the murder weapon, as even a marginally competent attorney would have done." (Gavin's brief, p. 42.) Gavin gives the following list of topics which, he asserts, would have demonstrated the "disparities between Meeks' trial testimony and prior statements:" (1) Meeks's knowledge of who had taken his firearm; (2) Gavin's living arrangements after his release from prison; (3) Meeks's knowledge of Gavin's murder conviction. (Gavin's brief, p.

43.)

We have instructed:

> "'"[D]ecisions regarding whether and how to conduct cross-examinations and what evidence to introduce are matters of trial strategy and tactics." Rose v. State, 258 Ga. App. 232, 236, 573 S.E.2d 465, 469 (2002). "'"[D]ecisions whether to engage in cross-examination, and if so to what extent and in what manner, are ... strategic in nature."'" Hunt v. State, 940 So. 2d 1041, 1065 (Ala. Crim. App. 2005), quoting Rosario-Dominquez v. United States, 353 F. Supp. 2d 500, 515 (S.D.N.Y. 2005), quoting in turn, United States v. Nersesian, 824 F.2d 1294, 1321 (2d Cir. 1987). "The decision whether to cross-examine a witness is [a] matter of trial strategy." People v. Leeper, 317 Ill. App. 3d 475, 483, 740 N.E.2d 32, 39, 251 Ill. Dec. 202, 209 (2000).'"

Bush v. State, 92 So. 3d 121, 155 (Ala. Crim. App. 2009) (quoting A.G. v. State, 989 So. 2d 1167, 1173 (Ala. Crim. App. 2007)).

Regarding the firearm that was used in the murder the circuit court noted that Gavin's "trial attorneys sought to prove that Meeks and the Defendant were on a joint venture when they came to Alabama, and that Meeks was responsible, in whole or in part, for the weapon being accessible or available for use in this crime." (C. 3493.) The circuit court also stated that Gavin's "trial attorneys focused on trying to implicate Meeks in the murder by proving that Meeks' testimony was not credible." (C. 3494.) The circuit court generally concluded that:

> "The Defendant contends that his trial attorneys did not undertake a sufficient investigation to make informed strategic decisions about whether to offer certain evidence or examine/cross-examine witnesses on certain subjects. The Defendant's argument is based on the Defendant's assumptions about what investigation the trial attorneys undertook, and what information they knew or failed to know.

> "There is no basis on which to support the Defendant's assumptions which are at the heart of his Rule 32 Petition. Neither this Court, nor the Defendant and his current attorneys, should speculate about what the Defendant's trial attorneys knew or did not know, or what they did or did not do."

(C. 3520.)

During his trial, Gavin's attorneys cross-examined Meeks about the facts surrounding Gavin and Meeks's trip to Centre, the events immediately following the shooting of Clayton, Meeks's connection to the handgun used in the murder including how he kept it unlocked in his home where his small son lived, and prior statements Meeks made to law enforcement. How that cross-examination was conducted was a strategic decision. Moreover, Gavin has failed to establish how he was prejudiced by the cross-examination his trial counsel conducted. Gavin is due no relief on this claim.

2.

Gavin next contends that his trial counsel were "ineffective in failing to investigate or to bring to light at trial blatant deficiencies and abnormalities in the State's own investigation of the murder." (Gavin's brief, p. 46.) Gavin specifically asserts that his trial counsel should have investigated: 1) the preservation of the Corporate Express van in which Clayton was shot; 2) the securing of the woods where Gavin was apprehended; 3) the notice law enforcement gave Meeks that he would be interviewed and the failure of police to search Meeks's vehicle, clothing, and home; and 4) conflicts of interest that Gavin alleges certain officers investigating the case had.

a.

Gavin asserts that his trial counsel were ineffective in failing to investigate and later inform the jury how law-enforcement officers processed the Corporate Express van that, he contends, "was almost immediately compromised when a rescue squad drove the van to the Cherokee County Sheriff's Office for processing." (Gavin's brief, p. 46.)

Danny Smith, an investigator with the District Attorney's Office for the Ninth Judicial Circuit, testified at Gavin's trial that a rescue-squad member had driven the Corporate Express van to the Cherokee County Sheriff's Office after Clayton's body was removed. Gavin's trial counsel did not cross-examine Smith about the transportation of the van. During a deposition taken in the Rule 32 proceedings, Smith said that "the van would have been taken by wrecker back to the sheriff's department." (C. 1923.) Larry Wilson, the chief deputy for the Cherokee County Sheriff's Department, testified at Gavin's trial that the Corporate Express van had been "pulled and [taken] to the sheriff's department where it was locked up, and then [the sheriff's department] asked for forensic sciences to have somebody come and fingerprint[] the van." (Record on direct appeal, R. 872.) The circuit court, in denying Gavin's claim regarding the preservation of the Corporate Express van, noted:

> "The jury heard the trial testimony of Smith and Wilson. Based on Smith's post-trial testimony it appears that if trial counsel had solicited additional trial testimony about this subject it may have resulted in the testimony being 'corrected' or clarified to remove the apparent conflict between the testimony of Smith and Wilson.
>
> "The Defendant's trial attorneys apparently chose not to pursue this matter further. The trial attorneys thereby allowed the jury to have the conflicting testimony [regarding the handling of the Corporate Express van] in this regard. The conflict was more helpful to the Defendant than would have been the 'corrected' testimony. By leaving the testimony in a state of conflict between [the investigating officers] the Defendant's trial attorneys were able to leave the jury with the argument that the improper handling of the crime scene had destroyed evidence."

(C. 3498-99.)

In the instant case, the circuit court correctly concluded that, had Gavin's trial counsel cross-examined Smith regarding the transportation of the van, Smith would have been

allowed to "correct" his testimony to Gavin's detriment. Therefore, Gavin has failed to establish how he was prejudiced by the cross-examinations his trial counsel conducted, and he is due no relief on this claim.

b.

Gavin contends that his "[t]rial counsel failed to investigate [and] to expose the extent to which evidence was compromised by the police's failure to follow standard procedure." (Gavin's brief, p. 47.) Gavin specifically argues that his attorneys provided ineffective assistance in failing to emphasize at trial that law-enforcement officers failed to secure the woods where he was apprehended.

The record of Gavin's trial demonstrates that his defense counsel cross-examined Deputy Wilson about the failure of law enforcement to "cordon off the area where [Gavin] was found" and that doing so would have been "standard procedure." (Record on direct appeal, R. 895.) Later during the cross-examination, Gavin's defense counsel reminded Deputy Wilson that he had "already said that [he] didn't cordon off the [wooded] area against standard procedure." (Record on direct appeal, R. 916.) Thus, the record does not support Gavin's argument, and he is due no relief on this claim.

c.

Gavin asserts that his trial counsel were ineffective in investigating Meeks's involvement in the murder. Gavin argues that his trial counsel should have informed the jury about the advance notice Meeks had that law-enforcement officers were coming to interview him and the failure of officers to impound or inspect Meeks's Chevrolet Blazer sport-utility vehicle, clothing, and home.

At the evidentiary hearing held on this claim, Gavin presented the expert testimony of Kenneth M. Webb, Sr., a licensed private detective and Chief Executive Officer of Fact Finders Group, Inc. Webb testified that it was his "understanding" that Meeks had been "given advanced notice that he was going to be interviewed." (R. 244.) No evidence was presented that established how far in advance of the interview Meeks was allegedly informed that law-enforcement

officers wanted to speak with him. During the deposition taken in the instant case, Danny Smith testified that he had not spoken with Meeks before interviewing him. Smith said that an officer in Illinois "facilitated a place for the interview [of Meeks] to take place and assured [Alabama law-enforcement officers] that Meeks would be available when [the Alabama law-enforcement officers] got there." (C. 1936.)

At Gavin's trial, during the cross-examination of Deputy Wilson, Wilson admitted that law-enforcement officers had not impounded the Chevrolet Blazer sport-utility vehicle or "examine[d] [its] interior in any way." (Record on direct appeal, R. 903.) Gavin's trial counsel also had Deputy Wilson confirm that law-enforcement officers had not questioned Meeks about the clothing he had been wearing at the time of the murder and that they had not collected that clothing.

In denying Gavin's petition the circuit court generally found that Gavin had

> "not met his burden of proving that his trial attorneys failed to sufficiently investigate this case. Merely because the Defendant's trial attorneys did not present certain evidence or examine/cross-examine witnesses on certain subjects does not mean that the attorneys failed to make informed decisions regarding such evidence and/or testimony."

(C. 3521.)

The record does not support Gavin's argument and he is due no relief on this claim. Moreover, Gavin is due no relief on his claim related to the alleged failure of his trial counsel to inform the jury about the failure of officers to impound or inspect Meeks's Chevrolet Blazer sport-utility vehicle and clothing because it is directly refuted by the record. See, e.g., McNabb v. State, 991 So. 2d 313, (Ala. Crim. App. 2007).

d.

Gavin next argues that his trial counsel failed to "bring to light at trial the troubling conflicts of interest that should have barred [Will County, Illinois, Deputy Sheriff] Tom

Arambasich, [Fort Payne Police Department Officer] Tony Burch,[3] and Investigator Danny Smith from participating in the investigation." (Gavin's brief, p. 49.) Gavin specifically contends that Deputy Arambasich and Officer Burch "should not have had any role in the investigation" because they were "personal friends" with Meeks. (Gavin's brief, p. 49.) Gavin asserts that Investigator Smith should not have participated in investigating the case because Gavin was charged with the attempted murder of Smith.

In denying the portion of this claim relating to Smith, the circuit court noted that there was "no evidence that the case against [Gavin] was tainted by Smith's participation as an investigator." (C. 3502.) The circuit court, in denying the portion of this claim that related to Arambasich and Burch, stated that if Gavin's trial counsel had emphasized the fact that Arambasich and Burch had attended the interview of Meeks "the jury might have been given the explanation which is now asserted before this Court; that is, they were allowed to attend in order to facilitate a free flow of information." (C. 3503.)

During the hearing held on Gavin's petition Webb, a licensed private detective, testified that the presence of Arambasich and Burch at the interview of Meeks was improper because "it created an atmosphere that was friendly to [Meeks]." (R. 241.) Webb also stated that the participation of Arambasich and Burch in the investigation created a bias and that "they could render an opinion that would not be normally accepted." (R. 253.) Webb said that Smith should not have investigated Gavin because "when you start getting victims involved in criminal investigations, they have a tendency to create an aura of impropriety. And from a police perspective, when you're a victim, someone else usually conducts the investigation." (R. 266.)

In the deposition he gave in the instant case, Smith said that Arambasich was present for the interview because "Meeks had already told Arambasich what had happened so there was a value to have him in there in case Meeks told a different

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[3]Burch's name is spelled alternatively in the record as "Birch."

story." (C. 1949.) Smith testified that Burch had gone to the interview of Meeks because Burch could make Meeks "feel comfortable talking with [officers investigating the murder]." (C. 1947.) Smith also said that Gavin's having shot at him did not impact his investigation of the case.

Gavin failed to establish that the performance of his attorneys were deficient as to the allegations in this claim or that he suffered prejudice as a result of their allegedly deficient performance. Therefore, he is due no relief on this claim.

3.

Gavin asserts that his trial counsel provided ineffective assistance in failing to move to suppress eyewitness-identification evidence. Specifically, Gavin argues that his "trial counsel should have made every effort to exclude ... the testimony of Larry Twilley, who provided an unreliable cross-racial identification of Gavin." (Gavin's brief, p. 51.)

In dismissing this claim, the circuit court found that even if Gavin had requested that the trial court "conduct a hearing out of the presence of the jury, Mr. Twilley's testimony would have been allowed for the jury to give it such weight as the jury found it entitled to receive." (C. 3508.) On direct appeal, under a plain-error standard of review, this Court "conclude[d] that the trial court did not err in allowing Twilley to identify Gavin at trial." Gavin v. State, 891 So. 2d 907, 962 n.23 (Ala. Crim. App. 2003). Gavin has not demonstrated that the circuit court erred in denying his Rule 32 ineffective-assistance-of-counsel claim based on the admission of Twilley's identification of Gavin, and Gavin therefore is due no relief on this claim.

4.

Gavin argues that his trial counsel were ineffective in cross-examining the witnesses who identified him at trial. Gavin specifically contends that his "trial counsel should have made every effort ... to impeach the testimony of Larry Twilley, who provided an unreliable cross-racial identification of Gavin." (Gavin's brief, p. 51.) In denying

this claim the circuit court found:

> "The Defendant's trial attorneys were not constitutionally deficient in their cross-examination of Mr. Twilley. For example, the trial attorneys elicited testimony that indicated that the position of Mr. Twilley's car in relation to the murder made it difficult for him to have seen the murderer. Testimony was elicited that Mr. Twilley's attention was not drawn to the scene of the shooting until after the shots were fired. The trial attorneys established that Mr. Twilley could only see the side of the shooter's face for a short time."

(C. 3508.)

The circuit court also noted that it found "it unrealistic to believe that Mr. Meeks, who weighed almost 100 pounds more than the Defendant, and who was only two inches taller than the Defendant, more closely fits the description given by Mr. Twilley on the night of the murder, and again at trial." (C. 3509.)

In the instant case, Gavin's trial counsel did not directly challenge Twilley's in-court identification of Gavin. Instead, they chose to challenge Twilley's vantage point from which he saw the murderer and the length of time Twilley saw him. Gavin has failed to demonstrate that the circuit court erred in denying his Rule 32 ineffective-assistance-of-counsel claim based on the cross-examination of Twilley and is, therefore, due no relief on this claim.

5.

Gavin next contends that his trial counsel provided ineffective assistance in failing to offer to stipulate that Gavin had a prior murder conviction.

Gavin asserts that "[w]hen the jury is asked to determine the fact of a prior conviction, it is a standard practice for defense counsel to offer to stipulate to that fact, thereby eliminating the risk that the prosecution will present prejudicial and inflammatory evidence of the prior crime."

(Gavin's brief, p. 58.) Although Gavin argues "the prosecution presented highly prejudicial evidence of Gavin's prior conviction to the jury," his only citation to the trial record references the prosecutor's referral "to Gavin as the 'convicted murderer from Chicago.'" (Gavin's brief, p. 57 (citing trial transcript).)

In denying this claim the circuit court found that Gavin had "failed to explain how a stipulation of his prior conviction would have mitigated the evidence of a prior conviction which was required to be proved as an element of the charged offense." (C. 3512.)

Gavin was charged with murder made capital because he had committed a prior murder within 20 years preceding the murder of William Clinton Clayton, Jr., a violation of § 13A-5-40(a)(13), Ala. Code 1975. On direct appeal, Gavin contended that the evidence of his prior conviction had been improperly admitted because it served as "improper evidence of his bad character." Gavin, 891 So. 2d at 950. This Court held that "Gavin's 1982 murder conviction was an element of the capital offense that the State was required to prove beyond a reasonable doubt; therefore, evidence of that conviction was properly admitted." Id.

Because Gavin failed to demonstrate that his trial counsel provided deficient performance or that he suffered prejudice as a result of their alleged deficiency he is due no relief on this claim.

6.

Gavin also asserts that he received ineffective-assistance-of-counsel because his trial counsel advised him against testifying at his trial.

At the hearing held on his petition, Gavin testified that he told his trial counsel that he wanted to testify at his trial, but Gavin did not say what he had told his trial counsel he wanted to say under oath. In an affidavit he submitted, Gavin's lead trial counsel stated "that for the entire 22 months from the time [he] was appointed to represent Mr. Gavin ... Mr. Gavin ... vehemently insisted that he was

not present at the scene of the shooting."[4] (C. 984.) On the day Gavin's trial began, however, "Mr. Gavin acknowledged for the first time that he had in fact been present at the scene of the shooting." (C. 984.) Although attorney Smith did not state in his affidavit why he did not call Gavin to testify in his own defense, Gavin's last-minute change of story would have given Smith a reason to not call Gavin as a witness. Moreover, Gavin concedes that his trial "testimony, by itself, would not likely have changed the outcome at trial." (Gavin's reply brief, p. 17.)

The circuit court did not err in denying this claim and Gavin is due no relief.

B. Penalty-Phase Ineffective-Assistance-Of-Counsel Claim

Gavin argues that, during the penalty phase of his trial, his trial counsel provided ineffective assistance of counsel because, he says, they failed to conduct a reasonable investigation in an effort to discover mitigation evidence. He specifically contends that his "trial counsel failed to conduct any meaningful investigation into mitigating evidence at all, although there was ample mitigating evidence available that should have been presented to the jury. Had Gavin enjoyed reasonably competent counsel, there is a reasonable possibility that he would not have been sentenced to death." (Gavin's brief, pp. 65-66.) Gavin asserts that his trial counsel should have investigated "information regarding Gavin's background that would have prompted reasonable counsel to inquire further, including that many of Gavin's siblings had drug problems and criminal histories, that he grew up in a gang-infested neighborhood and was exposed to significant violence and racial riots, and that he entered prison at a young age." (Gavin's brief, pp. 68-69.)

During the penalty phase of Gavin's trial, defense counsel presented the testimony of S.J. Johnson, a Jehovah's Witness minister, and Gavin's mother, Annette Gavin. In the affidavit he submitted in the instant case, Gavin's lead trial counsel said that Johnson was "a local minister with whom the Defendant had established a relationship during his

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[4]Attorney Smith swore to his affidavit on July 24, 2000.

incarceration in Cherokee County." (C. 984.) In denying this claim the circuit court noted that it could not "conclude that the trial attorneys erred in choosing to emphasize the Defendant's relationship with Rev. Johnson and the minister's opinion about the Defendant's redemptive qualities." (C. 3517.) The circuit court also stated that "[i]f the purpose of such testimony [regarding Gavin's past] would have been to 'humanize' the Defendant, the portrayal of the Defendant as the product of a violent family from a violent, gang ridden, and drug-infested Chicago ghetto where the Defendant had previously committed a murder would not be likely to achieve that result in the eyes of a Cherokee County, Alabama, jury." (C. 3517.)

> "'"'[F]ailure to investigate possible mitigating factors and failure to present mitigating evidence at sentencing can constitute ineffective assistance of counsel under the Sixth Amendment.' Coleman [v. Mitchell], 244 F.3d [533] at 545 [(6th Cir. 2001)]; see also Rompilla v. Beard, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005); Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). Our circuit's precedent has distinguished between counsel's complete failure to conduct a mitigation investigation, where we are likely to find deficient performance, and counsel's failure to conduct an adequate investigation where the presumption of reasonable performance is more difficult to overcome:
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> > "'"'[T]he cases where this court has granted the writ for failure of counsel to investigate

> potential mitigating evidence have been limited to those situations in which defense counsel have totally failed to conduct such an investigation. In contrast, if a habeas claim does not involve a failure to investigate but, rather, petitioner's dissatisfaction with the degree of his attorney's investigation, the presumption of reasonableness imposed by Strickland will be hard to overcome.'

"'"Campbell v. Coyle, 260 F.3d 531, 552 (6th Cir. 2001) (quotation omitted) ...; see also Moore v. Parker, 425 F.3d 250, 255 (6th Cir. 2005). In the present case, defense counsel did not completely fail to conduct an investigation for mitigating evidence. Counsel spoke with Beuke's parents prior to [the] penalty phase of trial (although there is some question as to how much time counsel spent preparing Beuke's parents to testify), and presented his parents' testimony at the sentencing hearing. Defense counsel also asked the probation department to conduct a presentence investigation and a psychiatric evaluation. While these investigatory efforts fall far short of an exhaustive

> search, they do not qualify as a complete failure to investigate. See Martin v. Mitchell, 280 F.3d 594, 613 (6th Cir. 2002) (finding that defense counsel did not completely fail to investigate where there was 'limited contact between defense counsel and family members,' 'counsel requested a presentence report,' and counsel 'elicited the testimony of [petitioner's] mother and grandmother'). Because Beuke's attorneys did not entirely abdicate their duty to investigate for mitigating evidence, we must closely evaluate whether they exhibited specific deficiencies that were unreasonable under prevailing professional standards. See Dickerson v. Bagley, 453 F.3d 690, 701 (6th Cir. 2006)."

"'Beuke v. Houk, 537 F.3d 618, 643 (6th Cir. 2008). "[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying heavy measure of deference to counsel's judgments." Wiggins, 539 U.S. at 521-22. "A defense attorney is not required to investigate all leads ...." Bolender v. Singletary, 16 F.3d 1547, 1557 (11th Cir. 1994). "A lawyer can almost always do something more in every case. But the Constitution requires a good deal less than maximum performance." Atkins v. Singletary, 965 F.2d 952, 960 (11th Cir. 1992). "The attorney's decision not to investigate must not be evaluated with the benefit of hindsight, but accorded a strong presumption of reasonableness." Mitchell v. Kemp, 762 F.2d 886, 889 (11th Cir.

1985).

> "'"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."
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> "'Strickland v. Washington, 466 U.S. at 691. "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 in part Wiggins, 539 U.S. at 527.'

"Ray[v. State], 80 So. 3d [965] at [984 (Ala. Crim. App. 2011)]. In addition,

> "'"[W]e 'must recognize that trial counsel is afforded broad authority in determining what evidence will be offered in mitigation.' State v. Frazier (1991), 61 Ohio St. 3d 247, 255, 574 N.E.2d 483. We also reiterate that post-conviction proceedings were designed to redress denials or infringements of basic constitutional rights and were not intended as an avenue for simply retrying the case. [Laugesen] v. State,

> [(1967), 11 Ohio Misc. 10, 227 N.E.2d 663]; State v. Lott, [(Nov. 3, 1994), Cuyahoga App. Nos. 66338, 66389, 66390]. Further, the failure to present evidence which is merely cumulative to that which was presented at trial is, generally speaking, not indicative of ineffective assistance of trial counsel. State v. Combs (1994), 100 Ohio App.3d 90, 105, 652 N.E.2d 205."

"'Jells v. Mitchell, 538 F.3d 478, 489 (6th Cir. 2008).

> "'"'[C]ounsel is not required to present all mitigation evidence, even if the additional mitigation evidence would not have been incompatible with counsel's strategy. Counsel must be permitted to weed out some arguments to stress others and advocate effectively.' Haliburton v. Sec'y for the Dep't of Corr., 342 F.3d 1233, 1243-44 (11th Cir. 2003) (quotation marks and citations omitted); see Herring v. Sec'y, Dep't of Corr., 397 F.3d 1338, 1348-50 (11th Cir. 2005) (rejecting ineffective assistance claim where defendant's mother was only mitigation witness and counsel did not introduce evidence from hospital records in counsel's possession showing defendant's brain damage and mental retardation or call psychologist who evaluated defendant pre-trial as having dull normal intelligence); Hubbard v. Haley,

> 317 F.3d 1245, 1254 n.16, 1260 (11th Cir. 2003) (stating this Court has 'consistently held that there is "no absolute duty ... to introduce mitigating or character evidence"' and rejecting claim that counsel were ineffective in failing to present hospital records showing defendant was in 'borderline mentally retarded range') (brackets omitted) (quoting Chandler [v. United States], 218 F.3d [1305] at 1319 [(11th Cir. 2000)])."

> "'Wood v. Allen, 542 F.3d 1281, 1306 (11th Cir. 2008). "The decision of what mitigating evidence to present during the penalty phase of a capital case is generally a matter of trial strategy." Hill v. Mitchell, 400 F.3d 308, 331 (6th Cir. 2005).'

"Dunaway [v. State, [Ms. CR-06-0996, Dec. 18, 2009]] ___ So. 3d ___ [___] at ___ [(Ala. Crim. App. 2009)].

"Likewise,

> "'"When claims of ineffective assistance of counsel involve the penalty phase of a capital murder trial the focus is on 'whether "the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."' Jones v. State, 753 So. 2d 1174, 1197 (Ala. Crim.

App. 1999), quoting Stevens v. Zant, 968 F.2d 1076, 1081 (11th Cir. 1992). See also Williams v. State, 783 So. 2d 108 (Ala. Crim. App. 2000). An attorney's performance is not per se ineffective for failing to present mitigating evidence at the penalty phase of a capital trial. See State v. Rizzo, 266 Conn. 171, 833 A.2d 363 (2003); Howard v. State, 853 So. 2d 781 (Miss. 2003), cert. denied, 540 U.S. 1197 [124 S. Ct. 1455, 158 L. Ed. 2d 113] (2004); Battenfield v. State, 953 P.2d 1123 (Okla. Crim. App. 1998); Conner v. Anderson, 259 F. Supp. 2d 741 (S.D. Ind. 2003); Smith v. Cockrell, 311 F.3d 661 (5th Cir. 2002); Duckett v. Mullin, 306 F.3d 982 (10th Cir. 2002), cert. denied, [538 U.S. 1004], 123 S. Ct. 1911 [155 L. Ed. 2d 834] (2003); Hayes v. Woodford, 301 F.3d 1054 (9th Cir. 2002); and Hunt v. Lee, 291 F.3d 284 (4th Cir.), cert. denied, 537 U.S. 1045 [123 S. Ct. 619, 154 L. Ed. 2d 517] (2002)."

"'Adkins v. State, 930 So. 2d 524, 536 (Ala. Crim. App. 2001) (opinion on return to third remand). As we also stated in McWilliams v. State, 897 So. 2d 437, 453-54 (Ala. Crim. App. 2004):

> "'"'Prejudicial ineffective assistance of counsel under Strickland cannot be established on the general claim that additional witnesses should have been called in mitigation. See Briley v. Bass, 750 F.2d 1238, 1248 (4th Cir. 1984); see also Bassette v. Thompson, 915 F.2d 932, 941 (4th Cir. 1990). Rather, the deciding factor is whether additional witnesses would have made any difference in the mitigation phase of the trial.' Smith v. Anderson, 104 F.Supp. 2d 773, 809 (S.D. Ohio 2000), aff'd, 348 F.3d 177 (6th Cir. 2003). 'There has never been a case where additional witnesses could not have been called.' State v. Tarver, 629 So. 2d 14, 21 (Ala. Crim. App. 1993)."'"

McWhorter v. State, [Ms. CR-09-1129, Sept. 30, 2011] ___ So. 3d ___, ___ (Ala. Crim. App. 2011) (quoting Hunt v. State, 940 So. 2d 1041, 1067-68 (Ala. Crim. App. 2005)).

We have also explained:

> "'[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)."

Broadnax v. State, 130 So. 3d 1232, 1248 (Ala. Crim. App. 2013).

In the affidavit he submitted, Gavin's lead trial attorney stated that he had "initiated contact almost immediately with Lucia Penland of the Alabama Prison Project (APP) to obtain the services of the APP to investigate matters involving mitigation." (C. 984.) In his one meeting with Penland, Gavin "adamantly refused to discuss mitigation matters." (C. 984.) Attorney Smith also indicated that, while Penland was in Chicago, members of Gavin's family "refused to speak with her, apparently because the Defendant had not authorized them to speak with [Gavin's] defense team." (C. 984.)

At the evidentiary hearing held on Gavin's petition Penland testified that during her interview with Gavin, which occurred on April 28, 1999, Gavin was hesitant to provide any mitigation evidence and insisted that he had not committed the murder. Gavin did, however, provide Penland with "[b]asic background information" such as his educational, medical, and family histories. (R. 321.) Penland testified that she "had a difficult time ... convincing [Gavin] to give [her] any information." (R. 346.) Penland also said that, at the insistence of Gavin, Gavin's mother would not speak with her while Penland was in Chicago. Penland stated that she did not know how much investigative work regarding mitigation attorney Smith had conducted on his own.

Penland stated that she had not completed her investigation of mitigation evidence before the commencement of Gavin's trial. Correspondence between Penland and attorney Smith demonstrates that, on October 13, 1999, Penland sent a facsimile to Smith in which Penland urged Smith to request a continuance "based on the information [APP was] developing, along with the lack of cooperation [APP had] encountered, and the time factor on [Penland's] part--having just this Monday finished with a trial on a prior case--which has not allowed [APP] to be further along than [APP was] at [that] time." (C. 490.) Smith replied to Penland in a letter stating that asking for a continuance based in part on the lack of cooperation by Gavin and Gavin's family "would ... not only

not be persuasive toward a continuance, but would in fact be counterproductive in that regard as well as towards [Gavin] as a whole."[5] (C. 496.) Smith requested that Penland forward to him "any information [she had] obtained in Mr. Gavin's case." (C. 496.)

Based on the foregoing, we are unable to say that the investigative steps taken by Gavin's trial counsel were unreasonable, and the circuit court did not err in denying this claim.

Moreover, we have conducted our own de novo review and have reweighed the alleged omitted mitigation evidence against the evidence that was presented at Gavin's trial and sentencing hearing. See Wiggins v. Smith, 539 U.S. 510 (2003). The trial court found the existence of three aggravating circumstances: (1) that the capital offense was committed while Gavin was under a sentence of imprisonment, see § 13A-5-49(1), Ala. Code 1975; (2) that Gavin had previously been convicted of another capital offense or a felony involving the use or threat of violence to the person, see § 13A-5-49(2), Ala. Code 1975; and (3) that the murder was committed during the course of a robbery in the first degree, see § 13A-5-49(4), Ala. Code 1975. Additionally, the trial court found that no statutory mitigating circumstances existed and that there were no nonstatutory mitigating circumstances. The evidence presented at Gavin's Rule 32 evidentiary hearing was to a great extent centered around Gavin's childhood in Chicago and imprisonment and, as the circuit court noted, likely would have been given very little weight by the jury. See, e.g., Washington, 95 So. 3d at 45-46. Thus, we agree with the circuit court that the admission of this evidence would not have changed the verdict in the penalty phase.

Accordingly, Gavin has failed to establish that he was prejudiced by the alleged omission of the above mitigating evidence. We agree with the circuit court that this testimony would have been unlikely to have humanized Gavin with his jury, and the circuit court correctly denied this claim.

---

[5]Gavin's trial counsel had already secured one continuance to allow for additional work on mitigation evidence.

II.

Gavin contends that juror misconduct denied him a fair trial. In his second amended petition, Gavin argued that the jury engaged in premature penalty deliberations and that the jury had improper contact with the bailiff. The circuit court summarily dismissed the new claims raised in Gavin's Second Amended Petition.[6]

"The general rules of preservation apply to Rule 32 proceedings." Boyd v. State, 913 So. 3d 1113, 1123 (Ala. Crim. App. 2003). Rules 32.2(a)(3) and (5), Ala. R. Crim. P. would preclude claims of juror misconduct if the claims could have been raised at trial or on appeal. See Ex parte Pierce, 851 So. 2d 606, 614 (Ala. 2000).

A.

In his second amended petition Gavin asserted that he was denied a fair trial because, he alleged, his jury prematurely engaged in sentencing deliberations. Gavin specifically contended that the jurors in his trial "voted on guilt and sentencing at the same time--that is, after the guilt determination was submitted to the jury ... but before the sentencing phase even began ...." (R. 2688 (emphasis in original).) In support of his claim, Gavin stated that T.M., the jury foreman, had related how, after the jury had discussed the evidence in deliberations, one juror stated that he was going to vote guilty and for the death penalty. The foreman also related that all the jurors then wrote down their votes for both the guilt and penalty phases.

We have explained:

> "Rule 606(b), Ala. R. Evid., specifically excludes the admission of juror testimony to attack 'internal influences.' '[P]otentially premature deliberations that occurred during the course of the trial' ... have been held to 'constitute[] a potential internal influence on the jury.' United

[6]We address the circuit court's denial of Gavin's second amended petition more fully in Part III of this opinion.

States v. Logan, 250 F.3d 350, 380-81 (6th Cir. 2001). See also Ledure v. BNSF Ry., 351 S.W.3d 13, 24 (Mo. Ct. App. 2011) ('Jurors' testimony post-verdict is not admissible to show alleged premature deliberations by a juror.'); United States v. Sabhnani, 529 F. Supp. 2d 384, 395 (E.D.N.Y. 2008) ('[T]he Court finds that Rule 606(b)[, Fed. R. Evid.,] protects the finality of the verdict and bars any inquiry into the jurors' deliberative processes.').

> "'"[W]hen there are premature deliberations among jurors with no allegations of external influence on the jury, the proper process for jury decision making has been violated, but there is no reason to doubt that the jury based its ultimate decision only on evidence formally presented at trial." United States v. Resko, 3 F.3d 684, 690 (3d Cir. 1993). Indeed, "[p]reserving the finality of jury verdicts militates strongly in favor of barring post-trial juror assertions of pre-deliberation discussion. The probability of some adverse effect on the verdict is far less than for extraneous influences." United States v. Williams-Davis, 90 F.3d 490, 505 (D.C. Cir. 1996).'
>
> "Taylor v. State, 270 P.3d 471, 481 (Utah 2012)."

Perkins v. State, [Ms. CR-08-1927, November 2, 2012] ___ So. 3d ___, ___ (Ala. Crim. App. 2012).

Because T.M.'s testimony would have been inadmissible at a hearing held on Gavin's petition, the circuit court did not err in dismissing Gavin's claim.

B.

Gavin argues that he was denied a fair trial because, he says, his jury had improper contact with the circuit court's bailiff. Gavin alleged in his petition that juror T.M.

reported that he and some other jurors had played golf with the bailiff during Gavin's trial; this, Gavin contends, "would justify reversal." (Gavin's brief, p. 90.) Gavin did not allege in his second amended petition that the bailiff had engaged in any improper communications with the sequestered jury, only that "[g]iven the seriousness of extra-juror influences, Mr. Gavin is entitled to a presumption of prejudice and an evidentiary hearing to examine these witnesses on what was discussed during the golf outing." (C. 2689.)

The circuit court did not abuse its discretion in summarily dismissing this claim because Gavin failed to plead sufficient facts in support of the claim.

C.

Finally, Gavin contends that the circuit court erred in not conducting an evidentiary hearing on his claims of juror misconduct, and argues that we should "remand [this] case to the trial court for an evidentiary hearing on [jury] misconduct." (Gavin's brief, p. 95.) Because the circuit court correctly dismissed Gavin's two substantive claims regarding juror misconduct, however, the circuit court was not required to conduct an evidentiary hearing before dismissing those claims. See Rule 32.7(d), Ala. R. Crim. P.

III.

Gavin asserts that the record is unclear as to whether his second amended petition was considered by the circuit court. Gavin specifically argues that:

> "This Court should either clarify the record that Gavin's Second Amended Petition is the operative pleading or, to the extent this Court finds that the trial court denied Gavin's motion for leave to amend in whole or in part, reverse that decision and enter an order granting Gavin's motion."

(Gavin's brief, p. 97.)

The record demonstrates that on April 2, 2010, after the

evidentiary hearing had been held on his petition, Gavin filed a "Motion for Leave to Amend his First Amended Rule 32 Petition and to File a Second Amended Petition." (C. 2633.) Gavin attached his second amended petition to his motion. In that motion Gavin submitted five amendments to his petition. The State filed an objection to Gavin's motion and on August 17, 2010, the circuit court issued an order in which it found Gavin's motion "to be nothing more than a brief to support [Gavin's] First Amended Rule 32 Petition" and noted that it would not consider grounds which were different from what Gavin had previously asserted or which relied on evidence outside the record. (C.R. 2971.)

In its order denying Gavin's petition, however, the circuit court stated:

> "The Court's Order of August 17, 2010, also states that to the extent that the Second Amended Rule 32 Petition asserts grounds for relief not asserted in the First Amended Rale 32 Petition, and to the extent that the Second Rule 32 Petition relies on evidence not otherwise part of the record, same would not be considered because of the attorneys' agreement stated to the Court at the conclusion of the hearing conducted on February 8-9, 2010.
>
> "The Defendant's Second Amended Rule 32 Petition includes an additional ground for relief based on the trial attorneys' advice to the Defendant concerning whether to testify at trial. Notwithstanding the Rule 32 attorneys' February 8-9 agreement to submit the matter on the theretofore filed petitions, this Court <u>has considered</u> the Second Amended Rule 32 Petition and the arguments advanced therein."

(C.R. 3491-91, n.2 (emphasis added).)

Gavin's argument is, therefore, refuted by the record, and he is due no relief on this claim.

Conclusion

For the foregoing reasons, we affirm the circuit court's denial of Gavin's petition for postconviction relief.

AFFIRMED.

Welch, Kellum, and Burke, JJ., concur. Windom, P.J., recuses.

APPENDIX I

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

D. Scott Mitchell
Clerk
Gerri Robinson
Assistant Clerk

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Montgomery, AL 36130-1555
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March 20, 2015

CR-10-1313 **Death Penalty**

Keith Edmund Gavin v. State of Alabama (Appeal from Cherokee Circuit Court: CC98-61.60; CC98-62.60)

NOTICE

You are hereby notified that on March 20, 2015, the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

D. Scott Mitchell

D. Scott Mitchell, Clerk
Court of Criminal Appeals

cc: Hon. David A. Rains, Circuit Judge
Hon. F. Dwayne Amos, Circuit Clerk
Steven J. Horowitz, Attorney - Pro Hac
Stephen C. Jackson, Attorney
Drew Kitchen, Attorney
Caroline Schiff, Attorney - Pro Hac
Melanie E. Walker, Attorney - Pro Hac
Beth Jackson Hughes, Asst. Atty. Gen.

APPENDIX J

State of Alabama,
PLAINTIFF

vs.

Keith Edmund Gavin,
DEFENDANT

* IN THE CIRCUIT COURT OF
* CHEROKEE COUNTY, ALABAMA
* CASE NO. CC-1998-061.60
* CC-1998-062.60

ORDER OF APRIL 18, 2011

On November 6, 1999, the Defendant was convicted of two counts of Capital Murder in connection with the murder of William Clinton Clayton, Jr. The murder was made capital (1) because it was committed during the course of a robbery in the first degree [Title 13A-5-40(a)(2) Code of Alabama (1975)], and (2) because the Defendant had been convicted of another murder within 20 years of the murder of Mr. Clayton [Title 13A-5-40(a)(13) Code of Alabama (1975)].

On September 26, 2003, the Alabama Court of Criminal Appeals affirmed the Defendant's conviction and sentence of death. Gavin v. State, 891 So. 2d 907 (2003). The Defendant's petition for writ of certiorari to the Alabama Supreme Court was denied on May 28, 2004 [Gavin v. State, 891 So. 2d 998 (2004)], and his petition for writ of certiorari to the United States Supreme Court was denied on January 24, 2005 [Gavin v. Alabama, 125 S. Ct. 1054 (2005)].

On direct appeal, the Alabama Court of Criminal Appeals stated the facts of Gavin's crimes, and his corresponding trial, as follows:

> A little after 6:30 p.m. on March 6 1998, Clayton, a contract courier for Corporate Express Delivery Systems, Inc. was shot and killed while sitting in a Corporate Express van outside the Regions Bank in downtown Centre. Clayton had finished his deliveries for the day and had stopped at Regions Bank to obtain money from the ATM in order to take his wife to dinner.

There were four eyewitnesses to the crime, two of whom positively identified Gavin as the shooter. Ronald Baker and Richard Henry, Jr. testified that they were stopped at a traffic light near the Regions Bank and the courthouse in downtown Centre at the time of the shooting. According to Baker and Henry, they saw a man get out of a vehicle, walk to a van parked on the street, and shoot the driver of the van. Upon hearing the gunshots, Baker and Henry immediately fled the scene; neither could identify the shooter.

Larry Twilley testified that he, too, was stopped at a traffic light by the Regions Bank in downtown Centre at the time of the shooting. Twilley testified that while he was stopped at the light, he heard a loud noise, turned, and saw a man with a gun open the driver's side door of a van parked on the street and shoot the driver of the van two times. According to Twilley, the shooter then pushed the driver to the passenger's side, got in the driver's seat, and drove away. Twilley testified that when he first saw the shooter, he noticed something black and red around his head, but that after the shooter got in the van and drove away, the shooter no longer had anything on his head; at that point, Twilley said, he noticed that the shooter had very little hair. At trial, Twilley positively identified Gavin as the shooter.

Dewayne Meeks, Gavin's cousin and an employee of the Illinois Department of Corrections, testified that in early February 1998, he and Gavin traveled from Chicago, Illinois, where they were living, to Cherokee County, Alabama "[t]o pick up some girls...and just to really get away." (R. 651.) Meeks said that they stayed for a weekend and then returned to Chicago. In early March 1998, Meeks said, Gavin wanted to return to Alabama to find a woman he had met in February. Meeks testified that Gavin told him that if he drove Gavin to Chattanooga, Tennessee, to meet the woman, the woman would reimburse him for the travel expenses. Meeks said that he agreed to drive Gavin to Tennessee and that Meeks' wife and three-year-old son also accompanied them.

Meeks testified that they left Chicago on the night of March 5, 1998, arrived in Chattanooga on the morning of

March 6, 1998, and checked into a Super 8 Motel. Meeks said that he rented two rooms at the motel, one for him and his family, and one for Gavin. After they arrived, Meeks said Gavin made a telephone call, and he and Gavin then drove to a nearby gasoline service station to wait for the woman Gavin had come to see. According to Meeks, the woman did not show up and Gavin then asked him to drive to Fort Payne, Alabama, so that Gavin could find the woman. Meeks agreed and they drove to Fort Payne, but they failed to locate the woman in Fort Payne, Meeks said they drove to Centre to find the woman.

Meeks testified that at approximately 6:30 p.m. on March 6, 1998, he and Gavin arrived in downtown Centre. When they stopped at the intersection near the courthouse and the Regions Bank, Meeks said, Gavin got out of Meeks's vehicle and approached a van that was parked nearby. According to Meeks, he thought Gavin was going to ask the driver of the van for directions. However, when Meeks looked up, he saw that the driver's side door of the van was open, and Gavin was holding a gun. Meeks stated that he watched as Gavin fired two shots at the driver of the van. According to Meeks, immediately after seeing Gavin shoot the driver of the van, he fled the scene, and Gavin got in the van and followed him. Meeks testified that Gavin honked the horn of the van and flashed the lights in an attempt to get Meeks to stop. However, Meeks refused to stop because, he said, he was scared. Meeks stated that he drove back to Chattanooga and told his wife what had happened. He and his wife and child then checked out of the motel and drove back to Chicago.

Meeks testified that when he arrived in Chicago, he immediately informed several of his friends who were in law enforcement about the shooting. As a result of his conversations with friends, Meeks said, he realized the gun used by Gavin was probably the gun that had been issued to him by the Illinois Department of Corrections. Meeks said that he then checked his home and determined that his gun was, in fact, missing. According to Meeks, he kept the gun in a drawer at home and he had not seen the gun for approximately two weeks before the shooting. Meeks testified that he immediately reported

the gun as missing to law enforcement. Meeks admitted that he did not mention to law enforcement when he reported the missing gun that he believed the gun had been used in a shooting in Alabama, but he said that he did inform his boss at the Illinois Department of Corrections that he believed the gun had been used in the shooting. After reporting the gun missing and discussing the shooting with several friends, Meeks said, he then contacted Alabama law enforcement to inform them of his knowledge of the shooting. On March 9, 1998, and again on April 6, 1998, Meeks was interviewed in Chicago by investigators from Alabama. After the interviews, Meeks said, he was indicted for capital murder in connection with the murder of Clayton; that charge was subsequently dismissed.

Danny Smith, an investigator with the District Attorney's Office for the Ninth Judicial Circuit, testified that on the evening of March 6, 1998, he was returning to Centre from Fort Payne when he heard over the radio that there had been a shooting and that both the shooter and the victim were traveling in a white van with lettering on the outside. As he proceeded toward Centre, Investigator Smith said, he saw a van matching the description given out over the radio, and he followed it. According to Investigator Smith, the van was traveling approximately 75 miles per hour and the driver was driving erratically.

Investigator Smith testified the he was speaking on the radio with various law-enforcement personnel regarding stopping the van when the van turned on its blinker and stopped on the side of the road. When he pulled in behind the van, Investigator Smith said, the van abruptly pulled back onto the road and sped away. Investigator Smith said that he continued pursuing the van and that, after he turned on his emergency lights, the van stopped in the middle of the road, near the intersection of Highways 68 and 48. Investigator Smith testified that when the van stopped, the driver got out of the vehicle, turned, fired a shot at him, ran in front of the van, turned and fired another shot at him, and then ran into nearby woods. Investigator Smith testified that the driver of the van was black, and that he was wearing a maroon or wine-colored shirt, blue jeans, and some type of

toboggan or other type of cap. At trial, Investigator Smith positively identified Gavin as the person who had gotten out of the van and shot at him.

After Gavin fled into the woods, Investigator Smith said, he went to the van and checked the victim. According to Investigator Smith, the victim was still alive, but barely, and he radioed for an ambulance. Investigator Smith testified that when he first went to the van, he saw blood between the two front bucket seats and on the passenger seat; however, there was "very little blood" on the driver's seat. (R. 567.) Investigator Smith said that when emergency personnel removed the victim from the van, blood was transferred to the driver's seat by the personnel who had to enter the van to secure the victim and remove him.

Investigator Smith also testified that, within minutes of Gavin's fleeing into the woods, several law-enforcement officers arrived at the intersection of Highways 48 and 68, and the wooded area into which Gavin had fled was encircled and sealed off so that "no one could come out and cross the road without being seen." (R. 563.)

Members of several different law enforcement agencies then conducted a search for Gavin.

At approximately 9:45 p.m., Tony Holladay, a dog handler for the Limestone Correctional Facility, arrived at the scene with his beagle. Holladay testified that when he first arrived, he obtained information indicating that Investigator Smith had chased the suspect for approximately 20 yards, but had stopped short of the woods. At that point Holladay said, he had Investigator Smith show him the exact spot he had stopped the pursuit so that the dog would not track Investigator Smith's trail from the roadway but would track the trial of the person who had entered the woods. Holladay testified that he then carried his dog to that spot and put him down. Holladay said that the dog immediately picked up a scent and tracked it into the woods to a creek. Holladay testified that he saw a man, whom he positively identified at trial as Gavin, standing in the creek under a bush, and that when Gavin saw him, Gavin attempted to

flee. Holladay stated and he ordered Gavin to stop, but that Gavin did not stop until Holladay fired a shot over Gavin's shoulder.

Gavin was then handcuffed and several law-enforcement officers assisted in maneuvering Gavin out of the creek, up the embankment, and through the woods to the road way. Kevin Ware, a deputy with the Cherokee County Sheriff's Department, testified that he participated in the search for Gavin and that he was present as Gavin was brought out of the creek. Deputy Ware stated that he heard Gavin say "I hadn't shot anybody and I don't have a gun." (R. 780.) The evidence indicated that from the time Gavin was discovered by Holladay to the time he heard the statement in Deputy Ware's presence, no one had had any conversation with Gavin regarding the shooting or why he was being arrested.

The record reflects that Clayton was pronounced dead upon arrival at the hospital. A subsequent autopsy revealed three gunshot wounds to his body caused by two bullets. Stephen Pustilnik, a medical examiner with the Alabama Department of Forensic Sciences, testified that one bullet passed through Clayton's left arm, entered his chest on the left side damaging both of Clayton's lungs and his heart, and exited the right side of the chest. The record reflects that that bullet was later found lodged in the passenger-side door of the van. The second bullet, Dr. Pustilnik said, entered Clayton's left hip and lodged in his back. Dr. Pustilnik testified that the wounds to Clayton's arm and hip would not have bled much because the bullets entered the muscles and the bleeding would have been contained inside those muscles. He stated that the wound to the chest would have bled quite a bit, and that, after blood filled the chest cavity, it would then exit the body at the lowest point. In addition, Dr. Pustilnik testified that there would not have been much "blow back" from the wounds, i.e., because the location of the wounds, the blood from the shots would not have blown backwards from the body toward the shooter. Dr. Pustilnik testified that the cause of Clayton's death was multiple gunshot wounds.

The record reflects that no "usable" fingerprints were

found in the van and that no bloodstains were found on Gavin's clothing. (R. 926.) However, the State presented evidence indicating that a motel-room key was found in Gavin's pants pocket after his arrest; the key fit room 113 at the Super 8 Motel in Chattanooga where Meeks and Gavin had rented rooms. In addition, two .40 caliber shell casings were found in the street outside the Regions Bank in downtown Centre, one .40 caliber shell casing was found in the roadway at the intersection of Highways 48 and 68, and a red and black toboggan cap was found near the woods at the intersection of Highways 48 and 68. The bullet found lodged in the passenger-side door of the van and the bullet in Clayton's back was also determined to be .40 calibers. Although law enforcement was unable to find the murder weapon on the night of the crime, several days later, on March 13, 1998, a .40 caliber Glock pistol was found near the woods where Gavin had been discovered. The evidence indicated that the three shell casings and the two bullets had been fired from the pistol, and that the pistol belonged to Dewayne Meeks. The State also presented evidence indicating that in 1982, Gavin had been convicted of murder in Cook County, Illinois. Gavin had served approximately 17 years of a 34-year sentence and had been released on parole only a short time before Clayton's murder.

The State also presented the testimony of Barbara Genovese, a supervisor at the Cherokee County jail. Genovese testified that in April 1998, both Gavin and Meeks were incarcerated at the jail, in separate cells. At one point, Genovese said, when she got Meeks and another inmate out of their cells to take them outside for exercise, Gavin called out to her from his cell and asked if he could go outside and exercise with Meeks and the other inmate. Genovese said that she told Gavin that he could not go outside with Meeks, and that Gavin asked her why. According to Genovese, she told Gavin that he could not go outside with Meeks because when Meeks had initially been brought to the jail, Gavin had become loud and unruly, "screaming and yelling and banging on the doors." (R. 1001.) At that point, Genovese said, Gavin said "Dewayne didn't do anything. I did it" and "Dewayne should not be in here." (R. 1002.) Genovese testified that she did not know what Gavin was referring

to when he said "I did it." (R. 1002.)

Gavin v. State, 891 So. 2d 907, 927-930 (2003).

On May 26, 2005, the Defendant filed a Petition For Relief From Conviction Or Sentence Pursuant to Rule 32 ARCrP. That Petition was returned to the Defendant's attorney for failure to use or follow the form prescribed by, and accompanying, Rule 32.6(a). Accordingly, on July 19, 2005, the Defendant refilled his Rule 32 Petition using and following the correct form.

On June 20, 2006, this Court dismissed many of Gavin's Rule 32 claims for the reasons set out in said Order.[1] The Defendant was, however, granted leave to file an amended Rule 32 petition with respect to his claim(s) of ineffective assistance of counsel (IAC).

On August 18, 2006, the Defendant filed his Amended Petition For Relief From Conviction Or Sentence Pursuant To Rule 32 ARCrP (First Amended Petition). The Court conducted an evidentiary hearing on February 8-9, 2010. At the conclusion of the evidentiary hearing the State and the Defendant agreed to supplement the record with the deposition of Dr. Craig A. Haney and to thereafter submit their proposed briefs to support and oppose the Defendant's First Amended Petition.

On April 2, 2010, the Defendant filed a Second Amended Rule 32 Petition rather than file a brief. On August 17, 2010, this Court concluded that the Defendant's Second Amended Rule 32 Petition and the materials filed in support thereof should be treated as the Defendant's brief.[2]

---

[1] On June 4, 2007, this Court entered an Order clarifying that the Order of June 20, 2006, was "a final order as to those claims dismissed by said Order."

[2] The Court's Order of August 17, 2010, also states that to the extent that the Second Amended Rule 32 Petition asserts grounds for relief not asserted in the First Amended Rule 32 Petition, and to the extent that the Second Rule 32 Petition relies on evidence not otherwise part of the record, same would not be considered because of the attorneys' agreement stated to the Court at the conclusion of the hearing conducted on February 8-9, 2010.

ASSERTED GROUNDS FOR RELIEF

This Court has attempted to organize the Defendant's IAC contentions by the subjects which the Defendant's multiple filings address.

I. IMPEACHMENT OF DEWAYNE MEEKS:

The Defendant's ineffective assistance of counsel (IAC) claims focus on the trial attorneys' failure to implicate and/or impeach Dewayne Meeks who was the State's key witness. The Defendant is apparently suggesting that Meeks was either the shooter, or that Meeks was complicit in the shooting.

1. Ownership of the Murder Weapon.

At trial Meeks testified that when he was interviewed by the investigators he told them that "The gun [Gavin] used was probably mine." Meeks also testified as follows:

> **Q. And where did you get it?**
> **A. Illinois Department of**
> **Q. Corrections. So it was your---**
> **A. Work.**
> **Q. ---official weapon for your job?**
> **A. Uh-huh.**

(Tr@ 679)

***

> **Q. How long had you been --- how long had it been since you had been issued that gun?**
> **A. I don't remember. It was a couple of months.**
> **Q. You had it a couple of months?**

The Defendant's Second Amended Rule 32 Petition includes an additional ground for relief based on the trial attorneys' advice to the Defendant concerning whether to testify at trial. Notwithstanding the Rule 32 attorneys' February 8-9 agreement to submit the matter on the theretofore filed petitions, this Court has considered the Second Amended Rule 32 Petition and the arguments advanced therein.

A. Probably.
Q. You'd never fired it?
A. Never shot it.
Q. Where did you keep it?
A. In my drawer, top drawer in my house. I took it to work sometime, but not all the time.

(Tr. @ 720-721).

On the basis of this testimony the Defendant now contends that the Defendant's trial attorneys were ineffective due to their failure to subpoena records of the IDOC to prove that the weapon was not issued to Meeks by the State of Illinois.

The Defendant has presented nothing to indicate that the Defendant's trial attorneys knew or should have known prior to trial that Meeks would offer testimony relating to where he got the murder weapon, or that he would testify that the weapon was state issued. The Defendant's trial attorneys had absolutely no reason to investigate where Meeks got the weapon.

Because the evidence overwhelmingly establishes that the Defendant shot and killed Mr. Clayton, the Defendant's trial attorneys appropriately concentrated on trying to impeach Meeks with respect to what Meeks said about how the Defendant got the weapon. In this regard the Defendant's trial attorneys sought to prove that Meeks and the Defendant were on a joint venture when they came to Alabama, and that Meeks was responsible, in whole or in part, for the weapon being accessible or available for use in this crime.

While Meeks attempted to disassociate himself from the weapon by claiming to be unaware that it was in the vehicle, the Defendant's attorneys

attempted to discredit him by pointing out the improbability of this testimony. Meeks' own self contradiction about where the weapon was kept added to the suggestion of culpability.

Because it was undisputed that Meeks and the Defendant came to Alabama in an unwholesome alliance, the Defendant's trial attorneys made a reasonably convincing argument by direct and circumstantial evidence that Meeks was complicit in the course of conduct which resulted in Mr. Clayton's tragic death.

The Defendant's trial attorneys focused on trying to implicate Meeks in the murder by proving that Meeks' testimony was not creditable. In their effort to discredit Meeks he was examined about his irresponsibility for keeping a weapon in an unlocked drawer where a young child lived. Meeks was also questioned about his inconsistencies when stating that the weapon was maintained in his dresser drawer and later stating that it may have been in his vehicle.

The Defendant's trial attorneys were not ineffective in attempting to implicate Meeks. At most, however, Meeks was complicit. There is no evidence that Meeks was the shooter. Indeed, the evidence is overwhelming that the Defendant was the shooter, and mere proof that Meeks lied about the gun being IDOC issued would not change that fact.

2. Access to the Murder Weapon:

The Defendant argues that his trial attorneys failed to impeach Meeks by showing the inconsistency between Meeks' trial testimony that the Defendant was "living with him" and Meeks' pretrial statement that Gavin was living with his

mother.

This Court finds the distinction to be without any impeachment value. It is clear that Meeks and the Defendant had meaningful contact after the Defendant's release from prison, and that the Defendant was in Meeks' home before the trip to Alabama. Whether he was in Meeks' home as a visitor or as a resident is a distinction without any material difference.

3. Meeks' Version of the Shooting:

The Defendant argues that his trial attorneys failed to impeach Meeks by pointing out the inconsistency between Meeks' trial testimony that the Defendant opened the van door and immediately shot the driver, and Meeks' pretrial statement to officer Burch that the shots were preceded by an apparent argument between the Defendant and the driver. The Defendant apparently believes that a more aggressive cross-examination of Meeks would have led the jury to believe that the shooter acted in self defense.

In preparation for trial, the Defendant's attorneys were furnished the investigative file which indicates that some witnesses to the incident observed the immediacy of the shooting as described by Meeks' trial testimony. Another witness said that prior to the shooting Mr. Clayton appeared to be attempting to surrender or exit the vehicle.

The cross-examination which the Rule 32 counsel now claims would have impeached Meeks at trial is actually testimony which would arguably have been more prejudicial to the Defendant. Any argument or suggestion that the shooter

acted in self defense is wholly without support, and would have further discredited the defense, rather than discredit Meeks. Accordingly, this Court is unwilling to conclude that the Defendant's trial attorneys were ineffective in deciding not to pursue a course which could have been even more prejudicial to their client.

4. The Mystery Woman:

At trial Meeks testified that he did not know the name of the woman whom the Defendant wanted to find when they came to Alabama. During an investigative interview Meeks told the interviewing officer that the only name he knew was "Casandra."

The Defendant now claims that the trial attorneys were ineffective for failing to point out this inconsistency to the jury. The Defendant also argues that the trial attorneys were ineffective for failing to investigate further to learn the woman's name.

Neither this Court nor the Defendant's Rule 32 counsel know the extent to which the Defendant's trial attorneys tried to learn the name of the mystery woman, or to locate her for trial; however, during the trial Meeks was effectively examined with respect to the credibility of his story about the woman whom he and the Defendant were trying to find. Not only was Meeks unable to provide her name, he was unable to provide a physical description. Even though he said that he had met the woman before, he could not even say whether she was tall or short, or skinny or fat.

The Defendant's trial attorneys were not ineffective in discrediting Meeks'

explanation for the trip to Alabama.

5. Meeks' Job Application:

When Meeks applied for his job with the Illinois Department of Corrections in 1994 he falsely stated on his job application that he did not know of any relative who was serving a prison sentence or was on parole. Of course, he did know that the Defendant was a state prison inmate at that time.[3]

The Defendant now contends that his trial attorneys were ineffective for failing to obtain Meeks' job application from IDOC.

Of all the things that the Defendant's attorneys had to do to prepare for a trial in this case, obtaining Meeks' IDOC job application was hardly high on the list. Even though Meeks apparently lied to his prospective employer, this Court is unwilling to conclude that the trial attorneys provided ineffective assistance of counsel by failing to seek and obtain this piece of information.

If the trial attorneys had gotten Meeks' IDOC job application it would only have proven that Meeks lied to get a job. It is not realistic to conclude that this false statement on Meeks' job application, approximately 3 years before Mr. Clayton's murder, would have resulted in a different outcome in this case.

II. INVESTIGATION IRREGULARITIES:

The Defendant contends that the Defendant's trial attorneys provided ineffective assistance because they failed to investigate and bring to light the

[3] The Defendant was convicted of Murder in the Circuit Court of Cook County, Illinois, on June 9, 1982, and he was sentenced to thirty-four years in prison. The Defendant was paroled on December 26, 1997. The murder of Mr.

State's deficiencies and irregularities in the investigation of this case.

1. Destruction of Evidence.

Mr. Clayton was shot while sitting in the driver's seat of a corporate van in Centre, Alabama. The shooter drove the van several miles from the location of the shooting, and then abandoned it on foot into the nearby woods.

The Defendant argues that the State possibly allowed valuable evidence to be destroyed by allowing a rescue squad member to drive the van to the Sheriff's Office before the van underwent an examination by the Department of Forensic Sciences.

Although Investigator Danny Smith testified that the vehicle was driven back to the Sheriff's Office by a rescue squad member, Investigator Larry Wilson testified that it was "pulled" back to the Sheriff's Office. In his post-trial testimony Investigator Smith corrected his trial testimony by stating that the van was towed from the scene by a wrecker.

The jury heard the trial testimony of Smith and Wilson. Based on Smith's post-trial testimony it appears that if trial counsel had solicited additional trial testimony about this subject it may have resulted in the testimony being "corrected" or clarified to remove the apparent conflict between the testimony of Smith and Wilson.

The Defendant's trial attorneys apparently chose not to pursue this matter further. The trial attorneys thereby allowed the jury to have the conflicting

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Clayton occurred on March 6, 1998.

testimony in this regard. The conflict was more helpful to the Defendant than would have been the "corrected" testimony. By leaving the testimony in a state of conflict between Smith and Wilson the Defendant's trial attorneys were able to leave the jury with the argument that the improper handling of the crime scene had destroyed evidence.

2. Contamination of Evidence:

It is undisputed that Mr. Clayton was dying when the driver fled on foot. It is further undisputed that several people were in and out of the van at the scene where Mr. Clayton was found.

After the vehicle arrived at the Sheriff's Office it was examined by an experienced forensic investigator from the Alabama Department of Forensic Sciences. The investigator found no blood on the driver's side front seat and no useable fingerprints.

There was substantial testimony and cross-examination about whether the position of Mr. Clayton's body adequately explained why blood was not found on the driver's side of the vehicle. In addition to the Defendant's trial attorneys' examination on this point, the forensic examiner was also cross-examined about the State's failure to use Luminal to detect blood in the vehicle. The trial attorneys also cross-examined the forensics expert about the State's failure to use the "fuming" method of detecting fingerprints.

Mr. Clayton was murdered on Friday, March 6, 1998. The van was inspected by the forensic examiner over the weekend, and it was returned to the

owner the following week. Investigator Smith and Investigator Wilson were cross-examined by the Defendant's trial attorneys about the State's failure to preserve the evidence.

The trial attorneys were not appointed until April 16, 1998. The Defendant's Rule 32 counsel argues that the Defendant's trial attorneys were deficient for failing to have the vehicle returned for further forensic evaluation. The trial attorneys may have determined, however, that because the vehicle had been returned to Mr. Clayton's employer over a month before the trial attorneys were appointed, the return of the vehicle would have been of no evidentiary value.

Of course, the Defendant's trial attorneys may have chosen not to pursue such a course because of the possibility that further forensic evaluation would have led to incriminating evidence against the Defendant. Instead, the trial attorneys may have decided that the lack of incriminating evidence was more helpful to the Defendant than having the vehicle further examined.

3. Meeks' Vehicle and Clothing.

Mr. Clayton was murdered on March 6, 1998. On March 9, 1998, Meeks was interviewed in Will County, Illinois where he had driven his Chevrolet Blazer. The State made no attempt to conduct a forensic evaluation of Meeks' Blazer, and they did not seize and test Meeks' clothes which he was wearing at the time of the shooting. They did not interview Meeks' wife.

The Defendant argues that his trial attorneys provided ineffective assistance because they failed to move to have Meeks' Chevrolet Blazer and

clothing impounded and tested for blood, gun powder residue, drugs, and other evidence.

The Defendant's trial attorneys were appointed on April 16, 1998. It is not clear when the Defendant's attorneys received the investigative and forensic reports and other documents provided through discovery. It is clear, however, that there was substantial elapsed time between the appointment of counsel, and the time when the said attorneys learned what the investigators had done and what they had failed to do.

At trial the Defendant's attorneys cross-examined State's witnesses about the failure to impound, photograph and examine the Defendant's vehicle and clothes.

There has never been any contention that Meeks' wife was present at the murder scene. Of course, she should, nevertheless, have been interviewed by the investigators and by the Defendant's trial attorneys.

In support of his Rule 32 Petition the Defendant has not, however, offered any evidence to establish that Meeks' wife would have implicated Meeks in this crime. While the failure of the investigators and trial attorneys to interview her is not reasonably explained by either, the Defendant has not carried his burden of establishing that such an interview by the trial attorneys would have benefited the Defendant.

The Defendant has failed to show that the trial attorneys provided ineffective assistance of counsel in this regard.

4. Victim as Investigator.

When the driver of the van exited the vehicle on Highway 68 in rural Cherokee County he fired two shots at Investigator Danny Smith who was in pursuit. The Defendant contends that because Smith continued to participate in the investigation of this case in the days and weeks that followed, the investigation was "tainted."

In support of his Rule 32 Petition the Defendant has submitted the reports of investigators who indicate that the practice of a victim serving as investigator is a prejudicial irregularity. The State has submitted the affidavit of an agent with the Alabama Bureau of Investigation who opined that Smith's participation was not improper under the circumstances of this case.

There is no evidence that the case against the Defendant was tainted by Smith's participation as an investigator. The overwhelming evidence against the Defendant establishes the Defendant's guilt with or without Smith's participation.

5. Friends Attending Meeks' Interview.

When investigators from Cherokee County, Alabama traveled to Illinois to interview Meeks, they were accompanied by Fort Payne, Alabama police officer Tony Burch who was a friend of Meeks from an earlier time when Meeks lived in this area.

Deputy Sheriff Tom Arambasich was also present during the interview. He was Meeks' long-time friend from Chicago to whom Meeks first reported the shooting, and it was Arambasich who contacted the law enforcement authorities in

Cherokee County Alabama.

The Defendant argues that it was improper for the Cherokee County Alabama investigators to allow Meeks' friends to be present during his interview. According to the Defendant, the Cherokee County investigators did not adequately investigate Meeks because of Meeks' friendship with Burch and Arambasich. The State has explained that Burch and Arambasich were requested to attend the interview in order to have the Defendant feel more relaxed.

It is correct that the Defendant's trial attorneys did not aggressively emphasize the fact that Meeks' law enforcement friends, Burch and Arambasich, attended the interview. If the trial attorneys had done so, the jury might have been given the explanation which is now asserted before this Court; that is, they were allowed to attend in order to facilitate a free flow of information. If the trial attorneys had aggressively attacked the interview technique, the State's explanation might have given the Meeks' interview greater weight in the eyes of the jury.

It seems quite reasonable that the Defendant's trial attorneys did not want to do anything to bolster Meeks' testimony. Accordingly, the Defendant's trial attorneys did not provide ineffective assistance of counsel merely by failing to question the interview process to any greater extent than pointing out the presence of Meeks' friends at the time.

III. EYE WITNESS IDENTIFICATION.

The Defendant argues that his trial attorneys failed to provide effective

assistance of counsel because the trial attorneys failed to move to suppress witnesses' identifications of the Defendant.

1. Investigator Danny Smith.

After Mr. Clayton was shot his assailant drove the victim's vehicle several miles to the place where the assailant exited the vehicle, turned and fired at the pursuing Investigator, Danny Smith, and fled into the nearby woods.

As a result of a manhunt involving tracking dogs and law enforcement officers on foot, the Defendant was apprehended hiding along a creek bank in the woods in rural Cherokee County. While the Defendant was being transported to jail, the transport vehicle stopped to let Investigator Smith see the person who had been apprehended to make sure the right person was in custody. Investigator Smith observed the Defendant in handcuffs sitting in the back of a police car. Investigator Smith was able to identify the Defendant as the driver who fired shots and fled on foot.

At trial Investigator Smith testified in great detail about his proximity to the Defendant, the headlights which made the Defendant visible, and the person's appearance and conduct at the time and place in question. Investigator Smith testified that he got "a good look at the man who came out of the van."

During the trial the Defendant's attorneys were granted a hearing outside of the presence of the jury concerning Investigator Smith's out-of-court identification of the Defendant. The Defendant's Rule 32 counsel argues that the Defendant's trial attorneys were ineffective as a result of having failed to seek a

pre-trial hearing on the question of whether Investigator Smith's identification was tainted by an impermissibly suggestive one-man show-up that occurred on the night of the crimes.

In its affirmance in this case the Court of Criminal Appeals concluded that the trial court properly allowed Investigator Smith's testimony. Because of Investigator Smith's high degree of certainty in his identification, this Court would not have disallowed the testimony as a result of a pre-trial hearing. After all, the Court did allow Investigator Smith to testify before the jury after first conducing a hearing on this subject outside of the presence of the jury. Therefore, the Defendant's trial attorneys were not ineffective for having failed to ask for a pre-trial hearing.

2. Larry Twilley.

The Defendant argues that his trial attorneys provided ineffective assistance by having failed to move to suppress Larry Twilley's in-court identification of the Defendant. The Defendant also argues that his trial attorneys' cross-examination of Mr. Twilley was constitutionally deficient.

At trial, Mr. Larry Twilley testified, in part, as follows:

> Q. If you would, tell these ladies and gentlemen what you observed unusual about the van, please, sir.
> A. Well, there was a loud noise that caught our attention and we turned around to see what it was and as we saw it, the door was being jerked open and the shooting starts.
>
> ***

Q. What, if anything, did you see? Was there anybody in the van?
A. Yes, sir.
Q. Do you know if it was a white man, black man?
A. It was an older white man.
Q. Okay. And you said somebody pulled the door open?
A. Right.
Q. Alright. And can you give a description of the person that pulled the door open?
A. It was a black guy, very little hair, and seemed like a goatee is about all I can remember of that.
Q. Do you have an idea about his height, weight? Was he heavy, slim?
A. He wasn't real heavy, but he wasn't slim.
Q. Okay. Do you remember whether or not he had anything on his head?

***

A. Not that I can remember. I mean, I kept seeing something, seems like something red, but I don't know if it was on his head or not.

***

Q. Okay. All tolled, Mr. Twilley, do you know how long that took?
A. About three or four minutes.
Q. Alright. Were you able to see the faces of either the man in the van or the black man that did the shooting?
A. The side of the face, the side.
Q. I'm sorry?
A. The side of the face of the guy that done the shooting, when he turned and came around.
Q. Would you be able to identify that man if you saw him?
A. Yeah.
Q. Is that man that you saw do the shooting that night, is he in the courtroom today?
A. Right over there. (indicating)
Q. You're pointing to the man seated at the table?
A. Yeah, because the hairline is what stood out the

most.

On cross-examination Mr. Twilley testified, in part, as follows:

Q. Alright. And the individual that you described, according to what you just said then, he would have opened the door in that direction, correct?
A. Right.
Q. Wouldn't that have put the door between him and you?
A. Well, I didn't really see him that well until he started turning out, and that's when I - -
Q. Alright. So you didn't see him at the time that he opened the door and jumped in the van?
A. No, I could see the driver and his arms.
Q. Alright. And you said that you saw one side of his face?
A. Right.
Q. And that was as he drove past you turning right, headed west towards Leesburg; is that right?
A. Right.

Upon cross-examination about the elapsed time the witness testified:

A. It happened in one cycle of the red light.

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Q. ...but you also said you only saw him that brief moment, is that correct? However long it was?
A. (Nodded in the affirmative.)
Q. And you told us you recognized him this morning because of his hairline; is that correct?
A. That's the part that stands out the most.
Q. That's the part that stands out. Well, now, didn't you tell the police back on the sixth of March when you gave a statement that he was wearing a red and black striped boggin?
A. I said he had something red and black.
Q. On his head?
A. Around his head.
Q. Okay. And yet, though he had this red and black thing on his head, the only way you can

identify him, the thing that stands out in your memory is his hairline; is that correct?
A. When he come around the corner, he didn't have anything on his head.

In footnote 23 of the Court of Appeals decision affirming the Defendant's conviction, the Court stated: "We have reviewed the record and conclude that the trial court did not err in allowing Twilley to identify Gavin at trial."

Although the Defendant argues that his trial attorneys were ineffective for having failed to move to suppress Mr. Twilley's in-court identification of the Defendant, and for having failed to effectively cross-examine Mr. Twilley, the omissions now claimed by the Defendant simply do not rise to the level of ineffective assistance of counsel. Even if the Court had been requested to conduct a hearing out of the presence of the jury, Mr. Twilley's testimony would have been allowed in order for the jury to give it such weight as the jury found it entitled to receive.

The Defendant's trial attorneys were not constitutionally deficient in their cross-examination of Mr. Twilley. For example, the trial attorneys elicited testimony that indicated that the position of Mr. Twilley's car in relation to the murder made it difficult for him to have seen the murderer. Testimony was elicited that Mr. Twilley's attention was not drawn to the scene of the shooting until after the shots were fired. The trial attorneys established that Mr. Twilley could only see the side of the shooter's face for a short time.

During closing argument these aspects of Mr. Twilley's testimony were emphasized to the jury, and the Defendant's trial attorneys faulted law enforcement

for failing to have Mr. Twilley view a lineup in the twenty months preceding the trial.

The Defendant apparently contends that there was a fatal inconsistency between Mr. Twilley's description of the assailant as given on the night of Mr. Clayton's murder, and the description given at trial.

The Defendant points out that in his statement Mr. Twilley described the assailant as "about six feet tall" and as "slim." but at trial he stated that the assailant "wasn't real heavy, but he wasn't slim."

The Defendant argues that the description given by Mr. Twilley on the night of the crime, and the description given at trial, more closely describes Mr. Meeks than the Defendant, and that the trial attorneys were deficient in failing to make these comparisons.

The Defendant was five feet eight inches tall and weighed 145 pounds at the time of his arrest. Meeks was five feet ten inches tall and weighed 240 pounds at the time. Meeks weighed almost one hundred pounds more than the Defendant.

This Court finds it unrealistic to believe that Mr. Meeks, who weighed almost 100 pounds more than the Defendant, and who was only two inches taller than the Defendant, more closely fits the description given by Mr. Twilley on the night of the murder, and again at trial.

Mr. Twilley testified that the assailant's most distinctive feature was his hairline. Indeed, the Defendant has a distinctive hairline. Although Mr. Meeks has a receding hairline, the Defendant's physical appearance as observed by Mr.

Twilley on the night of the murder and at trial was the factor which adds certainty to Mr. Twilley's in-court identification.

This Court finds that the Defendant's trial attorneys were not ineffective merely because they failed to convince the jury that Meeks' physical characteristics fit Mr. Twilley's description given on the night of the murder and at trial. On the contrary, the Defendant's physical characteristics more closely fit Mr. Twilley's description of the assailant given on the night of the murder.

IV. SEQUESTRATION OF WITNESSES:

The Defendant contends that his trial attorneys provided ineffective assistance by failing to move the Court for sequestration of witnesses.

Based on the affidavits of Larry Twilley and Ronald Baker, it appears that these witnesses were allowed to wait with others prior to testifying. Larry Twilley's affidavit states that he and another witness "talked about the shooting while I was waiting to be called to testify." Mr. Twilley does not say that his testimony was in any way affected by his discussions.

Ronald Baker's affidavit states that he "felt intimidated by the detective from Chicago and felt like I needed to agree with and cooperate with him." Mr. Baker's testimony had very little substantive value. Mr. Baker "[s]aw somebody walking toward the van. ...I saw him walk toward him and the door opened and it was, bam, bam...." Mr. Baker was unable to identify the shooter and did not see anything that happened after the shots were fired.

There is no evidence before this Court to establish that either Mr. Twilley or

Mr. Baker or any other witness altered their testimony in any way as a result of any pre-testimony contact with the prosecuting attorneys, other witnesses, or any other person.

V. WITNESS PREJUDICE.

Barbara Genovese (hereinafter Ms. Genovese) was a jailer at the Cherokee County Detention Center where the Defendant was incarcerated prior to trial. The Defendant filed a *pro se* civil complaint in federal court against the Cherokee County Sheriff, the Chief Investigator, the Detention Center Administrator, the Cherokee County Commission President, and Barbara Genovese, a supervisor at the Cherokee County Detention Center. These defendants were sued in their official capacities. The complaint alleged that the Defendant had been subjected to discrimination and unconstitutional treatment as a pre-trial detainee.

At the Defendant's trial for the murder of Mr. Clayton Ms. Genovese testified that while the Defendant was in jail she heard the Defendant make a comment implying that he, the Defendant, and not Dewayne Meeks, was the murderer. The Defendant argues that his trial attorneys failed to effectively cross-examine Ms. Genovese by suggesting that she was biased as a result of being named as a Defendant in the federal civil complaint.

The Defendant has not presented any evidence establishing that the Defendant's lawsuit created any personal bias on the part of Ms. Genovese.

Had the trial attorneys attempted to impeach Ms. Genovese on this subject, it might have led to testimony that the Defendant was kept in segregation because

he was charged with capital murder and considered too dangerous to put in the jail's general population. Such testimony could have been prejudicial to the Defendant.

The only practical way that the trial attorneys would have known of the lawsuit is for the Defendant to tell them. Therefore, the Defendant's trial attorneys may not have known of the lawsuit.

There is no evidence that the trial attorneys provided ineffective assistance of counsel with regard to the examination of Ms. Genovese.

VI. DEFENDANT'S PRIOR MURDER CONVICTION.

The Defendant argues that his trial attorneys were ineffective in failing to present evidence of the Defendant's prior conviction for murder from being introduced during the guilt phase of the trial.

The Defendant was charged with violating ALA. CODE 13A-5-40(a)(13) which requires proof that the Defendant committed a murder within twenty years preceding the commission of the charged offense. In this case, therefore, the State had the burden of presenting evidence of the Defendant's Illinois conviction.

The Defendant reasons that his trial attorneys should have stipulated to the prior conviction rather than having said evidence otherwise presented to the jury. The Defendant has failed to explain how a stipulation of his prior conviction would have mitigated the evidence of a prior conviction which was required to be proved as an element of the charged offense. This Court finds no basis for the

Defendant's argument that his trial attorneys were ineffective for having failed to so stipulate.

VII. MITIGATION.

The Defendant contends that his trial attorneys were ineffective in failing to present mitigation evidence of the Defendant's medical, psychological, sociological, and cultural history to explain or lessen the Defendant's culpability, and to support favorable consideration of a sentence less than death.

1. Lucia Penland.

The Defendant's trial attorneys were appointed on April 16, 1998. On October 11, 1998, the Defendant's lead counsel, Mr. Bayne Smith, contacted Ms. Lucia Penland of the Alabama Prison Project to engage Ms. Penland's services as a mitigation expert.

On Defendant 24, 1998, Mr. Bayne Smith sent Ms. Penland an executed engagement agreement at which time Ms. Penland was advised of a possible April 1999 trial. She was requested to contact Mr. Smith after the first of the year.

Ms. Penland apparently did not contact Mr. Smith until March 19, 1999, when she advised Mr. Smith that she could not be prepared before October 1999.

On April 23, 1999, Ms. Penland contacted Professor Craig Haney to engage his services as an expert on the psychological impact of imprisonment. Dr. Haney agreed to help if the trial was postponed.

At the request of the Defendant's trial attorney, and to accommodate Ms. Penland and Dr. Haney, the trial was postponed until November 1, 1999.

Ms. Penland met with Bayne Smith and the Defendant on April 28, 1999. In her testimony he stated that she had a "difficult time in the initial interview...convincing [the Defendant] to give me any information." In her affidavit Ms. Penland described the Defendant as "initially hesitant to put together a mitigation case as he maintained that he did not commit the murder."

Nevertheless, Ms. Penland traveled to Chicago in May 1999 for the purpose of further developing the necessary background information. In her affidavit Ms. Penland states that she was "unable to meet" with the Defendant's mother. In her testimony Ms. Penland acknowledged that the Defendant and his family would not cooperate with her. The Defendant's mother would not even agree to be interviewed.

In her fax to Bayne Smith on October 13, 1999, Ms. Penland recommended a further postponement of the trial due, in part, to the "lack of cooperation we have encountered." In her letter of October 19, 1999, to Mr. Smith, Ms. Penland states that the compilation of mitigation evidence is not complete due, among other reasons, to the "lack of cooperation from Mr. Gavin and his family." In his reply to Ms. Penland, Mr. Smith confirms that the Defendant "continues to be completely unwilling to discuss his background as it relates to the development of mitigation evidence."

Notwithstanding Ms. Penland's fax to Mr. Smith on October 13, 1999, Mr. Smith did not ask for a postponement of the November 1, 1999, trial, because the Court's Order postponing the earlier trial setting stated that no further

postponement would be granted based on the delay in the work of the Alabama Prison Project.

Although Ms. Penland seems to blame Bayne Smith with Ms. Penland's failure to conduct the mitigation investigation she says was needed, she undertook those responsibilities, and Mr. Smith was justified in relying on her to do what was needed in this regard.

Ms. Penland, apparently knowing that she was unable to personally conduct the mitigation investigation, engaged the services of John David Sturman, a sentencing consultant from Chicago, to assemble mitigation information. Mr. Sturman's findings were considered during the sentencing phase of this case.

Any fault which may be assigned for the absence of additional mitigation evidence is the fault of the Defendant and his family for failing or refusing to cooperate with his trial attorneys and the mitigation specialists.

This Court finds no support for the ineffective assistance of counsel claim relating to the work of Lucia Penland and the Alabama Prison Project, or their designees.

2. Betty Knight Paramore

Dr. Betty Knight Paramore is a mitigation specialist and forensic psychologist in Chicago. The Defendant presented her testimony at the Rule 32 hearing to illustrate what the Defendant contends the trial attorneys should have done to present mitigation evidence in this case.

Dr. Paramore identified a number of risk factors in the Defendant's life:

Low socioeconomic status/poverty
Parental criminality
Poor Parent-child relationship
Harsh, lax or inconsistent discipline
Separation from parent
Domestic violence
Abusive parent
Neglect
Weak social ties
Antisocial peers
Delinquent siblings
Gang membership
Risk Taking
Aggression
Community poverty
Concentration of delinquent peer groups
Availability of drugs and firearms
Exposure to violence.

The Defendant argues that had his trial attorneys done a reasonable investigation of mitigation evidence and constructed a social history, they would have been able to "humanize" the Defendant for the jury.

While the Defendant's trial attorneys presented the report of John David Sturman, and the Defendant's Mother, the trial attorneys did not concentrate on the Defendant's childhood and his social or cultural history. Instead, the trial attorneys largely relied on the testimony of Rev. A. J. Johnson and his contact with the Defendant through Rev. Johnson's jail ministry.

The Defendant argues that he was denied effective assistance of counsel because the attorneys did not humanize him through a mitigation specialist like Dr. Paramore.

It is clear that the Defendant's trial attorneys knew much of the Defendant's social and cultural background even though the Defendant and his

family refused to co-operate in the development of the details. This Court cannot conclude that the trial attorneys erred in choosing to emphasize the Defendant's relationship with Rev. Johnson and the minister's opinion about the Defendant's redemptive qualities.

It would not have been unreasonable for the Defendant's trial attorneys to conceal the details of the Defendant's background from the rural North Alabama jury. While this Court does not know what mitigation evidence was known to the trial attorneys through the attorneys' investigation and sources, it is quite possible that even if they had had Dr. Paramore's report prior to trial, the trial attorneys might have elected not to present such evidence to the jury out of concern that such evidence would be prejudicial to the Defendant.

Based on what is known from the record that has been established in this case, this Court is unable to conclude that the trial attorneys were ineffective in failing to present a report and testimony like that of Dr. Paramore. If the purpose of such testimony would have been to "humanize" the Defendant, the portrayal of the Defendant as the product of a violent family from a violent, gang ridden, and drug infested Chicago ghetto where the Defendant had previously committed a murder would not be likely to achieve that result in the eyes of a Cherokee County, Alabama jury.

3. Craig Haney.

In April 1999, Ms. Lucia Penland contacted Dr. Craig Haney to testify about the psychological impact of imprisonment. Ms. Penland reasoned that proof

of the Defendant's "institutionalization" would mitigate the gravity of the Defendant's crime.

For reasons which were not the fault of the Defendant's trial attorneys, Ms. Penland and Dr. Haney did not prepare the case-specific assessment which Ms. Penland contemplated. Accordingly, evidence of the effects of "institutionalization" was not offered during the sentencing phase of this case.

While the Defendant seeks to assign blame to his trial attorneys, this Court does not find that the Defendant's trial attorneys were at fault for the absence of this evidence. Nevertheless, Dr. Haney was deposed on March 31, 2010, and his testimony has been offered in support of the Defendant's Rule 32 Petition to show what the Defendant contends should have been offered at trial.

The topic of "institutionalization" was discussed by Ms. Penland and trial attorney Bayne Smith. It was attorney Smith who authorized Ms. Penland to proceed in April 1999 with efforts to develop this approach.

Although Dr. Haney was unable to undertake his work in this case prior to trial, the trial attorneys did not need Dr. Haney to tell them that violence begets violence. The Defendant grew up in violence, he committed a murder as a young adult, and he lived seventeen years in prison – a violent atmosphere where he had to be placed in protective segregation.

Dr. Haney's testimony would have necessarily emphasized the Defendant's violent history. He would have concluded, however, that the Defendant adjusted well to his prison environment, and could be expected to

adjust well to a lifetime of imprisonment for his current crime. Such emphasis and conclusions would not have likely benefited the Defendant in his trial by a Cherokee County Alabama jury.

This Court does not find that the Defendant was provided ineffective assistance of counsel as a result of Dr. Haney's failure to undertake his pre-trial study of the Defendant in this case. This Court also does not find that even if such a study had been undertaken prior to trial that it would have likely resulted in a different outcome in this case.

VIII. DEFENDANT'S DECISION NOT TO TESTIFY.

The Defendant's lead trial attorney, Bayne Smith, has stated by affidavit that the Defendant failed to cooperate in the investigation of this case. Mr. Smith's affidavit also states that it was the morning of trial that the Defendant first admitted even being present at the murder scene.

The Defendant says that he was advised by his trial attorneys not to testify. Of course, this Court does not know what the Defendant told the attorneys he wanted to say. There is no way to know whether he told his trial attorneys the same thing he has told his Rule 32 attorneys.

For the purpose of this Rule 32 Petition the Court will assume that the Defendant's current explanation of the events is the same explanation he gave his trial attorneys on the day of trial. If it is the same explanation, the trial attorneys had good reason to recommend that the Defendant not testify.

The Defendant's story is not believable. Cross-examination at trial would

have been brutal, and this Court finds that the Defendant made the correct decision not to testify.

CONCLUSIONS

The Defendant contends that his trial attorneys did not undertake a sufficient investigation to make informed strategic decisions about whether to offer certain evidence or examine/cross-examine witnesses on certain subjects. The Defendant's argument is based on the Defendant's assumptions about what investigation the trial attorneys undertook, and what information they knew or failed to know.

There is no basis on which to support the Defendant's assumptions which are at the heart of his Rule 32 Petition. Neither this Court, nor the Defendant and his current attorneys, should speculate about what the Defendant's trial attorneys knew or did not know, or what they did or did not do.

In order to sustain the claim of ineffective assistance of counsel the Defendant must show that counsel's representation fell below an objective standard of reasonableness. This Court must, therefore, presume that counsel's conduct was appropriate and reasonable, unless the contrary is proven to the Court by the evidence of ineffective assistance.

In addition to proving that the Defendant's trial attorneys did not perform to an objective standard of reasonableness, the Defendant must prove that the Defendant was prejudiced by counsel's ineffective assistance.

Whether an attorney acts reasonably under the circumstances depends, in part, upon the degree of cooperation the Defendant provides in developing his defense. When, as here, the Defendant refuses to cooperate and even falsely denies even being present at the scene of the crime, the attorneys' work on the Defendant's behalf must be measured with that lack of cooperation in mind.

Bayne Smith, the Defendant's lead trial attorney is deceased. Although he executed an affidavit regarding some of the issues raised in this Rule 32 Petition, this Court is without his explanation of most of the Defendant's contentions of ineffective assistance. Under these circumstances the Court is required to presume that he exercised reasonable professional judgment on the Defendant's behalf.

The Defendant has not met his burden of proving that his trial attorneys failed to sufficiently investigate this case. Merely because the Defendant's trial attorneys did not present certain evidence or examine/cross-examine witnesses on certain subjects does not mean that the attorneys failed to make informed decisions regarding such evidence and/or testimony.

Some of the contentions raised in the Defendant's Rule 32 Petition are mere restatements of arguments made on appeal. Some of the Defendant's contentions are nuanced in the Defendant's multiple filings, but all of the Defendant's contentions have been considered by this Court.

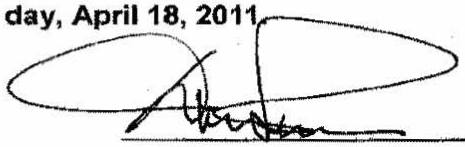
In this Court's sentencing order the Court found the evidence of the Defendant's guilt to be "overwhelming." The Court of Criminal Appeals likewise

found the evidence of the Defendant's guilt to be "overwhelming."

On the basis of the findings of this Court, whether set out herein or not, it is hereby

ORDERED, ADJUDGED AND DECREED that the Defendant's Petition(s) For Relief From Conviction or Sentence are hereby DENIED.

DONE this day, April 18, 2011.



David A. Rains, Circuit Judge

COPY TO:	Attorney for -
Ms. Pamela L. Casey Assistant Attorney General Office of Attorney General Capital Litigation Division Alabama State House 500 Dexter Avenue Montgomery, AL 35130	Plaintiff – State of Alabama
Hon. Mike O'Dell Ninth Judicial District Attorney Mr. Robert F. Johnston Assistant District Attorney	Plaintiff – State of Alabama
Mr. Stephen C. Jackson Mr. C. Andrew Kitchen MAYNARD, COOPER, AND GALE, P.C. 2400 AmSouth/Harbert Plaza 1901 Sixth Ave, N. Birmingham, AL 35203	Defendant – Keith Edmund Gavin
Mr. Prentice H. Marshall, Jr. Ms. Melanie Walker Mr. Matt Lyon SIDLEY, AUSTIN, BROWN, AND WOOD, LLP One South Dearborn St. Chicago, IL 60603	Defendant – Keith Edmund Gavin

Ms. Leigh Frazier
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[redacted]

AlaFile E-Notice

13-CC-1998-000061.60

Judge: DAVID A RAINS

To: JACKSON STEPHEN CLARK
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NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT CRIMINAL COURT OF CHEROKEE COUNTY,
ALABAMA

GAVIN KEITH EDMUND #Z-665
13-CC-1998-000061.60

The following matter was FILED on 4/18/2011 10:20:47 AM

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DWAYNE AMOS
CIRCUIT COURT CLERK
CHEROKEE COUNTY, ALABAMA
100 MAIN STREET
CENTRE, AL 35960

256-927-3637
dwayne.amos@alacourt.gov

AlaFile E-Notice

13-CC-1998-000061.60
Judge: DAVID A RAINS

To: CASEY PAMELA LYNN
220 2ND AVE E STE 210
ONEONTA, AL 35121

NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT CRIMINAL COURT OF CHEROKEE COUNTY,
ALABAMA

GAVIN KEITH EDMUND #Z-665
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AlaFile E-Notice

13-CC-1998-000061.60

Judge: DAVID A RAINS

To: GAVIN KEITH EDMUND #Z-665
HOLMAN PRISON
3700 HOLMAN UNIT 3U5
ATMORE, AL 36503

NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT CRIMINAL COURT OF CHEROKEE COUNTY,
ALABAMA

GAVIN KEITH EDMUND #Z-665
13-CC-1998-000061.60

The following matter was FILED on 4/18/2011 10:20:47 AM

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APPENDIX K

IN THE SUPREME COURT OF ALABAMA

October 23, 2015

1140665

Ex parte Keith Edmund Gavin. PETITION FOR WRIT OF CERTORARI - CRIMINAL (In re: Keith Edmund Gavin v. State of Alabama) (Cherokee Circuit Court: CC-98-61.60; CC-98-62.60; Criminal Appeals : CR-10-1313).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on October 23, 2015:

Writ Denied. No Opinion. Bolin, J. - Moore, C.J., and Stuart, Parker, Murdock, Shaw, Main, and Bryan, JJ., concur. Wise, J., recuses herself.

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

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

Witness my hand this 23rd day of October, 2015.

Julia Jordan Weller

Clerk, Supreme Court of Alabama

APPENDIX L

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

CR-10-1313

Keith Edmund Gavin v. State of Alabama (Appeal from Cherokee Circuit Court: CC98-61.60; CC98-62.60)

CERTIFICATE OF JUDGMENT

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

WHEREAS, the judgment indicated below was entered in this cause on August 22nd 2014:

Affirmed by Memorandum.

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

Witness.D. Scott Mitchell, Clerk
Court of Criminal Appeals, on this
the 23rd day of October, 2015.

D. Scott Mitchell

Clerk
Court of Criminal Appeals
State of Alabama

cc: Hon. David A. Rains, Circuit Judge
Hon. F. Dwayne Amos, Circuit Clerk
Steven J. Horowitz, Attorney - Pro Hac
Stephen C. Jackson, Attorney
Drew Kitchen, Attorney
Caroline Schiff, Attorney - Pro Hac
Melanie E. Walker, Attorney - Pro Hac
Beth Jackson Hughes, Asst. Atty. Gen.