No. _____

IN THE
Supreme Court of the United States

DAVID FREEMAN,

Petitioner,

v.

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION APPENDIX III of III

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February 21, 2023

Appendix Index

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

DAVID FREEMAN,	)	
	)	
Petitioner,	)	
	)	
v.	)	CASE NO. 2:06-CV-122-WKW
	)	[WO]
JEFFERSON S. DUNN,	)	
Commissioner, Alabama Department	)	
of Corrections,	)	
	)	
Respondent.	)	

ORDER DENYING RULE 59(e) MOTION

The matters before the court are (1) Petitioner's motion to alter or amend judgment filed August 27, 2018, pursuant to Rule 59(e), Fed. R. Civ. P. (Doc. # 107), (2) the motion to withdraw filed by Petitioner's attorney Keir Weyble (Doc. # 106), and (3) the motion to withdraw filed by Petitioner's attorney Chris Seeds (Doc. # 105). For the reasons set forth below, (1) Petitioner is entitled to no relief from the judgment issued July 2, 2018, denying Petitioner federal habeas corpus relief and denying Petitioner a Certificate of Appealability, but (2) the motions to withdraw filed by Petitioner's attorneys will be granted.

I. BACKGROUND

The facts and circumstances of Petitioner's capital offense and the procedural history of this cause, in both the state courts and this court, are set forth in detail in

the Memorandum Opinion and Order issued July 2, 2018 (Doc. # 102), in which the court (1) concluded the state trial and appellate courts reasonably rejected on the merits myriad claims presented by Petitioner on direct appeal or in Petitioner's Rule 32 proceeding, (2) rejected on the merits after *de novo* review a plethora of new claims asserted by Petitioner in his pleadings in this court, and (3) concluded all of Petitioner's claims in this court were so lacking in arguable merit as to be unworthy of a Certificate of Appealability. *Freeman v. Dunn*, no. 2:06-cv-122, 2018 WL 3235794 (M.D. Ala. July 2, 2018). Simply put, when viewed in the light most favorable to the jury's guilty verdict, the evidence at Petitioner's trial showed that he (1) fatally stabbed his former girlfriend (twenty-one times), (2) sexually assaulted and fatally stabbed (eleven times) his former girlfriend's mother, (3) stole a vehicle belonging to his former girlfriend's mother, (4) drove the stolen vehicle to his residence, (5) changed clothes and washed up, and (6) then went to work. *Id.*, 2018 WL 3235794, *1-3, *6, *8-9.

II. STANDARD OF REVIEW

The only grounds for granting a Rule 59(e) motion in the Eleventh Circuit are newly discovered evidence or manifest errors of law or fact. *Metlife Life & Annuity Co. of Conn. v. Akpele*, 886 F.3d 998, 1008 (11th Cir. 2018); *U.S. E.E.O.C. v. St. Joseph's Hosp., Inc.*, 843 F.3d 1333, 1349 (11th Cir. 2016); *Nichols v. Alabama State Bar*, 815 F.3d 726, 733 (11th Cir. 2016); *Jacobs v. Tempur-Pedic Intern., Inc.*,

626 F.3d 1327, 1344 (11th Cir. 2010); *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir.), *cert. denied*, 552 U. S. 1040 (2007). A Rule 59(e) motion cannot be used to re-litigate old matters, raise argument or present evidence that could have been raised prior to entry of judgment. *U.S. E.E.O.C. v. St. Joseph's Hosp., Inc.*, 843 F.3d at 1349; *Jacobs v. Tempur-Pedic Intern., Inc.*, 626 F.3d at 1344; *Arthur v. King*, 500 F.3d at 1343. "Motions for reconsideration should not be used to raise legal arguments which could and should have been made before the judgment was issued. Denial of a motion for reconsideration is 'especially soundly exercised when the party has failed to articulate any reason for the failure to raise the issue at an earlier stage in the litigation.'" *Lockard v. Equifax, Inc.*, 163 F.3d 1259, 1267 (11th Cir. 1998) (quoting *O'Neal v. Kennamer*, 958 F.2d 1044, 1047 (11th Cir. 1992)).

III. ANALYSIS

A. Request for Evidentiary Hearing

Insofar as Petitioner argues that he was entitled to an evidentiary hearing premised upon his arguments that he satisfied the standard for circumventing procedural default set forth in the Supreme Court's holding in *Martinez v. Ryan*, 566 U.S. 1 (2012), Petitioner's argument is a *non sequitur*. The same is true for Petitioner's arguments that this court erred in failing to address the Respondent's arguments that Petitioner had procedurally defaulted on various claims. The Supreme Court's holding in *Martinez v. Ryan* furnishes a narrow avenue for

circumventing a procedural default. It requires a showing that the performance of a federal habeas petitioner's state habeas counsel was so deficient as to preclude state court merits review of a meritorious claim of ineffective assistance by trial counsel, thus permitting a federal court to undertake a merits review of the otherwise procedurally defaulted complaint of ineffective assistance by trial counsel. *See Sullivan v. Sec'y, Fla. Dep't of Corr.*, 837 F.3d 1195, 1201 (11th Cir. 2016) ("Under *Martinez*, post-conviction counsel's failure to raise a claim in a state collateral proceeding can provide cause and prejudice to excuse a procedural default if: the procedural default is caused by post-conviction counsel's unconstitutionally ineffective assistance; the collateral proceeding in which post-conviction counsel erred was the first opportunity the defendant had to raise the procedurally defaulted claim; and the procedurally defaulted claim had at least 'some merit.'"). In this case, however, this court did not reject any of Petitioner's complaints of ineffective assistance by his trial counsel based upon a finding that Petitioner had procedurally defaulted on any of his claims. Instead, the court undertook *de novo* review of Petitioner's ineffective assistance claims, *i.e.*, the very relief to which Petitioner would have been entitled had this court endeavored to determine whether Petitioner's ineffective assistance claims were procedurally defaulted. Since there was no finding of procedural default, there was no need to address the corollary issue of whether the holding in *Martinez v. Ryan* excused Petitioner's procedural default

on any of his ineffective assistance claims. Petitioner's demand for an evidentiary hearing to resolve the applicability of *Martinez v. Ryan* to any claim in this action lacks any arguable merit and does not warrant relief from the judgment under Rule 59(e).

B. *De Novo* Review Permissible for Arguably Procedurally Defaulted Claims

Insofar as Petitioner argues this court erred in conducting *de novo* review of a variety of claims Petitioner presented for the first time in this court (as well as new factual allegations presented for the first time in this court), Petitioner is likewise entitled to no relief under Rule 59(e). The Supreme Court has made clear that federal habeas courts may deny writs of habeas corpus by engaging in *de novo* review when it is unclear whether AEDPA deference applies because a federal habeas petitioner will not be entitled to a writ of habeas corpus if his claim is rejected on *de novo* review. *Berghuis v. Thompkins*, 560 U. S. 370, 390 (2010). The Supreme Court has declined to address an issue of procedural default and chosen, instead, to resolve a claim on the merits, holding that an application for habeas corpus may be denied on the merits notwithstanding a petitioner's failure to exhaust in state court. *See Bell v. Cone*, 543 U. S. 447, 451 n.3 (2005) (citing § 2254(b)(2)). "An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." *Rhines v. Weber*, 544 U. S. 269, 277 (2005) (quoting 28 U.S.C. § 2254(b)(2)).

Writing for four Justices of the United States Supreme Court, Justice Alito explained the rationale underlying a federal habeas court's decision to eschew analysis of a factually and legally convoluted procedural default question in favor of simply addressing the lack of merit in a particular claim as follows:

> In the absence of any legal obligation to consider a preliminary nonmerits issue, a court may choose in some circumstances to bypass the preliminary issue and rest its decision on the merits. *See, e.g.*, 28 U.S.C. § 2254(b)(2) (federal habeas court may reject claim on merits without reaching question of exhaustion). Among other things, the court may believe that the merits question is easier, and the court may think that the parties and the public are more likely to be satisfied that justice has been done if the decision is based on the merits instead of what may be viewed as a legal technicality.

Smith v. Texas, 550 U. S. 297, 324 (2007) (Justice Alito, with Chief Justice Roberts and Justices Scalia and Thomas, dissenting). A Supreme Court majority employed this very approach in *Lambrix v. Singletary*, 520 U. S. 518, 520 (1997), where the Supreme Court held as follows:

> We do not mean to suggest that the procedural-bar issue must be resolved first; only that it ordinarily should be. Judicial economy might counsel giving the *Teague* question priority, for example, if it were easily resolvable against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law.

The Eleventh Circuit has likewise approved the adjudication on the merits of arguably procedurally defaulted but meritless claims. *See Jones v. Sec'y, Fla. Dep't of Corr.*, 834 F.3d 1299, 1318 (11th Cir. 2016) (federal habeas courts may deny writs of habeas corpus under § 2254 by engaging in *de novo* review when it is unclear

whether AEDPA deference applies, because a habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on *de novo* review (citing 28 U.S.C. § 2254(a)), *cert. denied*, 137 S. Ct. 2245 (2017); *Muhammad v. Sec'y, Fla. Dep't of Corr.*, 733 F.3d 1065, 1072-73 (11th Cir. 2013) ("The Supreme Court has explained that, when it appears that another issue is more 'easily resolvable against the habeas petitioner, whereas the procedural-bar issue involves complicated issues of state law,' a federal court may avoid the procedural bar issue. Because the procedural bar involves a complicated issue of state law and this petition is more easily resolvable against Muhammad on the merits, we assume without deciding that the procedural bar is inadequate."), *cert. denied*, 571 U. S. 1117 (2014); *Loggins v. Thomas*, 654 F.3d 1204, 1215 (11th Cir. 2011) ("When relief is due to be denied even if claims are not procedurally barred, we can skip over the procedural bar issues, and we have done so in the past." (citing *Valle v. Sec'y, Dep't of Corr.*, 459 F.3d 1206, 1213 (11th Cir. 2006), *cert. denied*, 552 U. S. 920 (2007)); *Thompson v. Sec'y for Dep't of Corr.*, 517 F.3d 1279, 1283 (11th Cir. 2008) ("We may, however, deny Petitioner's petition for habeas relief on the merits regardless of his failure to exhaust the claim in state court."), *cert. denied*, 556 U. S. 1114 (2009); *Henry v. Dep't of Corr.*, 197 F.3d 1361, 1366 n.2 (11th Cir. 1999) ("Judicial economy demands that federal courts attempt to avoid the inefficiency that would result from questioning the procedural dismissal of a facially meritless habeas corpus petition.

Indeed, the exercise of this discretion is a practical manifestation of that portion of the *Barefoot* inquiry requiring that the issues raised in the petition be 'adequate to deserve encouragement to proceed further.'" (citing *Barefoot v. Estelle*, 463 U. S. 880, 893 n.4 (1983))).

Thus, this court is authorized to deny relief on unexhausted or procedurally defaulted claims (without first determining whether the claims are unexhausted or procedurally defaulted) when the claims in question lack merit under *de novo* review. This is precisely what this court did in the course of rejecting on the merits a wide variety of Petitioner's unexhausted and possibly procedurally defaulted claims.

C. The Proper Standard of *De Novo* Review on Ineffective Assistance Claims

Insofar as Petitioner complains this court displayed inappropriate deference to the strategic decisions of Petitioner's trial counsel while reviewing a number of Petitioner's ineffective assistance claims under a *de novo* standard of review, Petitioner misperceives the nature of *de novo* review and the standard for evaluating the performance of counsel established in *Strickland v. Washington*, 466 U. S. 668 (1984). *See Harrington v. Richter*, 562 U. S. 86, 105 (2011):

> Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." (quoting *Strickland v. Washington*, 466 U. S. at 689).

This court employed appropriate deference when reviewing Petitioner's unexhausted ineffective assistance claims under the *de novo* standard of review appropriate for such claims. *See Porter v. McCollum*, 558 U. S. 30, 39 (2009) (holding *de novo* review of the allegedly deficient performance of petitioner's trial counsel was necessary because the state courts failed to address this prong of the *Strickland* analysis); *Rompilla v. Beard*, 545 U. S. 374, 390 (2005) (holding *de novo* review of the prejudice prong of *Strickland* was required where the state courts rested their rejection of an ineffective assistance claim on the deficient performance prong and never addressed the issue of prejudice). Likewise, even under a *de novo* standard of federal habeas corpus review, the decisions of Petitioner's trial counsel challenged in this action by Petitioner are entitled to a strong presumption of reasonableness. *See Woods v. Donald*, 135 S. Ct. 1372, 1375 (2015) ("when reviewing an ineffective-assistance-of-counsel claim, 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" (quoting *Strickland v. Washington*, 466 U. S. at 689)).

This court applied the proper deference in the course of examining the conduct of Petitioner's trial counsel and evaluating *de novo* Petitioner's possibly procedurally defaulted complaints of ineffective assistance of counsel.

D. Pleading Requirements in Section 2254 Proceedings

Insofar as Petitioner suggests that this court dismissed any of his claims based on his pleadings, in a manner analogous to the procedure set forth in Rule 4 of the *Rules Governing Section 2254 Cases in the United States District Courts*, Petitioner is factually inaccurate. Petitioner's argument misperceives the true nature of this court's review of his claims (under both the AEDPA and *de novo* standards of review) set forth in this court's exhaustive Memorandum Opinion and Order issued July 2, 2018. Petitioner also confuses the type of summary dismissal authorized under Rule 4 as a screening mechanism with the much more intensive, searching, review of the entire record undertaken by this court prior to denying relief on the merits in Petitioner's case.

Petitioner argues that he was deprived of the opportunity to amend or supplement his pleadings to allege specific facts in support of his often conclusory claims for federal habeas corpus relief. Petitioner also appears to argue in his Rule 59(e) motion that he should have been permitted additional opportunity to brief his claims for relief. Petitioner misconstrues the nature of the pleading requirements set forth in the *Rules Governing Section 2254 Cases in the United States District Courts.* As the Eleventh Circuit explained in *McNabb v. Commn'r, Ala. Dep't of Corr.*, 727 F.3d 1334, 1339-40 (11th Cir. 2013), *cert. denied*, 135 S. Ct. 951 (2015), a federal

habeas court is not required to give notice to the parties that it will decide the merits of the claims without briefing:

> First, the *Rules Governing Section 2254 Cases* do not specifically provide for briefing before a district court disposes of a habeas petition. Rule 2(c) provides that the petition must specify all grounds for relief, state the facts supporting all grounds, and state the relief requested. Rule 4 provides that a district court must examine promptly a petition and must dismiss it "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court." *Rules Governing Section 2254 Cases,* Rule 4. Rule 5 governs the filing of the respondent's answer, and it specifies the specific material the respondent must include with its filing. Rule 6, 7, and 8 address discovery, expansion of the record, and procedure for an evidentiary hearing, respectively. None of the remaining rules address briefing. Thus, there is no provision in the habeas rules that contemplates that a district court should grant the parties leave to file briefs addressing the merits of the claims that are contained in the habeas petition. Although adversarial briefing is vital to the court's decision-making process, a petitioner has no right to briefing in his habeas proceeding. Accordingly, we conclude the district court did not violate McNabb's due process rights in this circumstance (citations omitted).

Petitioner filed his original federal habeas corpus petition on February 16, 2006 (Doc. # 5) and thereafter failed to seek leave to amend. The Memorandum Opinion and Order denying relief on the merits was issued on July 2, 2018 (Doc. # 102), after the case was transferred to the undersigned.

Petitioner also misconstrues the nature of the pleading requirements applicable in federal habeas corpus proceedings. As the Eleventh Circuit explained in *Borden v. Allen*, 646 F.3d 785, 809-10 (11th Cir. 2011), *cert. denied*, 566 U. S. 941 (2012), the *Rules Governing Section 2254 Cases in the United States District*

Courts and the instructions accompanying the Standard Form for filing an action under Section 2254 found in the Appendix of Forms annexed to the Section 2254 Rules put a federal habeas petitioner on notice that he is required to engage in "fact pleading," as opposed to the mere "notice pleading" authorized under the Federal Rules of Civil Procedure:

> The § 2254 Rules and § 2255 Rules mandate "fact pleading" as opposed to "notice pleading," as authorized under *Federal Rule of Civil Procedure* 8 (a). Coupled with the form petition or motion, the federal rules give the petitioner or movant ample notice of the difference. If, for example, Rule 2(c)(1) and (2) of the § 2254 Rules should cause a petitioner (or his counsel) to doubt the words "specify all grounds" and "state the facts supporting each ground" mean, the **CAUTION** contained in paragraph (9) of the "instructions" should remove such doubt. As the Supreme Court has observed, "[h]abeas corpus petitions must meet heightened pleading requirements, *see 28 U.S.C. § 2254* Rule 2(c); *McFarland v. Scott*, 512 U. S. 849, 856, 114 S. Ct. 2568, 2572, 129 L. Ed. 2d 666 (1994).
>
> The reason for the heightened pleadings requirement -- fact pleading -- is obvious. Unlike a plaintiff pleading a case under *Rule 8(a)*, the habeas petitioner ordinarily possesses, or has access to, the evidence necessary to establish the facts supporting his collateral claim; he necessarily became aware of them during the course of the criminal prosecution or sometime afterwards. The evidence supporting a claim brought under the doctrine set forth in *Brady v. Maryland*, 373 U. S. 83, 83 S. Ct. 1194, 10 L. Ed 2d 215 (1963), for example, may not be available until the prosecution has run its course. The evidence supporting an ineffective assistance of counsel claim is available following the conviction, if not before. Whatever the claim, though, the petitioner is, or should be, aware of the evidence to support the claim before bringing his petition.
>
> Rule 4 of the *§ 2254* Rules puts the petitioner on notice of what is likely to happen if the petition fails to comply with the fact pleading requirements of Rule 2(c) and (d). "If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct

> the clerk to notify the petitioner." The judge acts *sua sponte*. "Federal courts are authorized to dismiss summarily any habeas petition that appears legally insufficient on its face, *see* 28 U.S.C. § 2254 Rule 4." *McFarland*, 512 U. S. at 856, 114 S. Ct. at 2572. As discussed below, such a summary dismissal by a federal court constitutes a ruling on the merits of a petitioner's or movant's claim (footnotes omitted).

Dismissal pursuant to Rule 4 of the *Section 2254 Rules* is appropriate at the outset of a federal habeas corpus proceeding, typically in situations in which the petitioner's inability to prevail on his claims is readily apparent from review of the petition and any accompanying documentation or review of readily available public records. For example, it is often possible upon the filing of a Section 2254 petition to determine from review of the petition and publically available state court records whether a petition for federal habeas corpus relief is barred by the one-year statute of limitations contained in 28 U.S.C. § 2244(d). In such circumstances, a district court must afford the petitioner reasonable notice and an opportunity to explain why statutory or equitable tolling precludes summary dismissal of the petition. *Day v. McDonough*, 547 U. S. 198, 210 (2006).

Likewise, summary dismissal pursuant to Rule 4 is appropriate when a federal habeas petition asserts claims that are foreclosed by applicable statute or well-settled case law. For example, 28 U.S.C. § 2254(i) provides that the ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under Section 2254. *Jimenez v. Fla. Dep't of Corr.*, 481 F.3d 1337, 1343 (11th Cir.), *cert. denied*,

552 U. S. 1029 (2007). Likewise, claims premised solely upon alleged violations of state procedural, evidentiary, or substantive rules, divorced from any accompanying allegations of a federal constitutional violation, also fail to furnish a basis for federal habeas corpus relief. *See Clark v. Atty. Gen., Fla.*, 821 F.3d 1270, 1287 (11th Cir. 2016) ("a violation of state law is not sufficient to entitle a petitioner to federal habeas relief" (citing 28 U.S.C. § 2254(d)(1))), *cert. denied*, 137 S. Ct. 1103 (2017); *Reese v. Sec'y, Fla. Dep't of Corr.*, 675 F.3d 1277, 1290 (11th Cir.) ("Questions of pure state law do not raise issues of constitutional dimension for federal habeas corpus purposes. A precedent of a state court about an issue of state law can never establish an entitlement to a federal writ of habeas corpus." (citation omitted)), *cert. denied*, 568 U. S. 905 (2012); *Hendrix v. Sec'y, Fla. Dep't of Corr.*, 527 F.3d 1149, 1153 (11th Cir.) (a violation of state law is not a ground for federal habeas corpus relief (citing *Lewis v. Jeffers*, 497 U. S. 764, 780 (1990)), *cert. denied*, 555 U. S. 1004 (2008). Thus, claims premised on either (1) the alleged ineffectiveness of state or federal counsel during collateral post-conviction proceedings or (2) alleged violations of state law are two other categories of claims properly subject to summary dismissal under Rule 4.

E. *De Novo* Review of the Entire Record

Contrary to the arguments in Petitioner's Rule 59(e) motion, this court did not summarily dismiss any of Petitioner's claims for federal habeas corpus relief

pursuant to Rule 4. Instead, this court undertook a detailed, exhaustive examination of the record and concluded that, in light of the evidence presented during Petitioner's trial, direct appeal, and Rule 32 proceedings, (1) the state courts reasonably denied relief on the merits on those claims fairly presented in the course of Petitioner's direct appeal and Rule 32 proceedings, *i.e.*, application of the AEDPA standard of review, and (2) the state court records currently before this court foreclose Petitioner's new claims, including new ineffective assistance complaints based on new factual theories which Petitioner failed to fairly present to the state courts, *i.e.*, application of a *de novo* standard of review. The analytical problems with Petitioner's federal habeas corpus claims this court identified in its Memorandum Opinion and Order issued July 2, 2018 were not problems with Petitioner's pleadings *per se*. Instead, they were (1) the fact the record before this court refuted the substance of Petitioner's claims under clearly established law (where the AEDPA standard of review was applicable) and (2) Petitioner's failure to allege any specific facts supporting his new (*i.e.*, unexhausted or possibly procedurally defaulted) claims, as required by Rule 2(c) of the *Rules Governing Section 2254 Cases in the United States District Courts.* Petitioner's conclusory ineffective assistance claims were rejected (under both the AEDPA and *de novo* standards of review) primarily because Petitioner failed to allege any specific facts

sufficient to satisfy the prejudice prong of the *Strickland* standard. *Freeman v. Dunn*, 2018 WL 3235794, *57, *59-60, *64-64, *70-73, *74-75, *79-82.

With regard to Petitioner's complaint that his trial counsel rendered ineffective assistance by failing to investigate the possibility that Petitioner had been sexually abused as a child, this court thoroughly reviewed the voluminous record, which included extensive documentation of mental health evaluations performed on Petitioner and detailed reports by social workers responsible for monitoring Petitioner's behavior while in the custody of the State of Alabama. Considering (1) Petitioner's extensive medical and mental health records included numerous reports stating that the Petitioner had denied any history of sexual contact or sexual abuse, (2) Petitioner's extensive medical, mental health, and social worker reports included no mention of any instance or history of childhood sexual abuse, and (3) the absence of any allegation in the record suggesting Petitioner ever informed his defense counsel or defense team that he had ever been the victim of childhood sexual abuse, it was objectively reasonable for Petitioner's trial counsel to employ the scarce resources available prior to Petitioner's capital murder trial to investigate other aspects of Petitioner's background and the possible availability of other forms of potentially mitigating evidence, as opposed to exploring the possibility that the Petitioner had been sexually abused as a child. *Freeman v. Dunn*, 2018 WL 3235794, *68-73.

Contrary to Petitioner's argument in his Rule 59(e) motion, this court did not criticize Petitioner for failing to inform his trial counsel *sua sponte* that he had been sexually abused as a child. What it did note, however, is that it is well-settled that the objective reasonableness of a trial counsel's strategic decision-making depends in no small part upon the information actually conveyed to the attorney by his or her client. *See Strickland v. Washington*, 466 U. S. 668, 690-91 (1984) ("[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."). "[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." *Id.*, 466 U. S. at 691.

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

> of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions (citation omitted).

Strickland, 466 U. S. at 691.

Analysis of the prejudice prong of the *Strickland* standard did not involve credibility determinations. Rather, the court assumed the factual accuracy of Petitioner's new mitigating evidence but evaluated the efficacy or weight of the new mitigating evidence in the context of all the relevant evidence now before the court, including both mitigating and aggravating evidence made part of the record during Petitioner's trial, state direct appeal, and Rule 32 proceedings. In evaluating prejudice in the context of the punishment phase of a capital trial, a federal habeas court must re-weigh all the evidence in aggravation against the totality of available mitigating evidence (had the petitioner's trial counsel chosen a different course). *Wong v. Belmontes*, 558 U. S. 15, 20 (2009); *Wiggins v. Smith*, 539 U. S. 510, 534 (2003). Petitioner is not entitled to any relief from the judgment issued July 2, 2018 (Doc. # 103).

V. CERTIFICATE OF APPEALABILITY

In the Eleventh Circuit, a district court is obligated to address *sua sponte* whether a federal habeas corpus petitioner is entitled to a Certificate of Appealability ("CoA") from a district court's order denying the petitioner's Rule 59(e) motion challenging a prior denial of federal habeas relief. *Perez v. Sec'y, Fla. Dep't of Corr.*, 711 F.3d 1263, 1264 (11th Cir. 2013) (citing 28 U.S.C. § 2253(c)((1)). A

CoA will not be granted unless the petitioner makes a substantial showing of the denial of a constitutional right. *Tennard v. Dretke*, 542 U. S. 274, 282 (2004); *Miller-El v. Johnson*, 537 U. S. at 336; *Slack v. McDaniel*, 529 U. S. 473, 483 (2000); *Barefoot v. Estelle*, 463 U. S. 880, 893 (1983). To make such a showing, the petitioner need *not* show he will prevail on the merits but, rather, must demonstrate that reasonable jurists could debate whether (or, for that matter, agree) the petition should have been resolved in a different manner or that the issues presented are adequate to deserve encouragement to proceed further. *Tennard v. Dretke*, 542 U. S. at 282; *Miller-El v. Johnson*, 537 U. S. at 336.

Petitioner's arguments in his Rule 59(e) motion are premised upon misconceptions about the pleadings requirements applicable in federal habeas corpus proceedings, as well as the deferential nature of true *de novo* review of ineffective assistance claims under the *Strickland* standard. Reasonable minds could not disagree that this court properly denied all relief requested in Petitioner's Rule 59(e) motion to alter or amend judgment. Petitioner is not entitled to a Certificate of Appealability.

VI. MOTIONS TO WITHDRAW

The Supreme Court has explained that motions to substitute counsel in capital cases should be evaluated under the "in the interests of justice" standard typically employed to judge substitution motions brought under 18 U.S.C. § 3599, which in

turn derives from 18 U.S.C. § 3006A, which governs the appointment and substitution of counsel in federal non-capital litigation. *Martel v. Clair*, 565 U. S. 648, 657-62 (2012). Unlike the situation the Supreme Court addressed in *Martel*, Petitioner does not present this court with any complaints about the performance of his federal habeas counsel or any claim there has been a breakdown in communication between himself and his federal habeas counsel. Instead, the attorney who filed Petitioner's Rule 59(e) motion filed a notice of appearance on July 23, 2018 (Doc. # 104). Petitioner's current federal habeas counsel then filed motions to withdraw on July 27, 2018 (Docs. #. 106 & 107), setting forth reasonable reasons for their respective desires to no longer represent Petitioner as this case proceeds forward. Since Petitioner is currently represented by capable federal habeas counsel, permitting the withdrawal of his other counsel under these circumstances is "in the interests of justice."

VII. ORDER

Having considered all of the arguments of Petitioner, whether specifically addressed herein or not, it is hereby **ORDERED** that all relief requested in his motion to reconsider, alter, or amend judgment, filed July 27, 2018 (Doc. # 107), is **DENIED**. Petitioner is **DENIED** a Certificate of Appealability from this court's denial of his Rule 59(e) motion. The motions to withdraw filed by Petitioner's

attorneys Keir Weyble (Doc. # 106), and Chris Seeds (Doc. # 105) are both **GRANTED.**

DONE this 15th day of August, 2018.

/s/ W. Keith Watkins
CHIEF UNITED STATES DISTRICT JUDGE

Appendix F

IN THE CIRCUIT COURT FOR THE FIFTEENTH JUDICIAL CIRCUIT
MONTGOMERY COUNTY, ALABAMA

STATE OF ALABAMA, Plaintiff,	)	
v.	)	CC No. 88-1412-EWR
DAVID FREEMAN, Defendant.	)	

SENTENCING ORDER

The Defendant, David Freeman, was charged in a six (6) count indictment with capital murder. Count I charged Freeman with the capital offense of two murders during the same scheme or course of conduct; Count II charged Freeman with the capital offense of murder of Sylvia Gordon during a burglary; Count III charged Freeman with the capital offense of murder of Mary Gordon during a burglary; Count IV charged Freeman with the capital offense of murder of Sylvia Gordon during a robbery; Count V charged Freeman with the capital offense of murder of Mary Gordon during a robbery; and Count VI charged Freeman with the capital offense of murder of Mary Gordon during a rape.

The trial on these charges commenced on June 17, 1996. On June 25, 1996, the jury found Freeman guilty on all counts. After a brief recess, the penalty phase of the trial commenced, and the jury returned an advisory verdict of eleven to one (11 to 1) recommending death.

On August 1, 1996, a sentencing hearing was held before the Court. No new evidence was offered by the State of Alabama or Freeman, and he did not make any statements prior to the pronouncement of sentence.

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I. VICTIMS

Sylvia Gordon was seventeen years old at the time of her death. She was a senior at Sidney Lanier High School and enrolled in the LAMP program, an advanced academic program. She was planning to attend college, after graduation from high school. Mary Gordon was a forty-three year old single mother having been divorced for sixteen years prior to her death. She had successfully raised two daughters, Deborah Gordon Hosford and Sylvia. She worked her entire adult life to provide for her daughters.

II. SUMMARY OF THE CRIME AND THE DEFENDANT'S PARTICIPATION

On March 11, 1988, Deborah Gordon Hosford picked up her sister, Sylvia Gordon, from Lanier High School and drove to their home at 29 Rosebud Court arriving at approximately 3:30 p.m. Waiting on the porch was the Defendant, David Freeman, who had ridden his bicycle to their home. Freeman had lived in a trailer near the Gordon home, and he wanted a romantic relationship with Sylvia Gordon. Sylvia was not romantically interested in Freeman, and was planning to tell him that she no longer wished to see him. Deborah, Sylvia, and Freeman entered the home. Deborah had to return to work and left at approximately 3:45 p.m. When she left, Freeman and Sylvia were sitting on the couch.

Freeman had given Sylvia a note essentially stating that he did not like seeing her only once a week, that he loved her, and that he did not want to lose her like all of his other girlfriends. Sylvia in return gave Freeman a note stating that she viewed the relationship only as friendship and that she did not want to have a serious relationship. Approximately a week prior to the murders, Freeman had a conversation with Frances Boozer, a

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co-worker, and told her that he would rather see Sylvia dead than someone else have her.

At about 1:00 a.m. Deborah Gordon Horsford returned home. She found the lights of the home turned off and the door unlocked and slightly ajar. She went inside and noticed that the house had been ransacked. She went to her sister's bedroom and found Sylvia, dead, in her bed with multiple stab wounds and clad only in a t-shirt and socks. As she was fleeing the house, she saw her mother, Mary Gordon, lying in a pool of blood on the floor of her bedroom. Mrs. Gordon was clad only in a shirt with her body being nude from the waist down with her legs spread apart.

Police arrived at the Gordon home and found blood throughout most of the house. Mary Gordon was stabbed 14 times by Freeman; two wounds were fatal. She lived for about five minutes. She had also been raped, and the semen deposited in her was consistent as having been left by Freeman. Sylvia Gordon was stabbed 22 times by him, and she remained conscious for eight to ten minutes after the first wound was inflicted. None of these wounds were fatal; Sylvia Gordon bled to death. Examination also revealed that Sylvia Gordon had tears in her vagina. Additionally, police found a shoe print on the shirt of Mary Gordon and a shoe print on a card found on the floor near the body of Mary Gordon. Police also noted that all phone lines in the house had been cut.

Freeman had brought a knife with him and used it to brutally kill Sylvia Gordon because she did not want a relationship, as well as kill Mary Gordon when she walked in on the murder. After committing the murders, Freeman stole the Gordon's 1980 Pontiac Sunbird and put his bike that he had ridden to the Gordon home in it and fled the scene. He attempted to establish an alibi by later going to work. The Gordon's car was found in a

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parking lot near Freeman's apartment. Freeman's fingerprint was found on the car and blood that was consistent with that of Sylvia Gordon and Mary Gordon was also in the car. Additionally found in the car was a butcher knife that had been cleaned of blood. The butcher knife was examined by an expert in trace evidence with the Department of Forensic Sciences and was determined to be consistent with having caused the wounds to Mary Gordon, to cut the bra and panties of Mary Gordon and to cut the jeans of Sylvia Gordon.

When the police arrived at Freeman's apartment, Freeman answered the door, and the officers noted a bandage to Freeman's right hand. When asked how he cut his hand, Freeman lied, claiming that he had cut his hand while repairing a chair. Freeman was arrested at his apartment. The police, upon a consent to search, found the clothing worn by Freeman which had blood consistent with that of Sylvia Gordon on them. A mixture of blood and semen was found in the underwear that he had worn. His shoes were seized and compared to the prints found on the shirt of Mary Gordon and the card found in the Gordon home. Examination revealed that Freeman's shoes were consistent with the prints found at the scene. Bite marks were noted on Freeman's arm which were made by Sylvia Gordon.

Freeman initially lied to the police as to his involvement in the crimes. He tried to establish an alibi for his whereabouts. However, when confronted with the evidence, Freeman admitted to stabbing Sylvia Gordon and stated that upon Mary Gordon entering the home he had no choice but to stab her. Freeman also claimed to have blacked out on two occasions during the crimes.

In late 1988 and early 1989 Freeman was mentally evaluated by the staff at Taylor Hardin Secure Medical Facility who found that he suffered no mental disease or defect which caused him to lack substantial capacity to

appreciate the criminality of his conduct or to conform his conduct to the requirements of law. In 1995, he was evaluated by Dr. Guy Renfro, an expert forensic psychologist, who also found he was responsible for his acts at the time of the offense.

III. AGGRAVATING CIRCUMSTANCES

The State argues that it has proved two aggravating circumstances:

(1) The capital offense was committed while Freeman was engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit, burglary, robbery and rape. Section 13A-5-49(4) of Code of Ala; and

(2) The capital offense was especially heinous, atrocious, or cruel, when compared to other capital offenses. Section 13A-5-49(8) of Code of Ala.

The Court finds that pursuant to the jury verdict, the State has proven beyond a reasonable doubt that Freeman committed the capital offense while in the commission of, or an attempt to commit, or in flight after committing or attempting to commit, burglary, robbery and rape. The finding of this aggravating circumstance is required by law. Section 13A-5-45(e) of Code of Ala. This aggravating circumstance shall be found and considered by the Court in determining a sentence. Section 13A-5-50 of Code of Ala. In as much as a jury found Freeman guilty of murder during the commission of a burglary, robbery and rape, the aforementioned aggravating circumstance is present by application of statute. As a matter of law, the Alabama Court of Criminal Appeals has also held that a trial court may find an aggravating circumstance even if the aggravating circumstance was an element of the

capital offense itself. Bradley v. Ala., 494 So.2d 750 (Cr. App. 1985), aff'd 494 So.2d 772 (Ala. 1986), cert. denied, 480 U.S. 923 (1987).

This Court further finds that the State has proven beyond a reasonable doubt the aggravating circumstance that this offense was especially heinous, atrocious, or cruel compared to other capital offenses. This aggravating circumstance is intended to apply "to only those consciousless or pitiless homicides which are unnecessarily tortuous to the victim." Ex parte Kyzer, 399 So.2d 330, 334 (Ala. 1991). The State must prove beyond a reasonable doubt that Sylvia and Mary Gordon experienced pre-mortem suffering; however, the suffering may either be physical or psychological. "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter indifference to or even the enjoyment of the sufferings of others. The words, "heinous, atrocious, or cruel" do not adequately describe these tortuous murders. Sylvia Gordon, only seventeen years old, with her entire life ahead of her, was stabbed 22 times and slowly, painfully bled to death because she did not want to be romantically involved with Freeman. Sylvia Gordon struggled to live. Her blood was smeared throughout her home as she struggled to escape the knife wielded by Freeman. Freeman answered her pleas by cutting all the phone lines in the home to prevent any call for help and then by taking her to her bed, cutting away her pants, raising her shirt, ripping her bra and exposing her breasts and attempting to rape her after she had died. Mary Gordon was stabbed 14 times, and as she was taking her last breaths, Freeman raped her. The suffering of Mary Gordon is unimaginable. She died knowing that her child was struggling to live and she was unable to save her. Sylvia Gordon and

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Mary Gordon were tortured at the hands of Freeman, and this Court finds that these killings were especially heinous, atrocious or cruel.

IV. MITIGATING CIRCUMSTANCES

Freeman has put forward some mitigating circumstances to support that he should receive life in prison without parole as opposed to the punishment of death. The Court considered the following mitigating circumstances listed under Section 13A-5-51 of the Code of Alabama:

(1) The Court finds as a mitigating circumstance that the Defendant has no significant history of prior criminal activity.

(2) The Court finds as a mitigating circumstance the capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(3) Neither victim was a participant in the defendant's conduct or consented to it.

(4) The defendant was not an accomplice in the capital offense committed by another person and his participation was not relatively minor.

(5) The defendant did not act under extreme duress or under the substantial domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired.

(7) The Court finds as a mitigating circumstance that Freeman was eighteen (18) years old at the time of the crime.

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In addition to the statutory mitigating circumstances, the Court has considered all aspects of Freeman's character or record and all circumstances of the offense offered by him as a basis for a sentence of life imprisonment without parole. The Court also considered all other relevant mitigating circumstances offered by him. The Court finds that Freeman's emotional disturbance due to a difficult family history and his transfer to a number of different placements is a mitigating circumstance. The Court further finds that the Defendant's antisocial personality is a mitigating circumstance.

V. CONCLUSION

This Court has considered this case at length. This Court has considered the jury's recommendation, the aggravating circumstances, the mitigating circumstances, and the presentence report, and the Court has engaged in the process required by law. The Court has not considered in deciding the sentence the recommendation of punishment in the presentence report, the previous jury's recommendation, nor the recommendation of the victims' family, if any. The Court finds, based on the nature of the aggravating circumstances, and the jury's advisory verdict, that the aggravating circumstances outweigh the mitigating circumstances, and therefore, David Freeman's punishment will be fixed at death.

The judgment and sentence based on the foregoing findings, it is the judgment of this Court that David Freeman be sentenced to death by electrocution.

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Freeman is further ordered to pay court costs, attorney fees, restitution in the amount of $14,974.00, and a $50.00 assessment to the Alabama Crime Victims Compensation Fund.

Done this 15 day of August, 1996.

Eugene W. Reese, Circuit Judge
Fifteenth Judicial Circuit
of Alabama

CC: Hon. Eleanor I. Brooks, District Attorney
Hon. J. Randall McNeill, Deputy District Attorney
Hon. Teresa C. Harris, Deputy District Attorney
Hon. Allen Howell, Attorney for Defendant
Hon. Bill Abell, Attorney for Defendant
Hon. John Norris, Attorney for Defendant

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Appendix G

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776 So.2d 160
(Cite as: 776 So.2d 160)

H

Court of Criminal Appeals of Alabama.
David FREEMAN
v.
STATE.
CR-95-2080.

April 30, 1999.
Rehearing Denied June 18, 1999.

Defendant, whose conviction for six counts of capital murder and death sentence were reversed on appeal, 651 So.2d 576, was convicted upon remand in the Montgomery Circuit Court, No. CC-88-1412.80,Eugene W. Reese, J., of same charges and sentenced to death. Defendant appealed. The Court of Criminal Appeals, Long, P.J., held that: (1) defendant was not entitled to competency hearing; (2) defendant did not invoke his right to remain silent; (3) defendant's statement did not constitute request for counsel; (4) defendant knowingly, voluntarily, and intelligently waived his *Miranda* rights; (5) defendant's roommate had authority to consent to search of apartment in which defendant was staying; (6) any error in jury instruction was harmless; (7) prosecutor's guilt-phase and penalty-phase closing arguments were proper; (8) evidence was sufficient to support conviction for capital offense of murder committed during first-degree robbery; (9) evidence was sufficient to support conviction for capital offense of murder committed during a first-degree burglary; (10) conviction did not violate double jeopardy; and (11) death sentence was neither excessive nor disproportionate to penalty imposed in similar cases.

Affirmed.

Affirmed, Ala., 776 So.2d 203.

West Headnotes

[1] Criminal Law 110 ⇐1030(1)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1030 Necessity of Objections in General
110k1030(1) k. In General. Most Cited Cases
Although failure of defendant, who was sentenced to death, to object to specific issues at trial did not bar review by Court of Criminal Appeals of those issues, defendant's failure to object weighed against defendant as to any claim of prejudice made on appeal.

[2] Criminal Law 110 ⇐1035(2)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1035 Proceedings at Trial in General
110k1035(2) k. Preliminary Proceedings. Most Cited Cases
Claim that trial court erred in failing to conduct hearing to determine competency of defendant, who was sentenced to death, to stand trial was subject to plain error review, where claim was never presented to trial court. Rules App.Proc., Rule 45A.

[3] Criminal Law 110 ⇐625.10(3)

110 Criminal Law
110XX Trial
110XX(A) Preliminary Proceedings
110k623 Separate Trial or Hearing on Issue of Insanity, Incapacity, or Incompetency
110k625.10 Preliminary Proceedings
110k625.10(2) Evidence, Information, or Conduct Invoking Inquiry
110k625.10(3) k. Doubt as to

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Competency; Reasonable Cause or Grounds. Most Cited Cases
Defendant failed to meet burden of showing that reasonable or bona fide doubt existed as to his mental capacity to stand trial, and, thus, defendant was not entitled to competency hearing, where court-ordered psychological evaluations of defendant performed shortly after murders and shortly before capital murder trial failed to indicate that defendant was incompetent to stand trial and defendant's outburst during trial was consistent with description in evaluation of defendant's uncooperative behavior.

[4] Criminal Law 110 ⚿625.10(3)

110 Criminal Law
110XX Trial
110XX(A) Preliminary Proceedings
110k623 Separate Trial or Hearing on Issue of Insanity, Incapacity, or Incompetency
110k625.10 Preliminary Proceedings
110k625.10(2) Evidence, Information, or Conduct Invoking Inquiry
110k625.10(3) k. Doubt as to Competency; Reasonable Cause or Grounds. Most Cited Cases

Criminal Law 110 ⚿1148

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1148 k. Preliminary Proceedings. Most Cited Cases
The determination of whether a reasonable doubt of defendant's sanity exists is a matter within the sound discretion of the trial court, which may be raised on appeal only upon a showing of an abuse of discretion.

[5] Criminal Law 110 ⚿625.15

110 Criminal Law
110XX Trial
110XX(A) Preliminary Proceedings
110k623 Separate Trial or Hearing on Issue of Insanity, Incapacity, or Incompetency
110k625.15 k. Evidence. Most Cited Cases
Even if capital murder defendant suffered from mental illness that caused him to commit murders, he was competent to stand trial, where there was no evidence that defendant did not understand proceedings against him or that he was unable to assist in his defense.

[6] Criminal Law 110 ⚿1036.1(5)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1036 Evidence
110k1036.1 In General
110k1036.1(3) Particular Evidence
110k1036.1(5) k. Confessions, Declarations, and Admissions. Most Cited Cases
Claim that trial court erred in admitting post-arrest statements by defendant, who was sentenced to death, was subject to plain error review, where claim was never presented to trial court. Rules App.Proc., Rule 45A.

[7] Criminal Law 110 ⚿412.1(4)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.1 Voluntary Character of Statement
110k412.1(4) k. Interrogation and Investigatory Questioning. Most Cited Cases
Defendant did not invoke his right to remain silent when, in response to police officer's question regarding what happened on day of murders, defendant stated that he could not talk about it, where statement was indication that defendant did not like to talk about murders and defendant was willing to handwrite statement about murders. U.S.C.A. Const.Amend. 5.

[8] Criminal Law 110 ⚿412.1(4)

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110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.1 Voluntary Character of Statement
110k412.1(4) k. Interrogation and Investigatory Questioning. Most Cited Cases
Once informed of *Miranda* rights, an accused has the burden of indicating in some manner his wish to remain silent. U.S.C.A. Const.Amend. 5.

[9] Criminal Law 110 ⚿412.1(4)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.1 Voluntary Character of Statement
110k412.1(4) k. Interrogation and Investigatory Questioning. Most Cited Cases
When a purported invocation of a Fifth Amendment privilege is ambiguous, the police may question the accused for the narrow purpose of clarifying the equivocal request. U.S.C.A. Const.Amend. 5.

[10] Criminal Law 110 ⚿412.2(4)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.2 Right to Counsel; Caution
110k412.2(4) k. Absence or Denial of Counsel. Most Cited Cases
Defendant's statement, in response to police officer's question regarding what happened on day of murders, that he could not talk about it did not constitute request for counsel. U.S.C.A. Const.Amend. 5.

[11] Criminal Law 110 ⚿412.2(4)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.2 Right to Counsel; Caution
110k412.2(4) k. Absence or Denial of Counsel. Most Cited Cases
Invocation of the *Miranda* right to counsel requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney. U.S.C.A. Const.Amend. 5.

[12] Criminal Law 110 ⚿412.2(4)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.2 Right to Counsel; Caution
110k412.2(4) k. Absence or Denial of Counsel. Most Cited Cases
If a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, cessation of questioning is not required. U.S.C.A. Const.Amend. 5.

[13] Criminal Law 110 ⚿412.2(2)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.2 Right to Counsel; Caution
110k412.2(2) k. Accusatory Stage of Proceedings; Custody. Most Cited Cases
Defendant was not in custody when police officer asked him what happened to his hand, and thus, *Miranda* warnings were unnecessary, where officer's inquiry, which was conducted at defendant's apartment, was investigatory, rather than accusatory and question did not necessarily call for incriminating response. U.S.C.A. Const.Amend. 5.

[14] Criminal Law 110 ⚿412.2(2)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.2 Right to Counsel; Caution
110k412.2(2) k. Accusatory Stage

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of Proceedings; Custody. Most Cited Cases
The fact that an interrogation occurs inside an accused's house is a factor tending to indicate that the interview is noncustodial, and, thus, that *Miranda* warnings are not required before such an inquiry. U.S.C.A. Const.Amend. 5.

[15] Criminal Law 110 ⇐412.1(4)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.1 Voluntary Character of Statement
110k412.1(4) k. Interrogation and Investigatory Questioning. Most Cited Cases
Absent compelling influences, psychological ploys, or direct questioning, the possibility that an accused will incriminate himself, and even the subjective hope on the part of the police that he will do so, is not the functional equivalent of interrogation, for the purpose of determining whether *Miranda* warnings are required. U.S.C.A. Const.Amend. 5.

[16] Criminal Law 110 ⇐412.2(5)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.2 Right to Counsel; Caution
110k412.2(5) k. Failure to Request Counsel; Waiver. Most Cited Cases
Defendant knowingly, voluntarily, and intelligently waived his *Miranda* rights; although defendant's expert psychological witness testified that defendant suffered from schizotypal personality disorder and depression, his testimony in no way indicated that at time defendant gave statements he was unable to understand his rights and to voluntarily waive them, other psychiatrists found that defendant did not suffer from any mental disease or defect at time of murders, and interrogating officers testified that defendant was cooperative and responsive throughout questioning. U.S.C.A. Const.Amend. 5.

[17] Criminal Law 110 ⇐412(4)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412 In General
110k412(4) k. Circumstances Affecting Admissibility in General. Most Cited Cases
An accused's alleged mental condition alone will not prevent a statement from being received into evidence at trial.

[18] Criminal Law 110 ⇐519(1)

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k519 Voluntary Character in General
110k519(1) k. What Confessions Are Voluntary. Most Cited Cases
The determination of whether a confession was voluntarily made is to be based upon a consideration of the totality of the circumstances.

[19] Criminal Law 110 ⇐525

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k524 Mental Incapacity
110k525 k. In General. Most Cited Cases
Mental abnormality of an accused is only one factor to be considered in determining from the totality of the circumstances the voluntariness and admissibility of a confession.

[20] Criminal Law 110 ⇐1031(1)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1031 In Preliminary Proceedings
110k1031(1) k. In General. Most Cited Cases
Claim that warrantless arrest of defendant, who was sentenced to death, was illegal was subject to plain

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error review, where claim was never presented to trial court. Rules App.Proc., Rule 45A.

[21] Searches and Seizures 349 ⚿177

349 Searches and Seizures
349V Waiver and Consent
349k173 Persons Giving Consent
349k177 k. Joint Occupants. Most Cited Cases
Defendant's roommate had authority to consent to search of apartment in which defendant was staying, where roommate either leased or owned apartment. U.S.C.A. Const.Amend. 4.

[22] Searches and Seizures 349 ⚿173.1

349 Searches and Seizures
349V Waiver and Consent
349k173 Persons Giving Consent
349k173.1 k. In General. Most Cited Cases
The consent of one who possesses common authority over a premises is valid as against the nonconsenting person with whom the authority is shared. U.S.C.A. Const.Amend. 4.

[23] Searches and Seizures 349 ⚿173.1

349 Searches and Seizures
349V Waiver and Consent
349k173 Persons Giving Consent
349k173.1 k. In General. Most Cited Cases
The authority of a third person to consent to a search turns on whether the third person and the defendant mutually used the property searched and had joint access to and control of it for most purposes so that it is reasonable to recognize that either user had the right to permit inspection of the property and that the complaining co-user had assumed the risk that the consenting co-user might permit the search. U.S.C.A. Const.Amend. 4.

[24] Criminal Law 110 ⚿1038.1(5)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1038 Instructions
110k1038.1 Objections in General
110k1038.1(3) Particular Instructions
110k1038.1(5) k. Evidence and Witnesses. Most Cited Cases
Claim that trial court erred in instructing jury that it had already determined voluntariness of statements by defendant, who was sentenced to death, was subject to plain error review, where claim was never presented to trial court. Rules App.Proc., Rule 45A.

[25] Criminal Law 110 ⚿1038.1(5)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1038 Instructions
110k1038.1 Objections in General
110k1038.1(3) Particular Instructions
110k1038.1(5) k. Evidence and Witnesses. Most Cited Cases
Any error in jury instruction, providing that trial court had made initial determination as to voluntariness of defendant's statements to police, was harmless, where trial court made clear that jury was ultimately to decide weight and credibility of statements, and, thus, that jury was to make ultimate determination as to statements' voluntariness.

[26] Criminal Law 110 ⚿736(2)

110 Criminal Law
110XX Trial
110XX(F) Province of Court and Jury in General
110k733 Questions of Law or of Fact
110k736 Preliminary or Introductory Questions of Fact
110k736(2) k. Confessions, Admissions, and Declarations. Most Cited Cases
Whether a confession was voluntary rests initially with the trial court; once the trial judge makes the preliminary determination that the confession was voluntary, it then becomes admissible into evidence, and thereafter the jury makes a determination of

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voluntariness as affecting the weight and credibility to be given the confession.

[27] Criminal Law 110 ⇐532(.5)

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k532 Determination of Question of Admissibility
110k532(.5) k. In General. Most Cited Cases
It is improper for a trial judge to disclose to the jury that he made a preliminary determination that a confession was voluntary and, therefore, admissible.

[28] Criminal Law 110 ⇐1038.1(4)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1038 Instructions
110k1038.1 Objections in General
110k1038.1(3) Particular Instructions
110k1038.1(4) k. Elements of Offense and Defenses. Most Cited Cases
Claim that instructions effectively deprived defendant, who was sentenced to death, of insanity defense was subject to plain error review, where claim was never presented to trial court. Rules App.Proc., Rule 45A.

[29] Criminal Law 110 ⇐1038.1(4)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1038 Instructions
110k1038.1 Objections in General
110k1038.1(3) Particular Instructions
110k1038.1(4) k. Elements of Offense and Defenses. Most Cited Cases
(Formerly 203k325)
Claim that trial court in capital murder prosecution erroneously instructed jury on element of intent was subject to plain error review, where claim was never presented to trial court. Rules App.Proc., Rule 45A.

[30] Criminal Law 110 ⇐778(6)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k778 Presumptions and Burden of Proof
110k778(6) k. Intent and Motive. Most Cited Cases
Jury instruction in capital murder prosecution, providing that jury may infer that person intends natural consequences of what he does if act is done so intentionally, did not relieve state of its burden of proof on intent element; instruction did not create mandatory presumption, but instead created permissive inference, which suggested to jury only possible conclusion to be drawn from evidence.

[31] Criminal Law 110 ⇐1037.1(1)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1037 Arguments and Conduct of Counsel
110k1037.1 In General
110k1037.1(1) k. Arguments and Conduct in General. Most Cited Cases
Claims that prosecutor engaged in numerous acts of misconduct in capital murder prosecution in which death sentence was imposed were subject to plain error review, where claims were never presented to trial court. Rules App.Proc., Rule 45A.

[32] Criminal Law 110 ⇐723(1)

110 Criminal Law
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k722 Comments on Character or

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Conduct
110k723 Appeals to Sympathy or Prejudice
110k723(1) k. In General. Most Cited Cases
Prosecutor's guilt phase closing argument comments, offering personal information about capital murder victims, did not constitute improper victim-impact argument, where comments were based upon evidence presented at trial or reasonable inferences drawn therefrom.

[33] Criminal Law 110 ⇐1171.1(2.1)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1171 Arguments and Conduct of Counsel
110k1171.1 In General
110k1171.1(2) Statements as to Facts, Comments, and Arguments
110k1171.1(2.1) k. In General. Most Cited Cases
In judging a prosecutor's closing argument, the standard is whether the argument so infected the trial with unfairness as to make the resulting conviction a denial of due process. U.S.C.A. Const.Amends. 5, 14.

[34] Criminal Law 110 ⇐713

110 Criminal Law
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k712 Statements as to Facts, Comments, and Arguments
110k713 k. In General. Most Cited Cases
A prosecutor's statement must be viewed in the context of all of the evidence presented and in the context of the complete closing arguments to the jury.

[35] Criminal Law 110 ⇐713

110 Criminal Law
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k712 Statements as to Facts, Comments, and Arguments
110k713 k. In General. Most Cited Cases
Statements of counsel in argument to the jury must be viewed as delivered in the heat of debate; such statements are usually valued by the jury at their true worth and are not expected to become factors in the formation of the verdict.

[36] Criminal Law 110 ⇐699

110 Criminal Law
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k699 k. Control by Court in General. Most Cited Cases

Criminal Law 110 ⇐1154

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1154 k. Arguments and Conduct of Counsel. Most Cited Cases
Questions of the propriety of counsel's argument are largely within the trial court's broad discretion, and the trial court's decision in that respect will not be reversed on appeal, absent abuse of that discretion.

[37] Criminal Law 110 ⇐720(1)

110 Criminal Law
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k712 Statements as to Facts, Comments, and Arguments
110k720 Comments on Evidence or Witnesses
110k720(1) k. In General. Most Cited Cases
Whatever is in evidence at trial is considered subject to legitimate comment by counsel.

[38] Criminal Law 110 ⇐1171.1(6)

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110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1171 Arguments and Conduct of Counsel
110k1171.1 In General
110k1171.1(2) Statements as to Facts, Comments, and Arguments
110k1171.1(6) k. Appeals to Sympathy or Prejudice; Argument as to Punishment. Most Cited Cases
Assuming prosecutor's guilt phase closing argument comments, offering personal information about capital murder victims, were irrelevant and improper, any resulting error was harmless, where there was no evidence that comments affected trial's outcome or otherwise prejudiced defendant.

[39] Criminal Law 110 ⚿723(3)

110 Criminal Law
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k722 Comments on Character or Conduct
110k723 Appeals to Sympathy or Prejudice
110k723(3) k. Reference to Frequency of Offenses and Appeals for Enforcement of Laws. Most Cited Cases
Prosecutor's guilt phase closing argument comment, telling the jury to enforce the law fairly and firmly and to let capital murder defendant know he is responsible, was proper general appeal for law enforcement and justice.

[40] Criminal Law 110 ⚿713

110 Criminal Law
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k712 Statements as to Facts, Comments, and Arguments
110k713 k. In General. Most Cited Cases
There is no impropriety in a prosecutor's appeal to the jury for justice and to properly perform its duty.

[41] Criminal Law 110 ⚿723(3)

110 Criminal Law
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k722 Comments on Character or Conduct
110k723 Appeals to Sympathy or Prejudice
110k723(3) k. Reference to Frequency of Offenses and Appeals for Enforcement of Laws. Most Cited Cases
In closing argument, a district attorney may make a general appeal for law enforcement.

[42] Criminal Law 110 ⚿723(3)

110 Criminal Law
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k722 Comments on Character or Conduct
110k723 Appeals to Sympathy or Prejudice
110k723(3) k. Reference to Frequency of Offenses and Appeals for Enforcement of Laws. Most Cited Cases
Prosecutor's guilt phase closing argument comment, telling jury that there are very few times in our lives when we can really do justice and asking jury to do justice for capital murder victims, was proper general appeal for law enforcement and justice.

[43] Criminal Law 110 ⚿1171.1(2.1)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1171 Arguments and Conduct of Counsel
110k1171.1 In General
110k1171.1(2) Statements as to Facts, Comments, and Arguments
110k1171.1(2.1) k. In General. Most Cited Cases
Where no single instance of alleged prosecutorial misconduct constitutes reversible error, the

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cumulative effect of these instances cannot be considered to be any greater.

[44] Sentencing and Punishment 350H ⚿ 1780(2)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(2) k. Arguments and Conduct of Counsel. Most Cited Cases
Given context of entire penalty phase closing argument, prosecutor's comments, suggesting that jury should act as conscience of community and impose death penalty, that jury should speak for community and do what was right and just, and that jury could make difference by recommending death penalty, were general appeals for law enforcement and justice and appeals to discharge duties in manner to punish defendant and deter others, rather than appeal for sympathy, where, throughout argument, prosecutor urged jury to make sentence based upon law and evidence, rather than upon prejudice, sympathy, or bias.

[45] Sentencing and Punishment 350H ⚿ 1780(2)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(2) k. Arguments and Conduct of Counsel. Most Cited Cases
Prosecutor's closing argument comments during capital murder penalty phase about victims' characteristics and consequences of cutting victims' lives short were proper.

[46] Sentencing and Punishment 350H ⚿ 1763

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1763 k. Victim Impact. Most Cited Cases

Sentencing and Punishment 350H ⚿ 1780(2)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(2) k. Arguments and Conduct of Counsel. Most Cited Cases
Prosecutor may present and argue in the penalty phase of a capital trial evidence relating to a victim and the impact of the victim's death on the victim's family.

[47] Sentencing and Punishment 350H ⚿ 1780(2)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(2) k. Arguments and Conduct of Counsel. Most Cited Cases
Prosecutor may refer to a victim's characteristics at the sentencing stage of a capital case.

[48] Sentencing and Punishment 350H ⚿ 1780(2)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(2) k. Arguments and Conduct of Counsel. Most Cited Cases
The state has a legitimate interest in counteracting the mitigating evidence which a capital murder defendant is entitled to present by reminding the sentencer that just as the murderer should be considered an individual, so too the victim is an individual whose death represents a unique loss to society and, in particular, to the victim's family.

[49] Criminal Law 110 ⚿ 720(9)

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110 Criminal Law
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k712 Statements as to Facts, Comments, and Arguments
110k720 Comments on Evidence or Witnesses
110k720(7) Inferences from and Effect of Evidence in Particular Prosecutions
110k720(9) k. Homicide. Most Cited Cases

Criminal Law 110 ⇐726

110 Criminal Law
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k726 k. Responsive Statements and Remarks. Most Cited Cases
Prosecutor's guilt phase closing argument comment, that one person in courtroom believed in death penalty, executed at knife point, and forgot to care that life is precious, was legitimate inference drawn from evidence and proper response to defense argument designed to persuade jury to sympathize with defendant.

[50] Criminal Law 110 ⇐720(6)

110 Criminal Law
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k712 Statements as to Facts, Comments, and Arguments
110k720 Comments on Evidence or Witnesses
110k720(6) k. Inferences from and Effect of Evidence in General. Most Cited Cases
Prosecutors may properly comment on inferences from the evidence and may draw conclusions from the evidence based on their own reasoning.

[51] Criminal Law 110 ⇐708.1

110 Criminal Law
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k708 Scope and Effect of Summing Up
110k708.1 k. In General. Most Cited Cases

Criminal Law 110 ⇐1155

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1155 k. Custody and Conduct of Jury. Most Cited Cases
Control of closing argument rests in the broad discretion of the trial judge and, when no abuse of discretion is found, there is no error.

[52] Criminal Law 110 ⇐699

110 Criminal Law
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k699 k. Control by Court in General. Most Cited Cases
A trial judge can best determine when discussion by counsel is legitimate and when it degenerates into abuse.

[53] Criminal Law 110 ⇐723(1)

110 Criminal Law
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k722 Comments on Character or Conduct
110k723 Appeals to Sympathy or Prejudice
110k723(1) k. In General. Most Cited Cases
Prosecutor's guilt phase closing argument comment, asking jury whether it should not impose death penalty because capital murder defendant lacked " big bad record," had mental problem and tough life, and may have been under duress or domination of someone, was proper argument that mitigating circumstances were outweighed by aggravating circumstances, rather than suggestion to base

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recommendation on sympathy for victims' family.

[54] Sentencing and Punishment 350H⚿1780(2)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(2) k. Arguments and Conduct of Counsel. Most Cited Cases
Prosecutor properly referred during penalty phase closing argument to certain aspects of capital murder defendant's juvenile history in arguing that mitigating circumstances deserved little weight and were outweighed by aggravating circumstances, where juvenile records were properly before jury in support of defense that defendant suffered from mental disease or defect and defense argued many aspects of juvenile record in attempting to establish mitigating circumstances.

[55] Homicide 203 ⚿1165

203 Homicide
203IX Evidence
203IX(G) Weight and Sufficiency
203k1162 Homicide in Commission of or with Intent to Commit Other Unlawful Act
203k1165 k. Predicate Offenses or Conduct. Most Cited Cases
(Formerly 203k253(6))
Evidence was sufficient to support finding that murders of victims and taking of their automobile formed continuous chain of events so as to support conviction for capital offense of murder committed during first-degree robbery; it took defendant over one hour to ride his bicycle from his apartment to victims' house such that it was reasonable to conclude that taking automobile was part of plan to leave crime scene undetected, return to apartment, change clothes, and go to work in attempt to establish alibi. Code 1975, § 13A-5-40(a)(2).

[56] Criminal Law 110 ⚿1144.13(3)

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.13 Sufficiency of Evidence
110k1144.13(2) Construction of Evidence
110k1144.13(3) k. Construction in Favor of Government, State, or Prosecution. Most Cited Cases

Criminal Law 110 ⚿1159.2(1)

110 Criminal Law
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Verdict
110k1159.2 Weight of Evidence in General
110k1159.2(1) k. In General. Most Cited Cases
In a challenge to the sufficiency of the evidence, an appellate court must consider the evidence in the light most favorable to the prosecution, and the appellate court will not substitute its judgment for that of the trier of fact.

[57] Criminal Law 110 ⚿1159.3(2)

110 Criminal Law
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Verdict
110k1159.3 Conflicting Evidence
110k1159.3(2) k. Province of Jury or Trial Court. Most Cited Cases
Conflicting evidence presents a jury question not subject to review on appeal, provided that the state's evidence established a prima facie case.

[58] Criminal Law 110 ⚿1134(8)

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110k1134 Scope and Extent in General
110k1134(8) k. Nature of Decision Appealed from as Affecting Scope of Review. Most Cited Cases
A trial court's denial of a motion for a judgment of

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acquittal must be reviewed by determining whether there existed legal evidence before the jury, at the time the motion was made, from which the jury by fair inference could have found the defendant guilty beyond a reasonable doubt.

[59] Criminal Law 110 ⚿1144.13(2.1)

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.13 Sufficiency of Evidence
110k1144.13(2) Construction of Evidence
110k1144.13(2.1) k. In General. Most Cited Cases

Criminal Law 110 ⚿1159.2(2)

110 Criminal Law
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Verdict
110k1159.2 Weight of Evidence in General
110k1159.2(2) k. Verdict Unsupported by Evidence or Contrary to Evidence. Most Cited Cases
A verdict of conviction will not be set aside on the ground of insufficiency of the evidence unless, allowing all reasonable presumptions for its correctness, the preponderance of the evidence against the verdict is so decided as to clearly convince the Court of Criminal Appeals that it was wrong and unjust.

[60] Criminal Law 110 ⚿29(14)

110 Criminal Law
110I Nature and Elements of Crime
110k29 Different Offenses in Same Transaction
110k29(5) Particular Offenses
110k29(14) k. Homicide. Most Cited Cases
The capital crime of the intentional killing of a victim during a robbery or an attempted robbery is a single offense beginning with the act of robbing or attempting to rob and culminating with the intentional killing of the victim. Code 1975, § 13A-5-40(a)(2).

[61] Homicide 203 ⚿607

203 Homicide
203III Homicide in Commission of or with Intent to Commit Other Unlawful Act
203III(B) Murder
203k593 Particular Offenses and Conduct
203k607 k. Robbery. Most Cited Cases
(Formerly 203k18(5))
In a prosecution for the capital offense of murder committed during a first-degree robbery, the fact that the victim was dead at the time the property was taken would not militate against a finding of a robbery if the intervening time between the murder and the taking formed a continuous chain of events. Code 1975, § 13A-5-40(a)(2).

[62] Homicide 203 ⚿607

203 Homicide
203III Homicide in Commission of or with Intent to Commit Other Unlawful Act
203III(B) Murder
203k593 Particular Offenses and Conduct
203k607 k. Robbery. Most Cited Cases
(Formerly 203k18(5))
A robbery committed as a mere afterthought and unrelated to a murder will not sustain a conviction for the capital offense of murder committed during a first-degree robbery. Code 1975, § 13A-5-40(a)(2).

[63] Criminal Law 110 ⚿738

110 Criminal Law
110XX Trial
110XX(F) Province of Court and Jury in General
110k733 Questions of Law or of Fact
110k738 k. Elements of Offenses. Most Cited Cases
The question of a defendant's intent at the time of the commission of the crime is usually an issue for the jury to resolve.

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[64] Homicide 203 ⚿908

203 Homicide
203IX Evidence
203IX(B) Presumptions and Inferences
203k908 k. Intent or Mens Rea. Most Cited Cases
(Formerly 203k145)
A defendant's intent to rob a victim, for the purpose of a prosecution for the capital offense of murder committed during a first-degree robbery, can be inferred when the intervening time, if any, between the killing and robbery was part of a continuous chain of events. Code 1975, § 13A-5-40(a)(2).

[65] Homicide 203 ⚿1165

203 Homicide
203IX Evidence
203IX(G) Weight and Sufficiency
203k1162 Homicide in Commission of or with Intent to Commit Other Unlawful Act
203k1165 k. Predicate Offenses or Conduct. Most Cited Cases
(Formerly 203k253(6))
Evidence was sufficient to support finding that defendant remained unlawfully in victims' house so as to support conviction for capital offense of murder committed during a first-degree burglary; although one victim let defendant come inside house to tell him she did not want to see him anymore, violent struggle took place between defendant and victims and victims physically resisted defendant's assault, from which jury could have found that victims revoked consent to remain in house. Code 1975, §§ 13A-5-40(a)(4), 13A-7-5.

[66] Criminal Law 110 ⚿1030(2)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1030 Necessity of Objections in General
110k1030(2) k. Constitutional Questions. Most Cited Cases
Claim that multiple convictions for same killings violated double jeopardy was subject to plain error review, where claim was never presented to trial court. Rules App.Proc., Rule 45A.

[67] Double Jeopardy 135H ⚿150(2)

135H Double Jeopardy
135HV Offenses, Elements, and Issues Foreclosed
135HV(A) In General
135Hk139 Particular Offenses, Identity of
135Hk150 Homicide
135Hk150(2) k. Felony-Murder or Misdemeanor-Manslaughter Prosecution. Most Cited Cases
Convicting defendant of capital offenses of murder of two persons by one act or pursuant to one scheme or course of conduct, of murder committed during first-degree rape, and of two counts of both murder committed during first-degree burglary and murder committed during first-degree robbery for killing of two victims did not violate double jeopardy, where each offense required proof of an element that other did not. U.S.C.A. Const.Amend. 5; Code 1975, § 13A-5-40(a)(2-4, 10).

[68] Sentencing and Punishment 350H ⚿1789(3)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1789 Review of Proceedings to Impose Death Sentence
350Hk1789(3) k. Presentation and Reservation in Lower Court of Grounds of Review. Most Cited Cases
Claim that trial court erred by failing to instruct jury in capital murder prosecution that its findings as to mitigating circumstances did not have to be unanimous was subject to plain error review, where claim was never presented to trial court. Rules App.Proc., Rule 45A.

[69] Sentencing and Punishment 350H ⚿1771

350H Sentencing and Punishment

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350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1771 k. Degree of Proof. Most Cited Cases
Once a capital murder defendant offers mitigating circumstance, the state has the burden of disproving the factual existence of that circumstance by a preponderance of the evidence.

[70] Sentencing and Punishment 350H 1788(3)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(3) k. Presentation and Reservation in Lower Court of Grounds of Review. Most Cited Cases
Capital murder defendant's claim that application of statutory aggravating circumstance that offense was especially heinous, atrocious, or cruel as compared to other capital offenses was unconstitutionally vague and had been applied in overly broad and arbitrary manner was subject to plain error review, where claim was never presented to trial court. Rules App.Proc., Rule 45A.

[71] Sentencing and Punishment 350H 1625

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(A) In General
350Hk1622 Validity of Statute or Regulatory Provision
350Hk1625 k. Aggravating or Mitigating Circumstances. Most Cited Cases
Especially heinous, atrocious or cruel statutory aggravating circumstance that is used in determining whether to impose the death penalty is constitutional on its face. Code 1975, § 13A-5-49(8).

[72] Sentencing and Punishment 350H 1684

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 k. Vileness, Heinousness, or Atrocity. Most Cited Cases

Sentencing and Punishment 350H 1780(3)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(3) k. Instructions. Most Cited Cases
Penalty phase jury instruction on especially heinous, atrocious, or cruel statutory aggravating circumstance, providing that heinous meant extremely wicked or shockingly evil, that atrocious meant outrageously wicked and violent, that cruel meant designed to inflict high degree of pain with utter indifference to or enjoyment of suffering of others, and that this circumstance only covered those cases in which degree of heinousness, atrociousness, and cruelty exceeded that which will always exist when capital offense is committed, was proper, where instruction reflected Supreme Court's statement that for crime to fit within this circumstance, it must be one of those conscienceless or pitiless homicides which are unnecessarily torturous to victim and instruction was identical to proposed pattern jury instructions. Code 1975, § 13A-5-49(8).

[73] Sentencing and Punishment 350H 1684

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 k. Vileness, Heinousness, or Atrocity. Most Cited Cases
Especially heinous, atrocious or cruel statutory aggravating circumstance was properly applied in capital murder prosecution, where victim was conscious for at least eight minutes after first of 22 stab wounds and left trail of blood through house and second victim was conscious for at least five minutes after first of 14 stab wounds and was raped while she was dying. Code 1975, § 13A-5-49(8).

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[74] Criminal Law 110 ⚿1038.1(6)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1038 Instructions
110k1038.1 Objections in General
110k1038.1(6) k. Form, Language, Preparation, and Delivery; Definition of Terms. Most Cited Cases
A trial court's following of an accepted pattern jury instruction weighs heavily against any finding of plain error.

[75] Sentencing and Punishment 350H ⚿1772

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1772 k. Sufficiency. Most Cited Cases
Record supported trial court's finding that statutory mitigating circumstance that defendant's capacity to appreciate criminality of his conduct or to conform his conduct to requirements of law was substantially impaired did not apply in capital murder prosecution; although defense expert testified that it was likely that defendant was unable to conform his conduct to requirements of law, court-appointed psychologists testified to the contrary. Code 1975, § 13A-5-51(6).

[76] Sentencing and Punishment 350H ⚿1653

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1653 k. Mitigating Circumstances in General. Most Cited Cases
A sentencer in a capital case may not refuse to consider or be precluded from considering mitigating factors.

[77] Sentencing and Punishment 350H ⚿1757

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1757 k. Evidence in Mitigation in General. Most Cited Cases
Defendant in a capital case generally must be allowed to introduce any relevant mitigating evidence regarding defendant's character or record and any of the circumstances of the offense, and consideration of that evidence is a constitutionally indispensable part of the process of inflicting the penalty of death.

[78] Sentencing and Punishment 350H ⚿1658

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1658 k. Manner and Effect of Weighing or Considering Factors. Most Cited Cases
Although the trial court is required to consider all mitigating circumstances, the decision of whether a particular mitigating circumstance is proven and the weight to be given it rests with the sentencer.

[79] Sentencing and Punishment 350H ⚿1661

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1661 k. Determinations Based on Multiple Factors. Most Cited Cases
Aggravating circumstances, including that murders were committed while defendant was engaged in commission of burglary, robbery, and rape and that offenses were especially heinous, atrocious, or cruel, outweighed mitigating circumstances, including no significant history of prior criminal activity, that offenses were committed while under influence of extreme mental or emotional disturbance, that defendant was 18 years old at time of offenses, that defendant was emotionally disturbed as result of difficult family history, and that defendant was diagnosed as suffering from antisocial personality disorder, and, thus, death was

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appropriate sentence for capital murder defendant. Code 1975, §§ 13A-5-49(4, 8), 13A-5-51(1, 7).

[80] Sentencing and Punishment 350H ⚿1681

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1681 k. Killing While Committing Other Offense or in Course of Criminal Conduct. Most Cited Cases

Sentencing and Punishment 350H ⚿1683

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1683 k. More Than One Killing in Same Transaction or Scheme. Most Cited Cases
Sentencing defendant, who was convicted of capital offenses of murder committed during robbery, murder committed during burglary, murder committed during rape, and murder of two or more persons by one act or pursuant to one scheme or course of conduct, to death was neither excessive nor disproportionate to penalty imposed in similar cases. Code 1975, § 13A-5-40(2, 4, 10).

[81] Criminal Law 110 ⚿304(16)

110 Criminal Law
110XVII Evidence
110XVII(A) Judicial Notice
110k304 Judicial Notice
110k304(16) k. Records. Most Cited Cases
Court of Criminal Appeals took judicial note of fact that crimes similar to those of which defendant was convicted, including murder committed during robbery, murder committed during burglary, murder committed during rape, and murder of two or more persons by one act or pursuant to one scheme or course of conduct, have been punished capitally throughout state. Code 1975, § 13A-5-40(2, 4, 10).

***168** Thomas M. Goggans, Montgomery, for appellant.
David Freeman, appellant, pro se.
Bill Pryor, atty. gen., and Paul H. Blackwell, Jr., asst. atty. gen., for appellee.
LONG, Presiding Judge.
In June 1988, the appellant, David Freeman, was indicted for six counts of capital murder in connection with the murders of Mary Gordon and Sylvia Gordon. Count I of the indictment charged Freeman with the murder of two or more persons by one act or pursuant to one scheme or course of conduct, see § 13A-5-40(a)(10), Ala.Code 1975. Count II charged Freeman with the murder of Sylvia Gordon during a burglary in the first degree, see § 13A-5-40(a)(4), Ala.Code 1975. Count III charged Freeman with the murder of Mary Gordon during a burglary in the first degree, see § 13A-5-40(a)(4), Ala.Code 1975. Count IV charged Freeman with the murder of Sylvia Gordon during a robbery in the first degree, see § 13A-5-40(a)(2), Ala.Code 1975. Count V charged Freeman with the murder of Mary Gordon during a robbery in the first degree, see § 13A-5-40(a)(2), Ala.Code 1975. Lastly, Count VI of the indictment charged Freeman with the murder of Mary Gordon during a rape in the first degree, see § 13A-5-40(a)(3), Ala.Code 1975. In August 1989, a jury found Freeman guilty of all six counts of capital murder charged in the indictment. The jury recommended, by a vote of 11-1, that Freeman be sentenced to death; the trial court accepted the jury's recommendation and sentenced Freeman to death by electrocution.

On direct appeal, this court reversed Freeman's convictions and remanded the cause for a new trial based on the prosecution's discriminatory use of its peremptory challenges in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). See *Freeman v. State*, 651 So.2d 573 (Ala.Cr.App.1992), rev'd on return to remand, 651 So.2d 576 (Ala.Cr.App.1994). Freeman was retried in 1996, and he was once again found guilty of all six counts of capital murder charged in the indictment. The jury again recommended, by a vote of 11-1, that Freeman be sentenced to death; the trial court accepted ***169** the jury's recommendation and sentenced Freeman to death by electrocution. This appeal follows.

At trial, Freeman did not deny that he murdered Mary Gordon and Sylvia Gordon. Instead, he

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pleaded not guilty by reason of mental disease or defect, and he argued to the jury that as a result of his alleged mental disease or defect, he was unable to conform his conduct to the requirements of the law. The evidence against Freeman was overwhelming. In its sentencing order, the trial court made the following findings of fact concerning the crime and Freeman's participation in the murders:

"On March 11, 1988, Deborah Gordon Hosford picked up her sister, [17-year-old] Sylvia Gordon, from Lanier High School [in Montgomery] and drove to their home at 29 Rosebud Court, arriving at approximately 3:30 p.m. Waiting on the porch was the defendant, David Freeman, who had ridden his bicycle to their home. Freeman ... lived in a trailer near the Gordon home, and he wanted a romantic relationship with Sylvia Gordon. Sylvia was not romantically interested in Freeman, and was planning to tell him that she no longer wished to see him. Deborah, Sylvia, and Freeman entered the home. Deborah had to return to work and left at approximately 3:45 p.m. When she left, Freeman and Sylvia were sitting on the couch.

"Freeman had given Sylvia a note essentially stating that he did not like seeing her only once a week, that he loved her, and that he did not want to lose her like all of his other girlfriends. Sylvia in return gave Freeman a note stating that she viewed the relationship only as friendship and that she did not want to have a serious relationship. Approximately a week prior to the murders, Freeman had a conversation with Francis Boozer, a co-worker, and told her that he would rather see Sylvia dead than [for] someone else have her.

"At about 1:00 a.m. Deborah Gordon Hosford returned home. She found the lights of the home turned off and the door unlocked and slightly ajar. She went inside and noticed that the house had been ransacked. She went to her sister's bedroom and found Sylvia, dead, in her bed with multiple stab wounds and clad only in a T-shirt and socks. As she was fleeing the house, she saw her mother, [43-year-old] Mary Gordon, lying in a pool of blood on the floor of her bedroom. Mrs. Gordon was clad only in a shirt, with her body being nude from the waist down with her legs spread apart.

"Police arrived at the Gordon home and found blood throughout most of the house. Mary Gordon was stabbed 14 times by Freeman; two wounds were fatal. She lived for about five minutes [after being stabbed the first time]. She had also been raped, and the semen deposited in her was consistent as having been left by Freeman. Sylvia Gordon was stabbed 22 times by him, and she remained conscious for eight to ten minutes after the first wound was inflicted. None of the wounds were fatal; Sylvia Gordon bled to death. Examination also revealed that Sylvia Gordon had tears in her vagina. Additionally, police found a shoe print on the shirt of Mary Gordon and a shoe print on a card found on the floor near the body of Mary Gordon. Police also noted that all [telephone] lines in the house had been cut.

"Freeman had brought a knife with him and used it to brutally kill Sylvia Gordon because she did not want a relationship, as well as [to] kill Mary Gordon when she walked in on the murder. After committing the murders, Freeman stole the Gordons' 1980 Pontiac Sunbird and put his bike that he had ridden to the Gordon home in it and fled the scene. He attempted to establish an alibi by later going to work. The Gordons' car was found in a parking lot near *170 Freeman's apartment. Freeman's fingerprint was found on the car and blood that was consistent with that of Sylvia Gordon and Mary Gordon was also in the car. Additionally found in the car was a butcher knife that had been cleaned of blood. The butcher knife was examined by an expert in trace evidence with the Department of Forensic Sciences and was determined to be consistent with having caused the wounds to Mary Gordon, to cut the bra and panties of Mary Gordon, and to cut the jeans of Sylvia Gordon.

"When the police arrived at Freeman's apartment, Freeman answered the door, and the officers noted a bandage on Freeman's right hand. When asked how he cut his hand, Freeman lied, claiming that he had cut his hand while repairing a chair. Freeman was arrested at his apartment. The police, upon a consent to search, found the clothing worn by Freeman, which had blood consistent with that of Sylvia Gordon on them. A mixture of blood and semen was found in the underwear that he had worn. His shoes were seized and compared to the prints found on the shirt of Mary Gordon and the card found in the Gordon home. Examination

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revealed that Freeman's shoes were consistent with the prints found at the scene. Bite marks were noted on Freeman's arm, which were [determined to have been] made by Sylvia Gordon.
"Freeman initially lied to the police as to his involvement in the crimes. He tried to establish an alibi for his whereabouts. However, when confronted with the evidence, Freeman admitted to stabbing Sylvia Gordon and stated that upon Mary Gordon's entering the home he had no choice but to stab her. Freeman also claimed to have blacked out on two occasions during the crimes.
"In late 1988 and early 1989 Freeman was mentally evaluated by the staff at Taylor Hardin Secure Medical Facility, who found that he suffered no mental disease or defect which caused him to lack the substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. In 1995, he was evaluated by Dr. Guy Renfro, an expert forensic psychologist, who also found [that] he was responsible for his acts at the time of the offense."

(C. 1224-27.) The trial court's findings in its sentencing order were supported by the evidence presented at trial.

[1] On appeal from his convictions, Freeman raises 16 issues, most of which he did not raise by objection in the trial court. Because Freeman was sentenced to death, his failure to object at trial does not bar our review of these issues; however, it does weigh against Freeman as to any claim of prejudice he now makes on appeal. See *Dill v. State,* 600 So.2d 343 (Ala.Cr.App.1991), aff'd, 600 So.2d 372 (Ala.1992), cert. denied, 507 U.S. 924, 113 S.Ct. 1293, 122 L.Ed.2d 684 (1993); *Kuenzel v. State,* 577 So.2d 474 (Ala.Cr.App.1990), aff'd, 577 So.2d 531 (Ala.), cert. denied, 502 U.S. 886, 112 S.Ct. 242, 116 L.Ed.2d 197 (1991).

Rule 45A, Ala.R.App.P., provides:
"In all cases in which the death penalty has been imposed, the Court of Criminal Appeals shall notice any plain error or defect in the proceedings under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial right of the appellant."

This court has recognized that " 'the plain error exception to the contemporaneous-objection rule is to be "used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." ' " *Burton v. State,* 651 So.2d 641, 645 (Ala.Cr.App.1993), aff'd, 651 So.2d 659 (Ala.1994), cert. denied, 514 U.S. 1115, 115 S.Ct. 1973, 131 L.Ed.2d 862 (1995), quoting *United States v. Young,* 470 U.S. 1, 15, 105 S.Ct. 1038, 1046, 84 L.Ed.2d 1 (1985) *171 (quoting *United States v. Frady,* 456 U.S. 152, 163, 102 S.Ct. 1584, 1592, 71 L.Ed.2d 816 (1982)). Accordingly, we will address the issues raised by Freeman on appeal.

I.

[2][3] Freeman contends that the trial court erred in failing to conduct a competency hearing to determine whether he was competent to stand trial. This claim was never presented to the trial court; therefore, our review will be under the plain error rule. Rule 45A, Ala.R.App.P.

The record reflects that the trial court granted Freeman's pretrial motion for a psychological examination to determine whether Freeman was competent to stand trial and to determine whether he was insane at the time of the commission of the murders. Dr. Guy Renfro, a forensic psychologist appointed by the trial court, evaluated Freeman in July 1995 and again in September 1995, and in his evaluation report, he made the following findings concerning Freeman's competency to stand trial:
"Results of [the Competency to Stand Trial Assessment Instrument (CAI)] found David Freeman to have the intellectual and psychological skills necessary to understand the charges against him and to assist in the preparation of his defense. He had a good appreciation of the charge[s] against him and the possible penalties which could occur should he be found guilty. He was aware that he could be either sentenced to death or given life without parole if found guilty on the present charge. He seemed to have a somewhat realistic appraisal of possible outcomes in the case. He also understood the role of various individuals involved

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in the court process. He was aware that the judge was neutral in the case. Mr. Freeman was judged as being mildly impaired in his understanding of court procedure. He stated that he was not aware of the fifth amendment protection against self-incrimination. However, once this was explained to him he did understand the concept that was involved. He possesses the capacity to disclose to his attorney pertinent facts about the offense. Whether he chooses to do so is another matter. He did have an adequate understanding of possible legal defenses. He was able to describe in his own words what an alibi defense or an insanity defense would entail. He also appears to have sufficient intellectual capacity to challenge prosecution witnesses if called upon to do so. There do not appear to be any self-defeating motivations which might cause him to sabotage efforts to defend him. He is judged by this examiner as having a mild risk to exhibit unmanageable behavior. He has been known to become overtly upset in court hearings in the past. This typically has occurred when he has been asked to talk about topics or areas which he does not wish to talk about. It is also noted by this examiner that mild impairments exist in Mr. Freeman's relationships with his attorneys. He is posing some difficulty in communicating with them at this time. These difficulties appear to be a reflection of Mr. Freeman's characteristic way of relating to others. Mr. Freeman apparently likes to feel in control and also likes to receive attention from others. He does not respond well when others place demands on him. Apparently he perceives that his present attorneys have placed demands on him that he is not willing to meet. More specifically, he is reporting that his attorneys are asking him to communicate more directly about pertinent information relating to the alleged crime rather than spending a lot of time with him and allowing him to relate the material in his own fashion. There was also a mild impairment in his understanding of what a guilty plea would involve. He showed some suspiciousness indicating that he had heard from other defendants that attorneys and others will go behind a particular individual's back in *172 order to do favors for each other. This appears to be a repetition of jailhouse rumor rather than reflecting a true delusional belief. Mr. Freeman does appear to have the intellectual and verbal skills necessary to testify if called upon to do so. However whether he would choose to respond to direct questioning is again another matter.

"In summary, the longstanding personality characteristics exhibited by Mr. Freeman may make him a somewhat difficult person to work with at times. It is likely that he will need to feel in control of situations and may have a tendency to feel rejected if individuals disagree with him. This may lead to his becoming angry and refusing to cooperate for a period of time. However, this does not appear to be a result of a true mental disease or mental illness. It does appear to be a situation which is under Mr. Freeman's voluntary control. Despite these limitations, it is this examiner's opinion that David Freeman is competent to stand trial in the current case."

(C. 3470-71.) Dr. Renfro also found that Freeman did not suffer from a mental disease or defect, either at the time of the murders or at the time of Dr. Renfro's evaluation, that would affect his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. Dr. Renfro's findings concerning Freeman's competency to stand trial and his mental state at the time of the murders were consistent with the findings of the Lunacy Commission in its psychiatric evaluation of Freeman performed shortly after the murders in December of 1988.

[4] We have said that "[i]t is the burden of a defendant who seeks a pretrial competency hearing to show that a reasonable or bona fide doubt as to his competency exists." *Woodall v. State,* 730 So.2d 627, 647 (Ala.Cr.App.1997), aff'd in relevant part, 730 So.2d 652 (Ala.1998). " 'The determination of whether a reasonable doubt of sanity exists is a matter within the sound discretion of the trial court and may be raised on appeal only upon a showing of an abuse of discretion.' " *Id.;* see also *Tankersley v. State,* 724 So.2d 557, 564 (Ala.Cr.App.1998).

Based on the record of the proceedings before us, we do not find that Freeman, either at trial or on appeal, met his burden of showing that a reasonable or bona fide doubt existed as to his competence to

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stand trial. In his brief to this court, Freeman relates an incident at trial that occurred just before the State rested its case. The record reveals that the trial court had recessed for lunch, and the deputies were escorting Freeman from the courtroom to eat lunch. Freeman, however, refused to leave without first getting his reading materials. When one of the deputies told Freeman that he did not have time to read at lunch, Freeman became very angry and combative. He threatened the deputies, kicked over the courtroom microphone, and kicked a door. He refused to comply with the deputies' orders and refused to return to the courtroom after the lunch break.

After Freeman was forced to return to the courtroom, the trial judge told Freeman that he needed to sit still, to which Freeman replied, "Fuck you. I am tired of everybody." (R. 689.) The trial judge then gave Freeman's lawyers a few minutes to talk to Freeman alone. After talking to Freeman, Freeman's trial counsel told the trial court that Freeman was not responsive and that he "seemed totally out of it." (R. 691.) Freeman's trial counsel further told the trial court that he thought that Freeman was having "some sort of psychotic-type episode." (R. 695.) The trial court responded that it did not agree with counsel's interpretation of Freeman's behavior. The trial court stated that Freeman "certainly did not seem to be out of touch with reality. He just seemed to be uncooperative." (R. 695.) The trial court informed Freeman that if he did not conduct himself appropriately, he would be *173 either bound and gagged or removed from the courtroom. There were no further disruptions or outbursts by Freeman for the remainder of the trial.

We do not find that this incident established a reasonable or a bona fide doubt as to Freeman's mental capacity to stand trial. Instead, we agree with the trial court's characterization of Freeman's behavior as being simply uncooperative. As the State correctly points out in its brief to this court, Dr. Renfro's findings in his evaluation report, that as a result of Freeman's longstanding personality characteristics Freeman was at times difficult to work with and that he felt the need to be in control of situations, accurately described the behavior exhibited by Freeman at trial. Renfro stated in his report that if Freeman felt that he was not in control of a situation, he might become angry and refuse to cooperate for a period of time. However, as Dr. Renfro noted, this behavior did not appear to be the result of a true mental disease or mental illness. Freeman was cooperative throughout his trial until he was not permitted to take his reading materials with him during the lunch recess. He then became uncooperative and angry, but after a short time, returned to being cooperative for the remainder of his trial. We do not find that Freeman's behavior during trial created a bona fide doubt as to his competency to stand trial. It was the trial judge who, "after hearing the testimony, as well as observing the demeanor and conduct of [Freeman], was in the best position to determine any question of [Freeman's] competency." *Cliff v. State,* 518 So.2d 786, 791 (Ala.Cr.App.1987). The trial court had before it, for its review, a court-ordered psychological evaluation of Freeman conducted shortly before trial, as well as a court-ordered psychiatric evaluation of Freeman performed by personnel at Taylor Hardin Secure Medical Facility conducted shortly after the murders in 1988. Neither evaluation indicated that Freeman was incompetent to stand trial.

[5] Moreover, even assuming that Freeman did in fact suffer from a mental illness and that that mental illness caused him to commit the murders, he "may still be competent to stand trial so long as he has sufficient understanding of the proceedings against him and an ability to aid his counsel in preparation for his defense." *Tankersley,* 724 So.2d at 565. Here, there is no evidence that Freeman did not understand the proceedings against him or that he was unable to assist his lawyers in his defense.

For these reasons, we find no error, much less plain error, as to this claim.

II.

[6] Freeman raises several issues concerning the admissibility of his post-arrest statements to police. Freeman did not, however, contest at trial the admission of these statements. As a result, the

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record before this court is, to say the least, sparse, and fails to provide this court with much of a factual basis on which to review Freeman's claims. Nevertheless, because we must review Freeman's claims for plain error, we will, with the record before us, address each of his claims concerning the admissibility of his statements to police.

A.

[7] Freeman contends that his post-arrest statements to police were improperly admitted at trial because, he says, the police continued to question him about the murders after he asserted his right to remain silent, in violation of *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

The record reveals that Freeman was initially advised of his *Miranda* rights when he was arrested at his apartment on March 12, 1988. Officer Terry Jett with the Montgomery Police Department testified that after Freeman was taken from the apartment to police headquarters for questioning, he was again advised of his *Miranda* rights before he was questioned. ***174** Jett testified that Freeman acknowledged that he understood those rights, that he signed a waiver to that effect, and that he agreed to talk to the police. In his March 12 statement to Jett, which was also audiotaped, Freeman denied any knowledge of, or participation in, the murders of Mary Gordon and Sylvia Gordon.

The record further reveals that on March 14, 1988, Detective Gary Graves, who at that time was a detective with the Montgomery Police Department and the case agent in charge of the Gordon case, went to the jail to question Freeman and to photograph bite marks on Freeman's arm. Graves testified that he advised Freeman of his *Miranda* rights, and that Freeman signed the rights waiver form stating that he understood his rights and that he agreed to waive those rights and talk to the police. Graves testified that he then asked Freeman what happened on the day of the murders. Graves stated that in response to that question, Freeman told him "he couldn't talk about it." (R. 598.) In an effort to clarify Freeman's comment, Graves then said to Freeman, "If you can't talk about it, can you write it for me?" (R. 599.) Graves testified that Freeman said that he would, and he then proceeded to handwrite two statements denying any involvement in the murders in the first statement, but admitting in the second statement to killing both Mary Gordon and Sylvia Gordon.

[8][9] Freeman maintains that he invoked his right to remain silent when he told Graves that "he couldn't talk" about the murders. We do not, as Freeman does, interpret this statement to be a clear and unequivocal invocation of Freeman's right to remain silent. As we stated in *Slaton v. State,* 680 So.2d 879 (Ala.Cr.App.1995), aff'd, 680 So.2d 909 (Ala.1996), cert. denied, 519 U.S. 1079, 117 S.Ct. 742, 136 L.Ed.2d 680 (1997):

"The United States Supreme Court has held that police officers must inform people of their constitutional rights before beginning custodial interrogations. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Included in the right to remain silent is a right to cut off questioning. *Miranda,* 384 U.S. at 474, 86 S.Ct. at 1628. When a defendant invokes his right to remain silent, that request must be 'scrupulously honored.' *Michigan v. Mosley,* 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975).

"This court recently stated that whether someone has invoked his right to remain silent is determined on a case-by-case basis.

" 'Whether there was a waiver of the right to remain silent and the right to counsel and whether the confession was knowingly, voluntarily, and intelligently made must be decided from the particular facts and circumstances of each case, including the background, experience, and conduct of the accused-the totality of the circumstances.'

"*Holmes v. State,* 598 So.2d 24, 26 (Ala.Crim.App.1992); see also *Thomas v. State,* 373 So.2d 1167 (Ala.1979), vacated on other grounds, 448 U.S. 903, 100 S.Ct. 3043, 65 L.Ed.2d 1133 (1980); *Magwood v. State,* 494 So.2d 124 (Ala.Crim.App.1985), *aff'd,* 494 So.2d 154 (Ala.), *cert. denied,* 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986).

"In this case, the police were questioning an admittedly scared 17-year-old who had just been arrested for murder and rape. He was visibly upset but had given no indication that he did not want to

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cooperate with the detectives and appeared to be readily responding to their questions. We are not persuaded that Slaton's response, 'Oh God, I don't feel like going through all this,' was an unequivocal invocation of his right to remain silent. It does not strike us as any kind of conscious request that he be allowed to remain silent. Instead, Slaton's comment seems a natural outburst borne of the fear and anxiety created by the circumstances in ***175** which he found himself. Therefore, we hold that Slaton's statement was not an invocation of his right to remain silent, that his *Miranda* rights were not violated, and that his statement was properly used at trial."

680 So.2d at 886-87. " 'Once informed of *Miranda* rights, an accused has the burden of indicating in some manner his wish to remain silent.' " *Ex parte Slaton,* 680 So.2d 909, 914 (Ala.1996), cert. denied, 519 U.S. 1079, 117 S.Ct. 742, 136 L.Ed.2d 680 (1997), quoting *Lightbourne v. Dugger,* 829 F.2d 1012 (11th Cir.1987), cert. denied, 488 U.S. 934, 109 S.Ct. 329, 102 L.Ed.2d 346 (1988); see also *Smith v. State,* 756 So.2d 892, 932 (Ala.Cr.App.1998). "When a purported invocation of a Fifth Amendment privilege is ambiguous, the police may question the accused for the narrow purpose of clarifying the equivocal request." *Beard v. State,* 612 So.2d 1335, 1341 (Ala.Cr.App.1992) (citations omitted).

Here, Freeman's response to Graves's question was not an unequivocal invocation of his right to remain silent. The response, instead, appears to be Freeman's simply saying that he did not like talking about the brutal murders. Freeman was, however, more than willing to handwrite a statement about the murders. As the State correctly points out in its brief to this court, Freeman's response to police was not an assertion of his right to remain silent, but instead indicated Freeman's desire to conduct the interview the way he wanted it conducted. This is further evidenced, as the State also points out in its brief, by Freeman's refusing to make a videotaped statement, while agreeing to make an audiotaped statement. Jett's and Graves's testimony at trial clearly indicated that Freeman wanted to answer their questions. In fact, both Jett and Graves testified that Freeman was cooperative throughout all of the questioning, and that he was responsive to all of their questions. For these reasons, we conclude that Freeman did not indicate that he wished to remain silent; thus, there was no violation of his *Miranda* rights in this regard.

B.

[10] Freeman further contends that his response to police during questioning, that he "couldn't talk about" the murders, amounted to a request for an attorney and that, therefore, because the police continued to question him without an attorney present, his statement was obtained in violation of *Miranda.* We find this claim also to be without merit.

[11][12] In *Ex parte Cothren,* 705 So.2d 861 (Ala.1997), cert. denied, 523 U.S. 1029, 118 S.Ct. 1319, 140 L.Ed.2d 482 (1998), the Alabama Supreme Court stated:

" 'Invocation of the *Miranda* right to counsel " requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." *McNeil v. Wisconsin,* 501 U.S., at 178 [111 S.Ct. 2204, 2209, 115 L.Ed.2d 158 (1991)]. But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning. See *ibid.* ("[T]he *likelihood* that a suspect would wish counsel to be present is not the test for applicability of *Edwards* "); *Edwards v. Arizona,* [451 U.S. 477] at 485, [101 S.Ct. 1880, 1885, 68 L.Ed.2d 378 (1981)] (impermissible for authorities "to reinterrogate an accused in custody if he has *clearly asserted* his right to counsel") (emphasis added).

" 'Rather, the suspect must unambiguously request counsel. As we have observed, "a statement either is such an assertion of the right to counsel or it is not." *Smith v. Illinois,* 469 U.S. [91] at 97-98 [105 S.Ct. 490, 494, 83 L.Ed.2d 488 (1984)] ... Although a suspect need not "speak with the discrimination of an Oxford don," *post,* at 476, 114 S.Ct., at ***176** 2364 (Souter, J., concurring in

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judgment), he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect. See *Moran v. Burbine,* 475 U.S. 412, 433, n. 4, [106 S.Ct. 1135, 1147, n. 4, 89 L.Ed.2d 410] (1986) ("[T]he interrogation must cease until an attorney is present *only* [i]f the individual states that he wants an attorney") (citations and internal quotation marks omitted).' "

705 So.2d at 864, quoting *Davis v. United States,* 512 U.S. 452, 458-61, 114 S.Ct. 2350, 2354-56, 129 L.Ed.2d 362 (1994) (some bracketed information original; some bracketed information added).

Here, Freeman did not make an unequivocal or unambiguous request for counsel; he made no request at all. Freeman's response that he "couldn't talk about" the murders can not be construed to be a request for counsel. Accordingly, we find no error, plain or otherwise, as to this claim.

C.

[13] Freeman also contends that when the police arrived at his apartment on the morning after the murders, they improperly questioned him before advising him of his *Miranda* rights. The record reveals that when Freeman opened his apartment door, Officer Jett asked him what had happened to his hand, which was covered with a bandage. Freeman told the officers that he had cut his hand on a chair in the apartment. The police then advised Freeman of his *Miranda* rights, and searched the apartment pursuant to a consent to search from Freeman's roommate, who was also present at the apartment when the police arrived. Freeman was arrested at that time, but he was not questioned about the murders until he arrived at police headquarters, where he was again advised of his *Miranda* rights. Freeman argues that because he was not advised of his *Miranda* rights before the police asked him about his hand, his post-*Miranda* statements were inadmissible because, he says, they were the "fruits of the poisonous tree." We do not agree.

[14] Because Freeman was not in custody when the police asked him about his hand, *Miranda,* which applies only when an individual is subjected to custodial interrogation, is inapplicable in this case. Freeman was not in custody for purposes of *Miranda.* As we stated in *Patterson v. State,* 659 So.2d 1014 (Ala.Cr.App.1995), in rejecting a similar claim to Freeman's:

"The appellant asserts that when the officers arrived at his house, he was a suspect in the shooting, that the interrogation inside his residence was custodial in nature, and that the police were required to give a *Miranda* warning before asking any questions. However, there was no evidence presented that the ' pre-*Miranda* ' questions were anything other than of a general investigative nature. Before asking any potentially incriminating questions, the appellant was given his *Miranda* warning, *Merriweather v. State,* 629 So.2d 77 (Ala.Crim.App.1993), and signed a consent to search his house. (R. 14.) The fact that the interrogation occurred inside the accused's house is a factor tending to indicate that the interview was noncustodial. *Henderson v. State,* 598 So.2d 1045, 1048 (Ala.Crim.App.1992). See also, *United States v. Phillip,* 948 F.2d 241 (6th Cir.1991), *cert. denied,* 504 U.S. 930, 112 S.Ct. 1994, 118 L.Ed.2d 590 (1992) (no custody when no restraint on freedom of movement to degree associated with formal arrest); *United States v. Hocking,* 860 F.2d 769 (7th Cir.1988) (no custody when interview conducted in home in polite tone and suspect not compelled to answer questions or restrained from terminating*177 interview, despite suspect's heart condition and mature age and agent's open disbelief of suspect's denials). ' "It is the compulsive aspect of custodial interrogation, and not the strength or content of the officer's suspicions at the time the questioning was conducted, which led the Court to impose the *Miranda* requirements with regard to custodial questioning." *Finch v. State,* 518 So.2d 864, 867 (Ala.Cr.App.1987).' *Lemley v. State,* 599 So.2d 64, 71 (Ala.Crim.App.1992). 'The Court has "explicitly recognized that *Miranda* warnings are not required '... because the

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questioned person is one whom the police suspect.' " *California v. Beheler,* 463 U.S. [1121] at 1125, 103 S.Ct. [3517] at 3520, 77 L.Ed.2d 1275 [(1983)] (quoting *Oregon v. Mathiason,* 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714 (1977)).' *Finch v. State,* 518 So.2d 864, 867 (Ala.Crim.App.1987)."

659 So.2d at 1016; see also *Jackson v. State,* 412 So.2d 302, 306-07 (Ala.Cr.App.1982) (*Miranda* warnings not required when police officers, who were conducting a general on-the-scene investigation of a recent homicide, asked accused, " What happened?"); *Truex v. State,* 282 Ala. 191, 192, 210 So.2d 424, 425 (1968) (*Miranda* not implicated when police officer asked suspect at scene of homicide, "What happened?").

[15] Here, Officer Jett's inquiry of Freeman at his apartment was investigatory rather than accusatory and, therefore, it was not necessary to give a *Miranda* warning before making the inquiry. " ' [I]n the absence of "compelling influences, psychological ploys, or direct questioning," the " possibility" that an accused will incriminate himself, and even the subjective "hope" on the part of the police that he will do so, is not the functional equivalent of interrogation.' " *Buchannon v. State,* 652 So.2d 799, 802 (Ala.Cr.App.1994), quoting *Gilchrist v. State,* 585 So.2d 165, 175 (Ala.Cr.App.1991). Moreover, the question did not necessarily call for an incriminating response, and obviously, did not invoke one from Freeman. Freeman's response, that he had cut his hand on a chair, was clearly not incriminating.

For these reasons, we find no error, much less plain error, as to this claim.

D.

[16] Freeman's final claim of alleged error concerning the admission of his post-arrest statements is that because he allegedly suffers from a "schizotypal personality disorder and major depression," he was incapable of making an intelligent waiver of his *Miranda* rights and voluntarily making his statements. Freeman offers nothing in his brief to show that his waiver was anything but voluntary, other than the general, conclusory statement that his mental impairment prevented him from knowingly and voluntarily waiving his rights.

[17][18][19] "An accused's alleged mental condition alone will not prevent a statement from correctly being received into evidence at trial." *Wheeler v. State,* 659 So.2d 1032, 1034 (Ala.Cr.App.1995). In *Wheeler,* we stated:
" 'Any mental impairment, short of mania or such impairment of the will and mind that an individual becomes unconscious of the meaning of his words, will not render a statement or confession inadmissible. The determination of whether a confession was voluntarily made is to be based upon a consideration of the "totality of the circumstances." *Blackburn v. Alabama,* 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960). "Mental abnormality of an accused is only one factor to be considered in determining from the totality of the circumstances the voluntariness and admissibility of a confession. *Corbin v. State,* 412 So.2d 299 (Ala.Cr.App.1982); *Shorts v. State,* 412 So.2d 830 (Ala.Cr.App.1981)." *Baker v. State,* 472 So.2d 700, 703 (Ala.Cr.App.1985).' "

***178** 659 So.2d at 1035, quoting *McCord v. State,* 507 So.2d 1030, 1033 (Ala.Cr.App.1987).

Our review of the record convinces us that Freeman knowingly, voluntarily, and intelligently waived his rights. During questioning by both the State and Freeman's trial counsel, the interrogating officers testified that Freeman was cooperative throughout the questioning, that he was responsive to all of their questions, and that there was nothing unusual about his appearance and demeanor. The officers also testified that when he made the statements Freeman exhibited normal behavior and speech, and that he appeared to know what he was doing.

Freeman's claim that his statements were not voluntary appears to be based on the diagnosis of his expert psychological witness, Dr. Barry Burkhart. However, as the State correctly points out in its brief to this court, "such a position ignores the conclusions of the team of psychiatrists who conducted the forensic evaluation [of Freeman] at

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Taylor Hardin [Secure Medical Facility]" and the psychiatric evaluation conducted on Freeman before the present trial by the court-appointed psychologist, Dr. Guy Renfro. The psychiatrists at Taylor Hardin and Dr. Renfro both found that Freeman did not suffer from any mental disease or defect at the time of the murders. (State's brief, p. 49.)

There was no evidence before the trial court to suggest that it should have, *sua sponte,* refused to admit Freeman's statements because he was incapable of voluntarily waiving his *Miranda* rights. Although Freeman's expert psychological witness testified that Freeman suffered from a schizotypal personality disorder and from depression, his testimony in no way indicated that at the time Freeman gave his statements he was unable to understand his rights and to voluntarily waive them. Moreover, as noted above, the expert testimony at trial concerning Freeman's mental condition was conflicting.

Accordingly, after reviewing the totality of the circumstances, we find that Freeman understood his rights, that he waived those rights, and that he voluntarily gave statements to police. For these reasons, we find no error, plain or otherwise, as to this claim.

III.

[20][21] Freeman contends that his arrest in his apartment without an arrest warrant was illegal; therefore, he says, his statements to police after his arrest and the items recovered as a result of the search of his apartment, which included the bloodstained clothes Freeman was wearing when he murdered the Gordons, were improperly admitted at trial because, he maintains, they were the "fruits of an illegal arrest." (Freeman's brief, p. 39.)

Initially we note that Freeman did not challenge at trial the legality of his arrest; therefore, as was the case with Freeman's claims concerning the admissibility of his statements, our review is confined to the facts contained in the record before us. We have reviewed Freeman's claim pursuant to the plain error rule and find it to be without merit.

In support of his claim, Freeman relies principally on *Payton v. New York,* 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). In *Payton,* the United States Supreme Court held that the Fourth Amendment prohibits the police from making a warrantless, nonconsensual entry into a suspect's residence in order to make a routine felony arrest. " 'The consent necessary in *Payton* context is consent to enter, not consent to arrest.' " *Fortenberry v. State,* 545 So.2d 129, 137 (Ala.Cr.App.1988), aff'd, 545 So.2d 145 (Ala.1989), cert. denied, 495 U.S. 911, 110 S.Ct. 1937, 109 L.Ed.2d 300 (1990), quoting *United States v. Briley,* 726 F.2d 1301 (8th Cir.1984); see also *Smith v. State,* 727 So.2d 147 (Ala.Cr.App.1998), aff'd, 727 So.2d 173 (Ala.1999).

Here, the record reveals that at 6:45 a.m. on March 12, 1988, the morning after ***179** the murders, the police went to an apartment at 443 South Court Street after receiving information, the nature of which is not contained in the record on appeal, to look for Freeman. Officer Terry Jett testified that he and several other officers went to the residence and knocked on the door. Freeman answered the door and Jett advised him of his *Miranda* rights. Jett further testified that Henry Peak, who was also at the residence, identified himself as the "owner" of the apartment. Jett stated that Peak consented to a search of the apartment. The consent-to-search form is contained in the record on appeal and is signed by Peak. It reveals that Peak voluntarily consented to a search of his residence at 443 South Court Street, Apartment A.

Jett testified that after he read Freeman his rights and obtained the consent to search from Peak, Freeman remained in the hallway of the apartment building with another police officer, while Jett searched the apartment. Jett testified that he saw some clothing, which appeared to be stained with blood, on the floor of a closet. According to Jett, the closet in which the clothes were found was in the "main room" of the apartment, and the door to the closet was open. Apparently, the "main room" of the apartment was being used as a bedroom. Jett testified that after the search of the apartment,

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Freeman was arrested and taken to police headquarters for questioning.

The record further reveals, according to one of Freeman's post-arrest statements to police, that Henry Peak rented the apartment at 443 South Court Street, and that Peak was Freeman's " roommate." (C. 3205.) Freeman also told police that he had just moved into the apartment "a couple of days" before the murders, and that he had not paid Peak any money towards rent. (R. 3205.)

[22][23] The evidence indicating Peak's voluntary consent to search the apartment was undisputed. As we stated in *Fortenberry v. State,* supra, " ' "the consent of one who possesses common authority over the premises ... is valid as against the ... nonconsenting person with whom the authority is shared." ' " 545 So.2d at 137, quoting *United States v. Purham,* 725 F.2d 450, 455 (8th Cir.1984) . We have also stated, in *Colbert v. State,* 615 So.2d 1213 (Ala.Cr.App.), rev'd on other grounds, 615 So.2d 1218 (Ala.1992):

"Anyone with a reasonable expectation of privacy in the place being searched can consent to a warrantless search. *United States v. Yarbrough,* 852 F.2d 1522, 1533-34 (9th Cir.), cert. denied, 488 U.S. 866, 109 S.Ct. 171, 102 L.Ed.2d 140 (1988). Any person with common authority over, or other sufficient relationship to the place or effects searched can give valid consent. *United States v. Bertram,* 805 F.2d 1524, 1528 (11th Cir.1986).

"Here, the police officers received consent to search the apartment from the appellant's roommate, Earle Cramer. Cramer freely and voluntarily gave his consent to search the apartment. Mr. Cramer signed a form giving the officers consent to search the entire premises. Therefore, it is not necessary for the officers to procure a search warrant, and the evidence seized during the search was admissible against the appellant to the same extent that it would have been against Mr. Cramer. *McLoyd v. State,* 390 So.2d 1115, 1116 (Ala.Cr.App.1980).

"....

"The trial court was correct in overruling the appellant's motion to suppress evidence of the contents of the apartment where the appellant was living with a cotenant who gave his consent to the search of the apartment."

615 So.2d at 1214-15. "[T]he authority of a third person to consent to a search turns on whether the third person and the defendant 'mutually used the property searched and had joint access to and control of it for most purposes so that it is reasonable to ***180** recognize that either user had the right to permit inspection of the property and that the complaining co-user had assumed the risk that the consenting co-user might permit the search.' " *Smiley v. State,* 606 So.2d 213, 215 (Ala.Cr.App.1992), quoting *United States v. Rizk,* 842 F.2d 111, 112-13 (5th Cir.), cert. denied, 488 U.S. 832, 109 S.Ct. 90, 102 L.Ed.2d 66 (1988); see also *Rieber v. State,* 663 So.2d 985, 990 (Ala.Cr.App.1994), aff'd, 663 So.2d 999 (Ala.), cert. denied, 516 U.S. 995, 116 S.Ct. 531, 133 L.Ed.2d 437 (1995).

Here, Peak, who either leased or owned the apartment where Freeman was staying, and who, according to Freeman, was Freeman's roommate, clearly had the authority to consent to the search of the apartment. He voluntarily gave his written consent for the police to search the entire apartment; therefore, because *Payton* concerned a factual situation different from the factual situation in the present case, i.e., a warrantless and *nonconsensual* entry into a suspect's residence, we find no merit to Freeman's argument that his statements to police and the evidence seized pursuant to what was a consensual search were improperly admitted at his trial.

We do not mean to imply by our holding that the police did not have the requisite probable cause to support an arrest of Freeman in his residence. Due to the paucity of the record before us, we do not know what facts and circumstances concerning the crime and Freeman's involvement in the murders were known to the officers at the time of Freeman's arrest. However, given our finding that there was a search for which there was valid consent, we need not reach that issue. Accordingly, for the reasons above, we find no error, much less plain error, as to this claim.

IV.

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[24][25] Freeman contends that the trial court erred in instructing the jury that it had already determined the voluntariness of Freeman's statements to police. The record shows that during its oral charge to the jury, the trial court instructed the jury as follows:

"Indeed, it is not my job to decide in this case what evidence is or is not important to you. My job is to decide if it meets the legal requirements to be admitted, and it is your job to decide what evidence is worthy and important, what weight, if any, to be given to the evidence in reaching your verdict.

"If you believe from the evidence that David Freeman was a weak-minded person at the time he made statements to the police, you may consider that fact in determining the weight of such statements.

"With regard to an alleged confession or statement by the defendant, you may consider all the facts and circumstances surrounding the taking of the alleged confession or statement in determining the weight or credibility, if any, which you give to the alleged confession or statement. In exercising your exclusive prerogative of determining the credibility of the evidence or the weight to be given to the evidence in this case, you should consider all the circumstances under which the alleged confession was obtained and the appliances by which it was supposedly elicited, including the situation and the mutual relationship of the parties.

"And finally, while the Court determines the voluntariness of the confession, the jury is to determine the weight or credibility and may disregard an alleged confession which is unworthy of belief or in which they entertain a reasonable doubt as to its truth."

(R. 1231-33.) Freeman did not object to the above-quoted instructions; thus, we will review his claim under the plain error rule, that is, we must determine whether the error "has or probably has adversely affected the substantial right of the appellant." Rule 45A, Ala.R.App.P.

***181** [26][27] "[W]hether a confession was voluntary rests initially with the trial court; once the trial judge makes the preliminary determination that the confession was voluntary, it then becomes admissible into evidence. Thereafter, the jury makes a determination of voluntariness as affecting the weight and credibility to be given the confession. " *Ex parte Singleton,* 465 So.2d 443, 446 (Ala.1985). "It is improper for a trial judge to disclose to the jury that he made a preliminary determination that a confession was voluntary and, therefore, admissible." *Singleton,* 465 So.2d at 445 . Here, however, the trial court's instructions were clear in stating that it was the jury that would ultimately determine the voluntariness of Freeman's statements.

Although the trial court told the jury that it had made the initial determination as to the voluntariness of Freeman's statements, the court made clear to the jury that it was ultimately to decide the weight and credibility to be given Freeman's statements and that, therefore, it was to make the ultimate determination as to the voluntariness of the statements. See *Ex parte Gaddy,* 698 So.2d 1150, 1158 (Ala.), cert. denied, 522 U.S. 1032, 118 S.Ct. 634, 139 L.Ed.2d 613 (1997). While the trial court may have erred by telling the jury that it had made an initial determination of the voluntariness of Freeman's statements, nothing in the trial court's instructions indicated that the jury should believe Freeman's statements simply because the trial court had determined them to be voluntary. See *Clark v. State,* 621 So.2d 309, 325 (Ala.Cr.App.1992). Nor did the instructions indicate that the jury played no role in determining the voluntariness of the statements. *Id.* Further, the trial court informed the jury that it could disregard the statements if it found them to be unworthy of belief or if it entertained a reasonable doubt as to their truth. Thus, the trial court's instructions did not incorrectly inform the jury of the applicable law concerning the voluntariness of statements, did not affect a substantial right of Freeman, and did not constitute prejudicial error, much less plain error. As the Alabama Supreme Court stated in *Ex parte Gaddy,* supra:

"This case is unlike *Bush [v. State,* 523 So.2d 538 (Ala.Cr.App.1988) (where the trial court committed plain error by specifically charging the jury that it was not entitled to disregard the fact that the trial court had admitted into evidence Bush's confession)], because in this case the judge simply charged the jury that he had made an initial determination that

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the confession was voluntary. Although the judge erred in doing so, he also specifically told the jury that it was to determine the issue of 'weight or credibility' of the confession and that it was free to ' disregard the defendant's statements which you deem to be unworthy of belief or in which you entertain a reasonable doubt as to its truth.' As this Court and the Court of Criminal Appeals have held, if the circuit court makes it clear in its instruction that the jury was 'to ultimately determine whether the confession was voluntary,' then the error in instructing the jury that the court had already made a determination of voluntariness may be found to be harmless. *Singleton [v. State,* 465 So.2d 443] at 446 [(Ala.1985)]; see *Aultman* [*v. State,* 621 So.2d 353] at 355 [(Ala.Cr.App.1992), cert. denied, 510 U.S. 954, 114 S.Ct. 407, 126 L.Ed.2d 354 (1993)], and *Clark* [*v. State,* 621 So.2d 309 at 324 (Ala.Cr.App.1992)]. The jury was informed that it could disregard Gaddy's confession entirely if it decided to give no weight to the confession or if it found the State's witnesses to be unworthy of belief.
"Again, because Gaddy did not object to the giving of the instruction, we review the instruction only for plain error. We strongly reiterate that the instruction given by the judge was erroneous, because a judge should not inform the jury that the judge has already determined the confession to be voluntary. *Singleton,* supra. In some cases, like ***182** *Bush,* supra, the charge can be so misleading or the circumstances can be such that the error will not be harmless. While we agree with Gaddy that the instruction was partially erroneous, we hold that the error does not rise to the level of 'plain error' that would justify a reversal of his conviction."

698 So.2d at 1158.

Here, as in *Ex parte Gaddy,* any error in the trial court's instructions to the jury was harmless error, at most, and certainly did not amount to plain error. See *Jackson v. State,* 674 So.2d 1318, 1325-26 (Ala.Cr.App.1993), aff'd in relevant part, 674 So.2d 1365 (Ala.1994) (the trial court's instructions that it had initially determined the voluntariness of the defendant's statements were not plain error where the jury was properly instructed as to its role in considering the statements).

V.

[28] Freeman also contends that the trial court's instructions on insanity effectively deprived him of an insanity defense. As best as we can discern, the only specific complaint Freeman makes in his brief to this court is, that by instructing the jury that a mental disease or defect does not include an abnormality manifested only by a defendant's repeated criminal or antisocial conduct, the trial court deprived Freeman of an insanity defense. (R. 1254-55.) Freeman argues that the "outward manifestation of insanity, particularly for the poor, may be criminal, antisocial, immoral, or mean" and that a mental disorder "may be characterized almost entirely by repeated criminal or antisocial conduct." (Freeman's brief, p. 63.) Freeman is presenting this claim for the first time on appeal; therefore, our review will be pursuant to the plain error rule. Rule 45A, Ala.R.App.P.

Section 13A-3-1, Ala.Code 1975, provides the following concerning insanity as a defense in a criminal case:
"(a) It is an affirmative defense to a prosecution for any crime that, at the time of the commission of the acts constituting the offense, the defendant, as a result of severe mental disease or defect, was unable to appreciate the nature and quality or wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.
"(b) *'Severe mental disease or defect' does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.*
"(c) The defendant has the burden of proving the defense of insanity by clear and convincing evidence."

(Emphasis added.)

Clearly, the trial court's instruction to the jury was in accordance with § 13A-3-1 and was therefore proper. That section clearly was intended to exclude from the definition of "severe mental disease or defect" repeated criminal or otherwise antisocial conduct. See *Click v. State,* 695 So.2d 209 (Ala.Cr.App.1996), cert. denied, 522 U.S. 1001, 118 S.Ct. 570, 139 L.Ed.2d 410 (1997); *McFarland v. State,* 581 So.2d 1249

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(Ala.Cr.App.1991). The trial court's instruction did not, as Freeman claims on appeal, deprive him of an insanity defense. We find no error, much less plain error, as to this claim.

VI.

[29][30] Freeman also contends that the trial court erroneously instructed the jury on the element of intent. Specifically, he argues that the trial court, by instructing the jury that it "may infer that a person intends the natural consequences of what he does if the act is done so intentionally," improperly shifted to him the burden of proving that he did not have the requisite intent. Freeman maintains that this portion of the trial court's instructions on intent violated the United States Supreme Court's holding in *Sandstrom v. Montana,* 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). He presents this issue for the first time on appeal. In fact, as the State correctly points out in its brief to ***183** this court, the instruction he now complains of on appeal was included as part of the transcript of Freeman's previous trial that Freeman submitted to the trial court for his requested instructions on insanity. (C. 1043; R. 1119-20.) Therefore, we will review this claim under the plain error rule. Rule 45A, Ala.R.App.P. We find no merit to Freeman's claim.

In *Hart v. State,* 612 So.2d 520, 529 (Ala.Cr.App.1992), aff'd, 612 So.2d 536 (Ala.1992), cert. denied, 508 U.S. 953, 113 S.Ct. 2450, 124 L.Ed.2d 666 (1993), we addressed and rejected a claim similar to Freeman's. In that case, we stated:

"In *Sandstrom [v. Montana,* 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)], the Supreme Court held that instructions which a reasonable jury could interpret as an 'irrebuttable direction by the court to find intent' violate a defendant's due process rights. *Sandstrom,* 442 U.S. at 517[, 99 S.Ct. 2450]. The complained-of instruction in *Sandstrom* was as follows: '[T]he law presumes that a person intends the ordinary consequences of his voluntary acts.' The instruction in *Sandstrom* created a 'mandatory presumption.'

"In *DeRamus v. State,* 565 So.2d 1167 (Ala.Cr.App.1990), the trial court gave a similar instruction to the jury as the one involved in the instant case. The instruction stated, ' "[Intent] may be inferred from the character of the assault, the use of a deadly weapon or any other circumstances." ' 565 So.2d at 1170. We stated that this instruction created a 'permissive inference,' and was not error.

" ' "A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts. A permissive reference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion." *Francis v. Franklin,* 471 U.S. [307] at 314, 105 S.Ct. [1965] at 1971 [, 85 L.Ed.2d 344 (1985)]. A permissive inference only violates the Due Process Clause "if the suggested conclusion is not one that reason and common sense justify in light of the facts before [the] jury." 471 U.S. at 314, 105 S.Ct. at 1971.'

"565 So.2d at 1170. The cited instruction in the instant case created a permissive inference. 'The specific language cited by the appellant could not reasonably have been understood as creating a presumption which relieved the State of its burden of proof on the element of intent.' 565 So.2d at 1170."

Here, the trial court's instructions on intent did not create a "mandatory presumption," but instead created a "permissive inference," which suggested to the jury only a possible conclusion to be drawn from the evidence, not one that it was required to draw. The instruction " 'could not reasonably have been understood as creating a presumption which relieved the State of its burden of proof on the element of intent.' " *Hart,* 612 So.2d at 529, quoting *DeRamus v. State,* 565 So.2d 1167, 1170 (Ala.Cr.App.1990). Accordingly, we find no error, plain or otherwise, here.

VII.

[31][32] Freeman further contends that the prosecutor engaged in numerous acts of misconduct at both the guilt and the penalty phases of his trial. Initially we note that Freeman did not object to any of the alleged instances of misconduct. " 'This court has concluded that the failure to object to

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improper prosecutorial arguments ... should be weighed as part of our evaluation of the claim on the merits because of its suggestion that the defense did not consider the comments in question to be particularly harmful.' " *Kuenzel v. State,* 577 So.2d 474, 489 (Ala.Cr.App.1990), aff'd, 577 So.2d 531 (Ala.), cert. denied, 502 U.S. 886, 112 S.Ct. 242, 116 L.Ed.2d 197 (1991), quoting *Johnson v. Wainwright,* 778 F.2d 623, 629 n. 6 (11th Cir.1985), cert. denied, ***184**484 U.S. 872, 108 S.Ct. 201, 98 L.Ed.2d 152 (1987). Thus, we must consider whether any of the prosecutor's comments complained of on appeal constituted plain error. Rule 45A, Ala.R.App.P.

[33][34][35][36] This court has stated that "[i]n reviewing allegedly improper prosecutorial comments, conduct, and questioning of witnesses, the task of this Court is to consider their impact in the context of the particular trial, and not to view the allegedly improper acts in the abstract." *Bankhead v. State,* 585 So.2d 97, 106 (Ala.Cr.App.1989), remanded on other grounds, 585 So.2d 112 (Ala.1991), aff'd on return to remand, 625 So.2d 1141 (Ala.Cr.App.1992), rev'd on other grounds, 625 So.2d 1146 (Ala.1993). See also *Henderson v. State,* 583 So.2d 276, 304 (Ala.Cr.App.1990), aff'd, 583 So.2d 305 (Ala.1991), cert. denied, 503 U.S. 908, 112 S.Ct. 1268, 117 L.Ed.2d 496 (1992). "In judging a prosecutor's closing argument, the standard is whether the argument 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *Bankhead,* 585 So.2d at 107, quoting *Darden v. Wainwright,* 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986) (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)). "A prosecutor's statement must be viewed in the context of all of the evidence presented and in the context of the complete closing arguments to the jury." *Roberts v. State,* 735 So.2d 1244, 1253 (Ala.Cr.App.1997), aff'd, 735 So.2d 1270 (Ala.1999). Moreover, " statements of counsel in argument to the jury must be viewed as delivered in the heat of debate; such statements are usually valued by the jury at their true worth and are not expected to become factors in the formation of the verdict." *Bankhead,* 585 So.2d at 106. "Questions of the propriety of argument of counsel are largely within the trial court's discretion, *McCullough v. State,* 357 So.2d 397, 399 (Ala.Cr.App.1978), and that court is given broad discretion in determining what is permissible argument." *Bankhead,* 585 So.2d at 105. We will not reverse the judgment of the trial court unless there has been an abuse of that discretion. *Id.*

We note that the trial court repeatedly instructed the jury in this case that the comments and argument of the lawyers were not evidence to be considered by the jury in reaching a verdict or in recommending a sentence. (R. 394, 1168, 1186, 1202 (guilt phase); 1289, 1290 (penalty phase)).

A.

Freeman contends that the following comments by the prosecutor during closing argument at the guilt phase of his trial were improper:

"Sylvia Gordon, 17-year-old girl, senior in high school. She was in LAMP [Lanier Academic Motivational Program, a high school honor's program]. She had a future. She had a promise. She had her whole life to live. She had just begun to live, nowhere close to reaching her potential.

"Mary Gordon wanted to do the best she could do. She did everything she could to provide for her children. She was alone. She had to be mother; she had to be father; she had to be everything, and she did a good job. She had Debbie [her older daughter], who worked hard, manager of a TCBY [a yogurt shop], gone through college, graduated high school, went through C-Pac, made the honors program. Sylvia, as we said, in the honor's program at LAMP. She did what she could. She worked so hard, as the testimony has shown, she was tired all the time. All she wanted to do was rest, if she could get a chance. And on Friday when the weekends come, when she comes home, home-think about this folks-her home, the place where she is the most comfortable, where she can be herself, where she can relax, she can unwind. And what she walks into is the worst nightmare that any parent can see, her own child helpless, dying, bleeding at ***185** the hands of this man. And why? Because he couldn't get what he wanted."

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(R. 1155-57.) Freeman argues that the prosecutor's comments about the victims were prejudicial because, he says, they were designed to create sympathy for the victims. After reviewing the comments in the context of the prosecutor's entire closing argument, we find no error, plain or otherwise.

[37] The record reveals that the prosecutor, through the testimony of Deborah Gordon Hosford, Mary Gordon's daughter and Sylvia Gordon's sister, established, without objection, all of the personal information about the victims contained in the prosecutor's argument that Freeman now claims on appeal was prejudicial. Thus, the prosecutor's comments about the victims were proper because they were based on evidence presented at trial. See *Frazier v. State*, 758 So.2d 577 (Ala.Cr.App.1999); *Burgess v. State*, 723 So.2d 742 (Ala.Cr.App.1997), aff'd, 723 So.2d 770 (Ala.1998); *Smith v. State*, 698 So.2d 189 (Ala.Cr.App.1996), aff'd, 698 So.2d 219 (Ala.), cert. denied, 522 U.S. 957, 118 S.Ct. 385, 139 L.Ed.2d 300 (1997). Whatever is in evidence at trial is considered subject to legitimate comment by counsel. *Jenkins v. State*, 627 So.2d 1034, 1050 (Ala.Cr.App.1992), aff'd, 627 So.2d 1054 (Ala.1993), cert. denied, 511 U.S. 1012, 114 S.Ct. 1388, 128 L.Ed.2d 63 (1994). The prosecutor's remarks about the victims were legitimate comments based on the evidence admitted at trial, or were reasonable inferences to be drawn from that evidence, and did not constitute improper victim-impact argument, as Freeman argues on appeal.

[38] Moreover, even if we were to assume that the prosecutor's comments were irrelevant and improper, we would find any resulting error harmless. In *Smith v. State*, opinion on return to remand, 756 So.2d 892, 904 (Ala.Cr.App.1997), we stated, relevant to such a claim:

" 'Recently, this Court examined the issue of victim impact evidence in *Ex parte Rieber*, 663 So.2d 999 (Ala.1995). In *Rieber*, we acknowledged that testimony regarding a murder victim's children was not relevant to the issue of the accused's guilt or innocence and was, thus, inadmissible during the guilt phase of trial; we noted, however, that "a judgment of conviction can be upheld if the record conclusively shows that the admission of the victim impact evidence during the guilt phase of the trial did not affect the outcome of the trial or otherwise prejudice a substantial right of the defendant." 663 So.2d at 1005. After thoroughly reviewing the record of this present case, we conclude that the limited testimony regarding Ms. Brown's infant son and the impact of Ms. Brown's death on her family, and the prosecution's limited references to such evidence, did not operate to deny Land a fair trial or to prejudice his substantial rights. Thus, we find no reversible error as to this issue.'

"*Ex parte Land*, 678 So.2d 224, 236 (Ala.), cert. denied, 519 U.S. 933, 117 S.Ct. 308, 136 L.Ed.2d 224 (1996)."

756 So.2d at 904-05.

We find no evidence that the prosecutor's comments during closing arguments regarding the victims affected the outcome of Freeman's trial or otherwise prejudiced Freeman.

B.

[39] Freeman further contends that during closing argument at the guilt phase the prosecutor improperly inflamed the passions of the jury by suggesting that the jurors "should act as the conscience of the community and join a war on crime" by convicting Freeman of the capital offenses with which he was charged. (Freeman's brief, p. 50.) The unobjected-to portion of the prosecutor's argument Freeman now complains of on appeal was as follows:

"In this country, in our civilization, we have laws that apply equally across the board. And these laws are our method ***186** of protecting ourselves, society feeling safe from those who do what David Freeman did. And when you feel outraged at what he did, it is all right, because that's the foundation of our civilization, for without laws, none of us are free, none of us. And we come to you to enforce those laws, because there is no where else to go now. Don't enforce them like David Freeman, giving no one a chance to yell and beg for their lives. Don't enforce it without ensuring his rights were protected. The State has proven its case.

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But enforce it fairly. Enforce it firmly. And let him know he is responsible."

(R. 1210-11.)

[40][41] "There is no impropriety in a prosecutor's appeal to the jury for justice and to properly perform its duty." *Price v. State,* 725 So.2d 1003, 1033 (Ala.Cr.App.1997), aff'd, 725 So.2d 1063 (Ala.1998).
" 'In Alabama, the rule is that a district attorney in closing argument may make a general appeal for law enforcement. *Embrey v. State,* 283 Ala. 110, 118, 214 So.2d 567 (1968).
" 'This line of argument is "within the latitude allowed prosecutors in their exhortations to the jury to discharge their duties in such a manner as, not only to punish crime, but to protect the public from like offenses and as an example to deter others from committing like offenses." *Varner v. State,* 418 So.2d 961 (Ala.Cr.App.1982); *Cook v. State,* 369 So.2d 1243 (Ala.Cr.App.1977), affirmed in part, reversed in part on other grounds, 369 So.2d 1251 (Ala.1978)....' "

Kuenzel v. State, 577 So.2d 474, 503 (Ala.Cr.App.1990), aff'd, 577 So.2d 531 (Ala.), cert. denied, 502 U.S. 886, 112 S.Ct. 242, 116 L.Ed.2d 197 (1991), quoting *Ex parte Waldrop,* 459 So.2d 959, 962 (Ala.), cert. denied, 471 U.S. 1030, 105 S.Ct. 2050, 85 L.Ed.2d 323 (1985); see also *Sockwell v. State,* 675 So.2d 4 (Ala.Cr.App.1993), aff'd, 675 So.2d 38 (Ala.1995), cert. denied, 519 U.S. 838, 117 S.Ct. 115, 136 L.Ed.2d 67 (1996).

We find that the prosecutor's comment was clearly a general appeal for law enforcement and justice, and an appeal to the jury to discharge its duties so as to punish Freeman for the commission of his crimes and to deter others from committing similar offenses. The comments did not have the prejudicial effect Freeman says they had. They were a call for justice, not sympathy. See *Price,* supra.

[42] Freeman also contends that the prosecutor engaged in misconduct when he commented to the jury: "There are very few times in all our lives when we can really do something, we can do justice. I am asking you, on behalf of Sylvia and Mary Gordon, to do justice for them." (R. 1165.) This comment, like the previous complained-of comment, was clearly a general appeal for law enforcement and justice. See *Kuenzel,* supra; see also *Henderson v. State,* 583 So.2d 276 (Ala.Cr.App.1990), aff'd, 583 So.2d 305 (Ala.1991), cert. denied, 503 U.S. 908, 112 S.Ct. 1268, 117 L.Ed.2d 496 (1992) (it is not reversible error when the prosecutor makes a brief statement that he spoke on behalf of the victims' family).

Accordingly, we find no error, plain or otherwise, as to the prosecutor's comments.

C.

[43] Freeman also contends that the "cumulative effect" of the prosecutor's alleged misconduct during closing argument at the guilt phase deprived him of a fair trial. "Where no single instance of alleged prosecutorial misconduct constitutes reversible error, the cumulative effect of these instances cannot be considered to be any greater." *Mims v. State,* 591 So.2d 120, 127 (Ala.Cr.App.1991); see also *Hunt v. State,* 642 So.2d 999 (Ala.Cr.App.1993), aff'd, 642 So.2d 1060 (Ala.1994). Because we have concluded that no single instance of the prosecutor's conduct was improper, ***187** any claim that that conduct had a cumulative prejudicial effect on his trial is without merit. See *Drinkard v. State,* 777 So.2d 225 (Ala.Cr.App.1998).

D.

[44] Freeman further contends that several comments by the prosecutor during his closing argument at the penalty phase were prejudicial and improper. We have reviewed all of the complained-of comments in the context of the entire closing argument, and we find that none of the comments constituted error, plain or otherwise.

Freeman claims that the prosecutor improperly suggested to the jurors that they should act as "the

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conscience of the community" and impose the death penalty; that they should speak for the people in the community and do what was "right and just"; and that they could make a difference by punishing Freeman for his crimes by recommending the death penalty. (R. 1292-93; 1296-97; 1299-1300.) We have reviewed the prosecutor's comments in the context of the entire closing argument and find that all of the remarks, like the similar remarks made by the prosecutor at the guilt phase, were general appeals for law enforcement and justice, and appeals to the jury to discharge its duties in such a manner as to punish Freeman for the commission of his crimes and to deter others from committing similar offenses. See *Price,* supra; *Kuenzel,* supra. Throughout his closing argument, the prosecutor urged the jury to make its sentence recommendation based on the law and the evidence, not on prejudice, sympathy, or bias for or against Freeman, Sylvia Gordon, Mary Gordon, or Debbie Gordon Hosford. (R. 1292, 1296, 1297, 1300, 1303.) The comments were clearly a call for justice, not sympathy.

[45][46][47] Freeman also claims that the prosecutor made improper comments about the victims during his closing argument. In *Payne v. Tennessee,* 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), the United States Supreme Court held that victim-impact evidence was admissible for consideration by the jury at the sentencing phase of a capital murder case. " '[A] prosecutor may present and argue evidence relating to the victim and the impact of the victim's death on the victim's family in the penalty phase of a capital trial.' " *Hyde v. State,* 778 So.2d 199, 213 (Ala.Cr.App.1998), quoting *McNair v. State,* 653 So.2d 320, 331 (Ala.Cr.App.1992), aff'd, 653 So.2d 353 (Ala.1994), cert. denied, 513 U.S. 1159, 115 S.Ct. 1121, 130 L.Ed.2d 1084 (1995). The prosecutor may also properly refer to the victim's characteristics at the sentencing stage of a capital case. *Payne,* 501 U.S. at 824-25, 111 S.Ct. 2597. " The United States Supreme Court's holding in *Payne v. Tennessee,* 'was based in large measure on the premise that this type of evidence related to the harm done by the defendant and, consequently, was a valid consideration in determining punishment to be imposed.' " *Price,* 725 So.2d at 1034, quoting *McNair,* 653 So.2d at 331.

[48] We have reviewed the prosecutor's allegedly improper comments about the victims and conclude that those comments were proper comments about the characteristics of the victims and the consequences of Freeman's cutting short their lives. " 'The State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered an individual, so too the victim is an individual whose death represents a unique loss to society and, in particular, [to the victim's] family.' " *Burgess v. State,* [Ms. CR-93-2054, November 20, 1998] --- So.2d ----, ---- (Ala.Cr.App.1998), quoting *Payne,* 501 U.S. at 825, 111 S.Ct. 2597.

[49] Freeman contends that the prosecutor improperly argued to the jury that Freeman " believed in the death penalty." ***188** On appeal, Freeman cites no authority to support his claim that the comments were improper. The complained-of comment, placed in context, was as follows:

"Your have a duty to do justice. And when you vote, look inside and do justice. And none of us in this courtroom can fault you if you are true to your duty. I ask you to do justice in this case.

"I ask you to go back to March 11, 1988, imagine you are there and you are watching him do this. *We know one person in this courtroom who believes in the death penalty, who executes at knifepoint, forgetting cries out, forgetting being afraid, forgetting caring that life is precious.* He made a choice. Follow the law."

(R. 1303; emphasis indicates that portion of the argument complained of on appeal.)

[50][51][52] We find nothing improper about the prosecutor's comments. The comments were legitimate comments on evidence presented at trial. Prosecutors may properly comment on inferences from the evidence and may draw conclusions from the evidence based on their own reasoning. As we stated in *Taylor v. State,* 666 So.2d 36 (Ala.Cr.App.1994), aff'd, 666 So.2d 73 (Ala.1995), cert. denied, 516 U.S. 1120, 116 S.Ct. 928, 133 L.Ed.2d 856 (1996):

" 'While in argument to the jury, counsel may not argue as a fact that which is not in evidence;

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nevertheless, he may state or comment on proper inferences from the evidence and may draw conclusions from the evidence based upon his own reasoning. *Sanders v. State,* 423 So.2d 348 (Ala.Crim.App.1982); *Speigner v. State,* 369 So.2d 39 (Ala.Crim.App.), cert. denied, 369 So.2d 46 (Ala.1979); *Liner v. State,* 350 So.2d 760 (Ala.Crim.App.1977). The prosecutor, as does defense counsel, has a right to present his impressions from the evidence. *Sanders,* supra; *Hayes v. State,* 395 So.2d 127 (Ala.Crim.App.1980) , cert. denied, 395 So.2d 150 (Ala.1981); *McQueen v. State,* 355 So.2d 407 (Ala.Crim.App.1978). He may argue every legitimate inference and may examine, collate, shift and treat the evidence in his own way. *Sanders,* supra; *Hayes,* supra; *McQueen,* supra. Liberal rules are allowed counsel in drawing inferences from the evidence in their argument to the jury, whether they are truly drawn or not. *Sanders,* supra; *Liner,* supra; *Smith v. State,* 344 So.2d 1239 (Ala.Crim.App.), cert. denied, 344 So.2d 1243 (Ala.1977). Control of closing argument rests in the broad discretion of the trial judge and, where no abuse of discretion is found, there is no error. *Thomas v. State,* 440 So.2d 1216 (Ala.Crim.App.1983); *Robinson v. State,* 439 So.2d 1328 (Ala.Crim.App.1983); *Elston v. State,* 56 Ala.App. 299, 321 So.2d 264 (1975). The trial judge can best determine when discussion by counsel is legitimate and when it degenerates into abuse. *Hurst v. State,* 397 So.2d 203 (Ala.Crim.App.), cert. denied, 397 So.2d 208 (Ala.1981); *Garrett v. State,* 268 Ala. 299, 105 So.2d 541 (1958).' "

666 So.2d at 64, quoting *Sasser v. State,* 494 So.2d 857, 859-60 (Ala.Cr.App.1986).

The prosecutor's comments were clearly legitimate inferences drawn from the evidence and were also proper responses to the arguments of Freeman's trial counsel designed to persuade the jury to sympathize with Freeman. We find no error, plain or otherwise, as to this claim.

[53] Freeman also contends that the prosecutor improperly suggested to the jury that if it did not vote to impose the death penalty, the jury would owe Debra Gordon Hosford, Sylvia Gordon's sister and Mary Gordon's daughter, an apology. The prosecutor argued the following to the jury:

"You know, the law passed by the legislature, it guides us all. Let it guide you today. Don't make your decision based on prejudice, bias, sympathy for or against the defendant, Mary Gordon, ***189** Sylvia Gordon, or Debbie [Gordon] Hosford. Go by the law. Go by what is right.

"*The defendant would have you forget what happened March 11, 1988. The defendant would have you think, 'Well, gee, he made a juvenile mistake,' and so you ought to pardon him for this. You ought to say, 'Well, we won't punish you so hard.' What are you going to do? 'Debbie, I am sorry. I am sorry, Debbie, but your mother and your sister were butchered. He didn't have a big bad record, so we didn't think the ultimate punishment in this case was enough.' It was the right thing to do. What are you going to say? ' Debbie, he might have had a mental problem sometime and had a tough life. Even though he butchered your mother and your sister, we don't think the death penalty is right. Debbie, he might have been under duress or domination of somebody, I don't know who, but somebody out there might have made him do this so it is okay.' Debbie, the only person there that made him do anything was in total control, was David Freeman himself.*

"And then they argue to you something about disregarding the law. The Judge is going to read you the law. Listen. It is the same words. You have already found it. Substantial capacity, ability to conform, under some kind of duress. It is the same thing. And he wants you to pretend like it is different. No, that is another lie.

"And, lastly, I guess he wants you to say to Debbie, 'Debbie, he was only 18.' I am sorry. Only 18. We are going to forget what he did. Now he is a grown man."

(R. 1300-02; emphasis indicates that portion of the argument complained of on appeal.)

The prosecutor's argument, contrary to Freeman's claim on appeal, did not suggest to the jury that it should vote for the death penalty based simply on sympathy for the victims or for the victims' family. The prosecutor was simply arguing to the jury that

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the mitigating circumstances argued by Freeman, even if proven, were outweighed by the aggravating circumstances. The prosecutor urged the jury to follow the law in making its sentencing recommendation. It did not urge the jury to base its recommendation on sympathy for the victims' family. We find no error, much less plain error, here.

[54] Lastly, Freeman contends that the prosecutor improperly referred to Freeman's juvenile record during his closing argument. We have reviewed the prosecutor's comments and find them to be nothing more than the prosecutor's arguing to the jury that the mitigating circumstances argued by Freeman to exist deserved little weight in this case. Freeman's juvenile records were properly before the jury in support of Freeman's defense that he suffered from a mental disease or defect at the time of the murders. The defense argued many aspects of Freeman's juvenile record in an attempt to establish several mitigating circumstances. Thus, the prosecutor properly referred to certain aspects of Freeman's juvenile history in arguing that the mitigating circumstances deserved little weight in his case and that they were outweighed by the aggravating circumstances. The prosecutor may properly argue legitimate inferences to be drawn from the evidence. We find no error, plain or otherwise, as to this claim.

VIII.

[55] Freeman contends that the evidence presented by the state was insufficient to support his capital murder convictions for the robbery-murders of Sylvia Gordon and Mary Gordon. See § 13A-5-40(a)(2), Ala.Code 1975. Freeman does not contest the evidence showing that he stabbed and intentionally killed the Gordons, and he does not contest the evidence showing that he stole the Gordons' car. He does, however, contend that the state ***190** failed to prove that the murders were committed during the commission of a robbery in the first degree because, he argues, his intent to steal the victims' car was formed only after he had murdered them. We find no merit to this claim.

[56][57][58][59] "In a challenge of the sufficiency of the evidence, an appellate court must consider the evidence in the light most favorable to the prosecution, and the appellate court will not substitute its judgment for that of the trier of fact." *Maddox v. State,* 620 So.2d 132, 133 (Ala.Cr.App.1993). Conflicting evidence presents a jury question not subject to review on appeal, provided that the state's evidence established a prima facie case. *Gunn v. State,* 387 So.2d 280 (Ala.Cr.App.), cert. denied, 387 So.2d 283 (Ala.1980). A trial court's denial of a motion for a judgment of acquittal must be reviewed by determining whether there existed legal evidence before the jury, at the time the motion was made, from which the jury by fair inference could have found the defendant guilty beyond a reasonable doubt. *Willis v. State,* 447 So.2d 199 (Ala.Cr.App.1983). Furthermore:
" ' "A verdict of conviction will not be set aside on the ground of insufficiency of the evidence, unless, allowing all reasonable presumptions for its correctness, the preponderance of the evidence against the verdict is so decided as to clearly convince this Court that it was wrong and unjust." ' "

McCollum v. State, 678 So.2d 1210, 1215 (Ala.Cr.App.1995), quoting *Cox v. State,* 500 So.2d 1296 (Ala.Cr.App.1986), quoting other cases.

[60][61][62][63][64] The state's evidence, including Freeman's statements to police, showed that when Freeman entered the Gordons' house, concealing a knife in his jacket, he intended to kill Sylvia Gordon. In his statement to police, Freeman said that when Mary Gordon entered the house, he had no choice but to kill her. He also said that when he saw the victims trying to get to the telephone, he pulled the telephones off the walls to prevent Mary and Sylvia from calling for help. After brutally killing the Gordons, Freeman placed his bicycle in the trunk of the Gordons' car, fled the crime scene in the car, and abandoned the car in a parking lot near his apartment.
"The capital crime of the intentional killing of the victim during a robbery or an attempted robbery is a single offense beginning with the act of robbing or attempting to rob and culminating with the

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intentional killing of the victim. The offense consists of two elements, robbing and intentionally killing. *Davis v. State,* 536 So.2d 110 (Ala.Cr.App.1987), aff'd, 536 So.2d 118 (Ala.1988) , cert. denied, 490 U.S. 1028, 109 S.Ct. 1766, 104 L.Ed.2d 201 (1989); *Magwood v. State,* 494 So.2d 124 (Ala.Cr.App.1985), aff'd, 494 So.2d 154 (Ala.), cert. denied, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986).

" 'As the Alabama Supreme Court held in *Cobern v. State,* 273 Ala. 547, 142 So.2d 869 (1962), "the fact that the victim was dead at the time the property was taken would not militate [against a finding] of robbery if the intervening time between the murder and the taking formed a continuous chain of events." *Clements v. State,* 370 So.2d 708, 713 (Ala.Cr.App.1978), aff'd in pertinent part, 370 So.2d 723 (Ala.1979); *Clark v. State,* 451 So.2d 368, 372 (Ala.Cr.App.1984). To sustain any other position "would be tantamount to granting to would-be robbers a license to kill their victims prior to robbing them in the hope of avoiding prosecution under the capital felony statute." *Thomas v. State,* 460 So.2d 207, 212, (Ala.Cr.App.1983), aff'd, 460 So.2d 216 (Ala.1984).

" 'Although a robbery committed as a "mere afterthought" and unrelated to the murder will not sustain a conviction under § 13A-5-40(a)(2) for the ***191** capital offense of murder-robbery, see *Bufford v. State,* [382 So.2d 1162 (Ala.Cr.App.), cert. denied, 382 So.2d 1175 (Ala.1980)]; *O'Pry v. State,* [642 S.W.2d 748 (Tex.Cr.App.1981)], the question of a defendant's intent at the time of the commission of the crime is usually an issue for the jury to resolve. *Crowe v. State,* 435 So.2d 1371, 1379 (Ala.Cr.App.1983). The jury may infer from the facts and circumstances that the robbery began when the accused attacked the victim and the capital offense was consummated when the defendant took the victim's property and fled. *Cobern v. State,* 273 Ala. [at] 550, 142 So.2d [at] 871 (1962). The defendant's intent to rob the victim can be inferred where "[t]he intervening time, if any, between the killing and robbery was part of a continuous chain of events." *Thomas v. State,* 460 So.2d at 212.... See also *Cobern v. State; Crowe v. State; Bufford v. State; Clements v. State.*' "

Bush v. State, 695 So.2d 70, 118-19 (Ala.Cr.App.1995), aff'd, 695 So.2d 138 (Ala.), 522 U.S. 969, 118 S.Ct. 418, 139 L.Ed.2d 320 (1997), quoting *Hallford v. State,* 548 So.2d 526, 534-35 (Ala.Cr.App.1988), aff'd, 548 So.2d 547 (Ala.), cert. denied, 493 U.S. 945, 110 S.Ct. 354, 107 L.Ed.2d 342 (1989), quoting in turn *Connolly v. State,* 500 So.2d 57, 63 (Ala.Cr.App.1985), aff'd, 500 So.2d 68 (Ala.1986).

We find that the evidence, when viewed in the light most favorable to the prosecution, was clearly sufficient to allow the jury to reasonably conclude that the murders of the Gordons and the taking of their car formed a continuous chain of events and, therefore, that the taking of the car was not a mere " afterthought" to the murders. In his statement to police, Freeman said that it took him over an hour to ride his bicycle from his apartment to the Gordons' house. Certainly, it was reasonable for the jury to conclude that taking the car was part of Freeman's overall plan to murder the Gordons, leave the crime scene undetected, return to his apartment, change his bloody clothes, and get to work on time in an attempt to establish an alibi. Freeman did, in fact, arrive at work on time, only several hours after he had committed the murders. " '[E]ven if the appellant took the victim's property when he was in "immediate flight after the attempt or commission," his actions were still embraced within the statutory scheme for murder committed during a robbery.' " *Siebert v. State,* 562 So.2d 586, 594 (Ala.Cr.App.1989), aff'd, 562 So.2d 600 (Ala.), cert. denied, 498 U.S. 963, 111 S.Ct. 398, 112 L.Ed.2d 408 (1990), quoting *Davis v. State,* 536 So.2d 110 (Ala.Cr.App.1987), aff'd, 536 So.2d 118 (Ala.1988).

Whether Freeman intended to rob the victims of their car when he killed them was a question for the jury. See *Harris v. State,* 671 So.2d 125 (Ala.Cr.App.1995); *Pierce v. State,* 576 So.2d 236 (Ala.Cr.App.1990), cert. denied, 576 So.2d 258 (Ala.1991); *Siebert,* supra. The evidence certainly supported the reasonable conclusion that the capital offense began when the attack on the victims occurred and was consummated when Freeman fled the Gordons' house in the Gordons' car; thus, Freeman's convictions for the capital offense of murder during the course of a robbery were proper.

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IX.

[65] Freeman also contends that the evidence was insufficient to support his convictions for the capital offense of murder committed during a burglary because, he says, there was no evidence that Freeman "broke and entered" the Gordons' house. (Freeman's brief, p. 29.)

Section § 13A-7-5, Ala.Code 1975, provides, in part:
"(a) A person commits the crime of burglary in the first degree if he knowingly and unlawfully enters or remains unlawfully in a dwelling with intent to commit a crime therein, and, if, in effecting entry or while in [the] dwelling or in ***192** immediate flight therefrom, he or another participant in the crime:
"(1) Is armed with explosives or a deadly weapon; or
"(2) Causes physical injury to any person who is not a participant in the crime; or
"(3) Uses or threatens the immediate use of a dangerous weapon."

Section 13A-7-1(4), Ala.Code 1975, further provides that "[a] person 'enters or remains unlawfully' in or upon premises when he is not licensed, invited or privileged to do so." Under our current burglary statute, the state is no longer required to prove a "breaking and entering"; that common-law element has been replaced with the general requirement that there be an unlawful entry or an unlawful remaining.

In support of his claim, Freeman relies principally on the Alabama Supreme Court's decision in *Ex parte Gentry,* 689 So.2d 916 (Ala.1996). In *Ex parte Gentry,* the Court overruled a long line of cases that held that evidence of a struggle and a murder inside a victim's dwelling alone was sufficient to establish that any initial license to enter had been revoked and that, therefore, the defendant had "remain[ed] unlawfully" within the meaning of the burglary statute. However, in *Davis v. State,* 737 So.2d 480 (Ala.1999), the Alabama Supreme Court overruled *Ex parte Gentry,* holding:
"*Gentry* served a valid purpose in condemning a finding of burglary merely from the commission of a crime that could not be deemed to be within the scope of the privilege to enter. To hold otherwise would have converted every privileged entry followed by a crime into a burglary, thereby running afoul of the constitutional requirement of reserving capital punishment for only the most egregious crimes. *Gentry,* supra, 689 So.2d at 921. However, in sweeping out mere evidence of the commission of a crime following privileged entry, this Court condemned the use of evidence of a struggle as indicium of revocation of the defendant's license or privilege to remain. In so doing, the Court swept with too broad a broom.
"Evidence of a struggle that gives rise to circumstantial evidence of revocation of a license or privilege can be used to show an unlawful remaining, a separate prong of the offense of burglary upon which a conviction can be based. We are certainly mindful of the doctrine of *stare decisis* and recognize that *Gentry* was decided only fairly recently; nevertheless, this Court must make a course correction if a correction is necessary. To the extent that *Gentry* is inconsistent with this rule, we overrule it.
"We reiterate that the evidence of a commission of a crime, standing alone, is inadequate to support the finding of an unlawful remaining, but evidence of a struggle can supply the necessary evidence of an unlawful remaining. In homicide cases, the mere fact of the victim's death cannot be equated with a struggle. For example, evidence of a privileged entry followed by death from an injury inflicted by surprise or stealth and causing instantaneous death would not constitute circumstantial evidence of an unlawful remaining. Likewise, a privileged entry followed by death from an injury inflicted by a delayed mechanism, such as poison, would be equally deficient.
"The evidence was sufficient for the jury to find that Davis killed Harrington [the victim] during a burglary. The evidence of a struggle giving rise to the inference of an unlawful remaining is supplied by Davis's choice to kill by a less-than-instantaneous technique of strangulation and by his use of three nonfatal stab wounds to the victim's lower back. Based on the circumstances suggested by the evidence, the jury reasonably could have found that Davis, from the point at which he began committing his criminal acts, ' remain[ed] unlawfully'***193** in Harrington's home

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with the intent to commit a crime."

737 So.2d at 483-84. We find that the evidence presented by the State was clearly sufficient to allow the jury to reasonably conclude that Freeman " remain[ed] unlawfully" in the Gordons' house and, therefore, that his convictions for burglary-murder were proper.

Freeman, who was carrying a knife concealed in his jacket, was waiting on the porch of the Gordons' house for Sylvia to arrive home. Deborah Gordon Hosford testified that she and Sylvia let Freeman come inside the house only because Sylvia was going to tell Freeman that she did not want to see him anymore. Shortly before the murders, Freeman told a co-worker that Mary Gordon did not like him and that if she was dead, he would have a chance with Sylvia. He also told this same co-worker that he would rather see Sylvia dead than to see her with someone else. In his statement to police, Freeman said:
"[Sylvia's] mother was coming in the door, I looked at Sylvia then I saw the knife in my hand then I said, 'I have no other choice,' so I stabbed her mother. I got cut on my right hand so I wrapped a handkerchief around my hand to stop the bleeding then when I came out of the bathroom I saw both of them trying to get to the phone so I ran over and got all of the phones off the walls then I waited until I knew they weren't going anywhere before I got the car keys."

(R. 3223.)

The evidence also showed that the Gordons' house was ransacked. Sylvia was stabbed 22 times; no one single wound was fatal. There was a trail of Sylvia's blood throughout the house, and her blood was smeared in almost every room of the house. She also had suffered defensive wounds on her hands, and the bite marks on Freeman's arm, seen by the police after his arrest, were positively identified as having been made by Sylvia. The medical examiner testified that Sylvia survived for approximately eight minutes while she bled to death.

The medical examiner also testified that Mary Gordon survived for five minutes before she died from the 14 stab wounds inflicted by Freeman. According to Freeman's own statement, Mary Gordon, after being stabbed in the back by Freeman, tried to get away from Freeman by going into her bedroom. Freeman told police that she tried to shut the bedroom door, but he forced his way in. Freeman also told police that both Sylvia and Mary tried to get to a telephone to call for help, but he pulled the telephones off of the walls before they could get to them.

We find that this evidence undoubtedly demonstrated that a violent struggle took place between Freeman and the victims, and that both victims physically resisted Freeman's assault. Therefore, we conclude that the jury reasonably could have found that the victims revoked their consent to Freeman's remaining in their house when he "began committing his criminal acts, and thus, that he 'remain[ed] unlawfully' in [the Gordons'] home." *Davis,* supra at 484.

X.

[66][67] Freeman contends that his multiple convictions and sentences for the same killings violated constitutional principles of double jeopardy. Because Freeman is presenting this claim for the first time on appeal, we will review it pursuant to the plain error rule. Rule 45A, Ala.R.App.P. We find no merit to Freeman's contention.

As we stated in *Arthur v. State,* 711 So.2d 1031 (Ala.Cr.App.1996), aff'd, 711 So.2d 1097 (Ala.1997):
"In *Ex parte McWilliams,* 640 So.2d 1015 (Ala.1993) the appellant was charged in a four-count indictment on the capital murder; the fourth count was dropped at the close of the State's case. The appellant claimed that his rights against double jeopardy were violated***194** because, he says, he was charged with and convicted of three counts of capital murder: two counts of murder made capital because it occurred during a robbery and one count of murder made capital because it occurred during a rape. He received one sentence of death. In holding that this double jeopardy

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claim was without merit, the Alabama Supreme Court stated:

" 'In *Grady v. Corbin,* 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), the United States Supreme Court addressed the scope of the coverage of the Double Jeopardy Clause, as follows:

" ' "The Double Jeopardy Clause embodies three protections: 'It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.' *North Carolina v. Pierce [Pearce],* 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969) (footnotes omitted). The *Blockburger* [*v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932),] test was developed 'in the context of multiple punishments imposed in a single prosecution.' *Garrett v. United States,* 471 U.S. 773, 778, 105 S.Ct. 2407, 2411, 85 L.Ed.2d 764 (1985)."

" '*Grady,* 495 U.S. at 516-17, 110 S.Ct. at 2090-91, 109 L.Ed.2d at 561. This Court has also held that the Double Jeopardy Clause of the Alabama Constitution, Art. I, § 9, applies only in the three areas enumerated above. *Ex parte Wright,* 477 So.2d 492 (Ala.1985).

" 'In this case, McWilliams was not prosecuted for the same offense after an acquittal; nor was he prosecuted for the same offense after a conviction. That is, he was not prosecuted twice for the same offense. Moreover, while in *King* [*v. State,* 574 So.2d 921 (Ala.Cr.App.1990)] the defendant received four separate prison sentences for the same offense, McWilliams has only been sentenced to die once and, indeed, can only be put to death once.

" 'In the context of prescribing multiple punishments for the same offense, the United States Supreme Court has stated that "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter,* 459 U.S. 359, 366, 103 S.Ct. 673, 678, 74 L.Ed.2d 535 (1983).

" 'In the present case, it is clear that the jury knew that it was convicting McWilliams of murdering Patricia Reynolds only once. It is also clear that the jury knew that McWilliams's crime was made capital because his victim was murdered in the course of one robbery and one rape. We conclude, therefore, that the sentencing court has not prescribed a greater punishment than the legislature intended. Even if McWilliams's rights against double jeopardy had been violated by the two convictions of robbery-murder, the convictions for one count of robbery-murder, the convictions for one count of rape-murder would remain; and either of these would be sufficient to support a death sentence.'

"640 So.2d at 1022."

711 So.2d at 1075-76.

Here, Freeman was not being prosecuted a second time for the same offense after either an acquittal or a conviction. Nor did Freeman receive separate sentences for each offense. Freeman " 'has only been sentenced to die once and, indeed, can only be put to death once.' " *Arthur,* 711 So.2d at 1075, quoting *Ex parte McWilliams,* 640 So.2d 1015, 1022 (Ala.1993), aff'd. 666 So.2d 90 (Ala.1995), cert. denied, ***195**516 U.S. 1053, 116 S.Ct. 723, 133 L.Ed.2d 675 (1996). Freeman was properly indicted and convicted of six separate and distinct capital offenses involving the murders of Mary and Sylvia Gordon, each requiring proof of an element that the other did not. Accordingly, we find no plain error here.

XI.

[68][69] Freeman also contends that the trial court erred by failing to instruct the jury that its findings as to mitigating circumstances did not have to be unanimous. In failing to so instruct the jury, he says, the trial court implied that the jurors had to unanimously agree before they could find the existence of a mitigating circumstance. Freeman did not object at trial to the trial court's instructions to the jury concerning mitigating circumstances; therefore, we will review this claim under the plain error rule. Rule 45A, Ala.R.App.P. We have reviewed the trial court's instructions to the jury; we find nothing in the instructions that would have suggested to the jurors, or given them the impression, that their findings concerning the existence of mitigating circumstances had to be

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unanimous. See *Coral v. State,* 628 So.2d 954, 985 (Ala.Cr.App.1992), aff'd, 628 So.2d 1004 (Ala.1993), cert. denied, 511 U.S. 1012, 114 S.Ct. 1387, 128 L.Ed.2d 61 (1994); *Windsor v. State,* 683 So.2d 1027 (Ala.Cr.App.1994), aff'd, 683 So.2d 1042 (Ala.1996), cert. denied, 520 U.S. 1171, 117 S.Ct. 1438, 137 L.Ed.2d 545 (1997).

As we stated in *Williams v. State,* 710 So.2d 1276 (Ala.Cr.App.1996), aff'd, 710 So.2d 1350 (Ala.1997), cert. denied, 524 U.S. 929, 118 S.Ct. 2325, 141 L.Ed.2d 699 (1998), in rejecting a claim identical to Freeman's:

"In *Mills v. Maryland,* [486 U.S. 367] at 384, 108 S.Ct. 1860, 100 L.Ed.2d 384 [(1988)], the United States Supreme Court held that a sentence of death must be vacated where 'there is a substantial probability that reasonable jurors, upon receiving the judge's instructions ... well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance.' Again, no objection was made to the instructions in the trial court.

"Section 13A-5-45(g) provides:

" 'The defendant shall be allowed to offer any mitigating circumstance defined in Sections 13A-5-51 and 13A-5-52. When the factual existence of an offered mitigating circumstance is in dispute, the defendant shall have the burden of interjecting the issue, but once it is interjected the state shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence.'

"The instructions to the jury in the present case in concerning the manner of establishing the existence of mitigating circumstances were in accordance with § 13A-5-45(g) and the *Alabama Pattern Jury Instructions: Criminal.* The jury was instructed that the appellant had the burden of interjecting a mitigating circumstance, but once it was interjected the state had the burden of disproving the factual existence of any mitigating circumstance by a preponderance of the evidence. The court gave no instruction suggesting that a finding of a mitigating circumstance had to be unanimous.

"The Alabama Supreme Court addressed this identical issue in *Ex parte Martin,* 548 So.2d 496, 499 (Ala.), cert. denied, 493 U.S. 970, 110 S.Ct. 419, 107 L.Ed.2d 383 (1989), and held that under the instructions given in *Martin,* 'the jurors could not have reasonably believed that they were required to agree unanimously on the existence of any particular mitigating factor.' For cases following *Martin,* see *Hutcherson v. State,* 677 So.2d 1174 (Ala.Cr.App.1994); *Windsor v. State,* 683 So.2d 1027 (Ala.Cr.App.1994); *Kuenzel v. State,* 577 So.2d 474 (Ala.Cr.App.1990), aff'd, ***196** 577 So.2d 531 (Ala.), cert. denied, 502 U.S. 886, 112 S.Ct. 242, 116 L.Ed.2d 197 (1991). The instructions given in *Martin* are substantially the same as those given in the instant case. After reviewing the instructions in the present case in their entirety, we conclude that there is no reasonable likelihood or probability that the jurors believed or could have reasonably believed that they were required to agree unanimously on the existence of any particular mitigating circumstance. The instructions were not only legally correct, but were clear and understandable. The case relied upon by the appellant, *Mills v. Maryland,* is factually distinguishable from the instant case. We find no merit in the appellant's contention, and no plain error in the instructions."

710 So.2d at 1307; see also *Weaver v. State,* 678 So.2d 260, 282 (Ala.Cr.App.1995), rev'd on other grounds, 678 So.2d 284 (Ala.1996).

Here, as in *Williams,* the jury was properly instructed that once Freeman offered a mitigating circumstance, the State had the burden of disproving the factual existence of that circumstance by a preponderance of the evidence. No portion of the trial court's instructions suggested to the jury that its findings concerning mitigating circumstances had to be unanimous. Moreover, the trial court's instructions were in accordance with the *Alabama Proposed Pattern Jury Instructions for Use in the Guilt Stage of Capital Cases Tried Under Act No. 81-178.* After reviewing the trial court's instructions, we find that there was "no reasonable likelihood or probability that the jurors believed that they were required to agree unanimously on the existence of any particular mitigating circumstance." *Williams,* 710 So.2d at 1307.

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Accordingly, we find no error, much less plain error, as to this claim.

XII.

[70] Freeman asserts that Alabama's application of the statutory aggravating circumstance that the offense was especially heinous, atrocious, or cruel as compared to other capital offenses is " unconstitutionally vague and has been applied in an overly broad and arbitrary manner." (Freeman's brief, p. 58.) This claim is presented for the first time on appeal; therefore, our review will be for plain error. Rule 45A, Ala.R.App.P.

[71] To the extent that Freeman is claiming that the "especially heinous, atrocious or cruel" statutory aggravating circumstance found in § 13A-5-49(8), Ala.Code 1975, is unconstitutional on its face, that argument is without merit. See *Bui v. State,* 551 So.2d 1094 (Ala.Cr.App.1988), aff'd, 551 So.2d 1125 (1989), cert. granted, judgment vacated on other grounds, 499 U.S. 971, 111 S.Ct. 1613, 113 L.Ed.2d 712 (1991); *Hallford v. State,* 548 So.2d 526, 541-42 (Ala.Cr.App.1988), aff'd, 548 So.2d 547 (Ala.), cert. denied, 493 U.S. 945, 110 S.Ct. 354, 107 L.Ed.2d 342 (1989).

[72][73] To the extent that Freeman is claiming that the "especially heinous, atrocious or cruel" statutory aggravating circumstance was unconstitutionally applied in his case, a claim also reviewable only for plain error, we find that argument to be without merit as well. Freeman appears to argue in his brief to this court that the trial court, by instructing the jury that all capital offenses were to some extent heinous, atrocious, or cruel, "stripped away" any "standard of comparison" for the jury to use in determining the existence or nonexistence of the statutory aggravating circumstance in his case. (Freeman's brief, p. 59.)

The trial court instructed the jury on the "especially heinous, atrocious or cruel" statutory aggravating circumstance as follows:
"Number two circumstance for you to consider, the capital offense was especially*197 heinous, atrocious, or cruel compared to other capital offenses.
"The term 'heinous' means extremely wicked or shockingly evil. The term 'atrocious' means outrageously wicked and violent. The term 'cruel' means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.
"What is intended to be included in this aggravating circumstance is those cases where the actual commission of the capital offense is accompanied by such additional acts as to set this crime apart from the norm of capital offenses. For a capital offense to be especially heinous or atrocious, any brutality which is involved in it must exceed that which is normally present in any capital offense.
For a capital offense to be especially cruel, it must be a conscienceless or pitiless crime which is unnecessarily torturous to the victim.
"All capital offenses are heinous, atrocious, and cruel to some extent. What is intended to be covered by this aggravating circumstance is only those cases in which the degree of heinousness, atrociousness, and cruelty exceeds that which will always exist when a capital offense is committed."

(R. 1309-10.)

In *Ex parte Kyzer,* 399 So.2d 330 (Ala.1981), the Alabama Supreme Court held that for a crime to fit within the "especially heinous, atrocious or cruel" aggravating circumstance listed in § 13-11-6(8) [now § 13A-5-49(8)] it must be one of "those conscienceless or pitiless homicides which are unnecessarily torturous to the victim." 399 So.2d at 334. Clearly, the trial court's instructions in this case reflected the limiting construction of the statutory aggravating circumstance established in *Ex parte Kyzer.* See *Hutcherson v. State,* 677 So.2d 1174, 1203 (Ala.Cr.App.1994), rev'd on other grounds, 677 So.2d 1205 (Ala.1996); *Slaton v. State,* 680 So.2d 879, 903 (Ala.Cr.App.1995), aff'd, 680 So.2d 909 (Ala.1996), cert. denied, 519 U.S. 1079, 117 S.Ct. 742, 136 L.Ed.2d 680 (1997); *Bui,* 551 So.2d at 1119.

[74] Furthermore, the trial court's instructions were identical to the *Alabama Proposed Pattern Jury Instructions for Use in the Sentence Stage of Capital Cases Tried Under Act No. 81-178.* "A

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trial court's following of an accepted pattern jury instruction weighs heavily against any finding of plain error." *Price v. State,* 725 So.2d 1003, 1058 (Ala.Cr.App.1997), aff'd, 725 So.2d 1063 (Ala.1998). For cases in which the same, or essentially the same, instructions were given to the jury, and were approved by the appellate courts of this state, see *Price,* supra at 1057; *Knotts v. State,* 686 So.2d 431, 446-47 (Ala.Cr.App.1995), aff'd, 686 So.2d 486 (Ala.1996), cert. denied, 520 U.S. 1199, 117 S.Ct. 1559, 137 L.Ed.2d 706 (1997); *Slaton,* supra at 902; *Haney v. State,* 603 So.2d 368, 385-86 (Ala.Cr.App.1991), aff'd, 603 So.2d 412 (Ala.1992), cert. denied, 507 U.S. 925, 113 S.Ct. 1297, 122 L.Ed.2d 687 (1993); *Ex parte Bankhead,* 585 So.2d 112, 123-24 (Ala.1991), aff'd on return to remand, 625 So.2d 1146 (Ala.1993), rev'd on other grounds, 625 So.2d 1146 (Ala.1993); *Bui,* supra at 1120; *Hallford,* supra at 541-42

Freeman's conduct, which we have discussed previously in this opinion, clearly was " conscienceless, pitiless, and unnecessarily torturous" to the victims. Both victims were stabbed repeatedly. Testimony at trial indicated that no single one of Sylvia Gordon's 22 stab wounds was fatal, and that she was conscious for at least 8 minutes after the first stab wound before she eventually bled to death. There was a trail of Sylvia's blood throughout the house. Testimony also indicated that Mary Gordon could have been conscious for at least 5 minutes after the first of her 14 stab wounds, and that she was raped by Freeman while she was dying. Clearly, these crimes were perpetrated with a design to inflict a great degree of pain and with utter indifference to the suffering of the victims. The degree of cruelty and violence in these crimes far exceeds that ***198** which is common to all capital offenses. For the reasons stated above, we find no error, plain or otherwise, as to this claim.

XIII.

[75][76][77][78] Freeman also contends that the trial court erred in failing to find as a statutory mitigating circumstance that Freeman's "capacity ... to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." See § 13A-5-51(6), Ala.Code 1975.

"A sentencer in a capital case may not refuse to consider or be 'precluded from considering' mitigating factors. *Eddings v. Oklahoma,* 455 U.S. 104, 110, 102 S.Ct. 869, 874, 71 L.Ed.2d 1 (1982) (quoting *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2964-65, 57 L.Ed.2d 973 (1978)). The defendant in a capital case generally must be allowed to introduce any relevant mitigating evidence regarding the defendant's character or record and any of the circumstances of the offense, and consideration of that evidence is a constitutionally indispensable part of the process of inflicting the penalty of death. *California v. Brown,* 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987) ; *Ex parte Henderson,* 616 So.2d 348 (Ala.1992); *Haney v. State,* 603 So.2d 368 (Ala.Cr.App.1991), aff'd, 603 So.2d 412 (Ala.1992), cert. denied, 507 U.S. 925, 113 S.Ct. 1297, 122 L.Ed.2d 687 (1993). Although the trial court is required to consider all mitigating circumstances, the decision of whether a particular mitigating circumstance is proven and the weight to be given it rests with the sentencer. *Carroll v. State,* 599 So.2d 1253 (Ala.Cr.App.1992) , aff'd, 627 So.2d 874 (Ala.1993), cert. denied, 510 U.S. 1171, 114 S.Ct. 1207, 127 L.Ed.2d 554 (1994) . See also *Ex parte Harrell,* 470 So.2d 1309 (Ala.) , cert. denied, 474 U.S. 935, 106 S.Ct. 269, 88 L.Ed.2d 276 (1985)."

Williams v. State, 710 So.2d at 1276, 1347 (Ala.Cr.App.1996), aff'd, 710 So.2d 1350 (Ala.1997), cert. denied, 524 U.S. 929, 118 S.Ct. 2325, 141 L.Ed.2d 699 (1998).

The trial court's sentencing order reflects that the court found the existence of two aggravating circumstances: that the capital offenses were committed while Freeman was engaged in the commission of, or an attempt to commit, a rape, a robbery, and a burglary, see § 13A-5-49(4), Ala.Code 1975, and that the capital offenses were especially heinous, atrocious, or cruel when compared to other capital offenses, see § 13A-5-49(8), Ala.Code 1975. The trial court further found the existence of three statutory mitigating circumstances: that Freeman had no

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significant history of prior criminal activity, see § 13A-5-51(1), Ala.Code 1975; that Freeman committed the capital offenses while he was under the influence of extreme mental or emotional disturbance, see § 13A-5-51(2), Ala.Code 1975; and that Freeman was 18 years old at the time of the murders, see § 13A-5-51(7), Ala.Code 1975. The trial court's sentencing order also reflects that the trial court considered all aspects of Freeman's character or record and any of the circumstances of the offenses that he offered as a basis for a life-imprisonment-without-parole sentence, and any other relevant mitigating circumstances offered by Freeman, and found the following to constitute nonstatutory mitigation: Freeman's emotional disturbance resulting from a difficult family history and to transfers to a number of different foster and group home placements throughout his life; and Freeman's "antisocial personality disorder."

In support of his claim that the trial court erred in failing to find the existence of the § 13A-5-51(6) statutory mitigating circumstance in his case, Freeman relies on the testimony of defense expert Dr. Barry Burkhart. Dr. Burkhart evaluated Freeman in June and August 1989, approximately a year and a half after the murders. Dr. Burkhart testified at the guilt phase of the trial that it was his opinion that Freeman suffered from a major***199** depressive disorder and a schizotypal personality disorder, the latter of which Dr. Burkhart said was similar to a borderline personality disorder and was characterized, in part, by an inability to get along with other people. It was Dr. Burkhart's opinion that at the time of the murders Freeman experienced a brief reactive psychosis, during which he lost touch with reality. Dr. Burkhart testified that it was very likely that as a result of a brief reactive psychosis and the stress of being abandoned and rejected by Sylvia, Freeman was unable to conform his conduct to the requirements of the law. On cross-examination, Dr. Burkhart testified that he was not a certified forensics examiner and that he did not hold himself out to be an expert in the field of forensic psychology. Dr. Burkhart also testified that it was possible that Freeman was not experiencing a psychotic episode when he murdered the Gordons.

The record reveals that there was, however, an abundance of evidence presented by the state to contradict Dr. Burkhart's testimony and to show that at the time of the murders, Freeman's ability to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law was not impaired. Dr. Guy Renfro, the court-appointed psychologist who was ordered to perform, and who did perform, a forensic evaluation of Freeman in July and September 1995, made the following conclusions concerning Freeman's mental state at the time of the murders:

"The information utilized in the current determination of Mr. Freeman's mental state at the time of the alleged offense includes material contained in the police reports of the investigation of the crime, statements made by Mr. Freeman at the time of his arrest and shortly thereafter, and information conveyed to the examiner during the current evaluation.

"The information examined would indicate that Mr. Freeman was displaying the personality characteristics of a borderline personality disorder at the time of the alleged offense. That is, he had difficulty in maintaining relationships. He was very sensitive to possible feelings of rejection or abandonment. He was likely to manifest intense anger and could engage in aggressive acting out towards others. While these characteristics do appear to have played a role in Mr. Freeman's choices and decisions during this time frame, there are no indications that he did suffer from a mental disorder or illness which would have prevented him from appreciating the consequences of his behavior. Instead, there are indications both in police reports and in Mr. Freeman's own statements which indicate that he did realize that certain aspects of his behavior were wrong and thus necessitated further action to conceal his identity and to attempt to avoid apprehension and detection. Mr. Freeman stated in his own words that he knew what he was doing was wrong and was attempting to avoid apprehension. Mr. Freeman does claim amnesia for certain aspects of his behavior on the date of the alleged offense. However, this examiner observed inconsistencies in Mr. Freeman's description of amnesia. That is, at times Mr. Freeman would state that he did not recall something and later he would make statements indicating that he did have a

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memory of this incident. Mr. Freeman even admitted that he tends to recall certain details at certain times while seeming to be unable to recall them at others. There were also instances where Mr. Freeman claimed he could not recall any information about a particular time frame but he would later provide detailed and specific information which could be corroborated indicating no problem with his actual memory. These inconsistencies are much more suggestive of a voluntary attempt to avoid disclosure and possible further incrimination rather than a true amnecis event which is the result of a neuropsychological condition.
***200** "In summary, the information reviewed in this evaluation does indicate that at the time of the offense David Freeman was capable of discerning right from wrong and could appreciate the wrongfulness of acts such as that with which he is charged. For this reason it is recommended that the case proceed to trial as scheduled."

(C. 3471-72.)

Dr. Renfro testified that he found nothing during his evaluation to indicate that Freeman would have had trouble at the time of the murders conforming his conduct to the requirements of the law. He further testified that he found no evidence of delusional thinking or hallucinations. Dr. Renfro stated that all of Freeman's actions and behavior during and after the murders indicated that he did not lack the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. Dr. Renfro also stated that he found nothing to indicate that Freeman was experiencing a brief reactive psychosis when he murdered the Gordons.

The findings of the Lunacy Commission, a team of three psychiatrists at Taylor Hardin Secure Medical Facility who evaluated Freeman in December 1988, were similar to the findings of Dr. Renfro. The Lunacy Commission examined Freeman to determine his competency to stand trial and his mental state at the time of the offense. All three doctors on the commission found that there was no evidence that Freeman was suffering from any mental illness at the time of the murders, nor was there any evidence indicating that, at the time of the murders, Freeman was unable to conform his conduct to the requirements of the law. All of the doctors diagnosed Freeman as having either an " antisocial personality disorder" or an adjustment disorder "with depressed mood."

As noted above, the trial court did find, as a statutory mitigating circumstance, that Freeman committed the murders while he was under extreme mental and emotional disturbance. The trial court also found as nonstatutory mitigation that Freeman suffered from an antisocial personality disorder. The record reflects that the trial court considered all of the evidence offered by Freeman to establish the existence of the statutory mitigating circumstance that Freeman's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, and based on that evidence, determined that that circumstance did not exist. "The factual determination of the existence or nonexistence of a mitigating circumstance is within the sound discretion of the trial judge where the evidence in that regard is in conflict." *Wesley v. State,* 575 So.2d 108, 121 (Ala.Cr.App.1989), rev'd on other grounds, 575 So.2d 127 (1990).

Accordingly, we find that the trial court's findings concerning the statutory mitigating circumstances were amply supported by the record. Thus, we find no error, much less plain error, as to this claim.

XIV.

[79][80] In accordance with Rule 45A, Ala.R.App.P .. we have examined the record for any plain error with respect to Freeman's capital murder convictions and death sentence, whether or not brought to our attention or to the attention of the trial court. We find no plain error or defect in the proceedings, either in the guilt phase or in the sentencing phase of the trial.

We have also reviewed Freeman's sentence in accordance with § 13A-5-51, Ala.Code 1975, which requires that, in addition to reviewing the case for any error involving Freeman's capital murder conviction, we shall also review the propriety of the

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death sentence. This review shall include our determination of the following: (1) whether any error adversely affecting the rights of the defendant occurred in the sentence proceedings; (2) whether the trial court's findings concerning the aggravating ***201** and mitigating circumstances were supported by the evidence; and (3) whether death is the appropriate sentence in the case. Section 13A-5-53(b) requires that, in determining whether death is the proper sentence, we determine: (1) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) whether an independent weighing by this court of the aggravating and mitigating circumstances indicates that death is the proper sentence; and (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

After the jury convicted Freeman of the capital offenses charged in the indictment, a separate sentence hearing was held before the jury in accordance with §§ 13A-5-45 and -46, Ala.Code 1975. After hearing evidence concerning aggravating and mitigating circumstances, after being properly instructed by the trial court as to the applicable law, and after being correctly advised as to its function in finding any aggravating and mitigating circumstances, the weighing of those circumstances, if appropriate, and its responsibility in reference to the return of an advisory verdict, the jury recommended by a vote of 11-1 that Freeman be sentenced to death by electrocution.

Thereafter, the trial court held another hearing, in accordance with § 13A-5-47, Ala.Code 1975, to aid it in determining whether it would sentence Freeman to life imprisonment without parole or to death, as recommended by the jury. The trial court ordered and received a written presentence investigation report, as required by § 13A-5-47(b). Upon conclusion of the hearing, the trial court entered specific written findings concerning each aggravating circumstance enumerated in § 13A-5-49, Ala.Code 1975, each mitigating circumstance enumerated in § 13A-5-51, Ala.Code 1975, and any mitigating circumstance found to exist under § 13A-5-52, Ala.Code 1975, as well as written findings of fact summarizing the offense and Freeman's participation in the offense.

In its findings of fact, the trial court found the existence of two statutory aggravating circumstances: (1) that the murders were committed while Freeman was engaged in the commission of, or an attempt to commit, or flight after committing a burglary, a robbery, and a rape, see § 13A-5-49(4), Ala.Code 1975; and (2) that the capital offenses were especially heinous, atrocious, or cruel compared to other capital offenses, see § 13A-5-49(8), Ala.Code 1975. The trial court found the existence of three statutory mitigating circumstances: (1) that Freeman had no significant history of prior criminal activity, see § 13A-5-51(1), Ala.Code 1975; (2) that the capital offenses were committed while Freeman was under the influence of extreme mental or emotional disturbance; and (3) that Freeman was 18 years old at the time of the offenses, see § 13A-5-51(7), Ala.Code 1975. The trial court also heard testimony regarding Freeman's character or record and any of the circumstances of the offenses that Freeman offered as a basis for sentencing him to life imprisonment without parole instead of death, see § 13A-5-52, Ala.Code 1975. In this regard, the trial court found that the following evidence was mitigating: (1) that Freeman was emotionally disturbed as a result of his difficult family history and his numerous placements to and transfers from various foster and group homes throughout his life; and (2) that Freeman was diagnosed as suffering from an " antisocial personality disorder."

The trial court's sentencing order reflects that after considering all the evidence presented, the presentence report, and the advisory verdict of the jury and after weighing the aggravating circumstances against the statutory and nonstatutory mitigating circumstances in the case, the trial court found that the aggravating circumstances outweighed the statutory and nonstatutory mitigating circumstances. Accordingly, the trial court sentenced***202** Freeman to death. The trial court's findings concerning the aggravating circumstances and the mitigating circumstances are supported by the evidence.

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[81] Freeman was convicted of the offenses of murder committed during a robbery, murder committed during a burglary, murder committed during a rape, and the murder of two or more persons by one act or pursuant to one scheme or course of conduct. These offenses are defined by statute as capital offenses. See § 13A-5-40(2), (4) and (10), Ala.Code 1975. We take judicial notice that similar crimes have been punished capitally throughout the state. See, e.g., cases dealing with murders committed during a robbery: *Burgess v. State,* [Ms. CR-94-0475, December 18, 1998] --- So.2d ---- (Ala.Cr.App.1998); *Clemons v. State,* 720 So.2d 961 (Ala.Cr.App.1996), aff'd, 720 So.2d 985 (Ala.1998), cert. denied, 525 U.S. 1124, 119 S.Ct. 907, 142 L.Ed.2d 906 (1999); *Williams v. State,* 710 So.2d 1276 (Ala.Cr.App.1996), aff'd, 710 So.2d 1350 (Ala.1997), cert. denied, 524 U.S. 929, 118 S.Ct. 2325, 141 L.Ed.2d 699 (1998); *Kuenzel v. State,* 577 So.2d 474 (Ala.Cr.App.1990), aff'd, 577 So.2d 531 (Ala.), cert. denied, 502 U.S. 886, 112 S.Ct. 242, 116 L.Ed.2d 197 (1991); *Brownlee v. State,* 545 So.2d 151 (Ala.Cr.App.1988), aff'd, 545 So.2d 166 (Ala.), cert. denied, 493 U.S. 874, 110 S.Ct. 208, 107 L.Ed.2d 161 (1989); *Hallford v. State,* 548 So.2d 526 (Ala.Cr.App.1988), aff'd, 548 So.2d 547 (Ala.), cert. denied, 493 U.S. 945, 110 S.Ct. 354, 107 L.Ed.2d 342 (1989); *Davis v. State,* 536 So.2d 110 (Ala.Cr.App.1987), aff'd, 536 So.2d 118 (Ala.1988), cert. denied, 490 U.S. 1028, 109 S.Ct. 1766, 104 L.Ed.2d 201 (1989); see also the following cases dealing with murders committed during the course of a burglary: *Neal v. State,* 731 So.2d 609 (Ala.Cr.App.1997), aff'd, 731 So.2d 621 (Ala.1999); *Knotts v. State,* 686 So.2d 484 (Ala.Cr.App.1995), aff'd, 686 So.2d 486 (Ala.1996), cert. denied, 520 U.S. 1199, 117 S.Ct. 1559, 137 L.Ed.2d 706 (1997); *Taylor v. State,* 666 So.2d 36 (Ala.Cr.App.), opinion extended after remand, 666 So.2d 71 (Ala.Cr.App.1994), aff'd, 666 So.2d 73 (Ala.1995), cert. denied, 516 U.S. 1120, 116 S.Ct. 928, 133 L.Ed.2d 856 (1996); *Thomas v. State,* 539 So.2d 375 (Ala.Cr.App.), aff'd, 539 So.2d 399 (Ala.1988), cert. denied, 491 U.S. 910, 109 S.Ct. 3201, 105 L.Ed.2d 709 (1989); see also the following cases dealing with murders committed during a rape: *Brooks v. State,* 695 So.2d 176 (Ala.Cr.App.1996), aff'd, 695 So.2d 184 (Ala.), cert. denied, 522 U.S. 893, 118 S.Ct. 233, 139 L.Ed.2d 164 (1997); *Bradley v. State,* 494 So.2d 750 (Ala.Cr.App.1985), aff'd, 494 So.2d 772 (Ala.1986), cert. denied, *Williams v. Ohio,* 480 U.S. 923, 107 S.Ct. 1385, 94 L.Ed.2d 699 (1987); *Dunkins v. State,* 437 So.2d 1349 (Ala.Cr.App.), aff'd, 437 So.2d 1356 (Ala.1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984); see also cases dealing with the murder of two or more persons: *Pilley v. State,* [Ms. CR-96-1781, August 14, 1998] --- So.2d ---- (Ala.Cr.App.1998); *Burgess v. State,* 723 So.2d 742 (Ala.Cr.App.1997), aff'd,; *Williams v. State,* supra; *Taylor,* supra; *Siebert v. State,* 555 So.2d 772 (Ala.Cr.App.), aff'd, 555 So.2d 780 (Ala.1989), cert. denied, 497 U.S. 1032, 110 S.Ct. 3297, 111 L.Ed.2d 806 (1990); *Fortenberry v. State,* 545 So.2d 129 (Ala.Cr.App.1988), aff'd, 545 So.2d 145 (Ala.1989), cert. denied, 495 U.S. 911, 110 S.Ct. 1937, 109 L.Ed.2d 300 (1990); *Hill v. State,* 455 So.2d 930 (Ala.Cr.App.), aff'd, 455 So.2d 938 (Ala.), cert. denied, 469 U.S. 1098, 105 S.Ct. 607, 83 L.Ed.2d 716 (1984).

After carefully reviewing the record of the guilt phase and the sentencing phase of Freeman's trial, we find no evidence that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor. We conclude that the findings and conclusions of the trial court are amply supported by the evidence. We have independently weighed the aggravating circumstances against the statutory and nonstatutory mitigating circumstances, and we concur in the trial court's judgment that the aggravating circumstances outweigh the mitigating circumstances,*203 and that death is the appropriate sentence in this case. Considering Freeman and the crime he committed, we find that the sentence of death is neither excessive nor disproportionate to the penalty imposed in similar cases.

For the reasons stated above, Freeman's convictions and sentence of death are affirmed.

AFFIRMED.

McMILLAN, BASCHAB, and FRY, JJ., concur.
COBB, J., recuses herself.
Ala.Crim.App.,1999.

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Appendix H

Westlaw.

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H

Supreme Court of Alabama.
Ex parte David FREEMAN.
(In re David Freeman
v.
State).
1981565.

March 10, 2000.
Opinion on Denial of Rehearing May 26, 2000.

On retrial after reversal of convictions, 651 So.2d 576, defendant was convicted in the Montgomery Circuit Court, No. CC-88-1412.80,Eugene W. Reese , J., of six counts of capital murder, related to murders of two victims, and was sentenced to death. Defendant appealed and the Court of Criminal Appeals, Long, P.J., 776 So.2d 160, affirmed. On grant of defendant's petition for certiorari review, the Supreme Court, Lyons, J., held that: (1) there was no plain error, and (2) death sentence was proper.

Affirmed.

Johnstone, J., filed an opinion concurring in part and dissenting in part, and filed an opinion concurring in part and dissenting in part on overruling of application for rehearing.

West Headnotes

[1] Sentencing and Punishment 350H ⚿1788(3)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(3) k. Presentation and Reservation in Lower Court of Grounds of Review. Most Cited Cases
Supreme Court's review of a death penalty case requires court to address any plain error or defect found in the proceeding under review, even if the error was not brought to the attention of the trial court. Rules Civ.Proc., Rule 39(k).

[2] Criminal Law 110 ⚿1030(1)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1030 Necessity of Objections in General
110k1030(1) k. In General. Most Cited Cases
"Plain error" only arises if the error is so obvious that the failure to notice it would seriously affect the fairness or integrity of the judicial proceedings.

[3] Sentencing and Punishment 350H ⚿1681

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1681 k. Killing While Committing Other Offense or in Course of Criminal Conduct. Most Cited Cases

Sentencing and Punishment 350H ⚿1683

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1683 k. More Than One Killing in Same Transaction or Scheme. Most Cited Cases
Death sentence was proper for murder of two victims, committed during burglary, robbery, and rape. Code 1975, §§ 13A-5-40(a)(2, 3, 4, 10), 13A-5-53.

***203** Thomas M. Goggans, Montgomery, for

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petitioner.
Bill Pryor, atty. gen., and Kathryn D. Anderson, asst. atty. gen., for respondent.

LYONS, Justice.
David Freeman was convicted of six counts of capital murder, all six counts related to the murders of Sylvia Gordon and Mary Gordon. Count one charged Freeman with the murder of two or more persons by one act or pursuant to one scheme or course of conduct. See § 13A-5-40(a)(10), Ala.Code 1975. Counts two and three charged Freeman with murder during a burglary in the first degree. See § 13A-5-40(a)(4). Counts four and five charged Freeman with murder during a robbery in the first degree. See § 13A-5-40(a)(2). Count six charged Freeman with the murder of Mary Gordon during a rape in the first degree. See § 13A-5-40(a)(3).

***204** In August 1989, a jury found Freeman guilty on all six counts of capital murder and recommended, by a vote of 11-1, that the trial court sentence Freeman to death; the court did sentence him to death. However, on direct appeal, the Court of Criminal Appeals reversed Freeman's convictions and remanded the cause for a new trial, holding that the prosecution had used its peremptory strikes discriminatorily, in violation of *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). See *Freeman v. State,* 651 So.2d 573 (Ala.Crim.App.1992), *rev'd on return to remand,* 651 So.2d 576 (Ala.Crim.App.1994).

In his second trial, Freeman did not deny that he murdered Mary and Sylvia Gordon, but, instead, alleged that he had been unable to conform his conduct to the requirements of the law because of a mental disease or defect. Freeman was again convicted on all six counts, and the jury recommended the death penalty, by a vote of 11-1. The trial court, after weighing the aggravating and mitigating factors, accepted the jury's recommendation and sentenced Freeman to death by electrocution. The Court of Criminal Appeals affirmed the convictions and the sentence. See *Freeman v. State,* 776 So.2d 160 (Ala.Crim.App.1999). This Court granted Freeman's petition for certiorari review and heard oral arguments. We affirm the judgment of the Court of Criminal Appeals.

On March 11, 1988, Deborah Gordon picked up her 17-year-old sister Sylvia from school and they returned home. Freeman was waiting on the porch when the two girls arrived. He had arrived at the house after an hour-long bicycle ride. He had recently met the Gordon family and had developed a romantic interest in Sylvia. After eating her lunch, Deborah went to work and left her sister Sylvia and Freeman sitting on the couch.

Later that afternoon, Freeman gave Sylvia a note stating that he loved her and did not want to lose her. Sylvia, in return, gave Freeman a note stating that she viewed their relationship as a friendship and that she did not want to have a serious relationship with him. Deborah testified at trial that Sylvia had planned to tell Freeman that day that she did not wish to see him anymore.

Around 1:00 a.m. the next morning, Deborah Gordon returned to find that her sister Sylvia and her mother, Mary, had been killed. Sylvia's body was found on her bed; the only clothes on her body were a T-shirt and socks. Her jeans and underwear had been cut off her body and she had been stabbed 22 times. An autopsy determined that she had bled to death as a result of her stab wounds, although none of the stab wounds would have been, by itself, fatal. Experts testified that she had remained conscious for approximately eight minutes after the first wounds were inflicted and that some of her wounds were defensive in nature. Mary Gordon's body was found on her bedroom floor. Her jeans and underwear had been cut from her body. She had been raped and stabbed 14 times; two of the stab wounds would have been fatal.

Upon leaving the Gordon home, Freeman took the Gordons' automobile and drove around for some time. He abandoned the car in a parking lot near his apartment; he then changed clothes and telephone for a taxi to take him to the truck stop where he worked. The next morning, Freeman was questioned by the police and arrested.

Initially, Freeman denied any knowledge of the

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killings, but he later gave a statement admitting to stabbing the mother. However, Freeman declared that he "got dizzy" and blacked out during the course of the killings and could not remember specific details.

In late 1988 and early 1989, Freeman was given a mental evaluation by the staff at Taylor Hardin Secure Medical Facility. Three psychologists, working independently, found that Freeman did not suffer from any mental disease or defect that ***205** would cause him to lack the substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. In 1995, he was evaluated by Dr. Guy Renfro, a forensic psychologist, who agreed with the earlier assessment of Freeman's mental state.

Freeman raises the same issues in his certiorari petition that he raised before the Court of Criminal Appeals. The opinion of the Court of Criminal Appeals provides a thorough treatment of the facts of this case, and it correctly disposes of each issue raised by Freeman in his petition.

[1][2] Because this is a death-penalty case, this Court must, under Rule 39(k), Ala. R.App. P., review the record for plain error, i.e., any "error [that] has or probably has adversely affected the substantial rights" of the defendant.
"Our review of a death penalty case requires us to address any plain error or defect found in the proceeding under review, even if the error was not brought to the attention of the trial court. Rule 39(k), Ala. R.App. P. ' " 'Plain error' only arises if the error is so obvious that the failure to notice it would seriously affect the fairness or integrity of the judicial proceedings." ' *Ex parte Womack,* 435 So.2d 766, 769 [(Ala.1983)], *cert. denied,* 464 U.S. 986, 104 S.Ct. 436, 78 L.Ed.2d 367 (1983), quoting *United States v. Chaney,* 662 F.2d 1148, 1152 (5th Cir.1981). This Court will take appropriate action when the error 'has or probably has' substantially prejudiced the defendant. Rule 39(k), Ala. R.App. P."

Ex parte Jackson, 672 So.2d 810, 811 (Ala.1995), *cert. denied,* 517 U.S. 1247, 116 S.Ct. 2505, 135 L.Ed.2d 195 (1996). We have reviewed the proceedings for plain error and have found none.

[3] As required by § 13A-5-53(a), Ala.Code 1975, we have "review [ed] the propriety of the death sentence" in this case. Our review convinces us (1) that the sentence imposed upon Freeman was not " imposed under the influence of passion, prejudice, or any other arbitrary factor"; (2) that "an independent weighing of the aggravating and mitigating circumstances at the appellate level indicates that death was the proper sentence"; and (3) that Freeman's sentence of death is not " excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." § 13A-5-53(b)(1), (2), and (3). See *Ex parte Maples,* 758 So.2d 81 (Ala.1999) (murder made capital because two or more persons were murdered pursuant to one scheme or course of conduct); *Ex parte Roberts,* 735 So.2d 1270 (Ala.1999) (murder made capital because it occurred during a robbery); *Neal v. State,* 731 So.2d 609 (Ala.Crim.App.1997), *aff'd,* 731 So.2d 621 (Ala.1999) (murder made capital because it occurred during a burglary); *Brooks v. State,* 695 So.2d 176 (Ala.Crim.App.1996), *aff'd,* 695 So.2d 184 (Ala.1997), *cert. denied,* 522 U.S. 893, 118 S.Ct. 233, 139 L.Ed.2d 164 (1997) (murder made capital because it occurred during a rape).

Having considered the record, together with the petition and the briefs and the arguments of counsel, this Court concludes that the judgment of the Court of Criminal Appeals must be affirmed.

AFFIRMED.

HOOPER, C.J., and MADDOX, HOUSTON, COOK, SEE, BROWN, and ENGLAND, JJ., concur.
JOHNSTONE, J., concurs in part and dissents in part.
JOHNSTONE, Justice (concurring in part and dissenting in part).
I concur in the convictions for both murders on all theories except the theory of burglary-murder. The location element of burglary traditionally required proof of a breaking and entering. In enacting § 13A-7-5, Ala.Code 1975, the legislature added unlawfully remaining as an alternative for the

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location element. I know from my service in the Alabama House of Representatives***206** when that language originated that the legislature intended for this new alternative to reach only clandestine remaining-that is hiding inside the premises to await an opportune time to commit the intended crime. *Ex parte Gentry,* 689 So.2d 916 (Ala.1996), respected this limitation. *Davis v. State,* 737 So.2d 480 (Ala.1999), in overruling *Gentry* and eliminating this limitation, exceeds the intent of the legislature and violates the rule that criminal statutes be strictly construed against the State. The *Davis* rule will allow burglary convictions of unruly guests in fact scenarios never contemplated by the legislature as burglaries. We should return to the faithful *Gentry* interpretation.

A particular observation is appropriate in support of the convictions on the theory of robbery-murder. While the petitioner argues that his stealing the car was a mere afterthought, his statement to the police belies this argument. Referring to a time after he had finished stabbing both of the victims, he stated: "I got cut on my right hand so I wrapped a handkerchief around my hand to stop the bleeding then when I came out of the bathroom I saw both of them trying to get to the phone so I ran over and got all of the phones off the walls then I waited until I knew they weren't going anywhere before I got the car keys."

This statement implies that the petitioner was contemplating the theft of the car while he waited to learn whether he needed to apply still more force to the victims in order to steal the car. The opinion of the Court of Criminal Appeals recites this portion of the petitioner's statement, but only in a portion of the opinion discussing the burglary-murder theory as distinguished from the robbery-murder theory.

Changing the subject, I will note that this Court has not examined the petitioner's double-jeopardy claims because a majority deems that the death penalty renders the double-jeopardy issue academic if not moot. Our affirmance in this case should not be construed as any modification of or retreat from *Ex parte Rice,* 766 So.2d 143 (Ala.1999).

The death penalty is appropriate in this case regardless of the disposition of the burglary-murder theory. Thus I concur with the main opinion in its affirmance of the death penalty for each of the two murders.

On Application For Rehearing

LYONS, Justice.
APPLICATION OVERRULED.

HOOPER, C.J., and MADDOX, HOUSTON, COOK, SEE, BROWN, and ENGLAND, JJ., concur.
JOHNSTONE, J., concurs in part and dissents in part.
JOHNSTONE, Justice (concurring in part and dissenting in part).
I concur to overrule in all respects, except that I would grant as to the convictions on the theory of burglary-murder.

Ala.,2000.
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Appendix I

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

DAVID FREEMAN,	)	
	)	
Petitioner,	)	Case No. CC-88-1416.60-EWR
	)	
v.	)	
	)	
STATE OF ALABAMA,	)	
	)	
Respondent.	)	

FINAL ORDER REGARDING FREEMAN'S RULE 32 PETITION

The Court, having considered the fourth amended petition for postconviction relief pursuant to Rule 32, ARCrP, filed on behalf of the Petitioner, the State's response, and the evidence and argument received at the June 4, 2003, evidentiary hearing, the Court finds as follows:

FACTS OF THE CRIME

The evidence of Freeman's guilt was overwhelming. The Court adopts its findings of facts contained in its sentencing order:

> On March 11, 1988, Deborah Gordon Hosford picked up her sister, Sylvia Gordon, from Lanier High School and drove to their home at 29 Rosebud Court, arriving at approximately 3:30 p.m. Waiting on the porch was the defendant, David Freeman, who had ridden his bicycle to their home. Freeman had lived in a trailer near the Gordon home, and he wanted a romantic relationship with Sylvia Gordon. Sylvia was not romantically interested in Freeman, and was planning to tell him that she no longer wished to see him. Deborah, Sylvia, and Freeman entered the home. Deborah had to return to work and left at approximately 3:45 p.m. When she left, Freeman and Sylvia were sitting on the couch.
>
> Freeman had given Sylvia a note essentially stating that he did not like seeing her only once a week, that he loved her, and that he did not want to lose her like all of his other girlfriends. Sylvia in return gave Freeman a note stating that she viewed the relationship only as friendship and that she did not want to have a serious relationship. Approximately a week prior to the murders,

Freeman had a conversation with Francis Boozer, a co-worker, and told her that he would rather see Sylvia dead than someone else have her.

At about 1:00 a.m. Deborah Gordon Hosford returned home. She found the lights of the home turned off and the door unlocked and slightly ajar. She went inside and noticed that the house had been ransacked. She went to her sister's bedroom and found Sylvia, dead, in her bed with multiple stab wounds and clad only in a T-shirt and socks. As she was fleeing the house, she saw her mother, Mary Gordon, lying in a pool of blood on the floor of her bedroom. Mrs. Gordon was clad only in a shirt, with her body being nude from the waist down with her legs spread apart.

Police arrived at the Gordon home and found blood throughout most of the house. Mary Gordon was stabbed 14 times by Freeman; two wounds were fatal. She lived for about five minutes. She had also been raped, and the semen deposited in her was consistent as having been left by Freeman. Sylvia Gordon was stabbed 22 times by him, and she remained conscious for eight to ten minutes after the first wound was inflicted. None of the wounds were fatal; Sylvia Gordon bled to death. Examination also revealed that Sylvia Gordon had tears in her vagina. Additionally, police found a shoe print on the shirt of Mary Gordon and a shoe print on a card found on the floor near the body of Mary Gordon. Police also noted that all phone lines in the house had been cut.

Freeman had brought a knife with him and used it to brutally kill Sylvia Gordon because she did not want a relationship, as well as kill Mary Gordon when she walked in on the murder. After committing the murders, Freeman stole the Gordons' 1980 Pontiac Sunbird and put his bike that he had ridden to the Gordon home in it and fled the scene. He attempted to establish an alibi by later going to work. The Gordons' car was found in a parking lot near Freeman's apartment. Freeman's fingerprint was found on the car and blood that was consistent with that of Sylvia Gordon and Mary Gordon was also in the car. Additionally found in the car was a butcher knife that had been cleaned of blood. The butcher knife was examined by an expert in trace evidence with the Department of Forensic Sciences and was determined to be consistent with having caused the wounds to Mary Gordon, to cut the bra and panties of Mary Gordon, and to cut the jeans of Sylvia Gordon.

When the police arrived at Freeman's apartment, Freeman answered the door, and the officers noted a bandage on Freeman's

right hand. When asked how he cut his hand, Freeman lied, claiming that he had cut his hand while repairing a chair. Freeman was arrested at his apartment. The police, upon a consent to search, found the clothing worn by Freeman, which had blood consistent with that of Sylvia Gordon on them. A mixture of blood and semen was found in the underwear that he had worn. His shoes were seized and compared to the prints found on the shirt of Mary Gordon and the card found in the Gordon home. Examination revealed that Freeman's shoes were consistent with the prints found at the scene. Bite marks were noted on Freeman's arm, which were made by Sylvia Gordon.

Freeman initially lied to the police as to his involvement in the crimes. He tried to establish an alibi for his whereabouts. However, when confronted with the evidence, Freeman admitted to stabbing Sylvia Gordon and stated that upon Mary Gordon's entering the home he had no choice but to stab her. Freeman also claimed to have blacked out on two occasions during the crimes.

In late 1988 and early 1989 Freeman was mentally evaluated by the staff at Taylor Hardin Secure Medical Facility, who found that he suffered no mental disease or defect which caused him to lack the substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. In 1995, he was evaluated by Dr. Guy Renfro, an expert forensic psychologist, who also found [that] he was responsible for his acts at the time of the offense.

(C.R. 1224-1227)[1]

EVIDENCE PRESENTED AT THE EVIDENTIARY HEARING

Counsel for Freeman first called William Abell to testify. Abell was appointed about three weeks before Freeman's trial as a backup to Freeman's lead counsel, Allen Howell. Howell had become ill during Freeman's January trial, resulting in a mistrial. Abell had practiced law in Alabama since 1980 and had handled 200 to 300

[1] "C.R." refers to the clerk's record on direct appeal; "R" refers to the trial record on direct appeal.

criminal cases and some two or three capital cases.

Abell stated that , while Howell was in charge of Freeman's case, he had reviewed all documents and records related to the case and was fully prepared for trial. Not only did he stand ready to assist Howell if needed, Abell gave the opening statement at the guilt phase of Freeman's trial because he knew Howell would not be available. The crux of Abell's opening statement was that the State was responsible for Freeman's actions because he had been a ward of the State almost since birth and never received the psychological help he needed. Abell stated that he had worked on other cases with Howell, including a reverse discrimination case in which a man sued to be an escort to females at induction.

Next to testify was John Norris. At the time of Freeman's retrial, he had been practicing law two to three years and that this was his first capital case. Norris testified that Howell was responsible for the all the decisions in the case, specifically stating that Howell determined what experts to hire and what questions would be asked during voir dire examination. Norris stated that Howell was a certified nationally as a trial lawyer.

The final witness called was Thomas Goggans. Goggans testified that he was appointed to represent Freeman on direct appeal. Goggans indicated that he had been licensed to practice law since 1980 and that his practice was almost exclusively limited to criminal defense. Goggans

has participated in more than 20 capital murder cases at all stages, including the trial and appellate levels. Goggans indicated that he had no strategic reason for not raising certain claims on direct appeal. Goggans did state that he did not object to the admission of raw psychological data being admitted into evidence because he though it would support an argument that the Court erred by not having Freeman evaluated after he had been disruptive at a lunch break during trial. Goggans also testified that he believed it was his duty to raise, as well as to not raise, certain issues on appeal depending on merit.

In addition to this testimony, Freeman's Rule 32 counsel offered an affidavit purportedly executed by Ally Howell. According Freeman's fourth amended petition, Howell has changed gender and is now legally a woman. The State filed a motion to exclude Howell's affidavit based on the State's inability to subject Howell to cross-examination. Based on the holdings of the Alabama Court of Criminal Appeals in Callahan v. State, 767 So. 2d 380 (Ala. Crim. App. 1999), and Hamm v. State, 2002 WL 126990 (Ala. Crim. App. 2002), the Court granted the State's motion to exclude Howell's affidavit. Freeman's counsel also submitted a written proffer at the conclusion of the evidentiary hearing of what they contend could have been proven if the Court had granted Freeman's motion for funds. The Court has sealed Howell's affidavit for appellate purposes and will not consider it, or the proffer, in ruling on the allegations in Freeman's fourth amended petition.

CLAIMS CONTAINED IN FREEMAN'S RULE 32 PETITION

Freeman has raised 12 grounds for relief in his fourth amended Rule 32 petition. Grounds I, III, IV-VI, and X-XII contain substantive claims. Ground II contains allegations of ineffective assistance of trial counsel. Grounds VII and IX contain allegations that Freeman was denied his right to counsel under the Sixth and Fourteenth Amendments. Ground VIII contains allegations of ineffective assistance of appellate counsel. For simplicity, the Court will first address the substantive grounds in the light of Rule 32.2(a), ARCrP. The Court will then address Freeman's claims of ineffective assistance of counsel at trial and on appeal. Finally, the Court will address Freeman's allegations that his right to counsel was violated.

I. SUBSTANTIVE CLAIMS THAT ARE PROCEDURALLY BARRED AS BEING PRECLUDED UNDER RULE 32.2(a), ARCrP

"Rule 32 is not a substitute for a direct appeal." Siebert v. State, 778 So. 2d 842, 850 (Ala. Crim. App. 1999), cert. denied, 778 So. 2d 857 (Ala. 2000). "'[T]he procedural bars of Rule 32 apply with equal force to all cases, *including those in which the death penalty has been imposed.*'" Boyd v. State, 746 So. 2d 364, 374 (Ala. Crim. App. 1999), quoting State v. Tarver, 629 So. 2d 14, 19 (Ala. Crim. App. 1993) (emphasis added). The Alabama Court of Criminal Appeals has specifically held that "Rule 32 makes no provision for different treatment of death penalty cases." Thompson v. State, 615 So. 2d 129, 131 (Ala. Crim. App. 1992); see also

Cade v. State, 629 So. 2d 38, 43 (Ala. Crim. App. 1993). Further, the Alabama Court of Criminal Appeals has held that a circuit court should not address the merits of post-conviction claims that are procedurally barred under Rule 32, ARCrP. Siebert, 778 So. 2d at 846.

Rule 32.2(a), ARCrP, states in pertinent part:

> A petitioner will not be given relief under this rule based upon any ground:
>
> "...
>
> (2) Which was raised or addressed at trial; or
>
> (3) Which could have been but was not raised at trial, unless the ground for relief arises under Rule 32.1(b); or
>
> (4) Which was raised or addressed on appeal or in any previous collateral proceeding; or
>
> (5) Which could have been but was not raised on appeal, unless the ground for relief arises under Rule 32.1(b).

I.A. Claim that Freeman's capital murder convictions and sentence of death violated the Double Jeopardy Clause.

In Ground I of Freeman's fourth amended petition, he contends that the Double Jeopardy Clause of the United States Constitution was violated "when his trial was permitted to go forward after a previous proceeding ended in the declaration of a mistrial in the absence of manifest necessity." (Freeman's fourth amended petition at p. 2)

During Freeman's retrial in January 1996, his lead trial counsel became ill necessitating a mistrial. Before the trial that is the subject of this Rule 32 petition began in June 1996, Freeman raised this issue in a

writ of mandamus to the Alabama Court of Criminal Appeals and the Alabama Supreme Court. Both appellate courts denied Freeman relief. (C.R. 376-382) Freeman also raised this issue in a motion for writ of habeas corpus in the United States Federal Court for the Middle District of Alabama, and was denied. (C.R. 622-628, 870) Because this issue has been raised and addressed in a "previous collateral proceeding," it is precluded from review. Rule 32.2(a)(4), ARCrP. Therefore, this claim is dismissed.

I.B. Claim that admission of a videotape of the crime scene caused Freeman to be denied a fair trial.

In Ground III of Freeman's fourth amended petition, he contends that his rights to a fair trial were violated "by the admission of graphic unnecessarily cumulative images of the crime scene and the victims." (Freeman's fourth amended petition at p. 10) This claim is precluded from review because it could have been but was not raised at trial or on appeal. Rule 32.2(a)(3) and (a)(5), ARCrP. Therefore, this claim is dismissed.

I.C. Claim that Freeman's right to a fair trial was violated by the testimony of a forensic dentist.

In Ground IV of Freeman's fourth amended petition, he contends the testimony of the State's bite mark expert was "unreliable." (Freeman's fourth amended petition at p. 10) This claim is precluded from review because it could have been but was not raised at trial or on

appeal. Rule 32.2(a)(3) and (a)(5), ARCrP. Therefore, this claim is dismissed.

I.D. Claim that Freeman was denied the right to confront certain witnesses against him.

In Ground V of Freeman's fourth amended petition, he contends that his right to confront the witnesses against him "was violated by the admission of the hearsay testimony of Dr. Joel Dixon." (Freeman's fourth amended petition at p. 11) This claim is precluded from review because it was raised at trial and because it could have been but was not raised on appeal. Rule 32.2(a)(2) and (a)(5), ARCrP. Therefore, this claim is dismissed.

I.E. Claims that Freeman's death sentence was arbitrarily and capriciously imposed.

In Ground VI of Freeman's fourth amended petition, he contends his rights were violated "as a result of the jury's and trial court's consideration of materially inaccurate information at the sentencing phase of [Freeman's] capital trial." (Freeman's fourth amended petition at p. 11) This claim is precluded from review because it could have been but was not raised at trial or on appeal. Rule 32.2(a)(3) and (a)(5), ARCrP. Therefore, this claim is dismissed.

I.F. Claim that Freeman was denied his constitutional right to a trial by jury.

In Ground X of Freeman's fourth amended petition, he contends that his right to a fair trial was violated when "the trial judge, rather than the jury, determined the facts necessary to increase [Freeman's] sentence

from life without parole to death." (Freeman's fourth amended petition at p. 18) Freeman cites as authority Ring v. Arizona, 122 S. Ct. 2428 (2002). Recently in Sibley v. Culliver, 243 F. Supp. 2d 1278 (M.D. Ala. 2003), the United States Federal Court for the Middle District of Alabama addressed the application of Ring to cases on collateral review. The Sibley court held that "Ring may mot be applied retroactively to [a] case which is on collateral review." Id. at 1290. This claim is precluded from review because it could have been but was not raised at trial or on appeal. Rule 32.2(a)(3) and (a)(5), ARCrP. Therefore, this claim is dismissed.

I.G. Claim that Freeman's death sentence constitutes cruel and unusual punishment.

In Ground XI of Freeman's fourth amended petition, he contends that "[his] right to be free from the imposition of excessive, cruel an unusual punishment, as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution, was violated when he was sentenced to death despite the fact he is mentally retarded." (Freeman's fourth amended petition pp. 18-19) This claim is precluded from review because it could have been but was not raised at trial or on appeal. Rule 32.2(a)(3) and (a)(5), ARCrP. Therefore, this claim is dismissed.

Moreover, the record from trial establishes beyond any doubt that Freeman is not mentally retarded. The record contains the results of numerous IQ tests given to Freeman from ages eight through fourteen

years. Freeman's IQ scores include: 87 at age eight; 86 at age nine; 85 at age ten; 89 at age thirteen; and 89 at age fourteen. (C.R. 2478, 2162, 2233, 2164-2166, and 1501) The record also contains many hand-written letters from Freeman to various individuals that not only establish his literacy, but also clearly show a significant degree of intellectual functioning. Further, the Court personally addressed and observed Freeman on numerous occasions. Based on the record and the Court's personal knowledge of Freeman, even if this claim were properly before the Court, it would be without merit. See Ex parte Perkins, Ms. 1991016, 2002 WL 31630711, at *2 (Ala. Nov. 22, 2002) (holding that "this Court can determine, based on the facts presented at Perkin's trial, that Perkins, even under the broadest definition of mental retardation, is not mentally retarded); see also Gibby v. State, 753 So. 2d 1206, 1207-1208 (Ala. Crim. App. 1999) (finding that claims in a Rule 32 petition that are refuted by the record on direct appeal are without merit). Therefore, this claim is hereby denied.

I.H. Claim that Freeman's indictment was fatally defective.

In Ground XII of Freeman's fourth amended petition, he contends that "he was tried, convicted, and sentenced to death pursuant to an indictment which failed to allege the material elements necessary to the imposition of a death sentence under Alabama law." (Freeman's fourth amended petition at p. 19) This allegation is based on Freeman's interpretation of Ring v. Arizona. For the reasons stated in Part I.F of

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this order, this claim is precluded from review because it could have been but was not raised at trial or on appeal. Rule 32.2(a)(3) and (a)(5), ARCrP. Therefore, this claim is dismissed.

PRINCIPLES AND PRESUMPTIONS FOR EVALUATING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

To show that trial counsel was ineffective, a petitioner must show that (1) trial counsel's performance was deficient and (2) that the deficient performance prejudiced the petitioner. Strickland v. Washington, 466 U.S. 668 (1984). "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687.

Judicial scrutiny of counsel's performance "must be highly deferential." Chandler v. United States, 218 F.3d 1305, 1314 (11th Cir. 2000)(en banc). "It is important to note that judicial scrutiny of an attorney's performance is appropriately highly deferential because the craft of trying cases is far from an exact science; in fact, it is replete with uncertainties and obligatory judgment calls." Chandler, 218 F.3d at 1314, n.13, citing, Bolender v. Singletary, 16 F.3d 1547, 1557 (11th Cir. 1994). "It does not follow that any counsel who takes an approach we would not have chosen is guilty of rendering ineffective assistance ... [n]or does the fact that a particular defense ultimately proved to be unsuccessful demonstrate ineffectiveness." Id. at 1314.

"[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming

record support." Strickland, 466 U.S. at 696. "[B]ecause counsel's conduct is presumed reasonable, for a petitioner to show that the conduct was unreasonable, a petitioner must establish that no competent counsel would have taken the action that his counsel did take." Chandler, 218 F.2d at 1315.

The Alabama Supreme Court, in adopting the current Alabama Rules of Criminal Procedure, has established certain basic requirements of pleading and proof that must be met in a post-conviction petition. Rule 32.3, ARCrP, states:

> 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 preponderance of the evidence.

Rule 32.6(b), ARCrP, states:

> The petition must contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings.

Rule 32.7(d), ARCrP, states, in pertinent part:

> 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 exist 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.

II. CLAIMS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

In Ground II of Freeman's fourth amended petition, he contends that he received ineffective assistance from his trial counsel during the guilt phase of trial. The Court will address each allegation in turn.

II.A. Claim that trial counsel was ineffective during voir dire.

In Ground II.(A), Freeman contends that his trial counsel failed to effectively question the jury venire and failed to make "meritorious challenges for cause based on information revealed by prospective jurors during voir dire." (Freeman's fourth amended petition at p. 3) Freeman failed to indicate in his fourth amended petition, or at his evidentiary hearing, what questions trial counsel should have asked or what specific veniremember should have been challenged for cause. The Court finds that Freeman has failed to meet his burden of proving trial counsel's performance during voir dire was deficient or caused him to be prejudiced as required by Strickland. Rule 32.3, ARCrP. Therefore, this claim is hereby denied.

II.B. Claim that trial counsel was ineffective for failing to object to the admission of certain evidence of the crime scene.

In Ground II.(B), Freeman contends that his trial counsel was ineffective for failing to object to the videotape of the crime scene being admitted into evidence. Freeman also contends trial counsel was ineffective for failing to object to pictures of the crime because, according

to Freeman, they were cumulative and graphic in nature and inflamed the jury. Freeman proffered no argument or legal authority in his petition or at his evidentiary hearing that, if presented by trial counsel, would have caused this evidence to be excluded. The Court finds that Freeman has failed to meet his burden of proving trial counsel's performance was deficient or caused him to be prejudiced as required by Strickland. Rule 32.3, ARCrP. Therefore, this claim is hereby denied.

Moreover, had trial counsel objected to the videotape and pictures, it would have been overruled. During Freeman's trial, Thomas Knox testified as to the authenticity of the videotape. (R. 494-495) In Ex parte Siebert, 555 So. 2d 780, 783-784 (Ala. 1989), the Alabama Supreme Court held that the trial court properly admitted a videotape of the crime scene over Siebert's objection that the tape was "inflammatory, prejudicial, and cumulative." The Alabama Court of Criminal Appeals has held that "[p]hotographic evidence is admissible even though it may be cumulative or demonstrative of undisputed facts." Donahoo v. State, 505 So. 2d 1067, 1071 (Ala. Crim. App. 1986). Therefore, this claim is also without merit and is hereby denied.

II.C. Claim that trial counsel was ineffective for failing to object to the portion of the crime scene technician's testimony.

In Ground II.(C), Freeman contends that his trial counsel was ineffective for failing to object to Knox testifying as the videotape was

being shown to the jury. Freeman contends that Knox's testimony was unreliable and lacked an evidentiary foundation and scientific basis.

As previously stated, Knox properly authenticated the videotape before it was shown to the jury. Freeman proffered no argument or legal authority in his petition or at his evidentiary hearing that, if presented by trial counsel, would have caused this evidence to be excluded. The Court finds that Freeman has failed to meet his burden of proving trial counsel's failure to object was the result of deficient performance or caused him to be prejudiced as required by Strickland. Rule 32.3, ARCrP. Therefore, this claim is hereby denied.

Moreover, had trial counsel objected to Knox's testimony, it would have been overrule. In Hooks v. State, 534 So. 2d 329, 350-351 (Ala. Crim. App. 1987), the Alabama Court of Criminal Appeals held that the narration of a videotape is permissible so long as the narrator is present and available for cross-examination. Thus, even if trial counsel had objected to Knox's testimony, it would have been properly overruled. This claim is also without merit and is hereby denied.

II.D. Claim that trial counsel was ineffective for failing to object to the State's forensic odontology expert's testimony.

In Ground II.(D), Freeman contends that his trial counsel was ineffective for failing to object to Dr. Michael O'Brien testifying that the bite marks on Freeman's arm were made by Sylvia Gordon, one to the victims. Freeman proffered no argument or legal authority in his petition

or at his evidentiary hearing that, if presented by trial counsel, would have caused this evidence to be excluded. The Court finds that Freeman has failed to meet his burden of proving trial counsel's performance was deficient or caused him to be prejudiced as required by Strickland. Rule 32.3, ARCrP. Therefore, this claim is hereby denied.

Moreover, had trial counsel objected to O'Brien's testimony, it would have been overruled. In Ex parte Dolvin, 391 So. 2d 677 (Ala. 1980), the Alabama Supreme Court recognized the admissibility of testimony based on the field of forensic odontology. In Handley v. State, 515 So. 2d 121, 131 (Ala. Crim. App. 1987), the Alabama Court of Criminal Appeals specifically held that testimony from a dental witness concerning bite mark comparison is admissible so long as "the proper predicate for the admission of this expert testimony is laid." O'Brien testified to his extensive qualifications as an expert in forensic odontology and was properly accepted as such. (R. 435-438) Thus, even if trial counsel had objected to O'Brien's testimony, it would have been overruled. This claim is also without merit and is hereby denied.

II.E. Claim that trial counsel was ineffective for failing to present testimony of an alternative source for the bite marks on Freeman's arm.

In Ground II.(E), Freeman contends that his trial counsel was ineffective for failing to present available information to the jury of an alternative source for the bite marks on his arm. Freeman did not offer any testimony at his evidentiary hearing proving that evidence of an

alternative source for the bite marks on his arm exists. The Court finds that Freeman has failed to meet his burden of proving trial counsel's performance was deficient or caused him to be prejudiced as required by Strickland. Rule 32.3, ARCrP. Therefore, this claim is hereby denied.

II.F. Claim that trial counsel was ineffective for failing to submit autopsy data generated by the State to an independent pathologist.

In Ground II.(F), Freeman contends that his trial counsel was ineffective for failing to "submit autopsy data generated by the state's medical examiner to a qualified, independent pathologist for review." (Freeman's fourth amended petition at p. 6) Freeman did not even offer any evidence at his evidentiary hearing to suggest that had trial counsel associated an independent pathologist, any beneficial information would have been developed. The Court finds that Freeman has failed to meet his burden of proving trial counsel's failure to secure the serviced of a pathologist was the result of deficient performance or caused him to be prejudiced as required by Strickland. Rule 32.3, ARCrP. Therefore, this claim is hereby denied.

II.G. Claim that trial counsel was ineffective for failing to investigate, develop, and present evidence of Freeman's alleged neurological impairments.

In Ground II.(G) of Freeman's fourth amended petition, his entire argument to the Court is that his "[t]rial counsel failed to investigate, develop and present evidence that petitioner suffers from neurological impairments." (Freeman's fourth amended petition at p. 6) Freeman

presented absolutely no evidence at his evidentiary hearing concerning this claim. The Court finds that Freeman has failed to meet his burden of proving trial counsel's failure to investigate and present evidence of Freeman's alleged neurological impairments was the result of deficient performance or caused him to be prejudiced as required by Strickland. Rule 32.3, ARCrP. Therefore, this claim is hereby denied.

II.H. Claim that trial counsel was ineffective for deposing Dr. Guy Renfro.

In Ground II.(H), Freeman contends that trial counsel was ineffective for deposing Dr. Guy Renfro "despite knowledge that [Renfro's] conclusions were harmful to [Freeman's] defense." (Freeman's fourth amended petition at p. 6).

Trial counsel indicated during the trial that, despite having a copy of Renfro's report, "[they] weren't exactly sure what he was going to say." (R. 993) Trial counsel attempted to withdraw their questions asked during Renfro's deposition and objected to the State's questions as being leading. (R. 944) The Court overruled trial counsel's objections and allowed Renfro's deposition to be played to the jury in its entirety. (R. 1000) The record clearly indicates that trial counsel did not, and indeed, could not know what Renfro's exact testimony would be until he was deposed. Moreover, other than contending in his fourth amended petition that "the prosecution was supplied with useful evidence against [him]", Freeman completely fails to support this claim. Freeman fails to cite in his petition or argue at his evidentiary hearing what specific

testimony in Renfro's deposition caused him to be prejudiced. The Court finds that Freeman has failed to meet his burden of proving trial counsel's taking Renfro's deposition was the result of deficient performance or caused him to be prejudiced as required by Strickland. Rule 32.3, ARCrP. Therefore, this claim is hereby denied.

II.I. Claim that trial counsel was ineffective for failing to object to the testimony of Dr. Joel Dixon.

In Ground II.(I), Freeman contends that trial counsel was ineffective for failing to object to Dr. Dixon's testimony. Freeman contends Dixon's testimony was inadmissible because it relied on the hearsay account of "three non-testifying doctors" and, according to Freeman, violated is right under the Confrontation Clause of the United States Constitution.

Rule 703, ARE, states that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing." Dixon headed the lunacy commission at Taylor Harden Secured Medical Facility where Freeman was evaluated before his first trial. The commission consisted of three mental health professionals that evaluated Freeman and reported their findings to Dixon in order for him to make a final recommendation to the trial court concerning Freeman mental state. Freeman cites no authority in his fourth amended petition and offered none at the evidentiary hearing that, if presented by his trial counsel, would have required Dixon's testimony to be excluded. The

Court finds that Freeman has failed to meet his burden of proving trial counsel alleged failure to exclude Dixon's testimony was the result of deficient performance or caused him to be prejudiced as required by Strickland. Rule 32.3, ARCrP. Therefore, this claim is hereby denied.

II.J. Claim that trial counsel was ineffective for failing to investigate, develop, and present available mitigation evidence.

In Ground II.(J) of Freeman's fourth amended petition, his entire argument to the Court is that "[t]rial counsel failed to investigate, develop and present available evidence in mitigation of [his] punishment." (Freeman's fourth amended petition at p. 7) Freeman presented absolutely no evidence at his evidentiary hearing concerning this claim. The Court finds that Freeman has failed to meet his burden of proving trial counsel's alleged failure to investigate and present mitigating evidence was the result of deficient performance or caused him to be prejudiced as required by Strickland. Rule 32.3, ARCrP. Therefore, this claim is hereby denied.

II.K. Claim that trial counsel was ineffective in their presentation of mitigating evidence.

In Ground II.(K) of Freeman's fourth amended petition, his entire argument to the Court is that "[t]rial counsel failed to present available evidence regarding [his] background and his mental health history to the jury in a manner which would have allowed the jury to give this evidence mitigating effect during the sentencing phase." (Freeman's fourth amended petition at p. 7)

In Payne v. State, 791 So. 2d 383, 407 (Ala. Crim. App. 1999), the Alabama Court of Criminal Appeals held that "[m]erely because trial counsel did not present the evidence as Payne now believe he should have presented does not establish that trial counsel was ineffective." Freeman failed to offer any evidence at his evidentiary hearing proving that if trial counsel had presented the evidence of his background and mental health history in a different manner, the outcome of his trial would have been different. The Court finds that Freeman has failed to meet his burden of proving that trial counsel was either deficient in presenting mitigation evidence or that this presentation caused him to be prejudiced as required by Strickland. Rule 32.3, ARCrP. Therefore, this claim is hereby denied.

II.L. Claim that trial counsel was ineffective for failing to present evidence of Freeman's good behavior in and adaptability to prison.

In Ground II.(J) of Freeman's fourth amended petition, his entire argument to the Court is that "[t]rial counsel failed to investigate and introduce readily-available evidence of [his] good behavior in and adaptability to prison." (Freeman's fourth amended petition at p. 8) Freeman presented no evidence at his evidentiary hearing concerning this claim. The Court finds that Freeman has failed to meet his burden of proving trial counsel's alleged failure to investigate and present mitigating evidence was the result of deficient performance or caused

him to be prejudiced as required by Strickland. Rule 32.3, ARCrP. Therefore, this claim is hereby denied.

II.M. Claim that trial counsel was ineffective for failing to present evidence to impeach the testimony of State's witness Frances Boozer.

In Ground II.(M), Freeman contends that "Geraldine Dee Lancaster, Robert Sellers, and Carol Clearly were all potential witnesses who could have provided testimony to impeach the credibility of Ms. Boozer." (Freeman's fourth amended petition at p. 8) Freeman did not call Boozer, Lancaster, Sellers, or Clearly to testify at his evidentiary hearing and, thus, presented no evidence concerning this claim. The Court finds that Freeman has failed to meet his burden of proving trial counsel's alleged failure to impeach Boozer's testimony was the result of deficient performance or caused him to be prejudiced as required by Strickland. Rule 32.3, ARCrP. Therefore, this claim is hereby denied.

II.N. Claim that trial counsel was ineffective for failing to object to Alabama's capital murder sentencing scheme.

In Ground II.(N), Freeman contends that trial counsel was ineffective for "fail[ing] to object to Alabama's requirement that the judge, rather than the jury determine the existence of the facts necessary to the imposition of [Freeman's] death sentence." (Freeman's fourth amended petition at p. 8) Freeman cites Ring v. Arizona, 122 S. Ct. 2428 (2002) and Apprendi v. New Jersey, 530 U.S. 466 (2000), as authority.

In Ex parte Waldrop, Ms. 1001194, 2002 WL 31630710, at *5 (Ala. Nov. 22, 2002), the Alabama Supreme Court held:

> Because the jury convicted Waldrop of two counts of murder during a robbery in the first degree, a violation of Ala.Code 1975, § 13A-5-40(a)(2), the statutory aggravating circumstance of committing a capital offense while engaged in the commission of a robbery, Ala.Code 1975, § 13A-5-49(4), was "proven beyond a reasonable doubt." Ala.Code 1975, § 13A-5-45(e); Ala.Code 1975, § 13A-5-50. Only one aggravating circumstance must exist in order to impose a sentence of death. Ala.Code 1975, § 13A-5-45(f). Thus, in Waldrop's case, the jury, and not the trial judge, determined the existence of "aggravating circumstance necessary for imposition of the death penalty." Ring, [536] U.S. [584], 122 S. Ct. at 2443. Therefore, the findings reflected in the jury's verdict alone exposed Waldrop to a range of punishment that had as its maximum the death penalty. *This is all that Ring and Apprendi required.*

(Emphasis added) Freeman was convicted, *inter alia*, of two counts of murder during robbery in the first degree. Thus, as in Waldrop, Freeman's jury found beyond a reasonable doubt the facts necessary to expose him to the death penalty in its guilt phase verdict. Ground II.N fails to state a claim or establish a material issue of fact or law exists that would entitle Freeman to relief as required by Rule 32.7(d), ARCrP. This claim is without merit and is hereby denied.

II.O. Claim that trial counsel was ineffective during the guilt phase closing argument when, according to Freeman, counsel conceded that if Freeman was found guilty there would no question about what sentence he should receive.

In Ground II.(O), Freeman contends that trial counsel was ineffective for allegedly conceding during their guilt phase closing argument that if the jury found him guilt of capital murder that "no

genuine question would remain as to the sentence [he] would receive." (Freeman's fourth amended petition at p. 9)

Before Freeman's trial began, Freeman withdrew his plea of not guilty and proceeded solely on the plea of not guilt by reason of mental disease or defect. (C.R. 1205) The comments cited by Freeman in Ground II.(O), when viewed in the context of the entire trial and not, as Freeman would have it, in isolation, are obviously pleas for the jury to find him not guilty be reason of mental disease or defect, as opposed to finding him guilty of capital murder. Freeman presented no evidence at his evidentiary hearing proving that any juror interpreted trial counsel's comments as Freeman now contends in his fourth amended petition. Moreover, given trial counsel's strategy, the Court finds that the cited portions of trial counsel's guilt phase closing argument were not the result of deficient performance or caused Freeman to be prejudiced as required by Strickland. Rule 32.3, ARCrP. Therefore, this claim is hereby denied.

II.P. Claim that trial counsel was ineffective for failing to object to raw psychological testing data being admitted into evidence.

In Ground II.(P), Freeman contends that the admission of raw psychological data "created the impermissible risk that jurors, who were not trained to interpret it, reached conclusions about [Freeman's] character and mental status which prejudiced their decision making in both the guilt-or-innocence and sentencing phases of his capital trial."

(Freeman's fourth amended petition at p. 9) Freeman presented no evidence at his evidentiary hearing concerning this claim. The Court finds that Freeman has failed to meet his burden of proving trial counsel's failure to object to raw psychological data was the result of deficient or caused him to be prejudiced as required by Strickland. Rule 32.3, ARCrP. Therefore, this claim is hereby denied.

II.Q. Claim that trial counsel was ineffective for failing to investigate, develop and present evidence establishing that Freeman is mentally retarded.

In Ground II.(Q), Freeman contends that "[t]rial counsel failed to investigate, develop and present evidence establishing the [he] is mentally retarded." (Freeman's fourth amended petition at p. 9) As previously stated in Part I.G of this order, the record establishes beyond any doubt that Freeman is not mentally retarded. The Court finds that Ground II.(Q) fails to state a claim or establish a material issue of fact or law exists that would entitle Freeman to relief at require by Rule 32.7(d), ARCrP. Therefore, this claim is without merit and is hereby denied.

III. CLAIM THAT FREEMAN WAS DENIED THE RIGHT TO COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNTIED STATES CONSTITUTION AND ALABAMA LAW.

In Ground VII of Freeman's fourth amended petition, he contends that his right to counsel "was violated as a result of his representation at trial by lead counsel who labored under the debilitating, judgment impairing effects of a psychological condition which resulted in the alteration of counsel's gender, and permanently disabled counsel from

the practice of law." (Freeman's fourth amended petition at p. 13) In Ground IX of Freeman's fourth amended petition, he contends that his right to counsel was violated "as a result of his representation at trial by lead counsel who labored under an actual conflict of interest which adversely affected [Freeman's] defense." (Freeman's fourth amended petition at p. 17) Both of these grounds are based on the same underlying facts.

Rule 32 counsel attempted to elicit testimony from Norris about Howell's alleged condition. Norris testified, however, that he had no personal knowledge about Howell's alleged condition or conflict. Rule 32 counsel also proffered an affidavit purportedly from Howell. For the reasons previously stated in this order, the Court granted the State's motion to exclude the proffered affidavit. The Court finds, therefore, that Freeman has failed to meet his burden of proving that any possible psychological difficulties, that his lead counsel may have suffered, violated his right to counsel or caused a conflict of interest. Rule 32.3, ARCrP. Therefore, this claim is hereby denied.

IV. CLAIMS OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

In Ground VIII of Freeman's fourth amended petition, he contends that he received ineffective assistance from his appellate counsel. The Alabama Court of Criminal Appeals has held that "[A petitioner's] claims of ineffective assistance of appellate counsel depend on whether [the petitioner] proves that appellate counsel failed to present on direct appeal

a claim that would have entitled him to relief." Payne v. State, 791 So. 2d 383, 399 (Ala. Crim. App. 1999). Further, "[a]ppellate counsel is presumed to exercise sound strategy in the selection of issues most likely to afford relief on appeal." Thomas, 766 So. 2d at 876; see also Hamm v. State, CR-99-0654, 2002 WL 126990, *25 (Ala. Crim. App. Feb. 1, 2002)(holding that even if appellate counsel had raised the claims contained in Hamm's Rule 32 that Hamm "would not have been entitled to relief because none of the claims would have supported a finding of reversible error").

IV.A. Claim that appellate counsel was ineffective for failing to raise a claim of double jeopardy.

In Ground VIII.(A), Freeman contends that appellate counsel was ineffective for failing to raise a double jeopardy claim. This issue was raised and addressed by the Alabama appellate courts and United States District Court for the Middle District of Alabama and decided adversely to Freeman. (See Part I.A of this order) Appellate counsel was not, therefore, ineffective for failing to raise this issue a fourth time. This allegation fails to state a claim or establish that a material issue of fact or law exists that would entitle Freeman to relief as relief as required by Rule 32.7(d), ARCrP. This claim is without merit and is hereby denied.

IV.B. Claim that appellate counsel was ineffective for failing to raise on appeal the admission of allegedly graphic and cumulative images of the crime scene and the victims.

In Ground VIII.(B), Freeman contends that appellate counsel was ineffective for failing to raise on appeal the alleged graphic and cumulative nature of the photographic evidence of the crime scene and victims admitted at trial. As previously stated, the photographic evidence of the crime scene and victims was admissible despite it being graphic and cumulative. (See Part II.B of this order) Freeman failed to proffer in his petition or at his evidentiary hearing what argument or legal authority appellate counsel could have presented on appeal that would have caused the appellate courts to reverse his convictions or sentence. The Court finds that Freeman has failed to meet his burden of proving appellate counsel's performance was deficient or caused him to be prejudiced as required by Strickland. Rule 32.3, ARCrP. Therefore, this claim is hereby denied.

IV.C. Claim that appellate counsel was ineffective for failing to claim on appeal that the State failed to establish the admissibility or reliability of their dental expert.

In Ground VIII.(C), Freeman contends that appellate counsel was ineffective for failing to raise on appeal State's alleged failure to establish the admissibility or reliability of the State's dental odontologist. The Court has previously found that the State's forensic odontology evidence was admissible and that O'Brien had the requisite qualifications to testify

as an expert. (See Part II.D of this order) Freeman failed to proffer in his petition or at his evidentiary hearing what argument or legal authority appellate counsel could have presented on appeal that would have caused the appellate courts to reverse his convictions or sentence. The Court finds that Freeman has failed to meet his burden of proving appellate counsel's performance was deficient or caused him to be prejudiced as required by Strickland. Rule 32.3, ARCrP. Therefore, this claim is hereby denied.

IV.D. Claim that appellate counsel was ineffective for failing to raise the claim on appeal that Dixon's testimony violated the Confrontation Clause.

In Ground VIII.(D), Freeman contends that appellate counsel was ineffective for failing to raise on appeal that Dixon's testimony was hearsay and violated Confrontation Clause. The Court has previously found that Dixon's testimony was admissible. (See Part II.I of this order) Freeman failed to proffer in his petition or at his evidentiary hearing what argument or legal authority appellate counsel could have presented on appeal that would have caused the appellate courts to reverse his convictions or sentence. The Court finds that Freeman has failed to meet his burden of proving appellate counsel's performance was deficient or caused him to be prejudiced as required by Strickland. Rule 32.3, ARCrP. Therefore, this claim is hereby denied.

IV.E. Claim that appellate counsel was ineffective for failing to claim on appeal that the State was improperly permitted to introduce the prior testimony of Francis Boozer.

In Ground VIII.(E), Freeman contends that appellate counsel was ineffective for failing to raise on appeal that the Court erred admitting the prior testimony of Boozer. Freeman failed to proffer in his petition or at his evidentiary hearing what argument or legal authority appellate counsel could have presented on appeal that would have caused the appellate courts to reverse his convictions or sentence. The Court finds that Freeman has failed to meet his burden of proving appellate counsel's performance was deficient or caused him to be prejudiced as required by Strickland. Rule 32.3, ARCrP. Therefore, this claim is hereby denied.

IV.F. Claim that appellate counsel was ineffective for failing to claim on appeal that the State's capital murder sentencing scheme is unconstitutional.

In Ground VIII.(F), Freeman contends that appellate counsel was ineffective for failing raise on appeal the claim that Alabama's capital murder sentencing scheme is unconstitutional because, according to Freeman, "[it] permits the trial court, not the jury, [to] determine[] the existence of the aggravating factors rendering [him] eligible for a sentence of death". (Freeman's fourth amended petition at p. 16) The Court has previously stated, based on the Alabama Supreme Court's holding in Ex parte Waldrop, that Freeman's jury and not the Court found beyond a reasonable doubt the facts necessary to expose Freeman to the death penalty. (See Part II.F of this order) Freeman presented no argument or

legal authority at his evidentiary hearing that appellate counsel could have presented on appeal that would have caused the appellate courts to reverse his convictions or sentence. The Court finds that Ground VIII.(F) fails to state a claim or establish that a material issue of fact or law exists that would entitle Freeman to relief as required by Rule 32.7(b), ARCrP. Therefore, this claim is hereby denied.

IV.G. Claim that appellate counsel was ineffective for failing to raise on appeal the improper admission into evidence of raw psychological data.

In Ground VIII.(G), Freeman contends that appellate counsel was ineffective for failing to object to the admission into evidence of raw psychological data because, according to Freeman, it "created the impermissible risk that jurors and the Court ... reached materially inaccurate conclusions about [Freeman's] character and mental status." (Freeman's fourth amended petition at p. 17) At the evidentiary hearing, Goggans testified he did not raise this issue on appeal because he believed the raw psychological data would bolster his claim that the Court erred when it did not have Freeman evaluated after he had been disruptive during a lunch recess. See Freeman v. State, 776 So. 2d 160, 171-173 (Ala. Crim. App. 1999). Given that trial counsel's strategy was to convince the jury that Freeman was not guilt due to mental disease or defect, the Court finds that Goggans's strategic decision not to raise this claim on appeal was entirely reasonable. The Court finds that Ground VIII.(G) fails to state a claim or establish that a material issue of fact or

law exists that would entitle Freeman to relief as required by Rule 32.7(b), ARCrP. Therefore, this claim is hereby denied.

CONCLUSION

For the reasons stated above, the Court finds that Freeman in due no relief from his convictions for capital murder and sentence of death. Therefore, Freeman's Rule 32 petition in hereby DENIED.

DONE this the 25 day of JUNE, 2003.

EUGENE W. REESE
CIRCUIT JUDGE
FIFTEENTH JUDICIAL CIRCUIT

cc: Robert Lominack, Counsel for Petitioner

Jon B. Hayden, Assistant Attorney General

Appendix J

CAPLIT
Crenshaw
713278

Notice: This unpublished memorandum should not be cited as precedent. See Rule 54, Ala.R.App.P. Rule 54(d), states, in part, that this memorandum "shall have no precedential value and shall not be cited in arguments or briefs and shall not be used by any court within this state, except for the purpose of establishing the application of the doctrine of law of the case, res judicata, collateral estoppel, double jeopardy, or procedural bar."

Court of Criminal Appeals

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

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MEMORANDUM

CR-02-1971 Montgomery Circuit Court CC-88-1412.60

David Freeman v. State of Alabama

SHAW, Judge.

David Freeman appeals the circuit court's denial of his Rule 32, Ala.R.Crim.P., petition for postconviction relief, in which he attacked his 1996 capital-murder convictions and sentence of death.

In 1988, Freeman was indicted for six counts of capital murder in connection with the murders of Sylvia Gordon and her mother Mary Gordon. Count I of the indictment charged Freeman with the murder of two or more persons by one act or pursuant to one scheme or course of conduct, see § 13A-5-40(a)(10), Ala. Code 1975; Count II charged Freeman with the murder of Sylvia Gordon during a burglary in the first degree, see § 13A-5-40(a)(4), Ala. Code 1975; Count III charged Freeman with the murder of Mary Gordon during a burglary in the first

degree, see § 13A-5-40(a)(4), Ala. Code 1975; Count IV charged Freeman with the murder of Sylvia Gordon during a robbery in the first degree, see § 13A-5-40(a)(2), Ala. Code 1975; Count V charged Freeman with the murder of Mary Gordon during a robbery in the first degree, see § 13A-5-40(a)(2), Ala. Code 1975; and Count VI of the indictment charged Freeman with the murder of Mary Gordon during a rape in the first degree, see § 13A-5-40(a)(3), Ala. Code 1975. In August 1989, a jury found Freeman guilty of all six counts of capital murder charged in the indictment, and recommended, by a vote of 11-1, that Freeman be sentenced to death; the trial court accepted the jury's recommendation and sentenced Freeman to death.

On appeal, this Court reversed Freeman's convictions and sentence and remanded the cause for a new trial on the ground the prosecutor had violated Batson v. Kentucky, 476 U.S. 79 (1986). See Freeman v. State, 651 So. 2d 573 (Ala. Crim. App. 1992), rev'd on return to remand, 651 So. 2d 576 (Ala. Crim. App. 1994). Freeman was retried in July 1996, and he was once again found guilty of all six counts of capital murder charged in the indictment.[1] The jury again recommended, by a vote of 11-1, that Freeman be sentenced to death, and the trial court accepted the jury's recommendation and sentenced Freeman to death. Freeman's convictions and sentence were affirmed on appeal, see Freeman v. State, 776 So. 2d 160 (Ala. Crim. App. 1999), aff'd, 776 So. 2d 203 (Ala. 2000), and the United States Supreme Court denied certiorari review, see Freeman v. Alabama, 531 So. 2d 966 (2000). This Court issued a certificate of judgment on June 19, 2000.

Freeman, through counsel, filed his Rule 32 petition on September 28, 2001. On October 25, 2001, the State filed an answer to the petition and two motions to dismiss; in those filings, the State argued that all of the claims in Freeman's petition were either procedurally barred or insufficiently pleaded. Freeman filed four amended petitions, on November 9, 2001, January 28, 2002, July 25, 2002, and September 17, 2002,

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[1]Freeman was initially retried in January 1996; however, that trial ended in a mistrial. Freeman was then retried again in July 1996.

respectively.[2] The State responded to the amended petitions on November 27, 2001, April 11, 2002, August 1, 2002, and November 7, 2002, respectively.[3] An evidentiary hearing was conducted on June 4, 2003, and the circuit court issued an order denying Freeman's petition on June 25, 2003.

The circuit judge who ruled on Freeman's petition was the same judge who presided over Freeman's trial. In its order denying Freeman's petition, the circuit court quoted its findings of fact regarding the crime from its sentencing order; the sentencing order includes the following findings:

> "On March 11, 1988, Deborah Gordon Hosford picked up her sister, Sylvia Gordon, from Lanier High School [in Montgomery] and drove to their home at 29 Rosebud Court, arriving at approximately 3:30 p.m. Waiting on the porch was the defendant, David Freeman, who had ridden his bicycle to their home. [Before the murders,] Freeman had lived in a trailer near the Gordon home, and he wanted a romantic relationship with Sylvia Gordon. Sylvia was not romantically interested in Freeman, and was planning to tell him that she no longer wished to see him. Deborah, Sylvia, and Freeman entered the home. Deborah had to return to work and left at approximately 3:45 p.m. When she left, Freeman and Sylvia were sitting on the couch.
>
> "Freeman had given Sylvia a note essentially

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[2]Each amended petition included all of the claims and allegations from the previous petitions. Therefore, we refer throughout this memorandum to the fourth amended petition.

[3]With respect to the third and fourth amended petitions, the State argued that they were filed outside the limitations period in Rule 32.2(c) and, thus, that any claims in those petitions that did not relate back to the original petition were precluded. However, the Alabama Supreme Court has recently held that the relation-back doctrine does not apply to Rule 32 petitions. See Ex parte Jenkins, [Ms. 1031313, April 8, 2005] ___ So. 2d ___ (Ala. 2005). Therefore, the new claims in the third and fourth amended petitions were timely.

stating that he did not like seeing her only once a week, that he loved her, and that he did not want to lose her like all of his other girlfriends. Sylvia in return gave Freeman a note stating that she viewed the relationship only as friendship and that she did not want to have a serious relationship. Approximately a week prior to the murders, Freeman had a conversation with Francis Boozer, a co-worker, and told her that he would rather see Sylvia dead than [for] someone else [to] have her.

"At about 1:00 a.m. Deborah Gordon Hosford returned home. She found the lights of the home turned off and the door unlocked and slightly ajar. She went inside and noticed that the house had been ransacked. She went to her sister's bedroom and found Sylvia, dead, in her bed with multiple stab wounds and clad only in a T-shirt and socks. As she was fleeing the house, she saw her mother, Mary Gordon, lying in a pool of blood on the floor of her bedroom. Mrs. Gordon was clad only in a shirt, with her body being nude from the waist down with her legs spread apart.

"Police arrived at the Gordon home and found blood throughout most of the house. Mary Gordon was stabbed 14 times by Freeman; two wounds were fatal. She lived for about five minutes [after being stabbed the first time]. She had also been raped, and the semen deposited in her was consistent as having been left by Freeman. Sylvia Gordon was stabbed 22 times by him, and she remained conscious for eight to ten minutes after the first wound was inflicted. None of these wounds were fatal; Sylvia Gordon bled to death. Examination also revealed that Sylvia Gordon had tears in her vagina. Additionally, police found a shoe print on the shirt of Mary Gordon and a shoe print on a card found on the floor near the body of Mary Gordon. Police also noted that all [telephone] lines in the house had been cut.

"Freeman had brought a knife with him and used it to brutally kill Sylvia Gordon because she did

not want a relationship, as well as [to] kill Mary Gordon when she walked in on the murder. After committing the murders, Freeman stole the Gordons' 1980 Pontiac Sunbird and put his bike that he had ridden to the Gordon home in it and fled the scene. He attempted to establish an alibi by later going to work. The Gordons' car was found in a parking lot near Freeman's apartment. Freeman's fingerprint was found on the car and blood that was consistent with that of Sylvia Gordon and Mary Gordon was also in the car. Additionally found in the car was a butcher knife that had been cleaned of blood. The butcher knife was examined by an expert in trace evidence with the Department of Forensic Sciences and was determined to be consistent with having caused the wounds to Mary Gordon, to cut the bra and panties of Mary Gordon, and to cut the jeans of Sylvia Gordon.

"When the police arrived at Freeman's apartment, Freeman answered the door, and the officers noted a bandage [on] Freeman's right hand. When asked how he cut his hand, Freeman lied, claiming that he had cut his hand while repairing a chair. Freeman was arrested at his apartment. The police, upon a consent to search, found the clothing worn by Freeman, which had blood consistent with that of Sylvia Gordon on them. A mixture of blood and semen was found in the underwear that he had worn. His shoes were seized and compared to the prints found on the shirt of Mary Gordon and the card found in the Gordon home. Examination revealed that Freeman's shoes were consistent with the prints found at the scene. Bite marks were noted on Freeman's arm, which were [determined to have been] made by Sylvia Gordon.

"Freeman initially lied to the police as to his involvement in the crimes. He tried to establish an alibi for his whereabouts. However, when confronted with the evidence, Freeman admitted to stabbing Sylvia Gordon and stated that upon Mary Gordon's entering the home he had no choice but to stab her. Freeman also claimed to have blacked out on two

occasions during the crimes.

> "In late 1988 and early 1989 Freeman was mentally evaluated by the staff at Taylor Hardin Secure Medical Facility, who found that he suffered no mental disease or defect which caused him to lack [the] substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. In 1995, he was evaluated by Dr. Guy Renfro, an expert forensic psychologist, who also found [that] he was responsible for his acts at the time of the offense."

(Record on Direct Appeal, C. 1224-27.)[4] As noted in the court's findings, Freeman confessed to murdering Mary and Sylvia Gordon. In his confession, Freeman stated, in part:

> "[I] went to see if S[y]lvia was home. S[h]e was not there. So I stayed until she came. Debra and S[y]lvia drove up in a grey car. We all went in the house. 15 min[utes] later Debra left, I stayed a while. S[y]lvia gave me a note saying that she didn't w[an]t a really serious relationship, she asked me about this paragraph [in the note Freeman had given her] about I love you bit. I told her that I was just trying to say I liked her not as serious as when we first me[]t. After that I sort of blanked out. When I came to her mother was [c]oming in the door, I looked at S[y]lvia, then I saw a knife in my hand, then I said I have no other [ch]oice so I stabbed her mother. I got cut on my right hand so I [w]rap[p]ed a handkerchi[e]f around my hand to stop the bleeding, then when I came out of the bathroom I saw both of them trying to get to the phone so I ran over and got all of the phones of[f] the walls and then I waited until I [k]new they weren't going anywhere before I got the car keys. I got the car keys and left by that time it

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[4]This Court may take judicial notice of its own records, and we do so in this case. See, e.g., Hull v. State, 607 So. 2d 369, 371 (Ala. Crim. App. 1992).

> was about 5:30 p.m. or something like that. I took the silver car and I left."

(Record on Direct Appeal, C. 3222-23.) Despite his claim that he blacked out when he attacked Sylvia, Freeman later said in his statement that Sylvia was crying during the attack. In addition, Freeman said that he stabbed Mary in the back when Mary first walked into the house and that after he stabbed Mary the first time, Mary walked into her bedroom and tried to shut the door, but that he forced his way in. Freeman said that at that point, he blacked out again and awoke in Mary's bedroom lying next to Mary, and that Mary was still alive at that point. Freeman further stated that he then went into the bathroom to bandage the cut on his hand, and that when he came out, Sylvia was no longer in the living room where he had initially stabbed her, but was at the door to the kitchen. Finally, Freeman said that, although Sylvia's body was discovered in her bedroom, he did not move Sylvia to the bedroom after he stabbed her.

Freeman's defense at trial was that he was suffering from a mental disease or defect at the time of the murders. He presented testimony from Dr. Barry Burkhart, who evaluated Freeman in 1989. Dr. Burkhart diagnosed Freeman as suffering from a major depressive disorder and a schizotypal personality disorder. According to Dr. Burkhart, at the time of the murders, Freeman experienced a brief reactive psychosis which, Dr. Burkhart said, left Freeman unable to conform his conduct to the requirements of the law.[5]

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[5]Section 13A-3-1, Ala. Code 1975, was amended in May 1988, two months after the murders, to exclude the volitional test (lack of capacity to conform one's conduct to the requirements of the law) from the definition of insanity. See Act No. 88-654, Ala. Acts 1988. However, at the time of the murders in this case, a defendant was not responsible for his criminal acts if "'"at the time of such conduct as a result of mental disease or defect he lack[ed] substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."'" Archie v. State, 875 So. 2d 336, 340 (Ala. Crim. App. 2003), quoting Ware v. State, 584 So. 2d 939, 942 (Ala. Crim. App. 1991), quoting in turn, former § 13A-3-1(a), Ala. Code 1975 (1982 Replacement Vol.)

I.

Freeman raised several claims in his petition, including claims of ineffective assistance of trial and appellate counsel. "[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, [Ms. CR-02-0037, September 26, 2003] ___ So. 2d ___, ___ (Ala. Crim. App. 2003), quoting Elliott v. State, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992). "'[I]f the circuit court is correct for any reason, even though it may not be the stated reason, we will not reverse its denial of the petition.'" Scroggins v. State, 827 So. 2d 878, 880 (Ala. Crim. App. 2001), quoting Reed v. State, 748 So. 2d 231, 233 (Ala. Crim. App. 1999). Moreover, "the plain error rule does not apply to Rule 32 proceedings, even if the case involves the death sentence." Cade v. State, 629 So. 2d 38, 41 (Ala. Crim. App. 1993). Therefore, those claims that Freeman presented in his petition, but does not pursue on appeal are deemed to be abandoned and will not be addressed by this Court.[6] See, e.g., Brownlee v. State, 666

(emphasis added).

[6]Those claims include (1) that his July 1996 retrial violated the principles of double-jeopardy because, he said, there was no manifest necessity for declaring a mistrial in the January 1996 retrial (Ground I in Freeman's fourth amended petition); (2) that he was denied a fair trial as a result of "the admission of graphic, unnecessarily cumulative images of the crime scene and the victims" (Ground III in Freeman's fourth amended petition, C. 302); (3) that he was denied his right to confront the witnesses against him as a result of the admission of what he claimed was hearsay testimony from Dr. Joel Dixon (Ground V in Freeman's fourth amended petition); (4) that his death sentence was the result of the admission of what he claimed was materially inaccurate evidence that he was not suffering from a mental disease or defect (Ground VI.B. in Freeman's fourth amended petition); (5) that his death

So. 2d 91, 93 (Ala. Crim. App. 1995) ("We will not review issues not listed and argued in brief."). Finally, "[i]t is well settled that 'the procedural bars of Rule 32 apply with equal force to all cases, including those in which the death penalty has been imposed.'" Nicks v. State, 783 So. 2d 895, 901 (Ala. Crim. App. 1999), quoting State v. Tarver, 629 So. 2d 14, 19 (Ala. Crim. App. 1993). With these principles in mind, we now address those claims in Freeman's petition that have been pursued on appeal.

A.

Freeman contends that he was denied the effective assistance of counsel both at trial and on appeal. (Issues III, V, VI in Freeman's brief.) Freeman was represented at trial by Ally Howell, William Abell, and John David Norris. Howell was lead counsel and the testimony of Abel and Norris at the Rule 32 evidentiary hearing[7] indicates that Howell was in charge of every aspect of Freeman's defense; thus, Freeman's allegations of ineffective assistance of trial counsel are focused primarily on the conduct of Howell. Thomas Goggans represented Freeman on appeal.

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

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sentence was the result of the improper admission of raw psychological testing data that he claimed was misinterpreted by the jury and the court (Ground VI.D. in Freeman's fourth amended petition); (6) several allegations of ineffective assistance of trial counsel (Grounds II.B., II.C., II.I., II.M., II.N., II.O., and II.P. in Freeman's fourth amended petition); and (7) several allegations of ineffective assistance of appellate counsel (Grounds VIII.A., VIII.B., VIII.D., VIII.F., and VIII.G. in Freeman's fourth amended petition).

[7]Howell did not testify at the hearing, see Part II.C. of this memorandum.

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

"'466 U.S. at 687, 104 S.Ct. at 2064.

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

"'The claimant alleging ineffective assistance of counsel has the burden of showing that counsel's assistance was

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

> "'"Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every

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

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

> "'"Even if an attorney's performance is determined to be deficient, the petitioner is not entitled to relief unless he establishes that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Strickland,] 466 U.S. at 694, 104 S.Ct. at 2068."

"'Daniels, 650 So.2d at 552.

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

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

Rule 32.3, Ala.R.Crim.P., states that "[t]he petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief." Rule 32.6(b), Ala.R.Crim.P. states that "[t]he petition must contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings." As this Court noted in Boyd v. State, [Ms. CR-02-0037, September 26, 2003] ___ So. 2d ___ (Ala. Crim. App. 2003):

> "'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, entitles 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."

___ So. 2d at ___. 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 in Rule 32.3 and Rule 32.6(b). 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). Moreover, to sufficiently plead an allegation of ineffective assistance of counsel, a Rule 32 petitioner must not only "identify the [specific] acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment," Strickland v. Washington, 466 U.S. 668, 690 (1984), but must also plead specific facts indicating that he or she was prejudiced by the acts or omissions, i.e., facts indicating "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A bare allegation that prejudice occurred without specific facts indicating how the petitioner was prejudiced is not sufficient.

In this case, the State requested summary dismissal of Freeman's claims of ineffective assistance of trial and appellate counsel on the ground that his allegations were not sufficiently pleaded, but the circuit court denied the request. The court conducted an evidentiary hearing and, in its order denying Freeman's petition, the court found that Freeman failed to satisfy his burden of proof as to each of his allegations. However, after thoroughly reviewing

Freeman's petition, we conclude that Freeman was not entitled to an evidentiary hearing on his claims of ineffective assistance of trial and appellate counsel because, as explained below, none of his allegations were pleaded with sufficient specificity to satisfy the requirements in Rule 32.3 and Rule 32.6(b).[8] Although this was not the reason the circuit court gave for denying Freeman's allegations of ineffective assistance of counsel, as noted above, this Court will affirm the judgment of the circuit court if it is correct for any reason.

1.

In Ground II.A. of his fourth amended petition, Freeman alleged the following:

> "Trial counsel failed to conduct meaningful, constitutionally permissible voir dire of the prospective jurors at petitioner's trial, failed to pose questions necessary to discover bias and predisposition on the part of prospective jurors, and failed to articulate meritorious challenges for cause based on information revealed by prospective jurors during voir dire. As a result of counsel's deficient performance, there is a reasonable probability that one or more of the jurors seated on petitioner's capital trial harbored actual bias which, had it been disclosed, would have warranted their removal for cause."

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[8]We note that Freeman attempts to include more specific facts in his brief on appeal with respect to many of his allegations of ineffective assistance of counsel. However, those facts that Freeman includes in his brief that were not included in his original petition or any of his amended petitions cannot be considered by this Court. See, e.g., Bearden v. State, 825 So. 2d 868, 872 (Ala. Crim. App. 2001) ("Although Bearden attempts to include more specific facts regarding his claims of ineffective assistance of counsel in his brief to this Court, those allegations are not properly before this Court for review because Bearden did not include them in his original petition before the circuit court.").

(C. 295.) (Issue III.A. in Freeman's brief.) Freeman failed to identify what questions he believes his counsel should have asked prospective jurors that they did not ask, what jurors he believes should have been challenged for cause and why, or which jurors sat on his jury he believes were biased. Freeman's claim in this regard is nothing more than a conclusory allegation unsupported by any specific facts. Therefore, Freeman failed to satisfy his burden of pleading, and denial of this allegation of ineffective assistance of trial counsel was proper.

2.

In Ground II.D., II.E., and VIII.C. of his fourth amended petition, Freeman alleged that his trial and appellate counsel were ineffective for not challenging the admissibility of testimony from Michael O'Brien, the State's expert in forensic odontology, and that his trial counsel were ineffective for not presenting evidence of an alternative source for the bite marks found on his arm after the murders. (Issues III.B., III.C., and VI.A. in Freeman's brief.)

In Ground II.D., Freeman alleged:

> "Trial counsel failed to object to the testimony of the prosecution's purported forensic odontology expert concerning the alleged bite marks on petitioner's arm. As a result, this testimony was admitted in the absence of any demonstration: (i) that forensic odontology is sufficiently reliable to satisfy the criteria for admissibility as scientific evidence against the accused in a criminal proceeding; (ii) that the prosecution's witness possessed the expertise necessary to determine the age of the alleged marks on petitioner's arm; (iii) that the categories of bite marks described by the prosecution's witness are grounded in empirical data or recognized within the scientific community; (iv) that the alleged marks in this case bear sufficient indicia to be susceptible of accurate categorization within the set of categories described by the prosecution's expert; (v) that the prosecution's witness in this case possessed the expertise necessary to properly conduct the comparisons upon

which his testimony was purportedly based; or (vi) that the comparisons allegedly performed by the prosecution's expert yielded results possessing a level of reliability sufficient to warrant their consideration by a trial court in a capital case. The evidence presented through the testimony of the forensic odontologist was prejudicial to petitioner as it provided, among other things, evidence from which the jury could find the heinous, atrocious and cruel aggravating circumstance, and it also provided a basis for the jury's finding that petitioner had remained unlawfully in the victims' house after the revocation of consent and was, therefore, guilty of burglary. But for counsel's deficient performance, there exists a reasonable probability that the result of petitioner's trial would have been different."

(C. 296-97.) In Ground VIII.C., Freeman alleged:

"The record on appeal included the testimony of Michael O'Brien, who was called by the prosecution to provide his 'expert' opinion that bite marks allegedly found on petitioner's arm had been made within a day or two of O'Brien's examination of petitioner, to claim that the marks 'were consistent with marks made in either an offensive or defensive type of circumstance,' R. 444, ln 9-11, and to opine that the marks had been made by Sylvia Gordon. Despite the absence from the record of foundational testimony necessary to establish the admissibility or reliability of this testimony, see Ground II.D., supra, appellate counsel raised no challenge to the trial court's admission of, and reliance on O'Brien's testimony. Appellate counsel's failure in this regard constituted deficient performance, and, had counsel raised the available challenges on direct appeal, there is a reasonable probability that petitioner's convictions and/or sentence would have been reversed."

(C. 306-07.)

Although Freeman specifically alleged the act or omission

on the part of trial and appellate counsel that he believes was unreasonable, he failed to plead specific facts tending to indicate that he was prejudiced by counsel's performance in this regard. Freeman made only a conclusory allegation that the testimony of O'Brien was prejudicial because it "provided a basis" for the jury to find that Freeman was guilty of burglary and to find the presence of the heinous, atrocious, or cruel aggravating circumstance. However, Freeman alleged virtually no facts in his petition regarding the circumstances of the crimes, he did not allege anywhere in his petition what evidence was presented at trial by the State and the defense, and he did not state anywhere in his petition what aggravating and mitigating circumstances were presented to the jury at the penalty phase of the trial or what circumstances were found by the trial court to exist. Even assuming the bare factual allegations in the petition to be true, they do not tend to indicate that the testimony of the forensic odontologist was improperly admitted or that it prejudiced Freeman, either at the guilt phase or the penalty phase of the trial, in any way. Thus, Freeman failed to satisfy his burden of pleading with respect to these allegations of ineffective assistance of trial and appellate counsel.

In Ground II.E. of his fourth amended petition, Freeman further alleged:

> "Despite having been informed of an alternative source of the bite marks which were allegedly visible on petitioner's arm following his arrest, trial counsel failed to investigate and present reliable evidence in light of this information. But for counsel's deficient performance, there exists a reasonable probability that the result of petitioner's trial would have been different."

(C. 297-98.) Freeman did not even identify who or what the alternative source of the bite marks was; therefore, he clearly failed to satisfy his burden of pleading with respect to this allegation of ineffective assistance of trial counsel.

Moreover, we note that even if we were to consider these allegations of ineffective assistance of trial and appellate counsel to be sufficiently pleaded (which we do not), a review of the trial transcript reveals that they are meritless.

First, to the extent that Freeman is arguing that his trial and appellate counsel should have challenged the admissibility of O'Brien's testimony on the ground that the State failed to lay the proper predicate for the admission of scientific evidence, this Court has held that bite mark identification testimony is not scientific evidence. See Handley v. State, 515 So. 2d 121 (Ala. Crim. App. 1987). Thus, the predicate for the admission of scientific evidence was not necessary to the admissibility of O'Brien's testimony and any challenge on this ground would have been baseless. "[C]ounsel could not be ineffective for failing to raise a baseless objection." Bearden v. State, 825 So. 2d 868, 872 (Ala. Crim. App. 2001).

Second, to the extent that Freeman is arguing that his trial and appellate counsel should have challenged O'Brien's testimony on the ground that O'Brien was not qualified as an expert in forensic odontology, our review of the record reveals that he was properly qualified as an expert. O'Brien testified, in part, that he received his dental degree in 1983; that he completed a year fellowship in oral and maxillofacial surgery; that he received training in forensic dentistry/odontology[9] and pathology, including bite mark identification, while in the Navy; that he had been in private practice since 1986; that he was board certified from the National Dental Board of Examiners and the Alabama Board of Dental Examiners; that he was a member of the American Academy of Forensic Sciences, the American Society of Forensic Odontology, and the Alabama Association of Forensic Sciences; that he had written several articles about bite mark identification; and that he was a consultant with the Alabama Department of Forensic Sciences in the area of forensic odontology. The trial court certified O'Brien as an expert in bite mark identification. As this Court noted in Handley, "[t]he general rule is that the competence of an expert witness to testify is an inquiry substantially within the discretion of the trial judge, and the appellate court will not disturb the trial judge's determination of expert qualifications unless there is a clear abuse of this

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[9]O'Brien testified that forensic odontology is just "a fancy name for forensic dentistry." (Record on Direct Appeal, R. 439.)

discretion." 515 So. 2d at 131. O'Brien was qualified to testify as an expert in bite mark identification. Therefore, any challenge to O'Brien's testimony on this ground would have been baseless.

Finally, with respect to Freeman's arguments that his trial and appellate counsel should have challenged that portion of O'Brien's testimony wherein he stated that the bite marks on Freeman's arms appeared to be "no more than a day or two old" (Record on Direct Appeal, R. 443)[10] and that they appeared to have been made in an offensive or defensive type manner, and that trial counsel should have presented evidence of an alternative source for the bite marks, we find that Freeman suffered no prejudice. Even if trial and appellate counsel had successfully challenged O'Brien's testimony regarding the age of the bite marks and the manner in which the marks were inflicted and either the trial court excluded that testimony or this Court determined that testimony to be inadmissible and trial counsel had presented evidence that the source of the bite marks was someone other than Sylvia Gordon,[11] the outcome of Freeman's trial would not have been different. The evidence of the bite marks on Freeman's arm was only a small piece of the State's overwhelming case against Freeman and it was not a crucial component of the State's proof of capital murder during a burglary or of the heinous, atrocious or cruel aggravating circumstance, as Freeman appears to contend. See Freeman v. State, 776 So. 2d 160, 193 and 197-98 (Ala. Crim. App. 1999) (wherein this Court set forth the abundant evidence in addition to the bite marks that supported the charges of capital murder during a burglary and the heinous, atrocious or cruel aggravating

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[10]O'Brien testified that he examined the marks on March 12, 1988, the day after the murders; thus, his testimony regarding the age of the marks placed them within the time frame of the murder.

[11]We note that in his statement to police, Freeman said that he had received the bite marks from one of his relatives when that relative suffered an epileptic seizure. Thus, there was some evidence before the jury of an alternative source for the bite marks.

circumstance).[12] Additionally, as noted above, Freeman admitted that he murdered Mary and Sylvia Gordon; his defense at trial was insanity. Challenging the bite mark evidence, the only purpose of which would have been to suggest that Freeman did not commit the murders, would have conflicted with his defense. Therefore, neither trial or appellate counsel were ineffective in this regard.

Because these allegations of ineffective assistance of trial and appellate counsel were not sufficiently pleaded and are meritless based on our review of the trial transcript, they were properly denied by the circuit court.

3.

In Ground II.F. of his fourth amended petition, Freeman alleged:

> "Trial counsel failed to submit autopsy data generated by the state's medical examiner to a qualified, independent pathologist for review. As a result, trial counsel were wholly unprepared to challenge the medical examiner's damaging testimony concerning the nature of the victims' injuries and the duration of the suffering the victims endured. Among other things, this evidence was relevant to the heinous, atrocious and cruel aggravating circumstance as well as the burglary charge which required evidence that petitioner remained unlawfully without consent of the victim. But for counsel's deficient performance, there exists a reasonable probability that the result of petitioner's trial would have been different."

(C. 298.) (Issue III.D. in Freeman's brief.)

Freeman made only a conclusory allegation unsupported by any specific facts regarding the content of the medical examiner's testimony or what evidence he believes could have

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[12]Indeed, this Court did not even mention the bite marks when setting forth the evidence supporting the heinous, atrocious or cruel aggravating circumstance.

been obtained by submitting the autopsy data to an independent expert. Likewise, Freeman made only a bare and conclusory allegation that but for counsel's performance in this regard, the outcome of his trial probably would have been different without pleading any specific facts as to exactly how and why he was prejudiced by counsel's performance in this regard. Therefore, Freeman failed to satisfy his burden of pleading with respect to this allegation of ineffective assistance of trial counsel.

Moreover, even if this allegation were sufficiently pleaded, our review of the trial transcript reveals that it is meritless. Dr. James Lauridson, a medical examiner with the Alabama Department of Forensic Sciences who conducted the autopsies on Mary and Sylvia Gordon, testified that Mary suffered 11 major stab wounds and several smaller wounds; that some of the wounds were inflicted post-mortem; that of the wounds that were inflicted pre-mortem, several could have been fatal individually; that Mary "may have" lived from 5 to 10 minutes after the first wound was inflicted (Record on Direct Appeal, R. 665); that Mary most likely remained conscious and was able to feel pain for approximately three minutes after the first wound was inflicted; and that Mary died from multiple stab wounds. Dr. Lauridson testified that Sylvia suffered 22 major stab wounds and several smaller wounds; that one of the major wounds was inflicted post-mortem; that some of the wounds were on Sylvia's hands and arms and were defensive wounds; that Sylvia lived for approximately 10 minutes after the first wound was inflicted; that Sylvia may have remained conscious for as long as 8 minutes after the first wound was inflicted; and that Sylvia died from blood loss resulting from multiple stab wounds. Dr. Lauridson's testimony was entirely consistent with Freeman's own statement to police. As noted above, Freeman told police that both Mary and Sylvia were alive during the attack; that Sylvia was crying; that Mary attempted to get away from him by walking into her bedroom after she had initially been stabbed; and that both Mary and Sylvia attempted to reach a telephone. In addition, the Gordons' house had been ransacked and testimony at trial indicated that blood was found throughout the house, not just in one room, thus indicating that a violent struggle took place. There was ample evidence other than Dr. Lauridson's testimony, including Freeman's own statement to police, establishing that Freeman committed capital murder

during a burglary and that his crime was heinous, atrocious and cruel. After thoroughly reviewing the transcript, we find that, even if trial counsel had presented evidence from a forensic pathologist that rebutted the testimony of Dr. Lauridson regarding the victims' wounds and the length of time the victims survived, the outcome of Freeman's trial would not have been different.

Therefore, because this allegation of ineffective assistance of counsel was not sufficiently pleaded and is, based on our review of the record, meritless, it was properly denied by the circuit court.

4.

In Ground II.G. of his fourth amended petition, Freeman alleged:

> "Trial counsel failed to investigate, develop and present evidence that petitioner suffers from neurological impairments. But for counsel's deficient performance, there exists a reasonable probability that the result of petitioner's trial would have been different."

(C. 298.) (Issue III.E. in Freeman's brief.) Freeman failed to allege in his petition any facts tending to indicate that his counsel's performance was deficient or that he was prejudiced by counsel's performance. He did not allege what type of neurological impairments he suffered from; the severity of his alleged impairments; or how the alleged impairments would have been relevant to his trial. Likewise, Freeman made only a conclusory allegation that the result of his trial probably would have been different, without pleading any facts whatsoever that would tend to indicate that he was prejudiced. Because Freeman failed to satisfy his burden of pleading, denial of this allegation of ineffective assistance of trial counsel was proper.

5.

In Ground II.H. of his fourth amended petition, Freeman alleged:

> "Trial counsel deposed Dr. Guy Renfro despite knowledge that his conclusions were harmful to petitioner's defense. As a result of trial counsel's decision to take Dr. Renfro's deposition, the prosecution was supplied with useful evidence against petitioner, which it subsequently introduced at petitioner's trial. But for counsel's deficient performance, there exists a reasonable probability that the result of petitioner's trial would have been different."

(C. 298-99.) (Issue III.F. in Freeman's brief.) Freeman failed to even identify in his petition who Dr. Guy Renfro was, and, as the circuit court correctly found in its order, failed to plead any facts regarding what conclusions Dr. Renfro had that were harmful to Freeman or what evidence Dr. Renfro developed that was used by the State. Clearly then, Freeman failed to satisfy his burden of pleading with respect to this allegation of ineffective assistance of trial counsel, and it was properly denied by the circuit court.

6.

In Grounds II.J. and II.K. of his fourth amended petition, Freeman alleged:

> "Trial counsel failed to investigate, develop and present available evidence in mitigation of petitioner's punishment. But for counsel's deficient performance, there exists a reasonable probability that the result of petitioner's trial would have been different.
>
> "Trial counsel failed to present available evidence regarding petitioner's background and his mental health history to the jury in a manner which would have allowed the jury to give this evidence mitigating effect during the sentencing phase. But for counsel's deficient performance, there exists a reasonable probability that the result of petitioner's trial would have been different."

(C. 299.) (Issue III.G. in Freeman's brief.) Freeman did not allege in his petition what "available evidence" there was

about his background or mental health history that his counsel did not present or what "manner" he believes his counsel should have presented the unidentified evidence. Likewise, other than the conclusory allegation that but for counsel's conduct in this regard, there was a reasonable probability that the outcome of his trial would have been different, Freeman alleged no facts tending to indicate that he was prejudiced by counsel's preparation for and conducting of the penalty phase of his trial. His contentions in this regard are vague and conclusory and wholly insufficient to satisfy his burden of pleading. Therefore, denial of these allegations of ineffective assistance of trial counsel was proper.

7.

In Ground II.L. of his fourth amended petition, Freeman alleged:

> "Trial counsel failed to investigate and introduce readily-available evidence of petitioner's good behavior in and adaptability to prison. See Skipper v. South Carolina, 476 U.S. 1 (1986). But for counsel's deficient performance, there exists a reasonable probability that the result of petitioner's sentencing proceeding would have been different."

(C. 300.) (Issue III.H. in Freeman's brief.) Again, Freeman failed to allege what evidence he believes his counsel should have presented in this regard. He made no factual allegations whatsoever regarding what his behavior was in prison or how he adapted to prison life. In addition, he made only a conclusory allegation of prejudice without pleading any specific facts that would tend to indicate that evidence of his alleged "good behavior in and adaptability to prison" would have altered the balance of aggravating and mitigating circumstances. Therefore, Freeman failed to satisfy his burden of pleading with respect to this allegation of ineffective assistance of trial counsel, and it was properly denied by the circuit court.

8.

Ground VII of Freeman's fourth amended petition reads as follows:

> "Ground VII. Petitioner's right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Alabama law was violated as a result of his representation at trial by lead counsel who labored under the debilitating, judgment-impairing effects of a psychological condition which resulted in the alteration of counsel's gender, and permanently disabled counsel from the practice of law. United States v. Cronic, 466 U.S. 648 (1984); see also Williams v. Taylor, 529 U.S. 362 (2000); Strickland v. Washington, 466 U.S. 668 (1984).
>
> "Facts supporting this Ground:
>
> "A. The ground for relief states the necessary facts."

(C. 304-05.) In Ground IX of Freeman's fourth amended petition, Freeman also alleged that his trial counsel was laboring under a conflict of interest due to counsel's alleged psychological condition. With respect to this allegation, Freeman pleaded the following:

> "As alleged in Ground VII, supra, trial counsel suffered throughout his representation of petitioner from the debilitating, judgment-impairing effects of a psychological condition which subsequently resulted in the alteration of counsel's gender, and permanently disabled counsel from the practice of law. Due to the controversial and potentially embarrassing nature of this information, however, counsel did not reveal h[er] condition, or the effect it had on h[er] judgment and ability to effectively represent petitioner, to either h[er] client or the trial court. By putting h[er] personal interest in maintaining secrecy about h[er] condition ahead of h[er] obligation to reveal the impairments brought about by that condition, counsel

> deprived petitioner of his right to request that new counsel, free of psychological impairments, be appointed. As a result, petitioner was forced to go forward at trial with lead counsel whose judgment was impaired to such an extent that counsel failed to function in the manner guaranteed by the Sixth Amendment. See also Ground VII."

(C. 309-10.) (Issue V in Freeman's brief.)

Freeman pleaded no facts whatsoever in support of Ground VII of his petition. Contrary to Freeman's apparent belief, merely stating the ground for relief without any supporting facts is not sufficient to satisfy his burden of pleading. Likewise, Freeman's allegation in Ground IX of his petition consists of nothing more than conclusory statements unsupported by any specific facts indicating that counsel suffered from an actual conflict of interest that adversely affected her performance. Therefore, Freeman failed to satisfy his burden of pleading with respect to these allegations of ineffective assistance of trial counsel, and they were properly denied by the circuit court.

9.

In Ground VIII.E. of his fourth amended petition, Freeman alleged:

> "The record on appeal reveals that the State was permitted to introduce the prior testimony of an allegedly unavailable witness, Francis Boozer, over the objection of defense counsel. Had appellate counsel raised and argued this error, there is a reasonable probability that the result of petitioner's direct appeal would have been different."

(C. 308.) (Issue VI.B. in Freeman's brief.) Freeman failed to allege in his petition what the substance of Francis Boozer's testimony was; why he believed the testimony was inadmissible; or how the testimony prejudiced him. Therefore, Freeman failed to satisfy his burden of pleading with respect to this allegation of ineffective assistance of appellate counsel, and it was properly denied by the circuit court.

B.

In Ground IV of his fourth amended petition, Freeman alleged that he was denied a fair trial by the admission of testimony from the State's forensic odontologist. In Ground VI.A. and VI.C. of his fourth amended petition, Freeman alleged that he was denied a fair and accurate sentencing determination "as a result of the jury's and trial court's consideration of materially inaccurate information at the sentencing phase of petitioner's capital trial," specifically, the testimony of the State's forensic odontologist and forensic pathologist. (C. 303.) (Issue IV in Freeman's brief.) The circuit court correctly found that both of these claims were procedurally barred by Rule 32.2(a)(3) and (5), Ala.R.Crim.P., because they could have been, but were not, raised and addressed at trial and on appeal.

C.

In Grounds X and XII of his fourth amended petition, Freeman alleged that his death sentence violated the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002), for various reasons. (Issue VII in Freeman's brief.) Although we agree with Freeman that his claims in this regard are not subject to the procedural bars in Rule 32.2, Freeman is not entitled to relief because Ring does not apply retroactively to cases on collateral review. See Schriro v. Summerlin, ___ U.S. ___, 124 S.Ct. 2519 (2004); Brooks v. State, [Ms. CR-01-0607, April 29, 2005] ___ So. 2d ___ (Ala. Crim. App. 2005); Wilson v. State, [Ms. CR- 02-0394, April 29, 2005] ___ So. 2d ___ (Ala. Crim. App. 2005); Barbour v. State, [Ms. CR-00-1731, June 25, 2004] ___ So. 2d ___ (Ala. Crim. App. 2004); McWilliams v. State, 897 So. 2d 437 (Ala. Crim. App. 2004); and Boyd v. State, [Ms. CR-02-0037, September 26, 2003] ___ So. 2d ___ (Ala. Crim. App. 2003). Freeman's conviction was final in 2000, some two years before the United States Supreme Court issued its opinion in Ring.

Moreover, even if Ring were applicable to Freeman's case, all of Freeman's arguments regarding Ring were decided adversely to him by the Alabama Supreme Court in Ex parte Waldrop, 859 So. 2d 1181 (Ala. 2002). Freeman was convicted of capital murder during a robbery, capital murder during a burglary, and capital murder during a rape. By its guilt-

phase verdicts, the jury found beyond a reasonable doubt the aggravating circumstances necessary for imposition of the death penalty. There was no violation of Ring here. Therefore, the circuit court properly denied these claims.

D.

In Ground XI of his fourth amended petition, Freeman, relying on Atkins v. Virginia, 536 U.S. 304 (2002), alleged that his death sentence constitutes cruel and unusual punishment because, he said, he is mentally retarded. (Issue VIII in Freeman's brief.) In Ground II.Q. of his fourth amended petition, Freeman alleged that his trial counsel were ineffective for not investigating, developing, and presenting evidence to the trial court that he is mentally retarded. (Issue III.I. in Freeman's brief.)

In its order, the circuit court made the following findings of fact:

> "[T]he record from trial establishes beyond any doubt that Freeman is not mentally retarded. The record contains the results of numerous IQ tests given to Freeman from ages eight through fourteen years. Freeman's IQ scores include: 87 at age eight; 86 at age nine; 85 at age ten; 89 at age thirteen; and 89 at age fourteen. (C.R. 2478, 2162, 2233, 2164-66, and 1501)[13] The record also contains many hand-written letters from Freeman to various individuals that not only establish his literacy, but also clearly show a significant degree of intellectual functioning. Further, the Court personally addressed and observed Freeman on numerous occasions. Based on the record and the Court's personal knowledge of Freeman, even if this claim were properly before the Court,[14] it would be

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[13]The record also reflects an IQ score of 97 at the age of 14 (Record on Direct Appeal, C. 2981), and an IQ score of 86 at the age of 16 (Record on Direct Appeal, C. 2458).

[14]The circuit court also found that Freeman's substantive Atkins claim in Ground XI of his fourth amended petition was procedurally barred by Rule 32.2(a)(3) and (5), Ala.R.Crim.P.

> without merit. See Ex parte Perkins, [851 So. 2d 453 (Ala. 2002)] (holding that 'this Court can determine, based on the facts presented at Perkins's trial, that Perkins, even under the broadest definition of mental retardation, is not mentally retarded[']); see also Gibby v. State, 753 So. 2d 1206, 1207-1208 (Ala. Crim. App. 1999) (finding that claims in a Rule 32 petition that are refuted by the record on direct appeal are without merit). Therefore, this claim is hereby denied."

(C. 455-56.) The circuit court's findings are correct.

> "[A] defendant, to be considered mentally retarded, must have significantly subaverage intellectual functioning (an IQ of 70 or below), and significant or substantial deficits in adaptive behavior. Additionally, these problems must have manifested themselves during the developmental period (i.e., before the defendant reached age 18)."

Ex parte Perkins, 851 So. 2d 453, 456 (Ala. 2002) (opinion on remand from the United States Supreme Court). The trial record affirmatively refutes Freeman's allegation that he is mentally retarded. The trial record reflects that numerous IQ tests were administered to Freeman between the ages of 8 and 16 and that each time he was tested, Freeman had a full-scale IQ of between 86 and 97. Freeman clearly does not suffer from subaverage intellectual functioning. Thus, he does not meet the definition of mental retardation. Because Freeman is not mentally retarded, his death sentence does not constitute cruel and unusual punishment, and his trial counsel were not ineffective in this regard. Therefore, both of these claims were properly denied by the circuit court.

That finding was erroneous because Freeman's conviction was final long before the Supreme Court issued its opinion in Atkins, and this Court has held that Atkins applies retroactively on collateral review. See Clemons v. State, [Ms. CR-01-1355, August 29, 2003] ___ So. 2d ___ (Ala. Crim. App. 2003).

II.

Freeman also raises on appeal three arguments regarding the conduct of the Rule 32 proceedings. We address each in turn.

A.

Freeman contends that the circuit court erred in adopting verbatim the State's proposed order. (Issue IX in Freeman's brief.) However, this Court has repeatedly upheld the practice of adopting the State's proposed order when denying a Rule 32 petition for postconviction relief. See, e.g., Coral v. State, [Ms. CR-01-0341, May 28, 2004] ___ So. 2d ___ (Ala. Crim. App. 2004), and the cases cited therein. "Alabama courts have consistently held that even when a trial court adopts verbatim a party's proposed order, the findings of fact and conclusions of law are those of the trial court and they may be reversed only if they are clearly erroneous." McGahee v. State, 885 So. 2d 191, 229-30 (Ala. Crim. App. 2003). We have reviewed the record and, for the reasons explained in Part II of this memorandum, we conclude that the circuit court properly denied Freeman's petition. Therefore, we find no error on the part of the circuit court in adopting the State's proposed order.

B.

Citing Ake v. Oklahoma, 470 U.S. 68 (1985), Freeman contends that the circuit court erred in denying his requests for funds for expert assistance. (Issue I in Freeman's brief.)

The record reflects that Freeman filed three motions requesting funds for various experts and investigative services. In those motions, Freeman requested over $30,000 in funds to hire a neuropsychologist, a forensic odontologist, a forensic pathologist, a mitigation specialist, an investigator, a social worker, a risk assessment expert, a dermatologist, and a psychologist with expertise in gender

identity issues.[15] The circuit court denied all three requests.

Freeman's reliance on Ake v. Oklahoma is misplaced. As this Court explained in McGahee v. State, 885 So. 2d 191 (Ala. Crim. App. 2003), in addressing a similar issue:

> "McGahee's reliance on Ake v. Oklahoma is misplaced because postconviction proceedings pursuant to Rule 32, Ala.R.Crim.P., are not criminal in nature. McGahee, himself, pursued this discretionary legal action against the State of Alabama, and the action is civil in nature. See Hamm v. State, [Ms. CR-99-0654, February 1, 2002] ___ So. 2d ___, ___ (Ala. Crim. App. 2002), and cases cited therein. This Court held that the fundamental fairness mandated by the Due Process Clause does not require the trial court to approve funds for experts at a postconviction proceeding. Hubbard v. State, 584 So. 2d 895, 900 (Ala. Crim. App. 1991). Moreover, this Court has specifically held that Ake is not applicable in postconviction proceedings. Ford v. State, 630 So. 2d 111, 112 (Ala. Crim. App. 1991), aff'd, 630 So. 2d 113 (Ala. 1993). See also Williams v. State, 783 So. 2d 108 (Ala. Crim. App. 2000), aff'd, 662 So. 2d 929 (Ala. 1992) (table)."

885 So. 2d at 229. Similarly, in Williams v. State, 783 So. 2d 108 (Ala. Crim. App. 2000), this Court held that the circuit court had properly denied the petitioner's request for funds to hire a psychologist, a forensic pathologist, and a forensic expert, stating, in pertinent part:

> "First, the appellant contends that the circuit court erroneously denied his motions for funds to hire a psychologist, a forensic pathologist, and a forensic expert. Citing Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), he argues

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[15]Freeman also requested $840 in funds to pay for his trial counsel to travel to Alabama to testify at the Rule 32 hearing. We address this request in Part II.C. of this memorandum.

that the State is required to provide indigent defendants with experts to assist in preparing postconviction litigation and that to deny these experts results in the denial of due process. However, this court has held that indigent defendants are not entitled to funds to hire experts to assist in postconviction litigation. See Ford v. State, 630 So. 2d 111 (Ala. Crim. App. 1991), aff'd, 630 So. 2d 113 (Ala. 1993), cert. denied, 511 U.S. 1078, 114 S.Ct. 1664, 128 L.Ed.2d 380 (1994); Holladay v. State, 629 So. 2d 673 (Ala. Crim. App. 1992), cert. denied, 510 U.S. 1171, 114 S.Ct. 1208, 127 L.Ed.2d 555 (1994); Hubbard v. State, 584 So. 2d 895, 900-01 (Ala. Crim. App. 1991), cert. denied, 502 U.S. 1041, 112 S.Ct. 896, 116 L.Ed.2d 798 (1992)....

"'....

"Other jurisdictions have also declined to extend Ake to postconviction or collateral proceedings. See Braun v. State, 937 P.2d 505, 515 (Okla. Crim. App. 1997) ('We have said post-conviction proceedings are not intended to be a second direct appeal; they certainly are not intended to be a second trial proceeding. We refuse to undermine that principle by extending Ake to post-conviction proceedings...."); People v. Sanchez, 169 Ill.2d 472, 662 N.E.2d 1199, 1214, 215 Ill.Dec. 59, 74, cert. denied, 519 U.S. 967, 117 S.Ct. 392, 136 L.Ed.2d 308 (1996) ('Discussing Ake, we have previously determined "that there is no constitutional requirement that we duplicate the rights of a particular class of individuals in post-conviction proceedings." (People v. Wright (1992), 149 Ill.2d 36, 61, 171 Ill.Dec. 424, 449, 594 N.Ed.2d 276).'); Teague v. State, 772 S.W.2d 915, 927 (Tenn. Crim. App. 1988), cert. denied, 493 U.S. 874, 110 S.Ct. 210, 107 L.Ed.2d 163 (1989), overruled on other grounds by Owens v. State, 908 S.W.2d 923 (Tenn. 1995), and State v. Mixon, 983 S.W.2d 661 (Tenn. 1999) ('The petitioner's reliance upon Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), is misplaced. The rule

> created by the United States Supreme Court in this decision does not require the funding of experts in post-conviction proceedings.'). For the above-stated reasons, we conclude that the appellant's reliance on Ake is misplaced and that he was not entitled to the funds he requested. Therefore, his argument in this regard is without merit."

783 So. 2d at 113-14. In his brief, Freeman recognizes that the law is contrary to his position, and he urges us to overrule those cases in which this Court has held that a postconviction petitioner is not entitled to funds for expert assistance in postconviction proceedings. We decline to do so. Because Freeman was not entitled to funds for expert assistance, the circuit court's denial of his motions was not error.

Freeman also requested funds to pay for IQ testing in order to support his Atkins claim. As noted in Part I.D. of this memorandum, to be considered mentally retarded, a defendant must have an IQ of 70 or below and significant deficits in adaptive behavior and both must manifest themselves before the age of 18. Freeman was 32 years old when he filed his Rule 32 petition. An IQ test at the age of 32, even if it showed an IQ of below 70, would not have established that Freeman was mentally retarded, especially in light of the numerous IQ tests from his youth which reflected an IQ between 86 and 97. Therefore, the circuit court's denial of Freeman's request for funds to pay for IQ testing was not error.

C.

Finally, Freeman contends that the circuit court erred in denying his request for funds to pay for his trial counsel, Ally Howell, to travel from New York to Alabama to testify at the Rule 32 hearing, and then refusing to accept Howell's affidavit in lieu of her live testimony. (Issue II in Freeman's brief.) According to Freeman, by denying his request for funds and then refusing to accept Howell's affidavit, the circuit court denied him a full and fair evidentiary hearing on his Rule 32 petition. We disagree.

In addition to requesting funds for expert assistance, Freeman also requested $840 to pay for the travel expenses for his trial counsel to travel to Alabama to testify at the evidentiary hearing. Freeman filed this request on July 25, 2002. Although the State did not object to this request, the circuit court nonetheless denied it, without comment, on August 5, 2002. On May 29, 2003, Freeman's Rule 32 counsel provided the State a copy of an affidavit from trial counsel, executed on May 28, 2002, and indicated that they planned to introduce the affidavit at the June 4, 2003, evidentiary hearing. The State filed a written objection to the affidavit, arguing that admission of the affidavit would deny it any cross-examination of trial counsel. At the conclusion of the evidentiary hearing, the circuit court heard arguments regarding the affidavit. The State again reiterated that it could not cross-examine an affidavit, and stated that it had attempted to contact trial counsel through a telephone number it had gotten from the Alabama Bar Association, but had been unsuccessful. Freeman's Rule 32 counsel argued that because the circuit court had denied their request for travel funds, they had no other means to secure trial counsel's testimony other than through an affidavit, which they said was "the only forum we had available to us" (R. 121); that they did not receive the affidavit from trial counsel until only a few days before the evidentiary hearing because "it took some time getting to know Ms. Howell before we could talk in enough detail about the case that the information started flowing" (R. 118); and that "there was nothing to prevent the State from bringing Ms. Howell down." (R. 119.) The circuit court sustained the State's objection and excluded the affidavit.

On appeal, Freeman relies on Ake v. Oklahoma, 470 U.S. 68 (1985), in arguing that he was entitled to funds to pay for his trial counsel's travel expenses. However, as noted above, Ake does not apply to postconviction proceedings. Freeman has cited no other authority, and we have found none, that requires postconviction petitioners to be provided funds to pay for the travel expenses of an out-of-state witness in postconviction proceedings. Therefore, we cannot say that the circuit court abused its discretion in denying Freeman's request for travel funds.

Likewise, we find no abuse of discretion on the part of the circuit court in refusing to accept Howell's affidavit.

In Hamm v. State, [Ms. CR-99-0654, February 1, 2002] ___ So. 2d ___ (Ala. Crim. App. 2002), this Court addressed a similar situation as follows:

> "Rule 32.9(a), Ala.R.Crim.P., provides that a court has the discretion to take evidence by affidavit. As Hamm argues on appeal, postconviction counsel was aware of Dr. Watson and the substance of his testimony, but did not call him to testify at the hearing. If the court had admitted the affidavit, the State would not have been able to examine Dr. Watson about his education and expertise, his testing methods, the validity of his conclusions, or any other areas appropriate for cross-examination. As this Court stated in Callahan v. State[, 767 So. 2d 380 (Ala. Crim. App. 1999),] when addressing similar circumstances:
>
> > "'"The admission of the affidavit would have denied the State its right to cross-examine the witness. Additionally, the State did not know of the existence of the affidavit until the evidentiary hearing, so the State was also deprived of the opportunity to prepare a counter affidavit."
> >
> > "'... We cannot say the trial court abused its discretion when it refused to consider the affidavit in the absence of evidence that the affiant was actually unavailable, especially considering that the testimony was offered in such a fashion.... Presenting the testimony by affidavit prevented the State from confronting the affiant, and did not allow the trial court the opportunity to closely examine the complete testimony.... Rule 32.9(a), Ala.R.Crim.P.'
>
> "Callahan, 767 So. 2d 380, 403 (Ala. Crim. App. 1999), cert. denied,767 So. 2d 405 (Ala. 2000). See

> also McNair v. State, 706 So. 2d 828, 838 (Ala. Crim. App.), cert. denied, 706 So. 2d 828 (Ala. 1997), cert. denied, 523 U.S. 1064, 118 S.Ct. 1396, 140 L.Ed.2d 654 (1998) [('The refusal to admit the affidavits did not constitute error, because their admissibility was discretionary with the circuit court under the circumstances presented. See Rule 32.9.')].
>
> "Based on the foregoing, we find no error in the trial court's decision to exclude the affidavit of Dr. Watson. Hamm is not entitled to any relief on this claim."

___ So. 2d at ___ (footnote omitted). See also Ex parte MacEwan, 860 So. 2d 896 (Ala. 2002). Similarly, here, the admission of Howell's affidavit would have denied the State the opportunity to cross-examine Howell. In addition, although in both Hamm and Callahan v. State, 767 So. 2d 380 (Ala. Crim. App. 1999), this Court noted that the affidavit in question had not been submitted by the petitioner until the evidentiary hearing, while Freeman submitted Howell's affidavit six days before the evidentiary hearing, we cannot say that six days was sufficient time for the State to prepare to defend against the affidavit.[16]

Moreover, contrary to Freeman's contention, there were

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[16]Indeed, the State informed the circuit court that it had attempted, but been unsuccessful in contacting Howell. Freeman's argument in his reply brief on appeal that the State did not exercise diligence in its attempts to contact Howell and his expression that numerous other avenues could have been used by the State to contact Howell in order to refute her affidavit is unavailing. First, the State had no burden to locate and contact Howell; the burden of proof in a Rule 32 proceeding is on the petitioner, not the State. Second, although the State may very well have been able to locate and contact Howell through other avenues had it been given a sufficient amount of time, because Freeman disclosed the affidavit to the State only a few days before the evidentiary hearing, he cannot now complain that the State did not exhaust all available avenues to locate Howell.

other avenues available to him for securing Howell's testimony other than live testimony at the evidentiary hearing or by way of affidavit. Rule 32.9(a) gives the circuit court discretion to accept evidence not only at an evidentiary hearing or by affidavit, but also by written interrogatories and depositions, both of which would have at least provided the State with an opportunity to question Howell. Yet, the record reflects no attempt by Freeman's Rule 32 counsel to obtain Howell's testimony through these available means. In addition, in this particular case, the circuit court conducted three "preliminary" hearings to address various motions filed by the parties before the evidentiary hearing was conducted; all of these hearings were conducted telephonically at the request of Rule 32 counsel, who were from out of state. Despite the circuit court's willingness to conduct these hearings telephonically to accommodate Rule 32 counsel, the record reflects no request or attempt by Freeman to secure Howell's testimony telephonically.

Finally, we point out that, as noted in Part I.A. of this memorandum, none of Freeman's allegations of ineffective assistance of counsel were pleaded with sufficient specificity to warrant an evidentiary hearing. Because Freeman was not entitled to an evidentiary hearing based on his pleadings, any error in the circuit court's denial of Freeman's request for funds and/or its refusal to accept Howell's affidavit was harmless.[17]

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[17]We note that in Issue II of his brief, Freeman also contends:

> "Additionally, the circuit court refused to consider the proffer of evidence submitted by petitioner. C. 450. This submission set out in great detail what petitioner contended he would have proven had the circuit court not denied all requested funds. It is particularly unfair for the circuit court to refuse to even consider this proffer since it was the circuit court's refusal to properly fund this case that necessitated its submission in the first place. See C. 396."

(Freeman's brief at p. 17.) Rule 28(a)(10), Ala.R.App.P.,

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

Affirmed by memorandum.

McMillan, P.J., and Baschab and Wise, JJ., concur. Cobb, J., recuses herself.

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requires that an argument contain "the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on." "Recitation of allegations without citation to any legal authority and without adequate recitation of the facts relied upon has been deemed a waiver of the arguments listed." Hamm v. State, [Ms. CR-99-0654, February 1, 2002] ___ So. 2d ___, ___ (Ala. Crim. App. 2002). Because Freeman cited no authority in support of his argument that the circuit court erred in refusing to accept his proffer of evidence, this argument is deemed to be waived.

Appendix K

IN THE SUPREME COURT OF ALABAMA

January 20, 2006

1041678

Ex parte David Freeman. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: David Freeman v. State of Alabama) (Montgomery Circuit Court: CC88-1412.60; Criminal Appeals : CR-02-1971).

CERTIFICATE OF JUDGMENT

Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

SEE, J. - Nabers, C.J., and Lyons, Harwood, Woodall, Stuart, Smith, Bolin, and Parker, JJ., concur.

I Robert G. Esdale, Sr., 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 *20th* **day of** *January,* *2006*

Clerk, Supreme Court of Alabama

/bb

Appendix L

MR. HOWELL: 1, 2, 5, 6, 7. And under 13A-5-52, after consulting with the defendant, we don't have anything to offer under that section.

THE COURT: Ms. Brooks, are you going to call any witnesses? Have you decided?

MS. BROOKS: We do not intend to. Not knowing what their witness will say, we will reserve the right to call one on rebuttal, but we don't anticipate it.

THE COURT: All right. Sheriff, would you ask the jury to come in, please.

P E N A L T Y P H A S E

(The following occurred in the presence and hearing of the jury.)

THE COURT: All right, ladies and gentlemen. It now comes the time in the case where we will have what is called a sentencing hearing at this time. We will follow the same procedure that we did during the course of the trial. The State will present additional evidence if they

want to; the defense will present additional evidence; and then I'll give you some additional instructions, and then you will deliberate as it relates to those instructions.

Ms. Brooks.

MS. BROOKS: Thank you, Your Honor. Mr. McNeill will argue.

MR. MCNEILL: Good afternoon, ladies and gentlemen. This phase of the trial is going to be a little bit different than what you just went through. At this time, what your role is to do is after listening to the evidence that has already been presented to you and any other evidence that may be presented in this phase of the trial, you as the conscience of the community will make a recommendation as to the proper punishment that this defendant should receive. It is a very serious responsibility that you have.

What we expect the evidence is going to show in this phase of the trial, we are going to introduce all the exhibits that we have introduced previously that you had back there. We are going to introduce all the testimony, the sworn testimony that you heard from this witness stand. You get to consider that. And what we are doing this for is that before you can find and recommend that the proper punishment in this case would be death, is that you must find the existence of aggravating circumstances.

By your verdict that you have just returned, you have already found the existence of an aggravating circumstance. We have proved it to you beyond a reasonable doubt; that is, this murder was committed during the course of a robbery, in the course of a burglary, and during the course of a rape. You have found that.

We submit to you we are going to have another aggravating circumstance that also just screams out from the evidence that you have heard, that these killings were especially heinous, atrocious, and cruel. That is an aggravating circumstance.

What your role is and what you will do, we must prove to you the existence of these aggravating circumstances. You have got to find that.

The defense is going to be offering any evidence in mitigation; that is, evidence to say you should not have the death penalty. Aggravation is obviously evidence and circumstances that death penalty is the proper punishment.

You don't sit up there and count them up, that the State only has two, and the defense puts forth five; therefore, the proper punishment is life without. It

doesn't work that way.

How it works is that you have to weigh them. One aggravating circumstance, the ones you have already found, may be enough to outweigh any and all mitigating circumstances presented by the defense.

You have a very serious obligation. All sides want you to listen and to sift through the evidence that you have heard very carefully and weigh, but let the law help you.

At the conclusion of this phase of this trial, your verdict will be that the proper punishment, that the conscience of the community will be that this defendant should be punished by death.

THE COURT: Mr. Howell?

MR. HOWELL: The mitigating circumstances that we are going to submit to you for your consideration at this stage of the case are that Mr. Freeman had

no significant history of prior criminal activity, that Mr. Freeman at the time of this offense was under the influence of an extreme mental or emotional disturbance, that Mr. Freeman was under extreme duress at the time, that Mr. Freeman was unable to conform his conduct to the requirements of the law at the time, that he was substantially impaired, and, next, his age at the time, which was eighteen. After a fair consideration of those mitigating circumstances and the aggravating circumstances the State is going to put forward, we believe you will agree with us that life in prison without parole would be the appropriate punishment that you should put on your verdict form. Thank you.

THE COURT: Call your first witness.

MS. BROOKS: Your Honor, the State of Alabama moves to introduce all the testimony previously introduced in

the guilt phase and all the exhibits previously introduced for purposes of this hearing.

THE COURT: They are all admitted.

MS. BROOKS: Thank you. We will rest on that evidence.

THE COURT: Okay. Mr. Howell.

MR. HOWELL: Your Honor, we offer all the testimony and exhibits that we have put forth during guilt phase, as well, and offer those at this time.

THE COURT: They are admitted.

MR. HOWELL: And we have the one witness, Alexander Moore, that we would like to call.

THE COURT: Ladies and gentlemen, we are going to attempt to call a witness and let him testify by way of a speaker phone, as he is out of the Montgomery community. So we are going to attempt to do that.

Mr. Howell, do you have the telephone number for him?

THE COURT: Mr. Moore, how are you today? This is Gene Reese. I am calling

from the courtroom where we are trying the case of State of Alabama versus David Freeman. The parties have consented to your testimony being taken by speaker phone. Is that agreeable with you? If you Will hold on a minute, I am going to try to put you on the speaker phone.

Mr. Moore, can you hear us?

THE WITNESS: Yes.

THE COURT: All right, Mr. Howell. Mr. Moore, can you still hear all right?

THE WITNESS: Very little.

THE COURT: Ladies and gentlemen of the jury, can you hear okay?

THE COURT: I don't think you are going to have to speak to me after I put you under oath.

* * * * * * * *

ALEXANDER MOORE

The witness, called by the defense, after having first been duly sworn to speak the truth, the whole truth, and nothing but the truth, testified telephonically:

DIRECT EXAMINATION

BY MR. HOWELL:

Q. Mr. Moore, can you hear me all right?

A. Yes.

Q. Your name is Alexander Moore?

A. That's right.

Q. Where do you live?

A. Mobile, Alabama.

Q. And you are unable to be with us today because of some health problems; is that right?

A. Right.

Q. And how are employed?

A. I am a foundry service caseworker for the Mobile Community Action program Headstart. I am also an ordained deacon in the Catholic church.

Q. And have you had occasion to know David Freeman in the past?

A. Yes, I did.

Q. Is that while he was at Saint Mary's Home there in Mobile?

A. Yes, it was.

Q. Would you tell us about your dealings with David and how he was when you knew him there?

A. David was more or less a loner during his

stay at Saint Mary's, rather on the quiet side until confronted with anything that needed to be done or any corrections that needed to be made.

Q. All right, sir. And you had previously spoken with our investigator and given him a couple of photographs; is that right?

A. That's right.

Q. And one of them is a group photograph of some boys and some grown men in their coats and ties?

A. Yes.

Q. Do you recall that one?

A. Yes.

MR. HOWELL: Judge, we are marking that one Defendant's Exhibit 32.

Q. Are you the one in the picture who is in the clergy collar?

A. That's right.

Q. And would David be the one on the second row at the far right?

A. That's right.

Q. Is that the way he looked down there at that time as he was under your care?

A. That's right.

Q. You have given us another picture, which we have marked as Defendant's Exhibit 33, which are some boys --

A. At the summer home.

Q. What is the summer home?

A. The summer home was in Battles Walk over in Daphne, Alabama.

Q. And this picture also includes David on the back row of that picture?

A. That's right.

Q. And this is kind of descriptive of the way David was at that time while he was under your care and what things were like down there?

A. That's right.

Q. Deacon Moore, do you have anything you would like to say here to this jury today as far as whether David Freeman should receive life without parole or the death penalty?

MS. BROOKS: We object. That invades the province of the jury. It is improper for him to give his opinion as to the appropriate punishment.

THE COURT: Sustained. Rephrase your question.

Q. Father Moore, from your personal standpoint, which do you believe would be the most appropriate penalty for David?

MS. BROOKS: Objection, Your Honor, same grounds.

THE COURT: Sustained. What is your next question?

Q. Deacon Moore, what is your belief with regard to the death penalty?

MS. BROOKS: Objection, Your Honor, it is irrelevant.

THE COURT: Sustained. You don't answer that question.

Q. Is there anything else you would like to tell this jury about David, Father Moore?

MS. BROOKS: Objection, improper question.

THE COURT: Overruled. You can answer that.

A. David, to my way of thinking, was a good child like any other normal child that lived the lifestyle that he had to live. I think he would be deserving of some leniency, if possible, if at all possible.

MR. HOWELL: Thank you, Deacon Moore.

THE COURT: Hold on. There may be additional questions.

MR. HOWELL: We would offer Defendant's 32 and 33.

THE COURT: Admitted.

(Defendant's Exhibits 32 and 33 were admitted into evidence.)

MS. BROOKS: No questions, Your Honor.

THE COURT: Thank you, Mr. Moore.

Any other witnesses for the defense?

MR. HOWELL: No, sir. As we pointed out earlier, there was one --

MS. BROOKS: Excuse me. Your Honor, we object to Mr. Howell's comments in front of the jury.

THE COURT: Do you have additional witnesses?

MR. HOWELL: No, sir.

THE COURT: Any rebuttal from the State?

MS. BROOKS: No, Your Honor.

THE COURT: Closing remarks, State.

MR. MCNEILL: Judge, if I may let the jury finish looking at the photographs before them.

(Brief delay.)

THE COURT: Go ahead, Mr. McNeill.

MR. MCNEILL: Ladies and gentlemen, if you will remember last week when you were being selected to sit on this jury, the Judge asked you a series of questions. And he made a note that capital punishment is not designed for every and all cases. It is not designed for every and all murders. It is there, and it is on the books for the special types that have been set out by the legislature as the conscience of the community would feel would warrant the death penalty.

By your verdict that you have already rendered, you have found that this murder is eligible for the death penalty, and we have proven beyond a reasonable doubt the existence of that aggravating circumstance I have already told you, that this killing took place during a robbery, took place during

a rape, and took place during a burglary. That we have proven to you.

Ladies and gentlemen, we have proven something else to you, the other aggravating circumstance that we are relying on, that this killing is especially heinous, atrocious, and cruel.

What do those words mean? Heinous, extremely wicked or shockingly evil. Atrocious, outrageously wicked and vile. Cruel, designed to inflict high degree of pain with the utter indifference to or even the enjoyment of the suffering of others.

There cannot be a better description of what happened to Mary Gordon and what happened to Sylvia Gordon on May 11 of 1988 as heinous, atrocious, and cruel. Twenty-two stab wounds, not one was fatal. You have heard the testimony from Dr.

Lauridson that Sylvia Gordon lived up to ten minutes. You can look at the photographs that have been presented to you. The blood trails as she crawled on the floor trying to escape, a seventeen-year-old girl with her whole future in front of her, and her life ends because of this man's selfishness. The only reason, no other excuse, no more excuses.

Do you remember from all these psychological records that you have heard, and one of the ones that was presented to you was something from DYS, and this defendant was warned, hey, buddy, you are going to keep up, and you are going to get into the adult system? No more excuses. Today excuse time is over. It is over with.

Mary Gordon, how cruel, how cruel of an act to leave and to attack your own child. He left her daughter there helpless, bleeding.

Think what her last thoughts had to have been on this earth as she comes into that door, and not a thing she can do to save her child, nothing. He didn't give her the chance. He didn't give Sylvia the chance. You cross David Freeman, you end up dead, period. You are a witness to his act, you end up dead, period. And then to rape her and to smear the blood of her daughter on her while being raped. How heinous, how atrocious, how cruel.

Mary Gordon will never know what it is like to hear the laughter of her grandchildren. She will never know what it is like to see her daughters get married. She will never know what it is like, as she worked hard her entire life being mother and father and providing and protecting for the welfare of her children, she will never know what it is like to finally rest and enjoy life. He took it all, period. He

took it all.

Sylvia Gordon, her whole future in front of her, on the academic path, she will never know what it is like to have gone to college. She will never know what it is like to make a career. She will never know what it is like to meet the man you love and to get married. She will never know what it is like to bear children. She will never know what it is like to hold her child to her breast. He took it all. Selfish.

This defendant, ladies and gentlemen, believes in the death penalty. You cross him, you are dead. His whole life led up to this act. You have seen it in the records, his whole life. He didn't get his way, he loses his temper.

You just heard it from the Father, the deacon, who just testified by phone. He was good. He was quiet until confronted when he had to do something. He is not

in control any more. That's all he wants. What satisfies him? Wicked, evil, heinous, atrocious, control.

The defense is going to submit to you some mitigating circumstances. As I told you in my opening, mitigating circumstances are those circumstances that would suggest that the proper punishment in this case would be life without parole. If I may, I would like to read them out for you.

MR. HOWELL: Your Honor, we object to him instructing the jury on the law.

THE COURT: Ladies and gentlemen, remember what these lawyers say is not evidence or the law. I'll give it to you at the appropriate time.

MR. MCNEILL: The first mitigating circumstance they are going to rely on is that the defendant had no significant history of prior criminal activity. I will submit to you that is one mitigating circumstance that you should put

little weight, if any, to.

MR. HOWELL: Your Honor, we object to him arguing that the jury should disregard the statutory mitigating factors.

THE COURT: Ladies and gentlemen, remember these are just the arguments of the lawyers. They are not proper statements of the law. Go ahead.

MR. MCNEILL: Because, if you will recall from the testimony, he went to DYS. He went to DYS because he did criminal mischief. He broke into a trailer. You also will recall that at one time he used a butcher knife on a prior occasion. Does he have any adult record? No. I will suggest that the evidence would be that this mitigating circumstance would not outweigh the aggravating circumstance.

The second one, that the capital offense was committed while the defendant was under the

influence of extreme, mental, or emotional disturbance. Ladies and gentlemen, that's what we have been here for for the past week. They said that in their closing argument. By your verdict of guity, you have found that he is responsible for his conduct. That mitigating circumstance should not outweigh the aggravating circumstances that have been presented to you.

The next one, that the defendant acted under extreme duress or under the substantial domination of another person. There is no evidence that he acted under duress or under the domination of anybody. So that mitigating circumstance should not outweigh the aggravating circumstances that has been presented to you.

The next one, the capacity of the defendant to appreciate the criminality of his conduct which conforms his conduct to the

requirements of law was substantially impaired. Again, by your verdict, you have found that he is responsible for what he did on March 11, 1988. That mitigating circumstance should not outweigh the aggravating circumstances that have been presented to you.

And, finally, the age of the defendant at the time of the crime. He was eighteen years old. This eighteen-year-old did a very heinous, wicked, evil thing. That mitigating circumstance should not outweigh the aggravating circumstances.

I know the task is not easy that is before you. But what I ask you to do, though, is to let the law help you. Grapple with this issue. Go through the evidence. When you go through the evidence right in here, when you weigh out what you have heard, as the conscience of this community the appropriate

punishment in this case is death. What he did was evil, and it is totally inexcusable.

THE COURT: Mr. Howell.

MR. HOWELL: First off, I do object to Mr. McNeill's mischaracterization. He said he used a butcher knife once before. You will have this back in the jury room to use later. What it was, he ran off with one. He never did use it on anybody. He never even threatened anybody with it.

His only prior brush with the law is something that if it weren't part of the total picture necessary to see this boy and his total mental state, if it weren't necessary to see it for that, we would have made objections to keep it out, because it is a juvenile record. It is not admissible for anything. Juvenile records in this state get sealed. They get put away for a reason. The juvenile system is there to allow people who are young to make a

mistake.

What was his mistake? When he ran away from one of the group homes, he and the girl he was with needed a place to stay, broke in a trailer and stayed. I think they ate food while they were in there. They got caught and went back. It is not right, but we don't electrocute people for that.

The extreme mental or emotional disturbance and the inability to conform his conduct to the requirements of law, mitigating factors, aren't the same here. They don't mean the same thing as they did back here. Back here, that's out, because what that is is something you have already rejected. That statute says a person is not responsible if the jury finds that to be the case.

You have found him to be responsible. I respect that. But you can still find that these

factors exist, because, obviously, they do. You can decide they don't exist to the level necessary to not hold him responsible, but they exist, and they exist to the level, we submit, that he shouldn't be put to death. He should receive the leniency that Deacon Alexander Moore suggested.

His age at the time, eighteen years, a young man. That should be taken into account with everything else.

And duress, as is applied here, is almost synonymous with these other two I have just talked about about the mental state. He is acting under extreme pressures here. It is not that anybody else held a gun to his head while this was going on, but it was just that he had a lot going on inside of him that made all of this occur.

And last, I would submit to you that we don't correct the tragedy of

the loss of two lives by taking a third. The arithmetic doesn't work. The logic doesn't work. I mean, it is not necessary. The life without parole verdict would ensure that he never saw daylight again without somebody in a uniform being around him, and that would be an adequate punishment. And I ask you to return a verdict of life in prison without parole. Thank you.

MS. BROOKS: Ladies and gentlemen, you are about to determine the value of the lives of two people who are not here with us today. You are about to speak for the people in this community on what is right and what is just. None of us here take pleasure in that. We have a duty to do. You know, you didn't even choose to be here. You were summoned. You responded. You had a duty.

We are here for one reason, David Freeman. And because of him,

you have a hard decision to make. And I pray that you will not make it lightly.

I know you will be just and fair, that you will consider all the evidence, all the factors, all the circumstances, and the law. But our system is set up where if you harm one of us innocent people, you harm us all. And this is what David Freeman has done, and that's why you have this important decision to make.

My question to you is who needs protection? Who needs protection now? Is it David Freeman, or is it the innocents? It is too late for Sylvia and Mary. But this duty that you have to make is important, this duty you have to do.

The police officers have done theirs in collecting the evidence and taking the statements. The scientists have done theirs in analyzing the evidence and reporting

to you. The lawyers on both sides have done their duties. The Judge is doing his. And you have fulfilled part of yours. Life is precious. If only David Freeman believed that, you wouldn't have to make this decision.

The relationship between a parent and child like Mary and Sylvia is very special. It should be respected. It should be given honor, but he didn't. He wiped it out, because he thought if he could not have her, no one else would.

A lot has been said in this last week about who David Freeman is. It could be said that Debbie lost her mother and sister because of a man who never had a family. It could be said she lost her mother and her sister because he was a man who never had a chance, but those pictures belie that. The pictures that were introduced just this afternoon that you looked at just a

few minutes ago, what do they show you? A kid with other kids who was given the same chances, but rejected them, not once, not twice, but multiple times, multiple times. The truth is, he started lying and cheating and stealing and even assaulting, as soon as he had the ability to do it when he couldn't control. The truth is, he is not just quiet and withdrawn. He shows you throughout his statements no remorse, none. The truth is, he is not just barely functioning. He did fairly well. The truth is, he wasn't out of control. In fact, his so-called love letter to Sylvia, do you know what that was? It wasn't a love letter. You know what a love letter is. It was a warning. It was a demand. I'll have you. I won't lose you. That's who you are dealing with; his lust, his desire.

You have a duty that is greater than life itself. Just as a police

officer has a duty, and every time he or she goes out, they lay their lives down for you and me, for total strangers, a duty greater than life. Your duty today is just as important. It is important not just to David Freeman, but to the people who value life.

Earlier you were asked if you ever felt, have you ever read the paper, have you ever talked to somebody and said, why don't they do something about this? Why isn't something changed? Why don't they make a difference? Folks, you twelve are they now. You are they. There is no one else to do this.

You know, the law passed by the legislature, it guides us all. Let it guide you today. Don't make your decision based on prejudice, bias, sympathy for or against the defendant, Mary Gordon, Sylvia Gordon, or Debbie Hosford. Go by the law. Go by what is right.

The defendant would have you forget what happened March 11, 1988. The defendant would have you think, well, gee, he made a juvenile mistake, and so you ought to pardon him for this. You ought to say, well, we won't punish you so hard. What are you going to do? Debbie, I am sorry. I am sorry, Debbie, but your mother and your sister were butchered. He didn't have a big bad record, so we didn't think the ultimate punishment in this case was enough. It was the right thing to do. What are you going to say? Debbie, he might have had a mental problem sometime and had a tough life. Even though he butchered your mother and your sister, we don't think the death penalty is right. Debbie, he might have been under duress or domination of somebody, I don't know who, but somebody out there might have made him do this, so it is okay. Debbie, the only

person there that made him do anything was in total control, was David Freeman himself.

And then they argue to you something about disregarding the law. The Judge is going to read you the law. Listen. It is the same words. You have already found it. Substantial capacity, ability to conform, under some kind of duress. It is the same thing. And he wants you to pretend like it is different. No, that is another lie.

And, lastly, I guess he wants you to say to Debbie, Debbie, he was only eighteen. I am sorry. Only eighteen. We are going to forget what he did. Now he is a grown man.

What would it take for you to come back with a death penalty in this case? If he had been nineteen? If he had stabbed Sylvia twenty-three times, instead of twenty-two? If he had raped both of them? If he had killed not two but

three people? What would it take? What more do we in this county need to say that the death penalty was appropriate?

You have an appropriate case. You have a duty to do justice. And when you vote, look inside and do justice. And none of us in this courtroom can fault you if you are true to your duty. I ask you, I ask you to do justice in this case.

I ask you to go back to March 11, 1988, imagine you are there and you are watching him do this. We know one person in this courtroom who believes in the death penalty, who executes at knife point, forgetting cries out, forgetting being afraid, forgetting caring that life is precious. He made a choice. Follow the law.

THE COURT: Ladies and gentlemen, it, again, comes my responsibility to explain the law and charge you on what the law is in this case. And

Appendix M

STATE OF NEW YORK)
) AFFIDAVIT
COUNTY OF MONROE)

Ally Windsor Howell, who appeared personally before me, and after being duly sworn, deposes and says:

1. Prior to the year 2000, my name was Allen W. Howell and I was a practicing attorney in the State of Alabama since 1974. In September of 2000, I changed my name to Ally Windsor Howell. I have had all of my legal identification documents such as my U.S. Passport, Drivers License, Social Security Card, etc. changed to reflect this new name. I now live in the Town of Pittsford in Monroe County, New York and work in the City of Rochester in Monroe County, New York as an attorney-editor.

2. I was appointed as co-counsel with Richard Shinbaum to represent David Freeman prior to his first trial. Mr. Freeman was convicted and sentenced to death at that trial, but his convictions and sentence were reversed on direct appeal.

3. I continued to represent Mr. Freeman at his re-trial. During these proceedings I acted as lead counsel, with John Norris as co-counsel. John Norris was co-counsel because he had been practicing law for less than five years at that time, and therefore could not have handled a capital case alone.

4. As lead counsel, and as the only attorney who had represented Mr. Freeman previously, I was in charge of the defense and, therefore, was responsible for making decisions regarding trial preparation. As such, I determined what the defense to the charges would be, and how that defense would be presented to the jury at both the guilt-or-innocence and penalty phases of the trial.

Ally W. Howell

5. During Mr. Freeman's trial, I was solely responsible for presenting evidence on behalf of the defense, and was also solely responsible for objecting to the admission of evidence offered by the prosecution.

6. I have been contacted by Keir Weyble and Robert Lominack, current counsel for Mr. Freeman, concerning the pending Rule 32 petition and its allegations of violations of Mr. Freeman's Sixth Amendment right to counsel. I have been apprised of those allegations, and my thoughts and recollections with respect to them are set forth below.

7. I can recall no strategic reason for failing to object to the introduction of the crime scene video and photographs on the ground that they would only serve to inflame the jury.

8. I can recall no strategic reason for failing to object to the crime scene technician's opinion testimony concerning the source and nature of various items at the crime scene on the ground that the record lacked the requisite foundation for the admission of such testimony.

9. I can recall no strategic reason for failing to object to the testimony of the state's forensic odontologist on the bases that a foundation for the testimony was lacking, and that the expert was not qualified to render the opinions he presented to the jury.

10. I can recall no strategic reason for failing to properly and thoroughly object to the hearsay testimony of Dr. Joel Dixon, during which he effectively purported to speak on behalf of three non-testifying doctors, on the ground that this testimony violated Mr. Freeman's right to confront the state's witnesses. While I knew at the time of trial that this testimony was objectionable, and I did, in fact raise a single hearsay objection, I recognize and acknowledge that the objection as I presented it was insufficient.

11. I can recall no strategic reason for failing to object to Mr. Freeman's trial being conducted

Ally W. Howell

pursuant to Alabama's unconstitutional capital sentencing scheme, which requires the judge rather than the jury to determine the existence of the facts necessary to impose the death penalty.

12. I can recall no strategic reason for introducing into evidence Mr. Freeman's raw psychological testing information. I was aware that data of that type cannot be accurately interpreted by lay people.

13. I was aware of information that the bite marks found on Mr. Freeman's arm were alleged by Mr. Freeman to have been caused by one of Mr. Freeman's relatives during a seizure, and I can recall no strategic reason for failing to investigate and present that evidence at trial.

14. I can recall no strategic reason for failing to hire and consult with an independent pathologist to review the state medical examiner's conclusions as to the precise nature of the victims' injuries and the duration of their suffering.

15. I was aware that Mr. Freeman had certain traits and idiosyncracies that could indicate the presence of brain damage, and I also knew that evidence of brain damage would have been a powerful factor in explaining Mr. Freeman's crimes and mitigating his punishment. I can recall no strategic reason for failing to ask for funds for a neurological examination and neurological testing or to investigate the possibility that Mr. Freeman suffered from brain damage, and, if so, presenting such evidence to the jury.

16. At the time of trial, there was a substantial amount of information about Mr. Freeman's life and background available to us. This information was not presented to the jury in a manner which was likely to result in a recommendation of a life sentence. I can recall no strategic reason for failing to present to the jury at the sentencing phase of the trial in a more complete

Ally W. Howell

and coherent manner.

17. I can recall no strategic reason for failing to present evidence, which was in our possession in the form of Mr. Freeman's prison records, of his good behavior while incarcerated.

18. I can recall no strategic reason for failing to ask for funds for a neurological examination and neurological testing to investigate the possibility that Mr. Freeman suffered from brain damage and was, in fact, mentally retarded.

19. I can recall no reasonable strategic reason for deciding to depose Dr. Guy Renfro prior to trial even though I knew that Dr. Renfro's earlier written report indicated that his findings would not support Mr. Freeman's defense, and that these findings would be at odds with the insanity defense.

20. There was no reasonable strategic reason for my statement during guilt-or-innocence phase closing argument that the jury, if it found Mr. Freeman guilty, was signing his death certificate. This statement was simply a reflection of the fact that I had concentrated my efforts on the guilt phase of the trial, rather than on the sentencing phase.

21. I am a transgendered person. I was born into the body of a man, but am psychologically a woman. Since the time of Mr. Freeman's trial, I have become a woman. My physical change in sex or gender has been recognized by and noted on my official identification documents and records, such as my U.S. Passport, New York Drivers License, and employment records. Although I have felt different from other boys and men all my life, for most of my life I was able to repress these feelings. In about 1994, however, I began to feel overwhelmed by them. Beginning in October of 1995, I was also under stress because of my caretaking responsibilities at home, which included caring for my wife and

Ally W. Harrell

my infant son. My wife had a caesarian section delivery of our son in August of 1995, the day after her mother had a mastectomy due to cancer. In 1996 and 1997, my wife had surgeries to remove a lipoma, to have an infected lumbar-peritoneal shunt removed, and a total hysterectomy. After each of these surgeries, I had to help care for her and to shoulder more of the child rearing responsibilities for our son. In fact, during that period I felt more like a mother than a father, and my son identified me as the mother or primary caregiver figure in his life. In the period before the trial in 1996, I was able to tell only one person -- my wife -- about my gender conflicts, and at that point I did not fully understand them myself. I had trouble verbalizing my feelings because I did not understand them. It was only after several years of therapy by a qualified psychologist that I was able to understand my feelings and then to express them to others. I was discharged from the care of my psychologist and subsequent psychiatrist in 2001 and I am no longer being treated by any mental health professional. Because I was a lawyer in what is for all practical purposes a small town, and my job required me to consult with mental health experts on behalf of my clients, I did not feel safe enough to seek counseling for myself in the Montgomery area without compromising my professional position. This fear was later proved correct when I discovered that my local psychiatrist had been sharing information from my sessions with her with my former law partner. During this time, I felt very alone, as though I were the only person in the world struggling with these feelings I had to be one person at the office and another person, my true self, at home.

22. In addition to the extraordinary painfulness of this period, I was confronted in Mr.

Cathy W. Howell

Freeman's trial with a double rape-murder case. My representation of Mr. Freeman was made more complicated by my gender identification crisis. I am aware that many women defense attorneys handle rape cases without difficulty, but they have had years to come to terms with the conflict they feel about representing a man who has committed a crime that displays such gender-based hatred and/or disrespect toward the very group with which they themselves identify. I know that other women attorneys simply refuse to handle those cases. Because I was already appointed to represent Mr. Freeman, I had no time to work out my feelings about defending someone accused of a double rape-murder. I did move the court to be relieved from the case, citing personal and professional reasons and asking for an in camera hearing to explain those reasons, but the court never held such a hearing. Given the distractions and emotional conflict I was experiencing at the time, my duties of loyalty and diligence were almost certainly compromised. As a result, I do not believe that I provided Mr. Freeman with the type of representation I wish I had been able to provide, and to which he was legally entitled.

Further affiant sayeth naught.

Ally W. Howell

ALLY W. HOWELL

Sworn to and subscribed before me
this 28 Day of May, 2003.

Faith C. Weidman

NOTARY PUBLIC FOR NEW YORK

My Commission Expires: 6/30/2006

Faith C. Weidman
Notary Public Wayne County
State of New York
Commission Expires 6/30/06

COURT OF CRIMINAL APPEALS
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ORDER

CR-02-1971 *(DEATH PENALTY)*

David Freeman v. State of Alabama (Appeal from Montgomery Circuit Court: CC88-1412.60).

It appears to this Court that the appellant in the above referenced appeal has filed a motion with the trial court to supplement the record on appeal.

Upon consideration of the above, the Court of Criminal Appeals ORDERS that the trial court shall dispose of the appellant's motion to supplement the record within 14 days from the date of this order and, if a supplemental record is required, the trial court is requested to direct that it be prepared and filed with this Court at the earliest possible date and by no later than November 3rd, 2003; provided, however, that if the trial court finds that the supplemental record cannot be completed and filed with this Court by November 3rd, 2003, the trial court is requested to advise this Court of the earliest possible date thereafter by which the supplemental record will be filed.

This Court further ORDERS that the appellant shall have 14 days from the filing of the supplemental record or from the trial court's denial of the motion to supplement to file his brief. The appellee's briefing time shall run from the filing of the appellant's brief.

Done this the 6th day of October, 2003.

H.W. "Bucky" McMILLAN, PRESIDING JUDGE

CCA/wki

cc: Honorable Eugene W. Reese, Circuit Judge
Honorable Melissa Rittenour, Circuit Clerk
Jacqueline Bonnett, Court Reporter
Honorable Robert Lominack, Attorney, Appellant
Honorable Keir M. Weyble, Attorney, Appellant
Office of Attorney General

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ORDER

CR-02-1971 ***(DEATH PENALTY)***

David Freeman v. State of Alabama (Appeal from Montgomery Circuit Court: CC88-1412.60).

It is ORDERED that the Circuit Court shall transmit the sworn affidavit of Ally W. Howell to this Court within 14 days. Said affidavit shall be transmitted to this Court under seal.

Done this the 14th day of November, 2003.

H.W. "Bucky" McMILLAN, PRESIDING JUDGE

CCA/wki

cc: Honorable Eugene W. Reese, Circuit Judge
Honorable Melissa Rittenour, Circuit Clerk
Honorable Robert Lominack, Attorney, Appellant
Honorable Keir M. Weyble, Attorney, Appellant
Office of Attorney General

Appendix N

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-13995-P

DAVID FREEMAN,

Petitioner - Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

Elaine Scott
Court Reporter

raw materials of a powerful mitigating story, as well as numerous red flags signaling there was more to learn through investigation, trial counsel did nothing to follow those leads and offered the jurors nothing with which to interpret or understand the number of documents they had been handed. It was not until --

THE COURT: Let me make sure I understand what we're deciding in this appeal. The District Court denied your request for an evidentiary hearing. And I don't see in your brief where you argued that that was an abuse of discretion. Do you agree you have not argued that, that this Court erred in denying the evidentiary hearing?

MS. KONRAD: Your Honor, the briefing here on appeal is a little bit murky because the way the COA was granted made it seem as though only the merits of this underlying claim were at issue. We do believe that the District Court erred in its procedural ruling and erred in allowing us to have an evidentiary hearing to prove the facts that we allege in the District Court below.

investigative resources necessary to develop those facts.

THE COURT: And you talked about how these claims are not procedurally defaulted?

MS. KONRAD: How they are not?

THE COURT: Yes.

MS. KONRAD: Well, Your Honor, we actually -- and I'm glad that you brought that up. That was what we briefed below. The State argued that the claim was procedurally defaulted below. We briefed procedural default below. And so when we got to -- you know, years after all of our briefing was complete and the District Court conducted what it considered a de novo review, which we contest that it was, in fact, a de novo review, that -- that that was in error because it hadn't first resolved the procedural issue.

So what it should have done was determine whether we had shown cause, which was fully briefed. And this -- and, Your Honor, this is a complicated habeas case because the law has changed substantively since Mr. Freeman filed his habeas proceedings

and since the State briefed on procedural issues.

So we were in the initial stages of this habeas case where our expectation was that we would complete briefing on the procedural issues and then move to whether we would get an evidentiary hearing and allow for factual development. That is how it was set up. That is what the District Court at the time that we entered habeas in 2006 has said, we had pretrial conferences with the magistrate judge where we went through all of those -- all of those proceedings.

And so when -- we were waiting for a procedural ruling to see if we would be able to move forward on the merits, when the District Court came out with this decision saying that the claim was completely meritless under 2254(b)2, which is a vehicle that was inappropriate at this point and stage of the proceedings.

Now, the District Court's opinion was in error for multiple reasons. The District Court completely mischaracterized Mr. Freeman's claim and discounted his

District Court's order, the Court said that the ACCA's determination that his petition was pleaded with insufficient specificity withstood as the deference. Am I wrong about that?

MS. KONRAD: So the District Court looked at the claim that was presented in State Court and had one paragraph that was not -- not a detailed analysis, but saying that the claim as presented in State Court is under D -- 2254(d) would be reasonable.

First of all, so you are aware, Your Honor, the argument regarding 2254(d) was never briefed below because the State continued to argue this claim was procedurally defaulted. And so there was never any briefing below on 2254(d).

If the argument is that 2254(d) needs to be addressed and that Mr. Freeman needs to show how he can overcome the limitation on relief, I would respectfully ask that we be allowed to brief that issue because Mr. Freeman was responding to the State, who again never contested the facts, but argued over and over again that this claim was

defaulted.

So 2254(d) was never an issue. But even if we can show in briefing that the claim that was presented in State Court, which was a claim where Mr. Freeman was not allowed to develop facts, he did not get any of the funding or investigative resources, he didn't even --

THE COURT: I'm talking about the pleading, what the Alabama court found that the pleading was insufficient. And why is that's not entitled to EDPA deference, that ruling.

MS. KONRAD: Your Honor, that is that is not EDPA deference because the court below -- so again, this is a little bit procedurally complicated, but the trial level court found that Mr. Freeman had sufficiently pled his claims and moved forward and allowed Mr. Freeman to have an evidentiary hearing and then denied the claim on the merits.

When the case went up on appeal, the State did not argue that the claims weren't sufficiently pleaded. They argued the merits. Mr. Freeman argued his case and

Court to affirm the judgment of the District Court.

THE COURT: I do have a question, Ms. Simpson. Are you still arguing that the new allegations of mitigating circumstances are unexhausted?

MS. SIMPSON: Yes, Your Honor. I would argue that they are unexhausted below. They were not fairly --

THE COURT: But exhaustion applies to claims, right, not allegations or evidence? And it seems to me that they pertain to the same claim as the one Mr. Freeman brought in the fourth amended Rule 32 petition; is that right?

MS. SIMPSON: Yes, Your Honor. However, they were not fairly presented to the State Courts to allow the State Courts to have the first bite of the apple. For proclusion and exhaustion, the claim has to be fairly presented and fully presented to the State Courts below. This evidence that Freeman wanted, these 28 pages of new allegations, to be considered should have been in that fourth amended Rule 32 petition. The Circuit Court

should have had a chance to rule on it. The Alabama Court of Criminal Appeals and the Alabama Supreme Court should have had a chance to rule on it before it got to the District Court.

Instead, what the State Courts got was -- depending on how many claims the Court wants to consider, four to six sentences of highly precursory allegations.

THE COURT: Thank you.

MS. SIMPSON: Thank you, Your Honor.

THE COURT: So, in essence, what you're claiming, though, is that they are procedurally defaulted?

MS. SIMPSON: Yes, Your Honor. However, we would also say that if the Court does not find them to be procedurally defaulted, the District Court did not err by renewing the de novo. The District Court had grounds for doing, and the District Court correctly concluded that Mr. Freeman was not entitled to relief under a de novo review.

THE COURT: Thank you.

MS. SIMPSON: Thank you, Your

Honor.

THE COURT: Rebuttal?

MS. KONRAD: Thank you, Your Honor.

Ms. Simpson probably did a better job at explaining Mr. Freeman's background and history than his own counsel did during the penalty phase.

Just a few points that I want to make. Ms. Simpson said that Mr. Freeman should have presented all of these facts in State Court, and Mr. Freeman doesn't disagree with that. He attempted to. He did not have the resources and the funding as a poor prisoner sentenced to death in a state where counsel is not appointed in PCR. He had a pro bono attorney who did the best they could under the circumstances. And Martinez came out after full briefing in this District Court, and Martinez makes clear that State Courts have the option of either appointing counsel during a post-conviction proceeding in which the -- or not appointing counsel at all. But if no counsel is appointed and if there's a system in which there's no ability for

somebody to have counsel to develop facts and have the resources necessary, then the State doesn't get the benefit of arguing procedural default.

However, as Ms. Simpson noted, these claims -- the claim is defaulted because he did not present the facts to State Court, but there are reasons why, and that is the information that the District Court skipped over that needs to be resolved before reaching the merits. And the -- in this claim, Ms. Simpson also talked about all of the things that trial counsel presented in mitigation.

Trial counsel introduced all 13 exhibits of childhood records over five pages of testimony, in which he just asked the witness, Is this the record, is this the record, and without further explanation. That was volume 24 at page 59 of the habeas record.

We don't contest the facts that trial counsel put on about Mr. Freeman having a lot of placements. We don't contest that. What we're arguing here today is that trial counsel completely abandoned the mitigation