PETITION APPENDIX

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APPENDIX A

Rel: August 6, 2021

Alabama Court of Criminal Appeals

OCTOBER TERM, 2020-2021

CR-17-1025

Cuhuatemoc Hinricky Peraita

v.

State of Alabama

Appeal from Escambia Circuit Court
(CC-00-293.60)

COLE, Judge.

Cuhuatemoc Hinricky Peraita, an inmate on Alabama's death row, appeals the Escambia Circuit Court's summary dismissal in part and denial in part of his Rule 32, Ala. R. Crim. P., petition for postconviction relief.

Facts and Procedural History

In September 2001, Peraita was convicted of two counts of capital murder for killing Quincy Lewis -- one count because Peraita killed Lewis while Peraita was under a sentence of life imprisonment, see § 13A-5-40(a)(6), Ala. Code 1975, and one count because Peraita had been convicted of murder within the 20 years preceding the capital offense, see § 13A-5-40(a)(13), Ala. Code 1975.[1]

On direct appeal, this Court summarized the facts underlying Peraita's convictions as follows:

> "[Peraita], Michael Castillo, and Quincy Lewis were incarcerated at Holman Prison on December 10 and 11, 1999. Around midnight, an incident occurred in which Lewis was stabbed several times. Shortly thereafter, he died as a result of his injuries.

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[1]In 1994, Peraita and Robert Melson killed three employees of a Popeye's Chicken restaurant in Gadsden. Melson was convicted of capital murder and sentenced to death, and this Court affirmed his convictions and sentence. See Melson v. State, 775 So. 2d 857 (Ala. Crim. App. 1999), aff'd, 775 So. 2d 904 (Ala. 2000). Peraita was also convicted of capital murder, but he was sentenced to life in prison without the possibility of parole, and this Court affirmed his convictions and sentence. See Peraita v. State (No. CR-95-1413, Sept. 26, 1997), 725 So. 2d 1075 (Ala. Crim. App. 1997) (table). While serving his life-without-parole sentence, Peraita and Michael Castillo killed Lewis.

"Kevin James Bishop was employed as a correctional officer at Holman Prison and worked from 10 p.m. on December 10, 1999, until 6 a.m. on December 11, 1999. At approximately 11:43 p.m., as officers were doing a body count to make sure all of the inmates who were assigned to Dorm 4 were accounted for, he saw [Peraita] in the dorm. [Peraita] said, ' "What's up Bishop," ' and did not indicate that he was scared for himself or Castillo. (R. 966.) Bishop testified that, if [Peraita] had asked to be removed from the dorm, he would have been placed in segregation in a cell by himself for his protection until the situation could be investigated. After the body count was completed, the lights were turned down for the night so that only about one-half of the lights were on.

"Charles Smith was incarcerated at Holman Prison on the night of the offense and knew [Peraita], Castillo, and Lewis. Five or six days before the offense occurred, he had seen the knife that was used to stab Lewis in a paper bag at the foot of Lewis'[s] bed. He testified that he had heard Lewis tell [Peraita] to get the knife out of the bag and that [Peraita] had taken the knife and hidden it under his clothes.

"Shortly before midnight and after the body count on the night the offense occurred, Smith saw Castillo and Lewis together. Lewis was walking toward the television room, but he stopped and sat on a bed across from Castillo's bed, where Castillo was sitting. When he did, [Peraita], who was sitting on a box that was between the beds, got up to walk away. As [Peraita] walked between Castillo and Lewis, Lewis slapped him. [Peraita] continued to walk to his own bed. Smith testified that, after Lewis slapped [Peraita], the other inmates were expecting something else to happen. He explained that some sort of response is common in a prison when one inmate slaps another inmate.

"Smith testified that [Peraita] stayed at his bunk for two or three minutes and then returned to the box on which he had previously been sitting. After about three to five minutes, [Peraita] stood up and started out like he was going to leave again. However, he spun around, grabbed Lewis around the neck, and 'snatched his neck back.' (R. 1044.) Castillo then started stabbing Lewis in the neck and in several other places. In the process, he also stabbed [Peraita] in the arm. Eventually, Lewis put a towel to his neck and staggered out of the dorm. As he was doing so, Castillo gave the knife to [Peraita]. [Peraita] then 'hit [Lewis] in the side' and said, ' "Die, n[_____]." ' (R. 1045-46.)

"Smith testified that [Peraita] and Castillo had paid Lewis two cartons of cigarettes to leave them alone and that he had asked Lewis several times to leave them alone. He also testified that Lewis could not stand the idea of [Peraita] being with Castillo. Finally, he stated that [Peraita] had been sleeping in the bed above Lewis'[s] bed, but that he had changed to a different bed.

"Alvin Hamner was also incarcerated at Holman Prison on the night of the incident and knew [Peraita], Castillo, and Lewis. During the night, he heard some movement and turned to look at what was happening. At that time, he saw [Peraita] 'holding Quincy Lewis around the neck and Castillo standing over him.' (R. 1029.) He first thought Castillo was punching Lewis in the neck, chest, and stomach. However, after more lights were turned on, he saw blood and realized that Castillo had been stabbing Lewis. He testified that Castillo had the knife, but handed it to [Peraita] when the lights came on and officers entered the dorm. He further testified that, as Lewis was falling to the floor, he saw [Peraita] stab Lewis in the side. Lewis subsequently walked out of the dorm and into the hallway, where he again fell to the floor. As [Peraita] walked

by Lewis, Hamner heard him say, ' "M_____ f_____, die." ' (R. 1031.)

"Alphonso Burroughs was also employed as a correctional officer at Holman Prison and worked from 10 p.m. on December 10, 1999, until 6 a.m. on December 11, 1999. When he walked into Dorm 4, he saw Lewis, who was covered with blood, walking from the area around Castillo's bed. [Peraita] and Castillo, who were also covered with blood, were in the same area only a few feet from Lewis, and [Peraita] had a knife in his hand.

"Lewis walked out of the dorm and collapsed during the time Burroughs was escorting [Peraita] and Castillo out of the dorm. Burroughs went to help Lewis, and he told [Peraita] and Castillo to 'go on up the hall.' (R. 952.) [Peraita] and Castillo complied, and Burroughs, another officer, and two inmates picked up Lewis to carry him to the infirmary to get medical attention. Part of the way there, [Peraita], who was still holding the knife, and Castillo turned around. [Peraita] waved the knife and said, ' "Drop the bastard and let the bastard die." ' (R. 953.) [Peraita], who appeared to be mad, continued to swing the knife and said, ' "Y'all get back too or we'll cut you too." ' (R. 954.)

"Bishop also saw [Peraita] and Castillo standing side by side in the dorm. Both were covered with blood, and [Peraita] had a knife in his hand. Shortly thereafter, Lewis walked out of the dorm and collapsed. As others helped Lewis, Bishop stayed between [Peraita] and Castillo and Lewis. He testified that he told [Peraita] several times to put the knife down. However, [Peraita] said he would not do so until he and Castillo were in segregation. [Peraita] and Castillo walked part of the way down the hall, but then they turned around,

[Peraita] swung his knife toward Bishop, and said, ' "Put the bastard down and let the son-of-a-bitch die." ' (R. 972.)

"Kevin Dale Boughner was also employed as a correctional officer at Holman Prison on December 10 and 11, 1999. He saw [Peraita], who had a knife in his hand, walking toward the segregation area. [Peraita] and Castillo were '[c]overed with blood, arm [in] arm, walking down the hall at a very brisk pace' toward him. (R. 980.) [Peraita] looked at him and said, ' "If you get us to a safe place I'll give you the knife." ' (R. 980.) Boughner put them in a holding cell and locked the door, and [Peraita] threw the knife out. Boughner described [Peraita] as 'really pumped up, hyper, adrenaline flowing, just really pumped up, hyped up.' (R. 981.) He also stated that, on two occasions, [Peraita] asked, ' "Is he dead?" ' (R. 982.)

"Bishop remained with [Peraita] and Castillo while Burroughs, the other officer, and the two inmates carried Lewis to the infirmary. Burroughs testified that, while he was going toward the infirmary, Bishop and Boughner tried to lock [Peraita] and Castillo in separate holding cells. However, he heard [Peraita] say that he and Castillo would not give up the knife unless they were locked up together. Burroughs testified that, after he and Castillo were locked in a holding cell together, [Peraita] threw the knife to the floor.

"Sergeant William James, the shift commander for the segregation area, saw [Peraita] and Castillo, who he described as 'covered from head to toe with blood,' as they were approaching the holding cell. (R. 991.) After he was secured in the holding cell, [Peraita] asked, ' "Is he dead?" ' (R. 991.)

"Dr. William John McIntyre treated Lewis in the emergency room at Atmore Community Hospital

approximately one hour after the offense occurred. He testified that Lewis had six wounds, including a very large wound to his neck, and that he was close to death because he had lost so much blood. He further testified that medical personnel tried to revive Lewis, that they were not able to because the blood loss was irreversible, and that he pronounced Lewis dead.

"Dr. Leroy Riddick, a medical examiner employed by the Alabama Department of Forensic Sciences, performed an autopsy on Lewis'[s] body. He testified that Lewis had a total of eighteen separate injuries, including six stab wounds. One stab wound to his neck cut his carotid artery. Another stab wound to the chest went through the chest cavity and caused a lung to collapse. He also had several superficial incised wounds. Dr. Riddick concluded that the cause of death was sharp force injuries from stab wounds and cuts.

"The defense called several inmates to testify on [Peraita]'s behalf. Michael Best testified that he knew [Peraita], Castillo, and Lewis and had seen them interact; that the three seemed to get along well at first, but that the situation deteriorated over time; that Lewis had admitted to him that he had made threats against [Peraita] and Castillo; and that he had discussed those threats with [Peraita] and Castillo. Finally, he testified that Lewis had a reputation for being sexually violent in Holman Prison.

"James Jones testified that he knew [Peraita], Castillo, and Lewis; that he had seen them interact; that they initially did not have problems; and that eventually problems developed. He explained that [Peraita] and Lewis 'were partners' before Castillo arrived at Holman Prison; that Castillo came between [Peraita] and Lewis; that [Peraita] and Castillo 'paid' Lewis two cartons of cigarettes to leave them

> alone; that Lewis left them alone for seven or eight days; and that problems started again. (R. 1134.) Finally, he stated that Lewis made a threat against [Peraita] in his presence and that he told [Peraita] about the threat.
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> "Darwin Knight testified that he knew [Peraita], Castillo, and Lewis; that [Peraita] and Lewis had been 'partners'; and that there was 'a major change' in the relationship between [Peraita] and Lewis after Castillo arrived at Holman Prison. (R. 1139.)"

Peraita v. State, 897 So. 2d 1161, 1175-78 (Ala. Crim. App. 2003).

After the jury found Peraita guilty of two counts of capital murder, Peraita waived the right to have the jury participate in the sentencing hearing, see § 13A-5-44(c), Ala. Code 1975. "Before accepting [Peraita's] waiver, the trial court thoroughly explained [to Peraita] the rights he would be waiving. It also questioned him extensively about his decision and his understanding of the consequences thereof. Throughout the proceeding, [Peraita] remained adamant about his decision to waive jury participation in his sentencing." Peraita, 897 So. 2d at 1197. Thereafter, the trial court accepted his waiver. See Peraita, 897 So. 2d at 1175. Peraita then told the trial court that he wished to waive the presentation of all mitigation evidence. (Record in Peraita, case no. CR-01-0289, R.

1315.)[2] After another colloquy with Peraita, the trial court accepted Peraita's decision to waive the presentation of mitigation evidence. (Record in Peraita, case no. CR-01-0289, R. 1315-21.) "The trial court then conducted a sentencing hearing, received a presentence investigation [report], and sentenced [Peraita] to death." Id.

In its sentencing order, the trial court found three aggravating circumstances to exist -- that the capital offense was committed by a person under a sentence of imprisonment; that Peraita previously had been convicted of another capital offense or a felony involving the use or threat of violence to the person; and that the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses. The trial court found no statutory mitigating circumstances to exist. The trial court found the following nonstatutory mitigating circumstances to exist:

> "[Peraita] was born in Los Angeles, California on May 19, 1976. He was the youngest of four children. Peraita's father was abusive toward Peraita's mother and the four children. When Peraita was about two years of age, his abusive father

[2]This Court may take judicial notice of its own records, and we do so in this case. See, Nettles v. State, 731 So. 2d 626, 626 (Ala. Crim. App. 1998), and Hull v. State, 607 So. 2d 369, 371 n.1 (Ala. Crim. App. 1992).

> was killed by his mother and his aunt. They were convicted and his mother was imprisoned. [Peraita] lived in many foster homes and he claims to have been physically, sexually, and emotionally abused in these homes. He moved to Alabama in 1990 and spent two years at the Big Oak Ranch in Etowah County when he was fifteen and sixteen years of age. Peraita completed the 9th grade and he does not have a GED. He claims to have used alcohol, marijuana, and cocaine as a teenager. [Peraita] was evaluated at Taylor Hardin in 1994. This evaluation suggested a diagnosis of adjustment disorder with mixed disturbance of emotion and conduct; polysubstance abuse; and personality disorder not otherwise specified with antisocial features. Dr. DeFrancisco's mental evaluation report indicates that [Peraita] attempted suicide on more than one occasion. He has taken an overdose of medication and has tried to hang himself while incarcerated on the Etowah County capital murder charges. The Court has considered [Peraita's] difficult family history and childhood. The abuse, neglect, and absence of a stable home environment during his formative years have been considered by the Court. Also, the Court has weighed his abuse of alcohol and drugs which commenced when he was a teenager. In fact, the Court has searched all of the evidence in the case for evidence of mitigation, whether or not raised by the defense, in view of the fact that this is a capital case. The Court has considered all non-statutory mitigating circumstances presented throughout this proceeding which involved any aspect of [Peraita's] character or record and any of the circumstances of the offense."

(Record in Peraita, case no. CR-01-0289, C. 468-71.) The trial court then concluded that the aggravating circumstances "far outweigh" the

mitigating circumstances and sentenced Peraita to death. (Record in Peraita, case no. CR-01-0289, C. 472.) Peraita appealed.

On appeal, this Court affirmed Peraita's capital-murder convictions and death sentence. Peraita, 897 So. 2d at 1222. The Alabama Supreme Court affirmed this Court's decision. See Ex parte Peraita, 897 So. 2d 1227 (Ala. 2004). This Court issued a certificate of judgment on September 22, 2004, making Peraita's convictions and sentence final.

On September 16, 2005, Peraita timely filed a Rule 32 petition challenging his convictions and sentence. (C. 14-74.) In his petition, Peraita alleged that his trial counsel were ineffective during both the guilt phase and the penalty phase of his trial and that juror misconduct during the trial deprived him of his rights to a fair trial and to due process.[3] On

[3]Three pages of Peraita's original petition appear to have been omitted from the record on appeal, as Peraita's original petition goes from page 58 to page 62. (See C. 71-72). It is Peraita's duty to provide this Court with a complete record on appeal, and we will neither presume what Peraita's petition alleged in those missing pages nor presume error based on materials that are not included in the record. See Henderson v. State, 248 So. 3d 992, 1017 n.5 (Ala. Crim. App. 2017) (noting that even capital defendants have a duty to provide this Court with a complete record on appeal).

December 23, 2005, the State moved to dismiss Peraita's petition, alleging that Peraita's claims were either insufficiently pleaded, meritless, or precluded under Rule 32.2(a)(3) and (5), Ala. R. Crim. P. (C. 86-114.)

On July 3, 2006, Peraita filed his first amended Rule 32 petition. (C. 307-80.) In his first amended petition, Peraita reasserted his claims of ineffective assistance of counsel and juror misconduct and added a claim that the State had withheld "favorable evidence" from him.

On June 26, 2007, the circuit court issued an order summarily dismissing most of the claims Peraita raised in his petition and in his first amended petition. (C. 486-87.) The circuit court did, however, find that Peraita was entitled to an evidentiary hearing on some of the claims he raised in his petition. (C. 487.)

Thereafter, Peraita filed a second amended Rule 32 petition, adding claims that he did not knowingly and voluntarily waive his right to present mitigation evidence at his sentencing hearing, that his sentence is disproportionate when compared to the sentence of his more culpable codefendant, and that Alabama's method of execution violates the Eighth Amendment to the United States Constitution. (C. 588-672.)

On May 19, 2011, the State moved to dismiss Peraita's second amended petition. (C. 728-52.) On January 18, 2013, the circuit court issued an order summarily dismissing several of Peraita's remaining claims. (C. 853-67.) But the circuit court found that Peraita was entitled to an evidentiary hearing on the following claims:

> (1) That juror misconduct deprived him of his right to a fair trial and to due process.
>
> (2) That his trial counsel were ineffective for failing to "investigate and develop" testimony from Eddie John Campbell, who had been incarcerated at Holman Prison when Peraita and Castillo murdered Lewis.
>
> (3) That his trial counsel were ineffective for failing to "investigate and develop" testimony from Jack King, who had been incarcerated at Holman Prison when Peraita and Castillo murdered Lewis.
>
> (4) That his trial counsel were ineffective because they failed to present evidence indicating that Peraita did not stab Lewis.
>
> (5) That his trial counsel were ineffective because they did not adequately "investigate and evaluate" Peraita's mental health throughout the proceedings.
>
> (6) That Peraita did not knowingly and voluntarily waive his right to present mitigation evidence at his sentencing hearing.

(C. 853-67.)

On April 26 and 28, 2016, the circuit court held an evidentiary hearing on those six claims. At that hearing, Peraita presented testimony from eight witnesses: V.J., a juror at Peraita's trial (R. 121-34); Dr. Daniel C. Marson (R. 134-247); Edmundo Peraita III, Peraita's brother (R. 255-99); Loretta Mancuso, Peraita's mother (R. 299-340); Eddie John Campbell (R. 343-68) and Jack King (R. 369-82), inmates who were at Holman Prison with Peraita; and J. Todd Stearns and Wade Hartley (R. 394-550), his trial counsel.[4] The State called Dr. Glen King. (R. 551-96.)

On June 18, 2018, the circuit court issued a written order denying the claims Peraita presented at the evidentiary hearing and setting out its reasons for doing so. (C. 1253-79.) This appeal follows. (C. 1232-34.)

[4]Peraita also submitted an affidavit from Dr. William McIntyre, who testified at Peraita's original trial. (R. 115.) "The nature of his testimony in that affidavit is to identify certain records as records of the hospital relating to -- business records of the hospital relating to his treatment of the victim Quincy Lewis." (R. 115.)

Standard of Review

Peraita's petition was summarily dismissed in part under Rule 32.7(d), Ala. R. Crim. P., and denied in part under Rule 32.9(a), Ala. R. Crim. P. Our standard of review in this case is well settled:

> "Rule 32.7(d), Ala. R. Crim. P., authorizes a circuit court to summarily dispose of a petitioner's Rule 32 petition without accepting evidence,
>
> > " '[i]f the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings ....'
>
> "See also Hannon v. State, 861 So. 2d 426, 427 (Ala. Crim. App. 2003); Cogman v. State, 852 So. 2d 191, 193 (Ala. Crim. App. 2002); Tatum v. State, 607 So. 2d 383, 384 (Ala. Crim. App. 1992). Summary disposition is appropriate if the record directly refutes a petitioner's claim or if the claim is obviously without merit. See, e.g., Shaw v. State, 148 So. 3d 745, 764-65 (Ala. Crim. App. 2013). Moreover, 'a judge who presided over the trial or other proceeding and observed the conduct of the attorneys at the trial or other proceeding need not hold a hearing on the effectiveness of those attorneys based upon conduct that he observed.' Ex parte Hill, 591 So. 2d 462, 463 (Ala. 1991).
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> " 'Once a petitioner has met his burden ... to avoid summary disposition pursuant to Rule 32.7(d), Ala. R. Crim. P., he is then entitled to an opportunity to present evidence in

order to satisfy his burden of proof.' Ford v. State, 831 So. 2d 641, 644 (Ala. Crim. App. 2001). Rule 32.9(a), Ala. R. Crim. P., provides:

> " 'Unless the court dismisses the petition, the petitioner shall be entitled to an evidentiary hearing to determine disputed issues of material fact, with the right to subpoena material witnesses on his behalf. The court in its discretion may take evidence by affidavits, written interrogatories, or depositions, in lieu of an evidentiary hearing, in which event the presence of the petitioner is not required, or the court may take some evidence by such means and other evidence in an evidentiary hearing.'

"In Wilkerson v. State, 70 So. 3d 442 (Ala. Crim. App. 2011), this Court explained:

> " ' "The burden of proof in a Rule 32 proceeding rests solely with the petitioner, not the State." Davis v. State, 9 So. 3d 514, 519 (Ala. Crim. App. 2006), rev'd on other grounds, 9 So. 3d 537 (Ala. 2007). "[I]n a Rule 32, Ala. R. Crim. P., proceeding, the burden of proof is upon the petitioner seeking post-conviction relief to establish his grounds for relief by a preponderance of the evidence." Wilson v. State, 644 So. 2d 1326, 1328 (Ala. Crim. App. 1994). Rule 32.3, Ala. R. Crim. P., specifically provides that "[t]he petitioner shall have the burden of ... proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief." '

"70 So. 3d at 451.

> " '[W]here there are disputed facts in a postconviction proceeding and the circuit court resolves those disputed facts, "[t]he standard of review on appeal ... is whether the trial judge abused his discretion when he denied the petition." ' Boyd v. State, 913 So. 2d 1113, 1122 (Ala. Crim. App. 2003) (quoting Elliott v. State, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992)). However, 'when 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). 'The sufficiency of pleadings in a Rule 32 petition is a question of law.' Ex parte Beckworth, 190 So. 3d 571, 573 (Ala. 2013).
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> "With limited exceptions not applicable here, the general rule is that this Court may affirm a circuit court's judgment if it is correct for any reason. See Bryant v. State, 181 So. 3d 1087, 1100 (Ala. Crim. App. 2011); Moody v. State, 95 So. 3d 827, 833 (Ala. Crim. App. 2011), and McNabb v. State, 991 So. 2d 313, 333 (Ala. Crim. App. 2007), and the cases cited therein. Moreover, '[o]n direct appeal we reviewed the record for plain error; however, the plain-error standard of review does not apply to a Rule 32 proceeding attacking a death sentence.' Ferguson v. State, 13 So. 3d 418, 424 (Ala. Crim. App. 2008). See also Mashburn v. State, 148 So. 3d 1094, 1104 (Ala. Crim. App. 2013)."

Woodward v. State, 276 So. 3d 713, 728-29 (Ala. Crim. App. 2018). Additionally, we note that " ' "the procedural bars of Rule 32 apply with equal force to all cases, including those in which the death penalty has been imposed." ' " Mashburn v. State, 148 So. 3d 1094, 1104 (Ala. Crim. App. 2013) (quoting Nicks v. State, 783 So. 2d 895, 901 (Ala. Crim. App.

1999), quoting in turn, State v. Tarver, 629 So. 2d 14, 19 (Ala. Crim. App. 1993)). With these standards of review in mind, we address the arguments Peraita raises on appeal.

Discussion

I.

Peraita first argues that the circuit court erred when it denied his juror-misconduct claim. (Peraita's brief, pp. 22-37.)

In his Rule 32 petition, Peraita alleged that,

> "[o]n the second day of the trial, when the jury was in one of the side rooms waiting to go back into the courtroom, the jury ... discussed the details of his prior murder convictions, details previously determined inadmissible by [the trial] Court. During this conversation, jurors discussed that Mr. Peraita was the person involved in the killings of three or four people at the Popeye's restaurant in Gadsden, Alabama. The jurors knew that the deaths involved forcing three or four people into a freezer and shooting them at the Popeye's restaurant. At least one juror assumed based on the jury's conversation that Mr. Peraita was the shooter in those previous murders -- an assumption that was false. Jurors listened intently as this information was shared.
>
> "Outside the presence of the Court, the attorneys, and Mr. Peraita, the jury discussed the graphic details of these murders, including the role played [by] Mr. Peraita. The jury members carried this improper and extremely prejudicial information with them for the remainder of Mr. Peraita's trial

> and their deliberations. None of the jury members shared this information with Mr. Peraita's counsel or any members of the Court."

(C. 70.) Although Peraita did not identify which juror made the allegedly improper statement in either his Rule 32 petition or in any of the amendments to his Rule 32 petition, Peraita sent a letter to the circuit court on December 20, 2006, indicating that he had informed the State that "the juror who shared with his fellow jurors information regarding the details of [his] prior convictions was the foreperson, [E.P.]"[5] (C. 783.)

Because E.P. died before Peraita's evidentiary hearing, Peraita called V.J., another juror who had served on Peraita's jury, to testify about E.P.'s alleged comment. The State objected to V.J.'s testimony about what

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[5]As explained in note 13, an extrajudicial revelation of the identity of a juror who is alleged to have committed misconduct does not satisfy the full-fact pleading requirements of Rule 32.3 and Rule 32.6(b). But because the circuit court found this claim to be sufficiently pleaded and gave Peraita an opportunity to prove this claim at an evidentiary hearing, we cannot now hold that Peraita's juror-misconduct claim is insufficiently pleaded. See Ex parte McCall, 30 So. 3d 400, 404 (Ala. 2008) (By holding an evidentiary hearing, "the trial court implicitly found that the issues presented were 'material issue[s] of law or fact ... which would entitle [McCall] to relief,' Rule 32.7(d), and, under Rule 32.9(d), the trial court therefore had a responsibility to make findings of fact as to each of those issues.").

E.P. said, arguing that V.J.'s testimony was hearsay. (R. 124.) The circuit court sustained the State's objection but allowed Peraita to proffer V.J.'s testimony. According to V.J., on the second day of Peraita's trial, the jury was "[i]n the jury room" and they were "all sitting at the table" when E.P. said: "Do y'all know that this guy murdered three or four people there in Gadsden at Popeye's Chicken and put them in the freezer." (R. 124, 126, 131.) V.J. said that the other jurors had the opportunity to hear E.P., but she could not say whether the other jurors actually heard E.P. V.J. also said that she could not say whether the other jurors reacted to E.P.'s statement because she "really didn't look at their faces." (R. 132.) V.J. did not testify as to whether E.P.'s statement had any affect on her "personal decision on [Peraita's] guilt or innocence." (R. 133.) Additionally, V.J. did not testify as to whether E.P.'s statement was actually brought up during guilt-phase deliberations.

The circuit court denied Peraita's juror-misconduct claim for three reasons: (1) because "Peraita failed to establish that [V.J.'s] testimony was admissible over the State's hearsay objection" (C. 1256-57); (2) because "Peraita failed to prove that [E.P.'s] comment constituted extraneous

evidence" (C. 1254-55); and (3) because "Peraita failed to prove ... that the comment purportedly made by [E.P.] prior to the jury's guilt phase deliberations might have caused him to be prejudiced" (C. 1255-56). Peraita challenges all three findings on appeal. (Peraita's brief, pp. 22-37.)

First, Peraita argues that the circuit court erred when it found that V.J.'s testimony about what E.P. had allegedly told the other jurors was hearsay. Because the Alabama Rules of Evidence apply at evidentiary hearings on Rule 32 petitions, circuit courts "should exclude inadmissible hearsay" evidence from those proceedings. McWhorter v. State, 142 So. 3d 1195, 1254 (Ala. Crim. App. 2011). Rule 801(c), Ala. R. Evid., defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." (Emphasis added.) When a statement is not being offered for its truth, the statement is not hearsay and, thus, not excluded under the hearsay rule. See, e.g., Deardorff v. State, 6 So. 3d 1205, 1216 (Ala. Crim. App. 2004) ("A statement offered for a reason other than to establish the truth of the matter asserted therein is not hearsay. E.g.,

Smith v. State, 795 So. 2d 788, 814 (Ala. Crim. App. 2000)."). "Consequently, the most common approach for definitionally circumventing a hearsay objection is to argue that the statement is offered for some purpose in the case other than to prove the truth of the matter asserted." II Charles W. Gamble, et al. McElroy's Alabama Evidence § 242.01(1)(c) (7th ed. 2020).

Here, Peraita alleged that juror E.P. committed misconduct when he told other jurors about Peraita's prior criminal history, and he attempted to prove his allegation by introducing E.P.'s statement through V.J.'s testimony. When V.J. was about to testify to what E.P. allegedly said, the State objected that V.J.'s answer "[c]alls for hearsay." (R. 124.) Peraita later responded:

> "[T]he statement is not being introduced for the truth of the matter ascertained. It is being introduced as it would be introduced in a case of fraud or any other instance. The meaningful aspect of this testimony is that the juror said something to the other jurors concerning Mr. Peraita's prior convictions. If the statement was false it would be just as meaningful for our claim as if the statement were true. So the truth of whether or not what the foreperson said in the room is irrelevant to our claim. What is relevant is that the foreperson made a statement to the other jurors that concerned Mr. Peraita's prior convictions which were not

> presented as evidence at trial. That is the core of our juror claim."

(R. 128.) Peraita is correct.

As Peraita argued, the nature of his juror-misconduct claim did not turn on whether E.P. said something that was true. Rather, his juror-misconduct claim turned on the fact that E.P. made a statement -- specifically, that he told the other jurors that Peraita had "murdered three or four people there in Gadsden at Popeye's Chicken and put them in the freezer." (R. 124, 126, 131.)

As Dean Gamble has explained:

> "Some statements have significance in the case, without regard to whether they are true or not, simply because they were made. The statement, rather than being offered to prove the truth of the matter asserted, is being offered because it is an integral part of the issue to be resolved in the case. Some writers term such statements as ... operative facts. ... The number of instances when the mere fact of having made a statement forms part of the issue in a case is unlimited."

II Gamble, et al. McElroy's Alabama Evidence § 242.01(1)(c)(1) (footnotes omitted).

Juror E.P.'s statement about Peraita's criminal history to the other jurors, regardless of its truth, is an instance where the mere fact of having

made such a statement forms the basis of the issue at Peraita's Rule 32 hearing -- i.e., a juror-misconduct claim. The statement was introduced to show the impact the statement might have had on E.P.'s fellow jurors, not to show that Peraita did the act in question. Consequently, V.J.'s testimony about what E.P. said was not hearsay. Thus, the circuit court erred when it sustained the State's hearsay objection. Even so, it does not necessarily follow that V.J.'s testimony was admissible at Peraita's evidentiary hearing. As the circuit court found, V.J.'s testimony could still be excluded under Rule 606(b), Ala. R. Evid. Thus, we now turn to whether the circuit court correctly determined that V.J.'s testimony was inadmissible under that rule.

Rule 606(b), Ala. R. Evid., provides:

> "[A] juror may not testify in impeachment of the verdict or indictment as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the

> juror concerning a matter about which the juror would be precluded from testifying be received for these purposes."

(Emphasis added.) In other words, unless a juror's testimony concerns either (1) some extraneous prejudicial information that was improperly brought to the jury's attention or (2) an outside influence that "was improperly brought to bear upon any juror," then the juror cannot testify about what transpired between jurors during a trial.

Peraita does not contend that some "outside influence" was brought to bear upon any juror. Rather, Peraita argues only that E.P.'s comment to the other jurors about Peraita having killed three other people at a Popeye's restaurant was "extraneous prejudicial information." Thus, we address only that exception to Rule 606(b).

Generally, the extraneous-prejudicial-information exception to Rule 606(b) has been limited in scope " ' "to the visitation of a crime scene by a juror, the introduction of the definition of legal terms in the jury room, and [the reading of] concepts from general reference books." ' " Bethea v. Springhill Mem'l Hosp., 833 So. 2d 1, 7 (Ala. 2002) (quoting Lance, Inc. v. Ramanauskas, 731 So. 2d 1204, 1214 (Ala. 1999)). Although this list of

circumstances is not exhaustive, the listed instances of juror misconduct share two common characteristics. The first common characteristic "is the extraneous nature of the fact introduced to or considered by the jury." Sharrief v. Gerlach, 798 So. 2d 646, 652-53 (Ala. 2001) (emphasis added). Indeed, in each of these listed circumstances, a juror sought out information from an external source and then conveyed that information to the other jurors. The second common characteristic in each of these listed instances of misconduct is that the external source from which the juror gains his or her information is consulted during trial. See, e.g., Ex parte Arthur, 835 So. 2d 981, 984-85 (Ala. 2002) (holding that a juror committed misconduct when he consulted medical textbooks to determine whether the plaintiff's migraine headaches could be caused by some other reason than what she alleged in her trial and then shared that information with the other jurors); Apicella v. State, 809 So. 2d 841, 847 (Ala. Crim. App. 2000) (holding that a juror committed misconduct when the juror contacted an attorney and asked the attorney about a legal principle relevant to the case); Knight v. State, 710 So. 2d 511, 513-15 (Ala. Crim. App. 1997) (holding that a juror committed misconduct when

he "independently investigated the susceptibility of young female children to accidental infection of gonorrhea" and shared his findings with the other jurors); and Ex parte Lasley, 505 So. 2d 1263, 1264 (Ala. 1987) (holding that some jurors committed misconduct when they conducted "home experiments").[6]

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[6]Admittedly, we have found two cases in which a juror was found to have committed misconduct when the juror's "outside knowledge" was ostensibly obtained before trial and was shared with other jurors. First, in Clarke-Mobile Counties Gas District v. Reeves, 628 So. 2d 368, 370 (Ala. 1993) (plurality opinion), a juror was found to have committed misconduct when she told the other jurors that " 'Clarke-Mobile Counties Gas District had gone across her son's land and messed it up and did not ask permission.' " Second, in Taite v. State, 48 So. 3d 1, 3 (Ala. Crim. App. 2009) (plurality opinion), a juror was found to have committed misconduct when that juror told other jurors "that Taite had a prior conviction and had been imprisoned." Both cases, however, are plurality opinions and, thus, are not binding "prior decisions." See Ex parte Dearman, [Ms. 1180911, June 26, 2020] ___ So. 3d ___, ___ n.1 (Ala. 2020) ("[W]e did not grant certiorari review as to Dearman's argument regarding Ex parte Walker[, 122 So. 3d 1287 (Ala. Civ. App. 2013),] because Ex parte Walker is a plurality decision and, thus, is not a 'prior decision[ ]' of the Court of Civil Appeals for purposes of Rule 39(a)(1)(D), Ala. R. App. P."). Additionally, as the State points out in its brief on appeal, in Taite the State "implicitly conceded at trial" that the juror's information was "extraneous information within the scope of the exception provided for in Rule 606(b)." Taite, 48 So. 3d at 7. The State has made no such concession here.

But when the alleged "prejudicial information" comes from an intrinsic source, meaning that a juror came to the trial with certain information learned outside the scope of trial and passed that information along to the jury, any testimony concerning that information is inadmissible under Rule 606(b). See, e.g., Reeves v. State, 226 So. 3d 711, 754-55 (Ala. Crim. App. 2016) (holding that a juror's comment "that Reeves's family 'would "come after" the jurors after trial' and stress[ing] to the other jurors that 'the decision to impose the death penalty truly belonged to the judge rather than the jury' " was not based on "extraneous" information); Marshall v. State, 182 So. 3d 573, 618 (Ala. Crim. App. 2014) (holding that a juror's comment to other jurors that the victim's "vaginal tear could not have been caused by female masturbation" was not shown to have been obtained through some process outside the scope of the trial); Bethea, 833 So. 2d at 4 (finding that the jurors' knowledge about the use of Pitocin during labor and delivery and their discussion of their knowledge about Pitocin during deliberations was intrinsic information and did not come within the Rule 606(b)). In sum,

> "for information to come within the extraneous-information exception to Rule 606(b), the information must come to the jurors from some external authority or through some process outside the scope of the trial, either (1) during the trial or the jury's deliberations or (2) before the trial but for the purpose of influencing the particular trial."

Bethea, 833 So. 2d at 8.

Peraita does not argue that the alleged prejudicial information that E.P. shared was obtained by E.P. before Peraita's trial for the purpose of influencing Peraita's trial; thus, we examine only whether Peraita established that V.J.'s testimony about what E.P. said showed that E.P.'s statement about Peraita came "from some external authority or through some process outside the scope of the trial ... during the trial or the jury's deliberations." Bethea, 833 So. 2d at 8. If it did not, the circuit court properly concluded that Peraita failed to show that E.P.'s comment about Peraita was extraneous information under Rule 606(b).

As explained above, the extent of Peraita's evidence concerning E.P.'s statement about Peraita was testimony that V.J. heard E.P. say: "Do y'all know that this guy murdered three or four people there in Gadsden at Popeye's Chicken and put them in the freezer." (R. 124, 126,

131.) Peraita presented nothing at the evidentiary hearing to show that E.P. became privy to that information from an "external authority" or some "process outside the scope of the trial" during Peraita's trial. Bethea, 833 So. 2d at 8. Because Peraita failed to make this showing, the circuit court correctly concluded that Peraita failed to establish that V.J.'s testimony was admissible under the extraneous-prejudicial-information exception to Rule 606(b).

Even so, the circuit court correctly concluded that Peraita failed to prove that he was prejudiced by E.P.'s comment. Recently, this Court explained what a Rule 32 petitioner must show to prove that a juror committed misconduct by introducing "extraneous information" to the jury during deliberations:

> "In regard to the introduction of extraneous facts during jury deliberations, we have stated:
>
> > "'"Extraneous facts introduced in jury deliberations can result in actual prejudice or in prejudice as a matter of law, also called presumed prejudice." Ex parte Arthur, 835 So. 2d 981, 983 (Ala. 2002). The Alabama Supreme Court in Ex parte Apicella[, 809 So. 2d 865 (Ala. 2001),] discussed the differences between presumed prejudice and actual prejudice:

> "'"Apicella also argues that we should hold the extraneous material introduced through S.B.'s conversation with T.R. to be prejudicial as a matter of law. Apicella supports this argument with the following language from Knight [v. State], 710 So. 2d [511,] 517 [(Ala. Crim. App. 1997)]:
>
> > "'"'"Juror misconduct will justify a new trial ... when from the extraneous facts prejudice may be presumed as a matter of law." Whitten v. Allstate Ins. Co., 447 So. 2d 655, 658 (Ala. 1984) .... However, in some cases, "the character and nature of the extraneous material [constitute] prejudice as a matter of law and no showing that the jury was in fact influenced thereby in arriving at their verdict is necessary." Id. (prejudice presumed as a matter of law from jury's consulting encyclopedia and dictionary definitions ...).'
>
> "'"(Quoting Minshew v. State, 594 So. 2d 703, 716 (Ala. Crim. App. 1991).)

> " ' "... Our holding in Pearson [v. Fomby, 688 So. 2d 239, 245 (Ala. 1997),] serves to emphasize the limitations of the doctrine of 'prejudice as a matter of law.'
>
> " ' "Generally, a presumption of prejudice applies only in a case in which the jury's consideration of the extraneous material was ' "crucial in resolving a key material issue in the case." ' Dawson v. State, 710 So. 2d 472, 475 (Ala. 1997) (citing Hallmark v. Allison, 451 So. 2d 270, 271 (Ala. 1984), and Ex parte Thomas, 666 So. 2d 855 (Ala. 1995)).
>
> " ' "We are not willing to presume prejudice as a matter of law in this case. No evidence indicates that extraneous information arising from S.B.'s conversation influenced S.B.'s vote or that the information was ever considered by any other member of the jury. This case is distinguishable from cases such as Nichols v. Seaboard Coastline Railway, 341 So. 2d 671 (Ala. 1976) (prejudice found as a matter of law where juror brought definitions into the jury room during deliberations and copied them onto a chalkboard). We conclude that the particular circumstances of this case provide no basis for finding prejudice as a matter of law." '
>
> "Taite v. State, 48 So. 3d 1, 9 (Ala. Crim. App. 2009), quoting Ex parte Apicella, 809 So. 2d 865, 871-72 (Ala. 2001)."

Jackson v. State, 133 So. 3d 420, 437-38 (Ala. Crim. App. 2009).

Although a plurality of this Court has previously found that a juror's introduction of a defendant's prior criminal history resulted in "prejudice as a matter of law" because it "suggested that [the defendant] had a propensity to commit illegal acts, which was ' "crucial in resolving a key material issue in the case," ' " Taite, 48 So. 3d at 10 (quoting Dawson v. State, 710 So. 2d 472, 475 (Ala. 1997) (quoting other cases)), this is not a case in which a juror's introduction of a defendant's prior criminal acts results in prejudice as a matter of law because the prior criminal acts that E.P. allegedly mentioned to the other jurors were presented to the jury during the State's case-in-chief as part of the proof supporting the capital-murder charges.

As explained above, Peraita was charged with two counts of capital murder -- one count because Peraita killed Lewis while Peraita was under a sentence of life imprisonment, see § 13A-5-40(a)(6), Ala. Code 1975, and one count because Peraita had been convicted of murder within the 20 years preceding the capital offense, see § 13A-5-40(a)(13), Ala. Code 1975. Thus, as part of its case, the State had to prove that Peraita was serving

a sentence of life in prison at the time he killed Lewis and that Peraita had been convicted of murder within the 20 years before he killed Lewis.

At the outset of Peraita's capital-murder trial, Lieutenant Wayne Ragan of the Gadsden Police Department testified that he was present in the Etowah Circuit Court on March 19, 1996, when Peraita was convicted of four counts of capital murder and was sentenced to life in prison. (Record in Peraita, case no. CR-01-0289, R. 875-79.) As part of its proof, the State introduced (and the trial court admitted) several exhibits, including jury verdict forms, sentencing orders, and case-action-summary sheets, showing that Peraita had been convicted in Etowah County of murdering Darrell Collier, Nathaniel Baker, and Tamika Renee Collins during the commission of a first-degree robbery, that he did so pursuant to one scheme or course of conduct, that he committed a first-degree robbery against Bryant Archer, and that he was sentenced to life in prison. (Record in Peraita, case no. CR-01-0289, C. 547-608.)

Because the State had to prove that Peraita had previously murdered other people and that he was serving life in prison, and because the jury was well aware that Peraita had killed three people in Etowah

County, we will not presume prejudice as a matter of law based on E.P.'s comment. So we turn to whether Peraita showed that E.P.'s comment resulted in actual prejudice.

The Alabama Supreme Court has explained the actual-prejudice standard as follows:

> "Apicella argues that when a court is determining whether a juror's conduct has caused actual prejudice the standard applied is whether the extraneous material 'might have influenced that juror and others with whom he deliberated,' Roan v. State, 225 Ala. 428, 435, 143 So. 454, 460 (1932). Apicella relies heavily upon this statement in Roan:
>
> > " 'The test of vitiating influence is not that it did influence a member of the jury to act without the evidence, but that it might have unlawfully influenced that juror and others with whom he deliberated, and might have unlawfully influenced its verdict rendered.'
>
> "225 Ala. at 435, 143 So. at 460.
>
> "On its face, this standard would require nothing more than that the defendant establish that juror misconduct occurred. As Apicella argues, the word 'might' encompasses the entire realm of possibility and the court cannot rule out all possible scenarios in which the jury's verdict might have been affected.
>
> "However, as other Alabama cases establish, more is required of the defendant. In Reed v. State, 547 So. 2d 596,

598 (Ala. 1989), this Court addressed a similar case of juror misconduct:

> " 'We begin by noting that no single fact or circumstance will determine whether the verdict rendered in a given case might have been unlawfully influenced by a juror's [misconduct]. Rather, it is a case's own peculiar set of circumstances that will decide the issue. In this case, it is undisputed that the juror told none of the other members of the jury of her experiment until after the verdict had been reached. While the question of whether she might have been unlawfully influenced by the experiment still remains, the juror testified at the post-trial hearing on the defendant's motion for a new trial that her vote had not been affected by the [misconduct].'
>
> "It is clear, then, that the question whether the jury's decision might have been affected is answered not by a bare showing of juror misconduct, but rather by an examination of the circumstances particular to the case."

Ex parte Apicella, 809 So. 2d 865, 870-71 (Ala. 2001) (some emphasis omitted), abrogated on other grounds by Betterman v. Montana, 578 U.S. ___, 136 S. Ct. 1609, 194 L. Ed. 2d 723 (2016).

Here, at most, Peraita made a bare showing of misconduct -- that is, that E.P. made a statement concerning Peraita's past capital-murder convictions. After examining the circumstances of this particular case and

the evidence Peraita presented at his evidentiary hearing concerning this alleged misconduct, we cannot conclude that the jury's decision to convict Peraita might have been affected by E.P.'s statement. Indeed, as explained above, the jury was well aware that Peraita had previously killed three people in Etowah County and that he was serving a sentence of life imprisonment. Moreover, although V.J. said that E.P. made a comment about Peraita's past murders and that other jurors were present when E.P. made the comment, V.J. did not testify that any other juror heard E.P.'s statement, V.J. did not see any reaction from any of the jurors after E.P.'s statement because she "really didn't look at their faces" (R. 132), V.J. did not have any discussion with any other juror about E.P.'s statement, and V.J. did not testify that E.P.'s statement had any influence on her vote in Peraita's case (R. 133).

Because Peraita failed to prove that E.P.'s statement might have prejudiced him, the circuit court did not err when it concluded that "Peraita failed to prove that the isolated comment purportedly made by [E.P.] prior to the jury's guilt-phase deliberations was, in fact, considered, discussed, or even mentioned by jurors during their guilt-phase

deliberations or that it might have affected the outcome of the guilt-phase trial." (C. 1256.)

Accordingly, Peraita is not entitled to any relief on his juror-misconduct claim.

II.

Next, Peraita argues that the circuit court erred when it denied his claim that his "waiver of his right to present mitigation evidence was not voluntary." (Peraita's brief, p. 37.)

In his second amended petition, Peraita alleged that he "did not knowingly and voluntarily waive his right to present mitigation evidence at his sentencing hearing." (C. 660.) According to Peraita, "[t]he trauma and abuse [he] endured throughout his childhood ... compromised his cognitive and emotional functioning, and specifically rendered him incapable of making a knowing and voluntary waiver of his right to present mitigation evidence during his sentencing phase." (C. 660-61.) Peraita further alleged that the "trial record does not reflect that [his] purported waiver was a rational or reasoned decision based on an understanding of the sentencing phase or of the consequences of his

decision." (C. 661.) Peraita said that, had his counsel "secure[d] the services of a neuropsychologist to assess [his] capacity to make a knowing and voluntary waiver," trial counsel would have learned that Peraita did not have the capacity to waive the presentation of mitigation evidence and, thus, the trial court would have been required to "suspend proceedings or trial counsel would have been required to present ... the extensive mitigating evidence that would have supported the imposition of a sentence other than death." (C. 661.) The circuit court gave Peraita the opportunity to prove these allegations at an evidentiary hearing.

At the hearing, Peraita relied on the testimony of Dr. Marson, a neuropsychologist, to show that he was not able to knowingly and voluntarily waive the presentation of mitigation evidence. (R. 134-247.) Dr. Marson testified that he was hired by Peraita's postconviction counsel to conduct a neuropsychological examination on Peraita. (R. 142, 154.) Dr. Marson said that, "in twenty-five years, [he has] not ... seen a case of childhood trauma as severe as this one." (R. 154.) According to Dr. Marson, Peraita suffered "continuous physical and at times traumatic sexual abuse" from the time he was born until he was 12 years old, which,

he said, "had enormous psychiatric and developmental consequences for him as a child and as an adult." (R. 154.) As a result, Dr. Marson concluded, "there are a number of psychiatric disorders that flowed from this abuse and this childhood trauma," including "childhood traumatic stress disorder" and "childhood psychotic disorder," and Dr. Marson stated that Peraita is "on the schizophrenic spectrum." (R. 154-55.) Based on his examination of Peraita, Dr. Marson found as follows:

> "I think the constellation of psychiatric problems that I alluded to here and the intense personal shame [Peraita] felt about his past was this driving force that -- I think he was probably unconscious of himself but that made it almost impossible for him to be -- to make any decision other than to try to exclude this information from the Court in mitigation. So I don't think that [Peraita] was capable of giving a voluntary waiver because of the profound effects of these psychiatric problems."

(R. 157.) Dr. Marson explained that his findings about Peraita's mental health could have been revealed before Peraita's trial by "[a] very basic psychological evaluation involving standardized testing." (R. 158.)

The State, in response, called Dr. King, a clinical and forensic psychologist, to testify about his findings concerning Peraita's ability to waive the presentation of mitigation evidence. (R. 551-96.) Dr. King said

that he met with Peraita in 2015 and conducted a mental-status examination on him. (R. 559.) According to Dr. King, the examination he performed on Peraita assesses a person's "ability to think clearly, what their affective presentation is, whether they look depressed or animated, whether they are oriented as to person, place and time, [and] their ability to show adequate memory." (R. 560.) Dr. King said that the test he performed also detects the "presence of any delusional thinking, hallucinations, depersonalization, derealization and suicidal ideation or intent that may be present." (R. 560.) Dr. King found that Peraita "had no evidence of any thought disorder," that he had "no evidence of any overt depression or anxiety," that he "was animated throughout the interview [and] was cooperative, gentlemanly, laughed when appropriate, [and] looked a little distressed when appropriate." (R. 561.) Dr. King testified that Peraita "had no evidence of the presence of any delusional thinking, no hallucinations." (R. 561.) Dr. King also said that Peraita "denied that he had any kind of those symptoms" and"reported no suicidal ideations or intent." (R. 561.)

Dr. King explained the difficulty with determining someone's mental state 15 years earlier as follows:

> "I was really trying to determine his mental state fifteen years earlier [but] there are no psychological tests that will tell you that. The only psychological tests that may have some enduring qualities is really an intellectual examination like the Rorschach Intelligence Scale, which I brought with me [to Holman prison], but I chose not to give it because there was no indication that he had an intellectual deficit whatsoever."

(R. 561-62.) Dr. King explained that, in addition to meeting with Peraita, he examined the pretrial forensic evaluations conducted by Dr. Kimberly Ackerson and Dr. James Hooper at Taylor Hardin Secure Medical Facility, reviewed Dr. Robert DeFrancisco's report about Peraita, reviewed the transcript of the colloquy between the trial court and Peraita when Peraita waived the presentation of mitigation evidence, reviewed the presentence-investigation report that was ordered by the trial court, and reviewed the trial court's sentencing order. (R. 557-58.)

Based on his examination and his review of various documents, Dr. King concluded as follows:

> "First off, I found no evidence in my review, especially with the colloquy, that there's any difficulty, that Mr. Peraita had experienced any coercion whatsoever in waiving his

mitigation rights. He was asked repeatedly, over and over again if that were the case. He said that there wasn't.

"I find that when we look at it voluntarily we look for presence of any kind of serious mental illness or intoxication or mental defect that would adversely affect that kind of consideration. Of course, he was not intoxicated as he's been incarcerated. He takes some medications on a regular basis. In addition, he has no history from any mental defect. He never had any traumatic brain injuries that had been documented, no hospitalizations for traumatic brain injury. He had no history to that point of any serious mental illness. He had never been treated for any mental illness. He took no psychotropic medications for treatment. There had been a previous ten-day evaluation at Taylor Hardin Secure Medical Facility which is a prison hospital and the staff, there are multiple psychiatrists, psychologists, nurses, all of who contributed to a report finally generated by Doctors Ackerson and Hooper where they found that there was no evidence of any serious mental illness and had cleared him to actually proceed as competent to stand trial and assist legal counsel on defense for the case that was in Gadsden in Etowah County.

"There had been a previous evaluation by Dr. DeFrancisco, who also found no evidence for any serious mental illness or any defect.

"I did diagnose him with adjustment disorder, personality disorder and some drug dependence.

"So taking, as a whole, all of that information would indicate to me that he would meet that prong of consideration.

"In addition, Mr. Peraita had previously gone through a capital murder trial where mitigation evidence had been

> presented. So he had substantial knowledge about that process, what would occur there and why it would occur. So he certainly knew what mitigation evidence was and why it would be presented and what the outcome might be.
>
> "In addition, I have learned subsequent to my report that he is not only at least of average intelligence but probably functions in a high average range intellectual ability. So he has capacity to be informed, learn from information presented by legal counsel.
>
> "Taken altogether, I think that he has substantial evidence for the ability to waive his mitigation rights if he chooses to do that."

(R. 563-65.)

The circuit court denied Peraita's claim, finding that "Peraita failed to prove by a preponderance of the evidence that his waiver to present mitigation evidence was not knowingly and voluntarily made." (C. 1269.) The circuit court reasoned that this Court had found on direct appeal that "the record 'as a whole affirmatively establishes' that Peraita 'freely waived his right' to the jury's involvement in the penalty phase after having been 'expressly informed of such right' "; that, during Peraita's Rule 32 hearing, the circuit court had found that Peraita was "competent to waive his right to be present at the evidentiary hearing during the

testimony of his brother and mother"; that, "[h]aving been through one capital murder trial and sentencing, Peraita certainly knew if he permitted trial counsel to present mitigation evidence to the jury and judge, it was possible he could again be sentence to life without parole"; and that, instead of taking "that risk, Peraita made the knowing choice to waive his right to present mitigation evidence" because, although "[v]oluntarily waiving mitigation while knowing it would almost certainly lead to a death sentence is completely foreign and irrational to a vast majority of people," "to someone like Peraita ... a death sentence means being alone in a cell on death row away from the constant dangers of general population, and, to that person, such might seem entirely rational." (C. 1268-69.) The circuit court's conclusion that Peraita was competent to waive the presentation of all mitigation evidence and that he did so knowingly and voluntarily is supported by the record.

It is well settled that "a competent defendant can waive the presentation of mitigating evidence at a capital sentencing proceeding." Nelson v. State, 681 So. 2d 252, 255 (Ala. Crim. App. 1995) (opinion on remand from the Alabama Supreme Court).

> "Once a defendant is determined competent to stand trial, a presumption of competence attaches to the defendant in later proceedings. Durocher v. Singletary, 623 So. 2d 482, 484 (Fla. 1993). However, another competency hearing is required if a bona fide question as to the defendant's competency has been raised. Hunter v. State, 660 So. 2d 244, 248 (Fla. 1995)."

Boyd v. State, 910 So. 2d 167, 187 (Fla. 2005) (opinion as revised on denial of rehearing). When a competent defendant (against counsel's advice) wishes to waive the presentation of all mitigating evidence at his sentencing hearing, like Peraita did here, and

> "refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be. The court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence."

Koon v. Dugger, 619 So. 2d 246, 250 (Fla. 1993). Courts must do this to ensure that the defendant's waiver of the presentation of mitigation evidence is done knowingly and voluntarily. The record in this appeal and in Peraita's direct appeal support the circuit court's denial of Peraita's

claim that he did not knowingly and voluntarily waive his right to present mitigation evidence.

Before his trial, Peraita was evaluated for his competency to waive his rights under Miranda v. Arizona, 384 U.S. 436 (1966), and for his competency to stand trial. (Record in Peraita, case no. CR-01-0289, C. 122-25.) After those evaluations, Dr. DeFrancisco concluded that Peraita was both competent to stand trial and competent to waive his Miranda rights. (Record in Peraita, case no. CR-01-0289, C. 480-85.) Thus, a presumption of competence attached to Peraita throughout his trial, including the time when he made his decision to waive the presentation of mitigation evidence. And, as his counsel testified at the evidentiary hearing, Peraita did not do anything to make them believe that he was incompetent to assist in his defense. (R. 503.) Dr. Craig Haney, who Peraita's trial counsel hired as a mental-health expert, also never gave them any reason to believe that Peraita was not competent to waive the presentation of mitigation evidence. (R. 496). In fact, according to his trial counsel, they had discussions with Dr. Haney about Peraita's decision to waive mitigation evidence, and Dr. Haney "never gave [them]

any indication that he believed that there was an issue with Mr. Peraita's competency to waive the penalty phase." (R. 480.)

Although Dr. Marson testified at the evidentiary hearing that Peraita had psychological issues that, he said, would impact Peraita's ability to voluntarily waive the presentation of mitigation evidence, Dr. King concluded otherwise. Dr. King's opinion was consistent with Dr. DeFrancisco's opinion that Peraita was competent and could waive his rights.

Additionally, the record on appeal shows that Peraita made a knowing and intelligent waiver of the presentation of all mitigation evidence when he expressed his desire to waive such evidence. His counsel detailed for Peraita and the trial court what mitigation evidence they had intended to present, and Peraita confirmed that he did not want that evidence presented. (Record in Peraita, case no. CR-01-0289, R. 1295-1303.) After Peraita made it clear that he wanted to waive jury participation in sentencing, the following exchange occurred:

> "THE COURT: Okay. All right. Then the Court is going to allow the Defendant to waive a jury recommendation at this time and of course you realize this is irrevocable? This is it? I

mean once you waive it you waive it. It is going to be very difficult, if not impossible, to come back later and say I want a jury recommendation.

"[Peraita]: I understand.

"THE COURT: So that leads us to the next step as to whether we go forward with a hearing before a pre-sentence report is ordered or after the pre-sentence report is ordered.

"So I am going to ask the Defendant again since I have got to order one anyway and it's got to be received by the Court -- since I have got to order one anyway and have it before I can make a final ruling or decision, do you want to still have an immediate sentencing hearing or do you want to wait?

"[Peraita]: What do you mean sentencing hearing?

"THE COURT: The next phase would be to have a hearing in front of the Judge. Even if you had an advisory verdict from the jury you still have to have a sentencing hearing in front of the Judge. If you waive the jury's advisory verdict then there's a sentencing hearing in front of the Judge. Either way, there's going to be some sort of hearing in front of me.

"[Peraita]: Okay.

"THE COURT: And so with that said unless you consent to it we can't delay it until I receive a pre-sentence report. As I was telling you, it is my understanding that I cannot make a decision until I receive that pre-sentence report. So if you want to go forward with any type of hearing in front of the Court, if we don't do it today or tomorrow or Monday -- we will do it one of those three days, but we have still got to wait for

the pre-sentence report or we can wait until I get the pre-sentence report and have the hearing.

"[Peraita]: I have no problem with doing it now since we're all here and then wait until you get your opinion of what you're going to do. Since we're here I don't see no reason to wait.

"THE COURT: Well, I am not sure I am going to do it today. We might do it Monday. I might wait until Monday. Just don't wait until a pre-sentence report is received. Is that what you want to do rather than do it Monday?

"[Peraita]: Fine with me.

"THE COURT: Is that any problem for counsel?

"MR. STEARNS : Yes, sir, it could be. We need to -- Of course, Dr. Haney is here today and we need to -- the last time we had spoken with Mr. Peraita is that he had instructed us not to put on mitigating evidence whatsoever and if that's still his wish then we won't need to bring Dr. Haney back on Monday or go ahead and hear from him today. Judge, we had intended on -- we're prepared to go forward but Mr. Peraita has instructed us not to.

"THE COURT: Is that correct?

"[Peraita]: Yeah.

"THE COURT: You're in the position where you have instructed your attorneys not to present any mitigating testimony?

"[Peraita]: (Nods Head).

"COURT REPORTER: Would you answer out loud?

"[Peraita]: Oh, yeah. I thought he was going to go forward.

"THE COURT: I'm trying to decide where that puts us then as far as Dr. Haney.

"[Peraita]: He can go home.

"THE COURT: You don't want him to testify on your behalf?

"[Peraita]: No, I don't. There's nothing further to say from this point on.

"MR. STEARNS: He can go back to California today.

"THE COURT : Can either of you think of anything that we need to cover concerning this issue?

"MR. STEARNS: Judge, we would like to inform the Court of what we had intended to offer in way of mitigation just so it's a matter of record and Mr. Peraita hears it and he can inform the Court after hearing that that he's further instructed us not to offer any mitigation whatsoever.

"THE COURT: All right. What is it that you want to proffer?

"MR. STEARNS: Dr. Haney had prepared a social history outline of the family history of Cuhuatemoc Peraita. We would of course not be offering the social history outline into evidence but in it are family backgrounds and circumstances that we would expect to elicit from either Dr. Haney or Cuhuatemoc's

mother, Loretta Mancuso and his brother Edmundo who is here, both who are here and present in the courtroom. We expect that an extensive family background would have been developed through verbal testimony through Dr. Haney, Ms. Mancuso and Mr. Peraita and we would prove the social history outline prepared by Dr. Haney only for the purposes of showing what we would have expected to show and not as evidence itself.

"THE COURT: Okay. [Prosecutor], do you have any objection to that just to make sure the record reflects what is being done? Do you have anything that you want to add to that?

"[Prosecutor]: I have not had the opportunity to review the entire document, Your Honor, but I understand that they are offering that simply as an offer of proof that they would have attempted to introduce as mitigation evidence in response to questions from various people what is set forth on that document. I have no problem with them offering it for that purpose. Just the little bit that I did look at I think that there are probably things contained in there that would not have been admitted into evidence, but if it's just being offered just to show that they would have attempted to elicit; that they would have asked questions to witnesses that, if allowed, would have -- these responses would have been given, I have no problem with that.

"THE COURT: All right. It will be marked for identification and submitted for that limited purpose only to show that the attorneys for the Defendant were prepared to go forward with mitigation testimony and evidence in this case.

"Mr. Peraita, just to make sure, you understand that your attorneys were prepared to go forward with mitigation

evidence, and you're not doing this because you didn't feel like they were prepared or didn't have any evidence on your behalf?

"[Peraita]: No. I feel they did a very good job.

"Are you going to read that?

"THE COURT: Am I going to read it?

"[Peraita]: Yeah.

"THE COURT: I don't know.

"[Peraita]: I mean what I was trying to say is I prefer for you not to. I would not -- I know what they are doing. They did a good -- I'm saying that they did a very good job but I would prefer that you not read that. I don't want mitigating evidence so why put it in? I am saying right now they did a good job.

"THE COURT: It's just to show that they were prepared to go forward and you're not doing this because of any dissatisfaction with them.

"[Peraita]: No.

"THE COURT: You understand that they were prepared to go forward with evidence on your behalf, and we just wanted the record to reflect that.

"All right. Well, having waived the jury's advisory verdict and the State having consented and the Court having consented as well then I think what I could do is dismiss the jury. Then we can decide when we're going to have this

hearing we need to have, whether it be today or some other time.

"Is there anything else that y'all can think of that needs to be covered on the record at this time concerning this waiver of the right to an advisory verdict?

"Do you have any questions about this Mr. Peraita?

"[Peraita]: I just don't want you reading none of my background.

"THE COURT: I understand that. Do you have any questions about your waiver of an advisory verdict by this jury?

"[Peraita]: No.

"THE COURT: You feel like you understand it and you understand the law and that this is what you want to do?

"[Peraita]: Yes, sir.

"THE COURT: Do you feel this is in your best interest?

"[Peraita]: Yes, sir."

(Record in Peraita, case no. CR-01-0289, R. 1295-1303.)

Given Dr. King's testimony at the evidentiary hearing and the above-quoted colloquy, we cannot conclude that the circuit court erred

when it denied Peraita's claim that he did not knowingly and voluntarily waive the presentation of mitigation evidence at his trial.

Moreover, to the extent that Peraita alleged in his petition that his counsel were ineffective for failing to hire a neuropsychologist to assess his ability to waive the presentation of mitigation evidence, that claim also fails. It is clear from the testimony at Peraita's Rule 32 evidentiary hearing that expert witnesses can have varying opinions about the same subject matter. In part because of the variance in expert opinions, "to obtain relief on a claim that counsel were ineffective for failing to hire an expert witness, the petitioner must first plead the name of that expert, the substance of that expert's testimony, and that the expert is willing and available to testify at the petitioner's trial; then the petitioner must prove each of those allegations at an evidentiary hearing." Brooks v. State, [Ms. CR-16-1219, July 10, 2020] ___ So. 3d ___, ___ (Ala. Crim. App. 2020). Peraita failed to prove that Dr. Marson was available to provide his expert opinion about Peraita's mental state to trial counsel or for the court's consideration during Peraita's trial.

Indeed, although Dr. Marson did not recall having been retained by Peraita's trial counsel as an expert witness, one of Peraita's trial counsel testified that they had retained Dr. Marson as a psychological expert in Peraita's case before his trial but "had to look elsewhere" when Dr. Marson informed them that he had a conflict and could not serve as an expert for Peraita. (R. 474.) Thus, the evidence presented at the evidentiary hearing showed that not only did Peraita's trial counsel retain Dr. Marson (thus, foreclosing any claim that counsel were ineffective for failing to hire Dr. Marson), but also that Dr. Marson did not participate in Peraita's trial because he had a conflict that prevented him from doing so. In short, Peraita failed to prove that Dr. Marson was available to testify at his trial.

Accordingly, the circuit court did not err when it denied this claim.

III.

Next, Peraita argues that the circuit court erred when it denied his claim that his counsel were ineffective during the penalty phase of his trial when they "took no steps to investigate [his] capacity to make a knowing and voluntary waiver of his right [to present mitigation

evidence]." (Peraita's brief, pp. 44-70.) Specifically Peraita argues that his counsel (1) had a "duty to investigate [his] capacity to knowingly and voluntarily waive mitigation evidence" and failed to do so (Peraita's brief, pp. 53-56); (2) "had ample reason to investigate [his] capacity to knowingly and voluntarily waive mitigation" because of Peraita's history of "severe physical and sexual abuse," his "family history included severe psychiatric illnesses," his "history of suicidal acts," and his failure to "articulate[] any reason for his decision to waive mitigation evidence" (Peraita's brief, pp. 56-59); and (3) "failed to conduct a reasonable investigation regarding [his] mental capacity to waive mitigation" (Peraita's brief, pp. 59-65).

Peraita contends that effective counsel would have "sought the assistance of a psychologist to evaluate [his] capacity to knowingly and voluntarily waive mitigation evidence" and that, if his counsel had done so, "they would have learned of Peraita's significant psychiatric and psychological conditions -- for which many 'red flags' already existed in the record at the start of the 2001 trial."[7] (Peraita's brief, p. 52.)

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[7]In his brief on appeal, Peraita raises his arguments as Issues III.A.1, III.A.2, III.A.3, and III.B. Because all of these arguments concern

As we have often stated:

> "'To prevail on a claim of ineffective assistance of counsel, the petitioner must show (1) that counsel's performance was deficient and (2) that the petitioner was prejudiced by the deficient performance. See Strickland v. Washington, 466 U.S. 668 (1984).
>
> > "'"Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of

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his counsels' duty to investigate whether Peraita had the capacity to waive the presentation of mitigation evidence, we address his claims together.

> 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.

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

> something more or something different. So, omissions are inevitable. But, the issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.' Burger v. Kemp, 483 U.S. 776, 107 S. Ct. 3114, 3126, 97 L. Ed. 2d 638 (1987)."
>
> " 'Chandler v. United States, 218 F.3d 1305, 1313-14 (11th Cir. 2000) (footnotes omitted).
>
> " ' ....'
>
> "....
>
> "We also recognize that when reviewing claims of ineffective assistance of counsel 'the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.' Strickland v. Washington, 466 U.S. 668, 698, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)."

Marshall v. State, 182 So. 3d 573, 582-83 (Ala. Crim. App. 2014).

In denying Peraita's claim that his counsel were ineffective for failing to investigate his capacity to waive the presentation of mitigation evidence and for failing to hire a psychologist to evaluate his capacity to knowingly and voluntarily waive mitigation evidence, the circuit court made several findings. The circuit court concluded that Peraita's trial counsel "did, in fact, investigate whether Peraita was competent to waive presenting mitigation"; that there was no indication that Peraita was not

competent to waive mitigation; and that trial counsels' reliance on Dr. Haney's opinion that Peraita was competent to waive mitigation evidence was reasonable. (C. 1260-62.) The circuit court also found that Peraita had failed to prove that his counsel were ineffective for failing to seek an additional mental-health examination by Dr. Marson because his trial counsel had retained Dr. Marson and Dr. Marson "withdrew due a scheduling conflict." (C. 1262.) The circuit court's findings are supported by the record.

As explained above, Peraita's trial counsel testified at the evidentiary hearing that they learned early in their representation of Peraita that he intended to oppose the presentation of mitigation evidence during the penalty phase of his trial. Even so, Peraita's counsel developed an extensive mitigation case, hoping that they could convince Peraita to change his mind. Contrary to Peraita's assertions, whether Peraita had the capacity to waive the presentation of mitigation evidence was not a question that his trial counsel did not explore. In fact, Stearns testified that, although they did not have a clinical psychologist or neuropsychologist examine Peraita to "determine whether there was a

psychological basis of [his] decision not to present mitigation evidence," they

> "had Dr. Marson at one point in time. He was a neuropsychologist and Dr. Haney was the clinical psychologist. [Dr. Haney] was present and he never gave us any indication that he believed that there was an issue with Mr. Peraita's competency to waive the penalty phase. Dr. Haney was here, and we proffered him as an expert on institutionalization. He stayed in anticipation that we might be able to change [Peraita's] mind and [Dr. Haney] could testify at the penalty phase. So we consulted with Dr. Haney and there was no indication."

(R. 480-81.) When questioned as to whether they asked Dr. Haney if Peraita should be "examined and tested concerning his decision not to present the mitigation evidence," Peraita's counsel explained that they "met with Dr. Haney and Aaron McCall[, the mitigation expert,] and [they] discussed it in great length." Peraita's counsel testified that "Dr. Haney didn't indicate[] that he thought that [Peraita] was not able to make that decision" (R. 481), and they "discussed whether [Peraita] was able to waive mitigation and [they] relied on Dr. Haney." (R. 482.)

In short, although Peraita alleged that his counsel were ineffective because they "took no steps to investigate [his] capacity to make a

knowing and voluntary waiver of his right [to present mitigation evidence]" (Peraita's brief, pp. 44-70), his counsel did take steps to answer the question whether Peraita had the capacity to waive the presentation of mitigation evidence by discussing the issue with Dr. Haney. Peraita's trial counsel were not ineffective for relying on Dr. Haney's judgment. See Brooks, ___ So. 3d at ___ ("Brooks's ' "[t]rial counsel had no reason to retain another psychologist to dispute [Dr. King's] findings," ' Ray v. State, 80 So. 3d 965, 989-90 (Ala. Crim. App. 2011) (quoting Waldrop v. State, 987 So. 2d 1186, 1193 (Ala. Crim. App. 2007)), were 'entitled to rely on [Dr. King's] opinion of [Brooks's] mental condition, and ... [were] not obliged to shop around for another diagnosis that postconviction counsel now says was more favorable to [Brooks].' White v. State, [Ms. CR-16-0741, April 12, 2019] ___ So. 3d ____, ____ (Ala. Crim. App. 2019)."). Thus, the circuit court did not err when it denied this claim.

Moreover, although Peraita contends that effective counsel would have "sought the assistance of a psychologist to evaluate [his] capacity to knowingly and voluntarily waive mitigation evidence," and that, if his counsel had done so in this case, "they would have learned of Peraita's

significant psychiatric and psychological conditions" (Peraita's brief, p. 52), the circuit court correctly denied this claim for a second reason. At the evidentiary hearing, Peraita presented Dr. Marson as the mental-health expert his counsel should have hired to evaluate Peraita's capacity to waive mitigation. Of course, Peraita's trial counsel did hire Dr. Marson, but Dr. Marson did not participate in Peraita's defense because he had a conflict. As the circuit court correctly found when it denied this claim, "[t]he fact that Dr. Marson withdrew was not the fault of trial counsel, so their failure to have Peraita evaluated by Dr. Marson cannot be considered against trial counsel." (C. 1262.)

Even if Peraita's counsel had not initially retained Dr. Marson, his counsel would still not have been ineffective for failing to hire a mental-health expert to examine Peraita's capacity to waive mitigation, because they hired Dr. Haney and relied on Dr. Haney's judgment. The fact that a Rule 32 petitioner has found, " 'years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial.' " Ward

v. Hall, 592 F.3d 1144, 1173 (11th Cir. 2010) (quoting Davis v. Singletary, 119 F.3d 1471, 1475 (11th Cir. 1997)).

Accordingly, the circuit court did not err when it denied this claim.

IV.

Peraita next argues that the circuit court erred when it summarily dismissed his claims that his counsel were ineffective during the guilt phase of his trial. (Peraita's brief, pp. 70-82.)

As set out above, " ' "[t]o prevail on a claim of ineffective assistance of counsel, the petitioner must show (1) that counsel's performance was deficient and (2) that the petitioner was prejudiced by the deficient performance. See Strickland v. Washington, 466 U.S. 669 (1984)." ' " Brooks, ___ So. 3d at ___ (quoting Marshall, 182 So. 3d at 582-83, quoting in turn Yeomans v. State, 195 So. 3d 1018, 1026 (Ala. Crim. App. 2013)). A Rule 32 petitioner also has the burden of adequately pleading claims of ineffective assistance of counsel in his or her petition.

This Court has explained the pleading requirements of Rules 32.3 and 32.6(b), Ala. R. Crim. P., as follows:

> "'"'Rule 32.6(b) requires that the petition itself disclose the facts relied upon in seeking relief. Boyd v. State, 746 So. 2d 364, 406 (Ala. Crim. App. 1999). In other words, it is not the pleading of a conclusion "which, if true, entitle[s] the petitioner to relief." Lancaster v. State, 638 So. 2d 1370, 1373 (Ala. Crim. App. 1993). It is the allegation of facts in pleading which, if true, entitle[s] a petitioner to relief. After facts are pleaded, which, if true, entitle the petitioner to relief, the petitioner is then entitled to an opportunity, as provided in Rule 32.9, Ala. R. Crim. P., to present evidence proving those alleged facts.'"'
>
> "'[Boyd v. State,] 913 So. 2d [1113,] 1125 [(Ala. Crim. App. 2003)]. The burden of pleading under Rule 32.3 and Rule 32.6(b) is a heavy one. Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b). The full factual basis for the claim must be included in the petition itself. If, assuming every factual allegation in a Rule 32 petition to be true, a court cannot determine whether the petitioner is entitled to relief, the petitioner has not satisfied the burden of pleading under Rule 32.3 and Rule 32.6(b).'

"Hyde v. State, 950 So. 2d 344, 356 (Ala. Crim. App. 2006) (emphasis added). 'The pleading requirements of Rule 32 apply equally to capital cases in which the death penalty has

> been imposed.' Taylor v. State, 157 So. 3d 131, 140 (Ala. Crim. App. 2010."

Woods v. State, 221 So. 3d 1125, 1132-33 (Ala. Crim. App. 2016). We have also explained that, even if a claim of ineffective assistance of counsel is sufficiently pleaded, counsel is not ineffective for failing to raise a meritless claim. Id. at ___ (citing Carruth v. State, 165 So. 3d 627, 645 (Ala. Crim. App. 2014)). With these principles in mind, we address Peraita's arguments on appeal.

IV.A.

First, Peraita argues that the circuit court erred when it summarily dismissed his claim that his counsel were ineffective for failing "to investigate and present the self-defense case." (Peraita's brief, p. 73.) In his petition, Peraita divided this general claim of ineffective assistance of

counsel into several subcategories.[8] (See C. 323-42.) We address each argument in turn.

IV.A.1.

Peraita first argues that the circuit court erred when it summarily dismissed his claim that his counsel were ineffective for failing "to investigate threats against [him]." (Peraita's brief, p. 75.)

In his first amended petition, Peraita alleged that his counsel were ineffective because they "made no effort to present evidence that [his] life had been threatened days before the incident resulting in Mr. Lewis'[s] death." (C. 323.) According to Peraita, "[o]n December 2, 1999, a 'reliable source' advised Officer Darrell Owens that Mr. Peraita 'was going to get stabbed down if [Officer Owens] did not get [Mr. Peraita] out of

[8]Peraita argues, in passing, that the circuit court erred when it considered his several subcategories individually rather than as a "single unified claim." (Peraita's brief, p. 75.) Peraita's argument is meritless. " 'The claim of ineffective assistance of counsel is a general allegation that often consists of numerous specific subcategories. Each subcategory is an independent claim that must be sufficiently pleaded.' " Washington v. State, 95 So. 3d 26, 58 (Ala. Crim. App. 2012) (quoting Coral v. State, 900 So. 2d 1274, 1284 (Ala. Crim. App. 2004), overruled on other grounds, Ex parte Jenkins, 972 So. 2d 159 (Ala. 2005)). Thus, the circuit court did not err when it considered Peraita's claims individually.

population.' " (C. 323.) Peraita further alleged that, as a result of this reliable source's information, Peraita was removed from "population" while officers conducted an investigation. Peraita also alleged that the "threat to [his] life was related to his relationship with Mr. Castillo" and that, "[a]fter a limited investigation, [he] was returned to population." (C. 323-24.) The circuit court summarily dismissed this claim as insufficiently pleaded and as meritless. (C. 486.) We agree with the circuit court.

Indeed, although Peraita alleged that his counsel "made no effort to present evidence that [his] life had been threatened" days before he and Castillo murdered Lewis, Peraita did not allege who had allegedly threatened him -- a fact that would dictate whether such evidence would have been admissible at Peraita's trial. See Campbell v. State, 654 So. 2d 69, 74-75 (Ala. Crim. App. 1994) (holding that the circuit court properly excluded evidence of threats made to the defendant that were not made by the victim). Although Peraita alleged in his petition that a "reliable source" told Officer Owens of the threat, Peraita did not allege who the reliable source was who told Officer Owens about the threat. Thus, the

circuit court correctly concluded that Peraita's claim was insufficiently pleaded.

Moreover, Peraita's claim that his counsel failed to present evidence that Lewis had threatened him is clearly refuted by the record on direct appeal. At trial, Peraita's counsel put on evidence from inmate Michael Best who testified that Lewis had threatened Castillo and Peraita and that Best had told them that Lewis had made those threats. (Record in Peraita, case no. CR-01-0289, R. 1124-25.) Similarly, Peraita's counsel put on evidence from inmate James Jones, who testified that Lewis had made a threat to him "against Mr. Peraita" and that he had told Peraita about the threat. (Record in CR-01-0289, R. 1135-36.) Because the record on direct appeal shows that his trial counsel did present evidence that Lewis had threatened him, Peraita's claim that his counsel were ineffective for failing to present such evidence is refuted by the record and was properly dismissed. See Yeomans, 195 So. 3d at 1031 ("Thus, the record on direct appeal refutes this claim, and the circuit court did not err in summarily disposing of it. Rule 32.7(d), Ala. R. Crim. P.").

Accordingly, the circuit court did not err when it summarily dismissed this claim.

IV.A.2.

Next, Peraita alleges that the circuit court erred when it summarily dismissed his claim that his counsel were ineffective for failing to call various inmate witnesses to testify at his trial.

In his original petition, Peraita alleged that his counsel were ineffective because, he said, they failed to "investigate and develop" testimony from several inmate witnesses -- namely, Victor Ayler, Eddie John Campbell, Darwin Gregory Knight, Jimmy Harden, Jack King, Christopher Lane, Charles Davis, and Best. (C. 22-28.) In his first amended petition, Peraita reasserted this claim and alleged that "[s]everal of these witnesses would have offered testimony to either directly contradict evidence offered by the State or to provide context and background necessary to fully present [his] defense." (C. 325.) In reasserting this claim in his first amended petition, Peraita abandoned his allegations concerning inmate Victor Ayler and added allegations

concerning inmate Edward Junior. (C. 325-31.) Peraita, again, reasserted these allegations in his second amended petition. (C. 608-15.)

The circuit court summarily dismissed Peraita's claims as to inmates Knight, Harden, Lane, Davis, Best, and Junior as either insufficiently pleaded and/or without merit, but it granted him an evidentiary hearing on his claims as to inmates Campbell and King.[9] (C. 486-87, 695-96.)

On appeal, Peraita assumes that the circuit court summarily dismissed his claims concerning inmates Knight, Harden, Lane, Davis, Best, and Junior because it determined that their testimony would have been cumulative to other testimony presented at trial and argues that "the idea that additional witnesses would have been cumulative in a capital murder trial where the defense hardly presented any evidence at all does not withstand scrutiny" and that, even so, "the unpresented testimony was not cumulative by any definition." (Peraita's brief, pp. 77-78.) Peraita then lists the following six "facts [these witnesses] could have presented": (1) "Testimony that Peraita reported problems with Lewis to

[9]We address the circuit court's findings as to inmates Campbell and King in Part V.A. of this opinion.

prison officials"; (2) "Testimony that Peraita feared Lewis"; (3) "Testimony that Lewis had a reputation for carrying a knife"; (4) "Testimony that Peraita was controlled by Castillo"; (5) "Testimony that Peraita never stabbed Lewis"; and (6) "Testimony that Peraita did not make statements about wanting Lewis to die ... and that the statements were actually by Castillo." (Peraita's brief, p. 78.)

It is not clear whether the circuit court dismissed Peraita's claims as to inmates Knight, Harden, Lane, Davis, Best, and Junior because, as Peraita says, their testimony would have been cumulative. But we have held on numerous occasions that " 'Rule 32.7 does not require the trial court to make specific findings of fact upon a summary dismissal.' Fincher v. State, 724 So. 2d 87, 89 (Ala. Crim. App. 1998)." McAnally v. State, 295 So. 3d 149, 152 (Ala. Crim. App. 2019). Even though the grounds for dismissal of these claims by the trial court were not clear, the claims were properly dismissed because the proposed testimony was cumulative to other evidence presented at trial or inadmissible or because the failure to introduce it did not prejudice Peraita.

Concerning unpresented cumulative evidence, this Court has explained that,

> "'"'the failure to present additional mitigating evidence that is merely cumulative of that already presented does not rise to the level of a constitutional violation.' Nields v. Bradshaw, 482 F.3d 442, 454 (6th Cir. 2007) (quoting Broom v. Mitchell, 441 F.3d 392, 410 (6th Cir. 2006))." Eley v. Bagley, 604 F.3d 958, 968 (6th Cir. 2010). "This Court has previously refused to allow the omission of cumulative testimony to amount to ineffective assistance of counsel." United States v. Harris, 408 F.3d 186, 191 (5th Cir. 2005). "Although as an afterthought this [defendant's father] provided a more detailed account with regard to the abuse, this Court has held that even if alternate witnesses could provide more detailed testimony, trial counsel is not ineffective for failing to present cumulative evidence." Darling v. State, 966 So. 2d 366, 377 (Fla. 2007).'

"Daniel v. State, 86 So. 3d 405, 429-30 (Ala. Crim. App. 2011). '[P]ostconviction evidence can be cumulative to evidence presented during trial even where the postconviction evidence is more elaborate than the trial testimony. See Sweet v. State, 810 So. 2d 854, 863 (Fla. 2002).' State v. Bright, 200 So. 3d 710, 737 (Fla. 2016). '"[T]his Court has held that 'even if alternate witnesses could provide more detailed testimony, trial counsel is not ineffective for failing to present cumulative evidence.'"' Bailey v. State, 151 So. 3d 1142, 1151 (Fla. 2014). See also Davis v. State, 486 S.W.3d 898, 907 (Mo. 2016) ('[T]rial counsel's failure to develop or present evidence that is cumulative to that presented at trial does not constitute

> ineffective assistance of counsel.'); Commonwealth v. Mason, 130 A.3d 601, 648 (Pa. 2015) ('Nor may a determination of ineffective assistance of counsel be founded upon counsel's failure to present mitigating evidence that would have been cumulative of evidence presented at the penalty phase.'); Marcyniuk v. State, 436 S.W.3d 122, 135 (2014) ('[T]he failure to call witnesses whose testimony would be cumulative to testimony already presented does not deprive the defense of vital evidence.')."

Saunders v. State, 249 So. 3d 1153, 1171 (Ala. Crim. App. 2016). Although Saunders concerns trial counsel's failure to present penalty-phase evidence, Saunders applies equally to trial counsel's failure to present guilt-phase evidence.

At trial, Peraita's trial counsel called several inmate witnesses to testify concerning Peraita's relationship with Lewis, the events leading up to Lewis's murder, what happened when Lewis was murdered, and what happened after Lewis was murdered, including: Best, Harden, Knight, and Jones. Although Peraita alleged that his counsel were ineffective because they failed to present testimony from Best that "Lewis had a reputation for carrying a knife" and failed to present testimony from Harden, Junior, and Davis that "Peraita never stabbed Lewis," that testimony would have been cumulative to other evidence at Peraita's trial.

Indeed, at his trial, Peraita's counsel presented testimony from Harden that Lewis's "general reputation ... among the inmates" was that "[h]e's a notorious knife-fighter." (Record in Peraita, case no. CR-01-0289, R. 1142.) Additionally, as explained in part V.B. of this opinion, Peraita's counsel did present evidence through Dr. William John McIntyre and Dr. Leroy Riddick that Peraita did not stab Lewis. Counsel is not ineffective for failing to present cumulative evidence. Thus, the circuit court properly dismissed these claims of ineffective assistance of counsel.

As to Peraita's claims that his counsel were ineffective because they failed to present testimony from Knight and Best that "Peraita reported problems with Lewis to prison officials," failed to present testimony from Best that "Peraita feared Lewis," and failed to present testimony from Knight and Harden that "Peraita was controlled by Castillo," that testimony -- as characterized by Peraita in his petition -- would have been inadmissible in Peraita's trial. Indeed, testimony from Knight or Best regarding Peraita's "reporting" problems with Lewis to prison officials and comments from Knight or Harden about Castillo's "controlling" Peraita would have been inadmissible hearsay under the Alabama Rules of

Evidence, and testimony from Best concerning Peraita's "fear" of Lewis would have been inadmissible because " '[a] witness may not testify to the ... mental operation of another.' " Walker v. State, 194 So. 3d 253, 305 (Ala. Crim. App. 2015) (quoting Perry v. Brakefield, 534 So. 2d 602, 608 (Ala. 1988)). Counsel is not ineffective for failing to present inadmissible evidence. Thus, the circuit court did not err when it summarily dismissed these claims.

Additionally, as to Peraita's claim that his counsel were ineffective for failing to present testimony from Lane that "Peraita did not make statements about wanting Lewis to die ... and that the statements were actually by Castillo" (Peraita's brief, p. 78), Peraita failed to sufficiently plead how he was prejudiced by that failure. As we have explained,

> "to satisfy the burden of pleading a claim of ineffective assistance of counsel, a petitioner cannot merely allege that prejudice occurred or that there was some conceivable effect on the outcome of the trial; a petitioner must allege 'specific facts indicating how the petitioner was prejudiced,' i.e., how the outcome of the trial would have been different. Hyde v. State, 950 So. 2d 344, 356 (Ala. Crim. App. 2006)."

Mashburn, 148 So. 3d at 1116.

In his first amended petition, Peraita alleged that, if called, Lane would have testified that "Castillo was the person who said 'Let the bitch die' after the stabbing had occurred, and not Mr. Peraita," and that failing to introduce this testimony prejudiced Peraita because it "would have established Mr. Castillo as the aggressor at the scene of the stabbing, and not Mr. Peraita." (C. 329.) But Peraita did not plead how testimony from Lane that it was Castillo who said "Let the bitch die" would have resulted in a different outcome in Peraita's trial in light of other comments that Peraita made to Lewis, including, when he said to Lewis: "Die, n*****" (Record in Peraita, case no. CR-01-0289, R. 1045); when he said: "Mother fucker, die" (Record in Peraita, case no. CR-01-0289, R. 1031); and when Peraita swung the knife at corrections officers and told them: "Y'all get back or we'll cut you too" (Record in Peraita, case no. CR-01-0289, R. 954). Because Peraita did not adequately plead how he was prejudiced by his counsels' failure to present Lane's testimony in light of the other comments Peraita made to Lewis (which Lane's testimony does not contradict), the circuit court did not err when it summarily dismissed this claim.

IV.A.3.

Peraita next argues that the circuit court erred when it summarily dismissed his claim that his counsel were ineffective for failing "to introduce evidence of Mr. Lewis's history of violence." (Peraita's brief, p. 79.)

The totality of Peraita's argument on appeal regarding this issue is as follows:

> "The circuit court also erred when it summarily dismissed Peraita's claim of ineffective assistance of counsel resulting from trial counsel's failure to introduce evidence of Mr. Lewis's disciplinary records. C486; C331-32. The Circuit Court cited Rule 32.7, apparently accepting the State's argument that evidence of Mr. Lewis's disciplinary records could not have changed the outcome because this Court held there was sufficient evidence to convict Petitioner. C409 (citing Peraita v. State, 897 So. 2d 1161, 1211-12 (Ala. Crim. App. 2003)). But this Court's holding that the evidence presented at trial was legally sufficient to support a conviction has no bearing on whether counsel's failure to present other evidence had a reasonable probability of convincing the jury to reach a different conclusion."

(Peraita's brief, p. 79.) This argument does not satisfy Rule 28(a)(10), Ala. R. App. P., which requires that an argument contain "the contentions of the appellant/petitioner with respect to the issues presented, and the

reasons therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on." (Emphasis added.)

Indeed, Peraita cites no authority to support his contention that the circuit court erred when it summarily dismissed this claim. Instead, Peraita surmises that the circuit court erred when it "apparently accept[ed]" the State's reasons as to why his claim should be summarily dismissed. "'"It is not the function of this Court to .... to make and address legal arguments for a party based on undelineated general propositions not supported by sufficient authority or argument."'" Ex parte Borden, 60 So. 3d 940, 943 (Ala. 2007) (quoting Butler v. Town of Argo, 871 So. 2d 1, 20 (Ala. 2003), quoting in turn Dykes v. Lane Trucking, Inc., 652 So. 2d 248, 251 (Ala. 1994)). Consequently, Peraita's argument does not satisfy Rule 28(a)(10), and his argument that the circuit court erred when it summarily dismissed his claim is abandoned.

Even so, Peraita's argument on appeal is without merit. In his second amended petition, Peraita alleged that his counsel were ineffective for failing "to present evidence of Mr. Lewis'[s] violent history." (C. 615.) Specifically, Peraita alleged that his trial counsel should have introduced

"evidence of Mr. Lewis'[s] disciplinary record at the prison, which included approximately 89 disciplinary infractions." (C. 615.) Peraita alleged that "[n]ine of these infractions were for 'fighting,' four were for 'possession of contraband,' three were for 'threats,' one was for 'harassment,' and one was for 'assault.'" (C. 615.) Peraita further alleged that Lewis's disciplinary record "was admissible evidence" and "could have been used to support a theory of self-defense, as it is pertinent to Mr. Lewis's reputation for violence." (C. 615.) Peraita then alleged generally that his counsels' failure to introduce "this evidence of Lewis's violent actions and reputation was deficient performance that prejudiced the defense, and there is a reasonable probability that the result of the proceedings would have been different were it not for this error." (C. 615.) The circuit court summarily dismissed Peraita's claim on the basis that it was "without merit under Rule 32.7(d)." (C. 695.) We agree with the circuit court.

To start, although Peraita alleged that his counsel should have presented Lewis's prison-disciplinary records to prove "Mr. Lewis'[s] reputation for violence" (C. 615), Lewis's disciplinary records (assuming the records would have been admissible at trial) would have been

cumulative to other lawfully admitted evidence at Peraita's trial. Indeed, at his trial, Peraita's counsel presented testimony from inmates Best, Jones, and Harden. Best testified that, in his opinion, Lewis was "violent" and that Lewis had threatened Peraita and Castillo. (Record in Peraita, case no. CR-01-0289, R. 1123, 1124-25.) Jones testified that Lewis had made a threat against Peraita and that Castillo and Peraita "paid" Lewis two cartons of cigarettes to leave them alone. (Record in Peraita, case no. CR-01-0289, R. 1134-35.) Finally, Harden testified that Lewis's "general reputation ... among the inmates" was that "[h]e's a notorious knife-fighter." (Record in Peraita, case no. CR-01-0289, R. 1142.) Counsel is not ineffective for failing to present cumulative evidence. See Washington v. State, 95 So. 3d 26, 52 (Ala. Crim. App. 2012) (holding that counsel was not ineffective for failing to present evidence that would have been cumulative to other evidence presented at trial). Thus, the circuit court did not err when it summarily dismissed this claim.

Additionally, the circuit court properly dismissed this claim because it was insufficiently pleaded. Indeed, we have explained that, under Rule 404, Ala. R. Evid., evidence of " 'the deceased's violent nature may be

proved only by evidence of reputation and not by specific acts, ' " James v. State, 61 So. 3d 357, 366 n.5 (Ala. Crim. App. 2010) (quoting Quinlivan v. State, 627 So. 2d 1082, 1084 (Ala. Crim. App. 1992)), unless, in a case of self-defense, the accused had knowledge of a specific act of violence committed by the deceased. See Wright v. State, 641 So. 2d 1274, 1280 (Ala. Crim. App. 1993). Although Peraita pleaded facts showing that Lewis had a prison-disciplinary record and that the record included some specific incidences of Lewis's conduct, Peraita did not plead any facts as to the details of those specific incidences, who those specific incidences involved, when those specific incidences occurred, and whether Peraita actually had any knowledge of those incidences. Thus, Peraita failed to sufficiently plead any facts showing that Lewis's prison-disciplinary records would have been admissible had his trial counsel sought to admit them. Accordingly, Peraita is not entitled to any relief on this claim.

IV.A.4.

Peraita also argues that the circuit court erred when it summarily dismissed his claim that his counsel were ineffective "in [the] cross-examination of a State witness" by undermining his self-defense case

when they "asked [a] witness about his knowledge of threats by Lewis against [Peraita] even though the witness had specifically denied any such knowledge in [Department of Corrections] interviews." (Peraita's brief, p. 80.)

In his second amended petition, Peraita alleged that his counsel were ineffective when they "undermined the self-defense case in cross-examination" of Alvin Hamner when they asked Hamner whether he was aware of "trouble" between Lewis, Castillo, and Peraita and whether he was aware of threats that Lewis had made concerning Castillo and Peraita and Hamner denied having such knowledge. (C. 619.) Peraita alleged that his counsel had been provided with a statement that Hamner made to prison investigators in which he denied having any knowledge of "trouble between Mr. Lewis and Peraita and Mr. Castillo." (C. 620.) Peraita further alleged that, being armed with that knowledge, his counsel performed deficiently when they asked Hamner about the "trouble" and the "threats" because it made "it seem that Mr. Lewis never made any threats." (C. 620.) Peraita claimed that his counsels' cross-examination prejudiced him because, he said, "[t]his predictably fruitless

cross-examination could only increase the jury's doubts that Mr. Lewis had ever made any deadly threats." (C. 621.) The circuit court summarily dismissed this claim, in part, on the basis that it was meritless. (C. 695.) We agree with the circuit court.

The record on direct appeal shows the following exchange occurred between Peraita's counsel and Hamner during cross-examination:

> "[Peraita's counsel]: Had you known Quincy Lewis and Mr. Castillo and Lil' Warrior prior to [the stabbing]?
>
> "[Hamner]: Yeah, just from, you know, being at Holman Prison. I don't know them personally.
>
> "[Peraita's counsel]: You knew that they were having some trouble; didn't you?
>
> "[Hamner]: I didn't know nothing about them having no trouble.
>
> "....
>
> "[Peraita's counsel]: You don't know anything about Quincy Lewis threatening them?
>
> "....
>
> "[Peraita's counsel]: I believe my question to you is did you know of any threats that were made by Quincy Lewis against either Castillo or Mr. Peraita?

> "[Hamner]: No, sir.
>
> "[Peraita's counsel]: Do you know of any sort of transaction that occurred where Mr. Castillo and Mr. Peraita paid Quincy Lewis to leave them alone?
>
> "[Hamner]: No, sir.
>
> "[Peraita's counsel]: You don't know anything about that?
>
> "[Hamner]: No, sir."

(Record in Peraita, case no. CR-01-0289, R. 1034-36.) Thereafter, during the defense case, Peraita's counsel put on several other inmate witnesses to testify concerning the "trouble" between Peraita, Castillo, and Lewis. Specifically, there was testimony that Lewis was "violent," that the relationship between the three "deteriorated over time," that Lewis had made threats against Peraita and Castillo, that Peraita and Castillo were made aware of those threats, that there were "problems between the three of them," and that Peraita and Castillo "paid [Lewis] two cartons of cigarettes to leave them alone." (Record in Peraita, case no. CR-01-0289, R. 1122-23, 1124, 1125, 1133, 1134-35, 1136, 1143.)

Although Peraita alleged that his trial counsel should not have asked Hamner about the "trouble" and the "threats" when Hamner did not

have any personal knowledge of those things because doing so made "it seem that Mr. Lewis never made any threats" (C. 620), trial counsels' questioning Hamner about his lack of knowledge about the "trouble" and "threats," in the context of the entire trial, was a matter of trial strategy and does not amount to ineffective assistance of counsel.

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

Bush v. State, 92 So. 3d 121, 155 (Ala. Crim. App. 2009) (quoting A.G. v. State, 989 So. 2d 1167, 1173 (Ala. Crim. App. 2007)). " ' "[T]he scope of cross-examination is grounded in trial tactics and strategy, and will rarely constitute ineffective assistance of counsel." ' " Stanley v. State, [Ms. CR-18-0397, May 29, 2020] ___ So. 3d ___, ___ (Ala. Crim. App. 2020) (quoting

Bonner v. State, 308 Ga. App. 827, 828, 709 S.E.2d 358, 360 (2011), quoting in turn Cooper v. State, 281 Ga. 760, 762, 642 S.E.2d 817, 820 (2007)).

Moreover, trial counsels' questioning Hamner about his lack of knowledge did not undermine Peraita's self-defense case because that line of questioning merely established that Hamner was unaware of the trouble between Castillo, Peraita, and Lewis and that he was unaware of the threats Lewis had made concerning Castillo and Peraita. It did not establish that those things never occurred. As set out above, Peraita's trial counsel put on evidence from other inmates that established that there was trouble between Castillo, Peraita, and Lewis and that Lewis had made threats concerning Castillo and Peraita.

Accordingly, the circuit court did not err when it summarily dismissed this claim.

IV.A.5.

Next, Peraita argues that the circuit court erred when it summarily dismissed his claim that his counsel were ineffective for failing "to

adequately prepare evidence of Mr. Lewis's intoxication." (Peraita's brief, p. 81.)

In his first amended petition, Peraita alleged that his counsel were ineffective for failing "to prepare adequate evidence of the fact that Mr. Lewis regularly used Artane, a drug that commonly makes users short-tempered, paranoid, and quick to anger, and that on the day of his death Mr. Lewis was behaving as though he was under the influence of Artane." (C. 337-38.) According to Peraita, his counsel "made two critical failures": (1) "they failed to secure an expert to testify as to the psychological effects of Artane" and (2) "they failed to proffer evidence that Mr. Lewis regularly obtained Artane by buying it from other inmates on the black market -- not from the prison pharmacy." (C. 338.) As to the second "critical failure," Peraita alleged that inmates Knight and Best "could have testified that Mr. Lewis regularly bought Artane from other inmates and regularly took it in doses that far exceed the normal prescription dosage." (C. 340.) The circuit court summarily dismissed this claim of ineffective assistance of counsel on the basis that it was insufficiently pleaded. (C. 486.) We agree with the circuit court.

First, although Peraita alleged that his counsel should have hired an expert witness to testify about the effects of Artane, Peraita failed to identify, by name, any expert witness his counsel should have called to testify at his trial. Consequently, Peraita's claim did not satisfy the full-fact pleading requirements of Rule 32.6, Ala. R. Crim. P. See Daniel v. State, 86 So. 3d 405, 425-26 (Ala. Crim. App. 2011) (holding that, because Daniel failed to identify, by name, an expert witness who could have testified at his trial, Daniel's claim was insufficiently pleaded).

Second, Peraita's claim that his counsel "failed to proffer evidence that Mr. Lewis regularly obtained Artane by buying it from other inmates on the black market -- not from the prison pharmacy" -- and that inmates Knight and Best "could have testified that Mr. Lewis regularly bought Artane from other inmates and regularly took it in doses that far exceed the normal prescription dosage," is likewise insufficiently pleaded because Peraita failed to plead how that testimony from Knight and Best would have been admissible at Peraita's trial. See Mashburn, 148 So. 3d at 1154 (holding that, to sufficiently plead a claim that counsel was ineffective for failing to present testimony from a witness, a petitioner must plead,

among other things, "what admissible testimony those witnesses would have provided had they been called to testify") (emphasis added). Indeed, Peraita failed to plead any facts as to how Knight and Best knew that Lewis purchased Artane on the "black market" (for example, that they personally observed him doing so or that they sold it to him); Peraita failed to plead how Knight and Best were qualified to testify as to the "normal prescription dosage" for Artane; and Peraita failed to plead how they knew how much Artane Lewis consumed. Further, the failure to name a witness that could establish the effects of Artane makes the proposed testimony of Knight and Best (that Lewis obtained and used the drug) inconsequential because evidence that Lewis used the drug without establishing the effects of that usage could not have assisted Peraita's defense. Consequently, Peraita's claim did not satisfy the full-fact pleading requirements of Rule 32.6. See Daniel, supra.

Accordingly, the circuit court did not err when it summarily dismissed this claim.

IV.A.6.

Peraita also argues that the circuit court erred when it summarily dismissed his claim that his counsel were ineffective for failing "to adequately present testimony from [Michael] Castillo" -- Peraita's codefendant. (Peraita's brief, p. 82.)

In his first amended petition, Peraita alleged that his counsel were ineffective because they "failed to present testimony from an eyewitness who knew the most about the fact that [he] was acting in self defense: Mr. Castillo." (C. 340.) Although Peraita acknowledged that Castillo was Peraita's codefendant and was "under indictment at the time of [his] trial," Peraita alleged that his counsel "made no effort to determine" whether Castillo would assert his right not to testify. (C. 341.) According to Peraita, because Castillo "cooperated with [Department of Corrections] investigators," "[t]here [was] a reasonable possibility that Mr. Castillo would have testified at trial."[10] (C. 342 (emphasis added).) The circuit

[10]In his first amended petition, Peraita also alleged that his counsel were ineffective for failing to ask the trial court to continue his trial until after Castillo pleaded guilty. (C. 342.) But Peraita does not raise that argument on appeal. Instead, Peraita argues only that the circuit court

court summarily dismissed this claim on the grounds that it was insufficiently pleaded under Rule 32.6(b), Ala. R. Crim. P., and was meritless under Rule 32.7(d), Ala. R. Crim. P. (C. 486.)

According to Peraita, he sufficiently pleaded this claim because, he says, he pleaded "details of the topics of Castillo's unpresented testimony" and pleaded "specific grounds to believe that Castillo may have been willing to testify." (Peraita's brief, p. 82.) But

> "counsel is not ineffective for failing to call a witness who is unavailable. As the Supreme Court of Florida has stated:
>
> > " 'With regard to an ineffective assistance of counsel claim, witness availability is integral to a movant's allegations of prejudice. See Nelson v.

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erred when it summarily dismissed this claim of ineffective assistance of counsel because he pleaded "details of the topics of Castillo's unpresented testimony" and "specific grounds to believe that Castillo may have been willing to testify." (Peraita's brief, p. 82.) So, to the extent that Peraita alleged that his counsel were ineffective for failing to ask for a continuance of his trial to secure Castillo's presence, that claim has been abandoned, and we will not review it. See Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995) (" ' "[A]llegations ... not expressly argued on ... appeal ... are deemed by us to be abandoned." United States v. Burroughs, 650 F.2d 595, 598 (5th Cir.), cert. denied, 454 U.S. 1037, 102 S. Ct. 580, 70 L. Ed. 2d 483 (1981).' Burks v. State, 600 So. 2d 374, 380 (Ala. Crim. App. 1991). We will not review issues not listed and argued in brief. Burks.").

> State, 875 So. 2d 579, 583 (Fla. 2004). When a witness is unavailable to testify, trial counsel is not automatically ineffective for his or her failure to present that witness. See White v. State, 964 So. 2d 1278, 1286 (Fla. 2007). In such instances, due to the unavailability of the witness, a defendant cannot establish deficient performance or prejudice. See Nelson, 875 So. 2d at 583. There are many reasons for a witness's unavailability, ranging from the assertion by the witness of his or her right to remain silent, or the inability to locate witnesses or serve them with a subpoena. See id. n. 3. ... In a defendant's postconviction motion, if he or she alleges that counsel was deficient for the failure to call a witness, he or she must establish that the witness was available to testify. See Nelson, 875 So. 2d at 583.'
>
> "Nelson v. State, 73 So. 3d 77, 88-89 (Fla. 2011) (footnote omitted)."

Stallworth v. State, 171 So. 3d 53, 71-72 (Ala. Crim. App. 2013).

Here, Peraita alleged that his trial counsel should have presented testimony from Castillo, but Peraita did not allege that Castillo would have actually testified had he been called to do so. Instead, Peraita alleged that it was possible that Castillo would not have invoked his right to remain silent and testified in Peraita's defense. Peraita's speculative assertion that Castillo might have testified at his trial falls well short of

satisfying the pleading requirements of Rule 32.3 and Rule 32.6(b). See, e.g., Mashburn, 148 So. 3d at 1125 ("Speculation is not sufficient to satisfy a Rule 32 petitioner's burden of pleading.").

Moreover, although Peraita correctly points out in his brief on appeal that he pleaded "details of the topics of Castillo's unpresented testimony" (Peraita's brief, p. 82), Peraita's reference to the topics that Castillo could testify to -- i.e., "the events leading up to Lewis'[s] death, including Lewis'[s] threats of predatory violence and the failure of prison authorities to respond to these threats" (C. 341) -- does not satisfy the full-fact pleading requirement of Rule 32. To sufficiently plead his claim that his counsel were ineffective for failing to call Castillo at trial, Peraita was required not only to plead that Castillo would testify if called, but also "to plead with specificity what admissible testimony [Castillo] would have provided had [he] been called to testify," not the general topics his testimony would cover. Mashburn, 148 So. 3d at 1151.

Additionally, because Peraita failed to plead the substance of Castillo's testimony, Peraita also failed to satisfy his burden that

Castillo's testimony would not have been merely cumulative to testimony that was presented during trial. See Mashburn, 148 So. 3d at 1151.

Finally, Peraita's allegation that his counsel were ineffective for failing to call Castillo to testify fails to sufficiently plead prejudice, as his allegations include nothing more than a bare assertion that he was prejudiced by his counsels' failure and that "there is a reasonable probability that the result of the proceedings would have been different were it not for the errors." (C. 342.)

Thus, the circuit court properly dismissed this claim as insufficiently pleaded.

IV.B.

Next, Peraita argues that the circuit court erred when it summarily dismissed the following claims: (1) that his trial counsel were ineffective because they failed to "follow through on opening statement promises" (Peraita's brief, p. 83); (2) that his trial counsel were ineffective for failing to "object to inflammatory descriptions of Peraita" (Peraita's brief, p. 83); (3) that his trial counsel were ineffective when they failed "to protect [his] right to be present at trial" (Peraita's brief, p. 84); (4) that his trial counsel

were ineffective for failing to "investigate and evaluate [Peraita's] mental health and to adequately advise Peraita's purported waiver of mitigation" (Peraita's brief, p. 85); (5) that his trial counsel were ineffective for "failing to present mitigation evidence" (Peraita's brief, p. 86); (6) that his trial counsel were ineffective for failing "to voir dire jury on knowledge of prior convictions" (Peraita's brief, p. 87); (7) that his sentence is disproportionate when compared to his codefendant's sentence (Peraita's brief, p. 87); (8) that "Alabama's method of execution constitutes cruel and unusual punishment" (Peraita's brief, p. 89); and (9) that the State had failed "to disclose exculpatory evidence" (Peraita's brief, p. 91). We address each of these claims in turn.

IV.B.1.

Peraita first argues that the circuit court erred when it summarily dismissed his claim that his counsel were ineffective for failing "to follow through on opening statement promises." (Peraita's brief, p. 83.) Peraita's argument, however, fails to satisfy Rule 28(a)(10), Ala. R. App. P., which requires that an argument contain "the contentions of the appellant/petitioner with respect to the issues presented, and the reasons

therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on." (Emphasis added.)

The totality of Peraita's argument on appeal is as follows:

> "While the Circuit Court dismissed Claim II.B. under 32.6(b) and 32.7(d) (C486), the Petition contains the requisite specificity: it explains the promises made in opening statement that were not followed through by trial counsel and how this failure exacerbated the prejudice from trial counsel's failure to present an adequate self-defense case. C342-48. And the State's suggestion in its motion to dismiss (C418-19) that his claim is subject to 32.7(d) dismissal because trial counsel actually did follow through on his opening statement promises is not supported by the record, including the State's own closing argument that emphasized the defense's failure to present any support for its claims of self-defense. AR1213-17."

(Peraita's brief, p. 83.)

In his one-paragraph, two-sentence argument, Peraita cites no authority whatsoever to support his contention that this claim of ineffective assistance of counsel was sufficiently pleaded. It is not this Court's duty to figure out how Peraita believes the circuit court erred when it dismissed this claim on the basis that it was insufficiently pleaded. See Ex parte Borden, 60 So. 3d 940, 943 (Ala. 2007) (It is not this Court's obligation to " ' "address legal arguments for a party based on

undelineated general propositions not supported by sufficient authority or argument." ' " (quoting Butler v. Town of Argo, 871 So. 2d 1, 20 (Ala. 2003), quoting in turn Dykes v. Lane Trucking, Inc., 652 So. 248, 251 (Ala. 1994))). Thus, this argument is deemed abandoned, and we do not address it.

IV.B.2.

Next, Peraita argues that the circuit court erred when it summarily dismissed his claim that his counsel were ineffective when they failed "to object to inflammatory descriptions of Peraita" -- namely, the State's "repeated use" of Peraita's nickname, "Lil' Warrior." (Peraita's brief, p. 83.) This argument, like the argument addressed above, also fails to satisfy Rule 28(a)(10), Ala. R. App. P.

The totality of Peraita's argument on appeal is as follows:

> "The Circuit Court cited 32.7(d) to summarily dismiss the ineffectiveness claim based on trial counsel's failure to object to the repeated use by the State of the nickname 'Lil' Warrior' to refer to Mr. Peraita. C486; C348-50. The Court's dismissal apparently was based on the State's argument that this claim is barred because on direct appeal this Court did not find that the prosecutor committed misconduct in his closing statement. C420-21. But prosecutorial misconduct claims are governed by a wholly different standard than ineffectiveness claims,[23] and

> moreover this Court's holding did not address the appropriateness of the use of the 'Lil' Warrior' sobriquet -- it considered a different comment that '[e]verybody in Holman Prison is violent.' Peraita, 897 So. 2d at 1201.
>
> "_____
>
> "[23]Peraita v. State, 897 So. 2d 1161, 1201 (Ala. Crim. App. 2003) (statement in closing argument only warrants reversal if it 'so infected the trial with unfairness as to make the resulting conviction a denial of due process' (quoting Darden v. Wainwright, 477 U.S. 168, 181 (1986)))."

(Peraita's brief, pp. 84-85.)

Although Peraita cites to this Court's decision in his direct appeal, Peraita cites no authority showing that his claim is meritorious and did not warrant dismissal under Rule 32.7(d), Ala. R. Crim. P. Instead of explaining how his claim is meritorious, Peraita argues that the circuit court's "apparent" reason for dismissing his claim under Rule 32.7(d) was improper. Peraita's addressing of this one "apparent" reason fails to recognize that a circuit court does not have to give any reason when it summarily dismisses a claim under Rule 32.7(d), and, by focusing his argument on this one apparent reason, he ignores the other possible reasons on which the circuit court could have based its decision -- for

example, that Peraita's claim was meritless under Rule 32.7(d) because the use of the nickname "Lil' Warrior" did not prejudice Peraita.

Because Peraita's argument does not satisfy Rule 28(a)(10), Ala. R. App. P., this argument is deemed abandoned and we do not address it.

IV.B.3.

Peraita also argues that the circuit court erred when it summarily dismissed his claim that his counsel were ineffective when they failed "to protect [his] right to be present at trial." (Peraita's brief, p. 84.)

In his second amended petition, Peraita alleged that his counsel were ineffective when they did not "assert [Peraita's] unwaivable constitutional right to be present at the entire capital trial" when Peraita was absent from a portion of Dr. Haney's proffered testimony during the guilt phase of Peraita's trial. (C. 639.) Peraita alleged that he was prejudiced by this failure because he "had no opportunity to see the testimony of Dr. Haney before trial"; "[b]y not seeing the institutional self-defense testimony firsthand at trial, [he] was handicapped in assisting his counsel in how to present the self-defense case"; he "had less perspective with which to suggest alternate witnesses to cover the self-defense

evidence that was excluded"; and, had he "witnessed Dr. Haney's testimony, he may well have instructed his attorneys to present this evidence in the mitigation phase of his trial." (C. 639.) The circuit court summarily dismissed this claim on the grounds that it was insufficiently pleaded and without merit. (C. 695.) On appeal, Peraita challenges both conclusions.

The totality of Peraita's argument on appeal concerning the circuit court's finding that this claim was insufficiently pleaded is as follows: "As to 32.6(b), Peraita specifically pled the prejudice that resulted from his absence from the courtroom, including his potential ability to identify witnesses to try to mitigate gaps left by the exclusion of Dr. Haney's central testimony in the guilt phase." (Peraita's brief, p. 84.) This argument does not satisfy Rule 28(a)(10), Ala. R. App. P. Thus, it is deemed abandoned.

Even so, the circuit court properly dismissed this claim on the basis that it was insufficiently pleaded. As quoted above, on appeal, the only portion of this claim Peraita cites as showing that it was sufficiently pleaded was his alleged inability to "identify witnesses" that he could call

to "mitigate gaps left by the exclusion of Dr. Haney's central testimony in the guilt phase."[11] (Peraita's brief, p. 84.) In his petition, however, Peraita did not identify, by name, any witness who he could have called to testify. Nor did Peraita specifically allege what those witnesses would have testified to if he had called them. Thus, this claim was insufficiently pleaded, and the circuit court did not err when it summarily dismissed it.

IV.B.4.

Peraita argues that the circuit court erred when it summarily dismissed his claim that his trial counsel were ineffective for failing to "investigate and evaluate [his] mental health" and to "adequately advise [him] in connection with [his] purported waiver of mitigation." (Peraita's brief, p. 85.)

In his first amended petition, Peraita alleged that his counsel were ineffective for failing to "investigate and evaluate [his] mental health before trial." (C. 356-62.) According to Peraita:

[11]Because Peraita cites only this one allegation as showing that his claim was sufficiently pleaded, we address only that allegation.

> "In a letter to trial counsel, Aaron McCall, a mitigation specialist retained by trial counsel, expressed concern about Mr. Peraita's mental health and recommended securing the services of Daniel Marson, JD, PhD, a neuropsychologist, and Craig Haney, PhD, a psychology professor and social psychologist with an expertise [in] prison culture, and Marianne Rosenzweig, PhD, a clinical and forensic psychologist."

(C. 356.) Peraita further alleged that, instead of retaining "the services of Dr. Marson or any other neuropsychologist," his trial counsel "unreasonably relied on a limited evaluation by Robert DeFrancisco, PhD, a psychologist appointed by the Court to evaluate [his] 'competency to stand trial, mental state at the time of the offense and competency to waive Miranda warnings.'" (C. 357.) Peraita alleged that his counsel "had an obligation to pursue an independent mental health assessment to determine whether the persistent physical and psychological abuse [he] endured caused brain injury, a neuropsychological deficit or disassociative disorder." (C. 362.) The circuit court dismissed this claim as insufficiently pleaded. (C. 486.)

The record on direct appeal shows that Peraita's trial counsel moved the circuit court for funds to hire Dr. Marson, Dr. Haney, and Dr.

Rosenzweig. (Record in Peraita, case no. CR-01-0289, R. 112-14.) The circuit court granted Peraita's counsels' motion only as to Dr. Marson. (Record in Peraita, case no. CR-01-0289, C. 119.) After Peraita's counsel hired Dr. Marson, however, Dr. Marson withdrew from Peraita's case "due to scheduling conflicts," and the circuit court "allowed [Peraita's counsel] to retain and substitute Dr. Craig Haney as his psychological expert." (Record in Peraita, case no. CR-01-0289, C. 189.) Thus, contrary to Peraita's claim in his petition, his counsel did hire both Dr. Marson and Dr. Haney. And, although Peraita correctly alleged that his counsel did not hire Dr. Rosenzweig, the record on direct appeal clearly shows that his counsel moved the trial court for funds to hire her but that the trial court denied his request. Consequently, Peraita's claim is refuted by the record on direct appeal and was properly dismissed.

Moreover, to the extent that Peraita alleged that his counsel should have hired some other expert witness to assess his mental health, that claim is insufficiently pleaded. Indeed, Peraita did not identify, by name, any other expert witness his counsel should have hired to assess his mental health. See Daniel, 86 So. 3d at 425-26 ("Daniel failed to identify,

by name, any forensic or DNA expert who could have testified at Daniel's trial or the content of the expert's expected testimony. Accordingly, Daniel failed to comply with the full-fact pleading requirements of Rule 32.6, Ala. R .Crim. P.").

Accordingly, Peraita is due no relief on this claim.

IV.B.5.

Peraita next argues that the circuit court erred when it summarily dismissed his claim that his counsel were ineffective for failing to present mitigation evidence despite Peraita's telling his counsel that he wished to forgo the presentation of such evidence. In Adkins v. State, 930 So. 2d 524, 539 (Ala. Crim. App. 2001), however, this Court, joining "the majority of jurisdictions that have considered this issue," held "that a defendant is estopped from raising a claim of ineffective assistance of counsel for counsel's failure to present mitigating evidence when the defendant waived the presentation of mitigating evidence."

Because Peraita was competent to waive the presentation of mitigation evidence in this case, and because Peraita did, in fact, waive the presentation of mitigation evidence in this case, he cannot now

complain that his counsel were ineffective for honoring his wishes. See Brooks, ___ So. 3d at ___ ("Brooks cannot both dictate how his counsel presents mitigation evidence and later argue that his counsel were ineffective for following his instructions. This Court has never sanctioned such a tactic, and '[w]e refuse to find an attorney's performance ineffective for following his client's wishes.' Adkins v. State, 930 So. 2d 524, 540 (Ala. Crim. App. 2001)."). Accordingly, the circuit court did not err when it summarily dismissed this claim.

IV.B.6.

Peraita also argues that the circuit court erred when it summarily dismissed his claim that his counsel were ineffective for failing to voir dire the jury regarding its knowledge of Peraita's prior convictions.

Peraita's argument on appeal does not satisfy Rule 28(a)(10), Ala. R. App. P., which requires that an argument contain "the contentions of the appellant/petitioner with respect to the issues presented, and the reasons therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on." (Emphasis added.) The totality of Peraita's argument on appeal is as follows:

> "The circuit court cited 32.6(b) in dismissing Peraita's claim that trial counsel were ineffective for failing to question jurors regarding their knowledge of Peraita's prior conviction. C486; C373-74. But this claim very specifically pled this deficient performance and the prejudice that resulted; as pled in Claims I [-- his juror-misconduct claim --] and II.H.2. [-- his voir-dire claim --] and demonstrated at the evidentiary hearing, the jury's foreperson shared extraneous (and inaccurate) information about Peraita's prior conviction with the other jurors. C318-19; C373-74; C783-84."

(Peraita's brief, p. 87.)

Peraita cites no authority to support his contention that this claim of ineffective assistance of counsel was sufficiently pleaded. Peraita's two-sentence "argument" that he believes the circuit court erred when it dismissed this claim on the basis that it was insufficiently pleaded does not sufficiently apprise this Court of the reasons that the issue was properly pleaded. See Borden, 60 So. 3d at 943.

Even so, a simple reading of Peraita's petition and his amended petitions shows that the circuit court correctly concluded that Peraita's claim was insufficiently pleaded. To sufficiently plead a claim that counsel was ineffective for failing to properly or effectively conduct voir dire, a Rule 32 petitioner must "identify each juror who served on the jury

who was biased against him" and must plead "facts that, if true, would establish a reasonable probability that the outcome of the trial would have been different" had counsel acted differently. Stallworth, 171 So. 3d at 83. See also Brown v. State, 807 So. 2d 1, 5 (Ala. Crim. App. 1999) (holding that a claim that jurors failed to accurately answer questions during voir dire was insufficiently pleaded when the petitioner failed to identify by name any juror who failed to answer questions).

In his original petition, Peraita alleged that his counsel were ineffective because they "did not question jurors regarding their knowledge of Mr. Peraita's prior convictions." (C. 67.) According to Peraita, this "error was particularly glaring" because of the media attention that his prior capital-murder case had garnered and because of the "violent nature of the crime." (C. 67-68.) But Peraita did not allege the name of any juror who knew of his prior convictions. Instead, Peraita alleged that "at least one juror was able to link Mr. Peraita to the Gadsden murders, and shared that information with the rest of the jury." (C. 68.)

In its answer to Peraita's petition, the State recognized this pleading deficiency and argued, in part, that Peraita did not sufficiently plead his voir dire claim because he failed "to plead in this claim which juror knew of the facts of the Gadsden murder and how this knowledge prejudiced the outcome of his case." (C. 107.) Thereafter, instead of correcting the pleading deficiency noted by the State when he filed his first amended petition, Peraita simply reasserted the same allegations from his original Rule 32 petition in his first amended petition, again not identifying by name any juror who knew of Peraita's prior convictions. (C. 373-74.)

In its answer to Peraita's first amended petition, the State again argued that Peraita's claim was insufficiently pleaded, noting that, although he alleged that " 'at least one juror' knew details about his prior crime, he fail[ed] to identify the juror." (C. 432.) The State, quoting Brown, supra, argued that " '[t]he way [Peraita's] allegations [are] framed [make] it impossible for the State to defend against this claim.' " (C. 433.)

Thereafter, the circuit court dismissed Peraita's claim on the basis that it was insufficiently pleaded.[12] (C. 486.)

Peraita advances two reasons as to why he believes the circuit court erred when it summarily dismissed this claim on the basis that it was insufficiently pleaded. Neither reason entitles him to relief.

First, Peraita points to the juror-misconduct claim he raised in his petition as showing that he properly pleaded his voir dire claim. But Peraita's juror-misconduct claim suffers from the same pleading deficiency as his voir dire claim -- i.e., Peraita did not allege in his juror-misconduct claim the name of the juror who allegedly made a statement about Peraita's prior convictions. So Peraita's reference in his brief on appeal to his juror-misconduct claim does not save the pleading deficiency of his voir dire claim.[13]

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[12]Peraita reasserted this ineffective-assistance-of-counsel claim in his second amended petition. In so doing, Peraita again merely copied the allegations from his previous petitions and did not identify by name the juror who knew of his prior convictions. (C. 658.)

[13]We recognize that Peraita revealed to the State the identity of the juror who he alleged had committed misconduct in a discussion outside of court and later memorialized that conversation in a letter written to the circuit court. (C. 759, 783-84.) But Peraita's extrajudicial revelation of

Second, Peraita points to the fact that he "demonstrated at the evidentiary hearing" that it was the jury foreperson who "shared extraneous (and inaccurate) information about Peraita's prior conviction with the other jurors" as a reason why his voir dire claim was sufficiently pleaded. But evidence presented at an evidentiary hearing that supports a claim that was summarily dismissed as insufficiently pleaded before the evidentiary hearing does not revive that claim or remedy the deficiency in pleading. " ' "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).' " A.G., 989 So. 2d at 1172 (quoting Boyd, 913 So. 2d at 1125).

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the identity of the juror who he alleged had committed misconduct does not remedy the deficiency in the pleading of either his juror-misconduct claim or his voir dire claim. Our caselaw is clear, " ' "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).' " A.G. v. State, 989 So. 2d 1167, 1172 (Ala. Crim. App. 2007) (quoting Boyd v. State, 913 So. 2d 1113, 1125 (Ala. Crim. App. 2003)) (some emphasis added). Although Peraita eventually revealed to the State the identity of the juror in a statement outside of court and in a letter (not a pleading), Peraita, who was represented by counsel, never amended either his voir dire claim or his juror-misconduct claim to include the name of the juror. Simply put, no petition disclosed the identity of the juror.

Because Peraita's voir dire claim and his amendments to that claim failed to disclose the name of any juror who would have answered that he or she was aware of Peraita's prior convictions, Peraita failed to plead sufficient facts to show that his counsel were ineffective when they failed to ask about his prior convictions during voir dire. Accordingly, the circuit court did not err when it summarily dismissed this claim.

IV.B.7.

Peraita also argues that the circuit court erred when it summarily dismissed his claim that his sentence "is disproportionate when compared to the sentence of his more culpable co-defendant." (C. 661.) In summarily dismissing this claim, the circuit court found as follows:

> "There is no need for an evidentiary hearing, as the facts are already in evidence, or are facts of which the Court can take judicial notice. [Peraita's] accomplice, Michael Castillo, was charged with murder, and eventually [pleaded] guilty to manslaughter and received a sentence of twenty years. Castillo could not be charged with capital murder, as he did not meet the requirements of the capital murder statute. ... Peraita was charged with capital murder, as he qualified under Ala. Code § 13A-5-40(6) and § 13A-5-40(13) (1975). Moreover, this issue was raised on direct appeal by [Peraita], and is precluded pursuant to Alabama Rules of Criminal Procedure 32.2(4) and 32.2(5)."

(C. 866-67.) We agree with the circuit court.

In his direct appeal, Peraita argued that his capital-murder conviction and death sentence "are disproportionate because his allegedly more culpable codefendant was not charged with capital murder." Peraita, 897 So. 2d at 1197. In rejecting this claim, this Court held:

> "The prosecutor explained that [Peraita] was charged with two counts of capital murder because he was serving a sentence of life in prison at the time of the murder and because he had been convicted of another murder in the twenty years preceding this murder. He further explained that Castillo was 'indicted for murder simply because there is no circumstance under which -- under the capital punishment scheme there was no circumstance under which he could be indicted for capital murder.' (R. 41.) Clearly, the disparity between the charges and possible punishment [Peraita] and Castillo faced was not based on their degrees of culpability or on some inappropriate decision by the prosecutor or the trial court. Rather, the disparity was based wholly on the nature of [Peraita's] prior convictions and the length of his prior sentences."

Peraita, 897 So. 2d at 1197-98 (emphasis added). This Court also noted that the record on direct appeal did not indicate that "Castillo had been tried or sentenced at the time the trial court sentenced [Peraita]" to death, and, thus, "the trial court could not compare [Peraita's] sentence to Castillo's sentence." Peraita, 897 So. 2d at 1198. This Court ultimately

concluded that Peraita's death sentence was neither disproportionate nor excessive "when compared to the penalty imposed in similar cases." Peraita, 897 So. 2d at 1222.

When examining a claim that a death sentence is disproportionate because a codefendant received a lesser sentence, we have explained as follows:

> " ' "The law does not require that each person involved in a crime receive the same sentence. Wright v. State, 494 So. 2d 726, 739 (Ala. Crim. App. 1985) (quoting Williams v. Illinois, 399 U.S. 235, 243, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970)). Appellate courts should 'examine the penalty imposed upon the defendant in relation to that imposed upon his accomplices, if any.' Beck v. State, 396 So. 2d 645, 664 (Ala. 1980). However, the sentences received by codefendants are not controlling per se, Hamm v. State, 564 So. 2d 453, 464 (Ala. Crim. App. 1989), and this Court has not required or directed that every person implicated in a crime receive the same punishment. Williams v. State, 461 So. 2d 834, 849 (Ala. Crim. App. 1983), rev'd on other grounds, 461 So. 2d 852 (Ala. 1984). ' "There is not a simplistic rule that a co-defendant may not be sentenced to death when another co-defendant receives a lesser sentence." ' Id. (quoting Collins v. State, 243 Ga. 291, 253 S.E.2d 729 (1979))."

> " 'Ex parte McWhorter, 781 So. 2d 330, 344 (Ala. 2000). "Because of 'the need for individualized consideration as a constitutional requirement in imposing the death sentence,' Lockett v. Ohio, 438 U.S. 586, 605, 98 S. Ct. 2954, 2965, 57 L. Ed. 2d 973, 990 (1978), the focus must be on the defendant." Wright v. State, 494 So. 2d 726, 740 (Ala. Crim. App. 1985), aff'd, 494 So. 2d 745 (Ala. 1986).' "

Belisle v. State, 11 So. 3d 256, 321 (Ala. Crim. App. 2007) (quoting Gavin v. State, 891 So. 2d 907, 994 (Ala. Crim. App. 2003)).

Here, as this Court explained on direct appeal, the reason why Peraita was charged with capital murder and why Castillo was not charged with capital murder was not because Peraita was more culpable in Lewis's murder than Castillo. Rather, the difference between their charges was based upon Peraita's past criminal convictions and the length of the sentences he was serving at the time he and Castillo murdered Lewis. The same is true for their respective punishments. Simply put, Peraita's past criminal convictions and the lengths of the sentences he was serving at the time he participated in Lewis's murder made his capital-murder conviction eligible for a death sentence. The fact that Castillo could not be charged with capital murder or sentenced to death does not mean that Peraita's death sentence was "disproportionate." As this Court

held in his direct appeal, Peraita's death sentence was neither disproportionate nor excessive "when compared to the penalty imposed in similar cases." Peraita, 897 So. 2d at 1222 (emphasis added). Because sentencing is individualized and because this Court concluded in his direct appeal that Peraita's sentence was neither excessive nor disproportionate when compared to cases similar to Peraita's, the circuit court did not err when it summarily dismissed this claim on the basis that it was precluded under Rule 32.2(a)(4), Ala. R. Crim. P.

IV.B.8.

Peraita also argues that the circuit court erred when it summarily dismissed his claim that Alabama's method of execution is unconstitutional. (Peraita's brief, pp. 89-90.) This argument is without merit. This Court has held on numerous occasions that Alabama's method of execution " 'does not violate the Eighth Amendment to the United States Constitution.' " Callen v. State, 284 So. 3d 177, 240 (Ala. Crim. App. 2017) (quoting Thompson v. State, 153 So. 3d 84, 180 (Ala. Crim. App. 2012)). Thus, Peraita's claim is meritless, and the circuit court did not err when it summarily dismissed it.

IV.B.9.

Peraita argues that the circuit court erred when it summarily dismissed his claim that the State had "withheld exculpatory or impeachment evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963)." (Peraita's brief, p. 91.) Peraita's Brady claim, however, was insufficiently pleaded and, thus, properly summarily dismissed.

In his second amended petition, Peraita pleaded general statements of law concerning Brady claims and alleged that,

> "[u]pon information and belief, a number of the State's inmate witnesses were transferred to other facilities, in exchange for their testifying at trial. The State failed to turn over evidence relating to the agreements that led to these transfers."

(C. 668 (emphasis added).)

To sufficiently plead a Brady claim brought under Rule 32.1(a), Ala. R. Crim. P., the Rule 32 petition itself must set out a full factual basis, which, "if true, entitle[s] a petitioner to relief. After facts are pleaded, which, if true, entitle the petitioner to relief, the petitioner is then entitled to an opportunity, as provided in Rule 32.9, Ala. R. Crim. P., to present evidence proving those alleged facts." Boyd, 913 So. 2d at 1125. So, under

Rule 32.3 and Rule 32.6(b), Ala. R. Crim. P., Peraita had to plead sufficient facts to show that a Brady violation occurred.

To establish a Brady violation, and thus sufficiently plead a Brady claim in a Rule 32 petition,

> " 'a defendant must show that " '(1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material to the issues at trial.' " Johnson v. State, 612 So. 2d 1288, 1293 (Ala. Cr. App. 1992), quoting Stano v. Dugger, 901 F.2d 898, 899 (11th Cir. 1990), cert. denied, Stano v. Singletary, 516 U.S. 1122, 116 S. Ct. 932, 133 L. Ed. 2d 859 (1996). See Smith v. State, 675 So. 2d 100 (Ala. Cr. App. 1995). " 'The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.' " Johnson, 612 So. 2d at 1293, quoting United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481 (1985).' "

Bryant v. State, 181 So. 3d 1087, 1122 (Ala. Crim. App. 2011) (quoting Freeman v. State, 722 So. 2d 806, 810 (Ala. Crim. App. 1998)). Peraita's petition failed to set out a full factual basis of a Brady violation.

In his amended petition, Peraita did not allege that the State actually withheld or suppressed any evidence. Rather, Peraita's allegation about the State withholding Brady material was qualified by

the phrase "upon information and belief." (See C. 668.) In other words, Peraita's allegation was that he believed that the State had withheld certain material -- not that it did in fact do so. See Brooks, ___ So. 3d at ___ (recognizing that a Brady claim that is based "upon information and belief" that the State withheld Brady material is not an allegation that the State actually withheld any Brady material; thus, the Brady claim was insufficiently pleaded). Peraita's allegation that "upon information and belief" the State withheld evidence is nothing more than a speculative assertion that a Brady violation occurred. "Speculation is not sufficient to satisfy a Rule 32 petitioner's burden of pleading." Mashburn, 148 So. 3d at 1125. Consequently, the circuit court did not err when it summarily dismissed this claim.

V.

Peraita further argues that the circuit court erred when it denied his claims that his counsel were ineffective for failing to present self-defense evidence during the guilt phase of his trial. Specifically, Peraita alleges that his trial counsel were ineffective for failing to present testimony from two inmates at Holman Prison -- inmates Campbell and King -- and for

failing to present "medical evidence indicating that Peraita did not stab Mr. Lewis." (Peraita's brief, pp. 92-99.) Neither argument entitles Peraita to relief.

V.A.

First, Peraita argues that the circuit court erred when it denied his claim that his counsel were ineffective for failing "to call any defense eyewitnesses to refute the State's evidence." (Peraita's brief, p. 92.) According to Peraita, "Eddie John Campbell's and Jack King's eyewitness testimony (presented at the Rule 32 evidentiary hearing) was contrary to the most inflammatory evidence presented by the State at trial to support its theory that Peraita was an active participant in a premeditated murder." (Peraita's brief, p. 92.) The circuit court did not err when it denied this claim.

Concerning inmate Campbell, Peraita alleged in his second amended petition that his trial counsel were ineffective when they failed to call Campbell to testify in Peraita's defense. According to Peraita, Campbell had told investigators that Castillo stabbed Lewis, that Castillo had "pre-planned and orchestrated the killing," and that Peraita "swung the knife

[at Lewis] but he was not sure it connected." Peraita further asserted that Castillo "tried to give Mr. Peraita the knife after he finished stabbing Mr. Lewis and then he literally shoved it in Mr. Peraita's hand and closed Mr. Peraita's fist over it" and that Castillo "told Mr. Peraita not to give the knife to anybody." (C. 609.)

At the evidentiary hearing, Campbell testified that, when the incident between Castillo, Peraita, and Lewis first started, he was on his bed and heard his "home boy -- I heard him call, 'Don't let them do him like that.'" (R. 354.) Campbell said he then went to the "middle wall" in the dorm and saw that Peraita had "Lewis around the neck and Mr. Castillo had a knife in his hand trying to cut his throat." (R. 355.) Campbell testified that, when Peraita let Lewis go, Castillo gave Peraita the knife "and told [Peraita] don't give it to nobody." (R. 355-56.) Campbell said that Peraita looked "dumbfounded," like he "really don't even know what the hell going on." (R. 356.) Campbell said that Peraita then "walked up the floor behind Mr. Lewis and he swung the knife." (R. 357.) Campbell clarified, however, that he did not know whether Peraita struck Lewis with the knife. (R. 357.) Campbell said that, while Lewis

was on the ground and people were trying to move Lewis, Castillo "ran toward [them] with the knife," which caused them to drop Lewis, and that Peraita was with Castillo. (R. 361-62.) Campbell claimed that Peraita did not say anything. (R. 362.) Campbell said that he gave a statement of what he saw to investigators and that he was brought to the court for Peraita's trial, but he was not called to testify. (R. 363-64.) Campbell claimed that he did not speak with any attorneys while he was at the courthouse, but, he said, he did speak with people about what happened the night Lewis was stabbed while he was at the courthouse. (R. 364.)

One of Peraita's trial counsel, Stearns, testified at the evidentiary hearing that a writ of habeas ad testificandum was issued to bring Campbell to court for Peraita's trial. (R. 434.) Stearns said that, although he could not recall whether Campbell testified at Peraita's trial,

> "if [Campbell] didn't testify it was because he was up here and he told us he didn't want to testify and we were not putting on a state inmate who did not want to testify because we didn't know what he would say. So what he would have said I do not know. I know we have notes of what he told us at Holman but I cannot tell you what would have come out of his mouth on this witness stand."

(R. 436.) Stearns explained that he did not have any specific recollection about making a decision not to call Campbell to testify, but he did recall that there were "at least one or two [inmate witnesses] up here that when they were back in the witness room they told us they did not want to testify and we didn't call them." (R. 437.) Stearns stressed that every inmate who was brought to the courthouse was going to be called as a witness in Peraita's trial "unless they told us they weren't going to testify." (R. 437-38.) Stearns concluded: "So my best recollection would be [Campbell] was one of the ones that told us he didn't want to testify when he got up here but specifically as far as names, you know, I can't recall if he was specifically one of them." (R. 438.)

Hartley, Peraita's other trial counsel, testified that, although he did not have a recollection of Campbell, there was one particular inmate that was brought in to testify nicknamed "Cheese Curl or Cheese Fry" who "was crawfishing, back tracking and changing his story," so they did not call him as a witness. (R. 527.)

Concerning inmate King, Peraita alleged in his second amended petition that his trial counsel had a copy of King's "inmate statement" but

"never interviewed Mr. King," that King "saw Mr. Castillo stabbing Mr. Lewis and that Mr. Lewis was laying on top of Mr. Peraita on the bed," and that King said Castillo "stabbed Mr. Lewis a final time in front of the officers, and not Mr. Peraita." (C. 612.)

At the evidentiary hearing, King testified that, on the night Lewis was stabbed, King was on his bed and heard "[a] commotion." (R. 372.) King said that he "sat up" and he saw Castillo, Peraita, and Lewis. (R. 373.) King explained that Castillo was confronting Lewis and that Peraita was behind Lewis. (R. 374.) King said that, "at that time, [he] heard a bed shove and next thing you know Peraita done grabbed [Lewis] by the throat and he fell on the bed." (R. 374.) King then saw Castillo start stabbing Lewis with a knife. (R. 374.) King said that Castillo stabbed Lewis "three or four times" -- the "[t]hird one from the back" -- and then Peraita "turned [Lewis] loose and blood shot out of his neck." (R. 375.) King said that, when Peraita let go of Lewis, Peraita looked "[s]urprised, shocked." (R. 376.) According to King, Castillo yelled that he was not going to give up the knife until he and Peraita "get where [they are] going." (R. 376.) King further explained that, while Castillo, Peraita, and

Lewis were "walking the floor," people were saying that they were "still sticking that boy." (R. 377.) King said that, as they were walking out of the dorm, Castillo was stabbing Lewis in the back. (R. 382.) When Officer Burroughs came into the dorm, Castillo was still stabbing Lewis and Burroughs did not intervene. (R. 378.) King said that, during the altercation, he never saw Peraita with a knife. (R. 379.)

At the evidentiary hearing, Stearns said that, according to King's statement to prison investigators concerning Lewis's murder, "it didn't appear that [King] saw the entire event. When he first saw it he saw, according to what he said, Mr. Castillo standing over Mr. Lewis. So it didn't appear he saw anything."[14] (R. 443.) Additionally, Stearns said that King's statement to prison investigators does not say that he never saw Peraita with a knife. (R. 443.) Rather, King's statement says that Castillo gave Peraita the knife and "told him not to give up the knife until he got up there," which, Stearns said, "didn't really help Mr. Peraita. They put a knife in his hand." (R. 443.)

---

[14]King's statement was admitted during the evidentiary hearing as Petitioner's Exhibit 7. (R. 438.)

In denying this claim, the circuit court concluded that Peraita had failed to prove that his counsel performed deficiently with respect to Campbell and King. (C. 1273.) We agree with the circuit court. As we have explained:

> "'"[I]n the context of an ineffective assistance claim, 'a decision regarding what witnesses to call is a matter of trial strategy which an appellate court will not second-guess.'" Curtis v. State, 905 N.E.2d 410, 415 (Ind. Ct. App. 2009). "[T]he decision of which witnesses to call is quintessentially a matter of strategy for the trial attorney." Boyle v. McKune, 544 F. 3d 1132, 1139 (10th Cir. 2008). "Whether to call a particular witness is a tactical decision and, thus, a 'matter of discretion' for trial counsel." United States v. Miller, 643 F. 2d 713, 714 (10th Cir. 1981).'
>
> "Johnson v. State, [Ms. CR-05-1805, June 14, 2013] ___ So. 3d ____, ____ (Ala. Crim. App. 2007) (opinion on return to remand), judgment vacated on other grounds, Johnson v. Alabama, 582 U.S. ____, 137 S. Ct. 2292, 198 L. Ed. 2d 720 (2017)."

Stanley v. State, [Ms. CR-18-0397, May 29, 2020] ___ So. 3d ___, ___ (Ala. Crim. App. 2020).

Here, Peraita's counsel intended on calling Campbell to testify in Peraita's defense, but they ultimately chose not to call Campbell to testify

because he, along with another inmate, expressed reluctance about testifying at Peraita's trial. Additionally, although Peraita's counsel did not intend on calling King to testify at trial, that decision was based on counsels' reading of King's statement to prison investigators in which King said that Peraita possessed the knife used to stab Lewis. Moreover, both Campbell and King provided testimony at the evidentiary hearing that would have been harmful to Peraita's defense. Specifically, Campbell testified that Peraita "walked up the floor behind Mr. Lewis and he swung the knife" at him (R. 357), and King testified that Castillo was stabbing Lewis in the back (R. 382), which contradicted counsels' theory that Lewis was not stabbed in the back.

Based on the evidence presented at the hearing, Peraita failed to prove that his counsel acted deficiently when they made the decision not to call Campbell or King to testify at Peraita's trial. Accordingly, the circuit court properly denied this claim.

V.B.

Finally, Peraita argues that the circuit court erred when it denied his claim that his counsel were ineffective when they "failed to present

medical evidence indicating that Peraita did not stab Mr. Lewis." (Peraita's brief, p. 96.)

In his second amended petition, Peraita alleged that his counsel were ineffective when they "failed to present evidence to rebut the State's assertion that [he] stabbed Mr. Lewis." (C. 616.) According to Peraita, there were several documents his counsel could have introduced to show that Peraita did not stab Lewis in the back or side, including the autopsy report and "accompanying drawing prepared by the Alabama Department of Forensic [Sciences]," a "drawing prepared by nursing staff attending to Mr. Lewis at Atmore Community Hospital," a "triage sheet," an "emergency physician record," and Dr. McIntyre's progress notes. (C. 618-19.)

At the Rule 32 evidentiary hearing, Peraita questioned Stearns about medical records that showed that Lewis did not have stab wounds on his back. Stearns explained that, in discovery, he received Lewis's medical records from the emergency room of Atmore Community Hospital and an autopsy report concerning Lewis's cause of death. (R. 447-48.) Stearns testified that he recalled that there was a statement from an

inmate that indicated that Peraita had stabbed Lewis in the back. (R. 448.) Stearns also testified that, during his cross-examination of Dr. McIntyre at Peraita's trial, he showed Dr. McIntyre a drawing of Lewis's body that indicated the location of Lewis's stab wounds. According to Stearns, Dr. McIntyre admitted that there were no stab wounds on Lewis's back, and Stearns attempted to admit the drawing into evidence. (R. 451, 453.) Stearns explained, however, that the State objected to the admission of the drawing. (R. 452.)

Stearns further explained that, although he wanted the drawing admitted because it shows that Lewis did not have a stab wound on his back, he did not try to get it admitted as a "business record" because "when [he] asked [Dr. McIntyre] about [the lack of stab wound in the back] and asked him about the diagram he said there was one wound missing on there" and, thus, Dr. McIntyre "was not qualifying it at that point." (R. 452.) Stearns admitted that at least one other medical record indicated

that Lewis did not have a stab wound on his back (R. 453),[15] but he explained that he did not present any other medical records

> "[b]ecause Dr. McIntyre testified on direct examination to what we needed him to say that there was no stab wounds in the back. And at [902] he -- page [902 of the trial transcript] he concerned me when he said there was a missing wound. So I got what I needed out of him and got out of there."

(R. 455-56.)

In denying this claim, the circuit court found as follows:

> "Peraita contended that trial counsel were ineffective for failing to have admitted into evidence a drawing prepared by nurses at Atmore Community Hospital, indicating that [Lewis] was not stabbed in the back. The nurses' drawing was identified at Peraita's trial as Defendant Exhibit 2. An enlargement of the nurses' drawing was identified as Defendant Exhibit 2-A. The enlargement of the nurses' drawing was displayed in front of the jury during Mr. Stearns'[s] cross-examination of Dr. McIntyre.

---

[15]Stearns noted that one of the medical records Peraita says he should have used to prove that Lewis was not stabbed in the back states that Lewis had stab wounds "to the neck and trunk but it doesn't say what part of the trunk, whether it's front or back." (R. 454.) Stearns also explained that, although Peraita alleged that he should have used Dr. McIntyre's progress notes to prove that Lewis was not stabbed in the back, the drawing included with Dr. McIntyre's progress notes "doesn't designate ... the front of the trunk." (R. 455.)

> "... Mr. Stearns initially attempted to have the drawing admitted into evidence, but later reconsidered.
>
> "....
>
> "Mr. Stearns elicited the information from Dr. McIntyre that he believed was helpful to Peraita's defense. Moreover, during the cross-examination of the State medical examiner, Dr. Leroy Riddick, Mr. Stearns elicited additional testimony indicating that there were no fresh wounds on [Lewis's] back.
>
> "The record proves that members of the jury saw the nurses' drawing even though it was not ultimately admitted into evidence. Further, the information recorded on the nurses' drawing, that no stab wounds were on [Lewis's] back, would clearly have been cumulative to the testimony of Dr. McIntyre as well as Dr. Riddick. As such, this Court finds that Mr. Stearns'[s] performance on this matter was not deficient nor prejudicial."

(C. 1269-71 (footnotes omitted).) We agree with the circuit court.

Indeed, not only did the jury at Peraita's trial see the exhibit that Peraita claims his trial counsel should have admitted at his trial (see Record in Peraita, case no. CR-01-0289, R. 902), but it also heard evidence indicating that Lewis did not have a stab wound in his back through both Dr. McIntyre's testimony (see Record in Peraita, case no. CR-01-0289, R. 902-04) and Dr. Riddick's testimony (see Record in Peraita, case no. CR-01-0289, R. 918-19). Although the medical records Peraita says his

counsel should have presented also show that Lewis did not have a stab wound in his back, counsel is not ineffective for failing to present cumulative evidence. See Stallworth, 171 So. 3d at 71-72 (recognizing that counsel is not ineffective for failing to present testimony from a witness when that testimony would have been cumulative to other evidence presented at trial). Thus, the circuit court did not err when it denied this claim.

Conclusion

Based on these reasons, the judgment of the circuit court is affirmed.

AFFIRMED.

Windom, P.J., and McCool and Minor, JJ., concur. Kellum, J., concurs in the result.

APPENDIX B

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

D. Scott Mitchell
Clerk
Gerri Robinson
Assistant Clerk

P. O. Box 301555
Montgomery, AL 36130-1555
(334) 229-0751
Fax (334) 229-0521

February 4, 2022

CR-17-1025 **Death Penalty**

Cuhuatemoc Hinricky Peraita v. State of Alabama (Appeal from Escambia Circuit Court: CC00-293.60)

NOTICE

You are hereby notified that on February 4, 2022, the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

D. Scott Mitchell, Clerk
Court of Criminal Appeals

cc: Hon. Todd Stearns, Circuit Judge
Hon. John Robert Fountain, Circuit Clerk
James Blake Bailey, Attorney
Stewart Mckinnon Cox, Attorney
Michael P. Doss, Attorney - Pro Hac
Stephanie P. Hales, Attorney - Pro Hac
Brendan C. Smith, Attorney - Pro Hac
Matthew J. Warren, Attorney - Pro Hac
Jon Brennan Hayden, Asst. Atty. Gen.

APPENDIX C

IN THE SUPREME COURT OF ALABAMA

September 22, 2022

1210290

Ex parte Cuhuatemoc Hinricky Peraita. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Cuhuatemoc Hinricky Peraita v. State of Alabama) (Escambia Circuit Court: CC-00-293.60; Criminal Appeals: CR-17-1025).

ORDER

The Petition for Writ of Certiorari filed by Cuhuatemoc Hinricky Peraita on February 18, 2022, directed to the Escambia Circuit Court, having been submitted to this Court,

IT IS ORDERED that the Petition is GRANTED IN PART as to only the issue stated in Ground I—whether the lower court's rejection of the juror misconduct claim conflicts with state and federal law—of said Petition and DENIED IN PART as to all other grounds. Ala. R. App. P. 39(f).

IT IS FURTHER ORDERED as follows:

1. that Petitioner may file a brief addressing only the issue stated in Ground I of said Petition in accordance with Rule 39(g)(1);

2. that Respondent may then file a response brief in accordance with Rule 39(g)(2);

3. that, should either Petitioner or Respondent choose not to file a brief, such party shall instead timely file a waiver of the right to file such brief in accordance with Rule 39(g)(1)–(2);

4. that Petitioner may then file a reply brief in accordance with Rule 39(g)(3); and

5. that requests for oral argument, if any, shall be made in accordance with Rule 39(h).

IN THE SUPREME COURT OF ALABAMA

September 22, 2022

PER CURIAM. Parker, C.J., and Bolin, Bryan, Sellers, and Mitchell, JJ., concur.

Mendheim, J., concurs in part and dissents in part.

Shaw, and Wise, JJ., recuse themselves.

Witness my hand and seal this 22nd day of September, 2022.

Megan B. Rhodeseck

Clerk of Court,
Supreme Court of Alabama

FILED
September 22, 2022

Clerk of Court
Supreme Court of Alabama

APPENDIX D

IN THE SUPREME COURT OF ALABAMA

June 2, 2023

1210290

Ex parte Cuhuatemoc Hinricky Peraita PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Cuhuatemoc Hinricky Peraita v. State of Alabama) (Escambia Circuit Court: CC-00-293.60; Criminal Appeals: CR-17-1025).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on June 2, 2023:

Writ Quashed. No Opinion. PER CURIAM. -- Parker, C.J., and Bryan, Sellers, Mendheim, Stewart, Mitchell, and Cook, JJ., concur. Shaw and Wise, JJ., recuse themselves.

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

I, Megan B. Rhodebeck, certify that this is the record of the judgment of the Court, witness my hand and seal.

Megan B. Rhodebeck

Clerk, Supreme Court of Alabama

APPENDIX E

ALABAMA COURT OF CRIMINAL APPEALS

June 7, 2023

CR-171025
Cuhuatemoc Hinricky Peraita v. State of Alabama. (Appeal from Escambia Circuit Court: CC00-293.60).

CERTIFICATE OF JUDGMENT

To the Clerk of the above noted Trial Court, Greetings:

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

WHEREAS, the judgment indicate below was entered in this cause on August 3, 2021:

Affirmed.

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

Witness D. Scott Mitchell, Clerk
Court of Criminal Appeals, on this
the 7th day of June, 2023.

Scott Mitchell

Clerk
Alabama Court of Criminal Appeals

APPENDIX F

STATE OF ALABAMA

IN THE CIRCUIT COURT FOR THE COUNTY OF ESCAMBIA

TWENTY-FIRST JUDICIAL CIRCUIT

CRIMINAL

STATE OF ALABAMA,

Plaintiff,

Vs. CASE NO.:CC-00-293
DIVISION:II

CUHUATEMOC H. PERAITA,

Defendant.

----------/

COURT REPORTER'S OFFICIAL TRANSCRIPT OF TRIAL PROCEEDINGS ON APPEAL

BEFORE:
The Honorable Bradley E. Byrne, Circuit Court Judge, Brewton, Alabama, begining on the 17th day of September, 2001.

APPEARANCES:
For The State:
REO KIRKLAND, JR., ESQUIRE

For The Defendant:
JEFFREY TODD STEARNS, ESQUIRE
WADE L. HARTLEY, ESQUIRE

DENISE ALVERSON, Official Court Reporter

discretion of the trial court to weigh probative value against prejudicial value. The Court does not find that the prejudice substantially outweighs the probative value given limitations that are going to be set by the Court and further given the fact that strong limiting instructions will be given by the Court to the jury.

So what the Court ruling is going to be -- the State has the option of either accepting the stipulation or they can prove the prior convictions but they can only prove the elements that are absolutely necessary to meet the requirements of the statute which would be, in the Court's opinion, the date of conviction, the court of conviction, the offense as it deals with murder convictions. I don't even think conditions for robbery and attempted murder should be made known to the jury because that would not be an element of the offense under the indictment that would need to be proven, the sentence in all of the cases. So it will be the

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IN THE CIRCUIT COURT FOR THE COUNTY OF ESCAMBIA

TWENTY-FIRST JUDICIAL CIRCUIT

CRIMINAL

STATE OF ALABAMA,

Plaintiff,

Vs.

CASE NO.:CC-00-293
DIVISION:II

CUHUATEMOC H. PERAITA,

Defendant.

----------/

COURT REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS ON APPEAL

VOLUME III

BEFORE:

The Honorable Bradley E. Byrne, Circuit Court Judge, Brewton, Alabama.

APPEARANCES:

For The State:
REO KIRKLAND,JR., ESQUIRE

For The Defendant:
JEFFREY TODD STEARNS, ESQUIRE
WADE L. HARTLEY, ESQUIRE

DENISE ALVERSON, Official Court Reporter

about complicity if the proof in this case is that this Defendant did not inflict the fatal blow but merely held the victim while another person inflicted the fatal blow.

JAMES BURKETT: Uh-huh.

MR. KIRKLAND: Under that circumstance would it be impossible for you to recommend the imposition of the death penalty?

JAMES BURKETT: No, it would not be impossible. I know that kind of sounds like I had conflicting statements there. I just merely said I might be a little less likely to. If I knew he was holding him for the purpose of the other guy stabbing him then he would be just as guilty as the other person. If it was some circumstances that he didn't know he was going to stab him or something like that then I would have to be sure that he was doing it for that purpose.

MR. KIRKLAND: All right, sir. You understand that under the law of complicity that if a Defendant aided or

abetted, that is assisted in the murder ---

JAMES BURKETT: Yeah.

MR. KIRKLAND: --- that he's equally as guilty as the one who inflicted the death blow?

JAMES BURKETT: Yeah.

MR. KIRKLAND: Would you be able to follow that law?

JAMES BURKETT: Yes.

MR. KIRKLAND: Okay. Also I asked about circumstantial evidence, and I think you answered that you could not recommend the death penalty based on circumstantial evidence.

JAMES BURKETT: It would have to be mighty strong circumstantial evidence. Just about have to be beyond a shadow of a doubt.

MR. KIRKLAND: The circumstantial evidence would have to be stronger than direct evidence?

JAMES BURKETT: It would have to be strong enough to what now?

MR. KIRKLAND: I'm trying to figure out

how to ask you this Mr. Burkett. Do you understand that the State's burden of proof is beyond a reasonable doubt? That's our burden of proof.

JAMES BURKETT: Yes.

MR. KIRKLAND: And do you understand that we're entitled to prove guilt in this case solely based on circumstantial evidence?

JAMES BURKETT: Do I understand that you could?

MR. KIRKLAND: Yes, sir.

JAMES BURKETT: You're asking me could I recommend the death penalty solely on circumstantial evidence?

MR. KIRKLAND: Yes, sir.

JAMES BURKETT: I don't think I could.

MR. KIRKLAND: You couldn't do it?

JAMES BURKETT: No.

MR. KIRKLAND: Not under any circumstance?

JAMES BURKETT: I don't believe so.

MR. KIRKLAND: Even though the law says that circumstantial evidence, if it supports proof beyond a reasonable doubt, is just as good as direct evidence?

JAMES BURKETT: Well, I reckon if it was

STATE OF ALABAMA

IN THE CIRCUIT COURT FOR THE COUNTY OF ESCAMBIA

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CRIMINAL

STATE OF ALABAMA,

Plaintiff,

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DIVISION:II

CUHUATEMOC H. PERAITA,

Defendant.

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COURT REPORTER'S OFFICIAL TRANSCRIPT OF TRIAL PROCEEDINGS ON APPEAL

BEFORE:
The Honorable Bradley E. Byrne, Circuit Court Judge, Brewton, Alabama, on the 18th day of September, 2001.

APPEARANCES:
For The State:
REO KIRKLAND, JR., ESQUIRE

For The Defendant:
JEFFREY TODD STEARNS, ESQUIRE
WADE L. HARTLEY, ESQUIRE

DENISE ALVERSON, Official Court Reporter

KELLY WEBB: Yeah.

MR. KIRKLAND: How do you know these gentlemen?

KELLY WEBB: I went to school with Mr. Hartley's brother and I just know Todd just from being in Brewton.

MR. KIRKLAND: Being in Brewton?

KELLY WEBB: Uh-huh.

MR. KIRKLAND: Okay. Your knowing them, would that cause you any problem in being unbiased in this case?

KELLY WEBB: No.

MR. KIRKLAND: Would you favor the Defendant's case simply because you know either of these individuals?

KELLY WEBB: No, sir.

MR. KIRKLAND: Ma'am?

KELLY WEBB: No, sir.

MR. KIRKLAND: Okay. Anybody else that knows either Mr. Hartley or Mr. Stearns?

(NO OTHER RESPONSES).

Have either of these gentlemen represented any of you or any members of your immediate family or any of your close personal friends, served as an attorney?

(NO RESPONSE).

Do any of you know the Defendant in this case or any member of his family?

(NO RESPONSE).

Do any of you know a person named Michael Dewayne Castillo who is also charged with the same murder that Mr. Peraita is charged with?

(NO RESPONSE).

These are some possible witnesses in this case, and I am going to read these names to you and then if you know any of them I would ask that you indicate that you do by raising your hand.

Catherine Stallworth; Pat Bond, Lorette Mancuso; Edmundo Peraita; Michael Best; John Campbell; Michael Castillo; Jimmy Hardin; James Jones; Darwin Gregory Knight; Tommy Tunsdell? Any of you know any of those persons?

(NO RESPONSE).

For those of you that have children I would ask that you tell us their name and age and if we could let's start with Ms. Presley and then Mr. Preyer and go

down to Ms. Riley and come all the way across. Ms. Presley, could you start?

IRIS PRESLEY: Yeah. I have three daughters: Tiffany Presley, eight-and-a-half; Destiny Presley, three-and-a-half; and Brittany Presley, who is seven weeks.

MR. KIRKLAND: Thank you.

EMANUEL PREYER: I have one son and two daughters; Emanuel Preyer II and Patricia and Erica.

MR. KIRKLAND: What are their ages?

EMANUEL PREYER: Emanuel Preyer is forty-one and Patricia is thirty-seven and Erica is twenty-six.

FELICIA RILEY: No children.

MR. KIRKLAND: Ms. Sellers.

PAMELA SELLERS: I have two children. I have Joshua Sellers and he's thirteen; Jared Sellers, he's seven.

EARNESTINE SMITH: One son James Byron Smith, forty-one.

JOEL SMITH: I have one son, one daughter. Son is forty-six, Lavonne W. Smith; and one daughter forty-eight -- she's

STATE OF ALABAMA

IN THE CIRCUIT COURT FOR THE COUNTY OF ESCAMBIA

TWENTY-FIRST JUDICIAL CIRCUIT

CRIMINAL

STATE OF ALABAMA,

Plaintiff,

Vs. CASE NO.:CC-00-293
DIVISION:II

CUHUATEMOC H. PERAITA,

Defendant.

----------/

COURT REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS ON APPEAL

VOLUME VII

BEFORE:

The Honorable Bradley E. Byrne, Circuit Court Judge, Brewton, Alabama.

APPEARANCES:

For The State:
REO KIRKLAND,JR., ESQUIRE

For The Defendant:
JEFFREY TODD STEARNS, ESQUIRE
WADE L. HARTLEY, ESQUIRE

DENISE ALVERSON, Official Court Reporter

THE COURT: If there's anyone in the courtroom -- there will be no outburst or emotions displayed or anything said or done when the jury returns their verdict. If there's anyone who can't comply with that instruction then you need to exit the courtroom at this time.

You can bring them in.

(JURY IN BOX).

VERDICT

THE COURT: Ladies and gentlemen, have you reached a verdict in this case? If you would, give the verdict forms to the bailiff and the bailiff will hand them to me.

(COMPLIES).

Thank you.

Okay. As to Count One, we, the jury, find the Defendant guilty of the capital offense of murder while under a sentence of life imprisonment as charged in Count One of the indictment. That's signed by Mr. Preyer as the foreperson of the jury.

As to Count Two, we, the jury, find the Defendant guilty of the capital

offense of murder after having been convicted of murder within the preceding twenty years as charged in Count Two of the indictment.

Mr. Preyer, have I correctly read your verdict? Is that your verdict in this case?

MR. PREYER: That's our verdict.

THE COURT: Okay. And that is your verdict as well individually? You voted and that's your verdict?

MR. PREYER: Yes.

THE COURT: I am going to ask each of you individually just to confirm that this is your verdict.

John Crane, is this your verdict?

MR. CRANE: Yes, it is.

THE COURT: Tracey Hodgen, is this your verdict?

MS. HODGEN: Yes, sir.

THE COURT: Russchelle Ikner, is this your verdict?

MS. IKNER: Yes.

THE COURT: Laura Jackson, is that your verdict?

MS. JACKSON: Yes.

THE COURT: Vann Jones, is this your verdict?

MS. JONES: Yes.

THE COURT: Barbara Lanier, is this your verdict?

MS. LANIER: Yes.

THE COURT: Walter McCants is this your verdict?

MR. MCCANTS: Yes.

THE COURT: Iris Presley, is this your verdict?

MS. PRESLEY: Yes.

THE COURT: Mr. Preyer, out of an abundance of caution, is this your verdict?

MR. PREYER: Yes.

THE COURT: Pamela Sellers, is this your verdict?

MS. SELLERS: Yes, sir.

THE COURT: And Joel Smith, is this your verdict?

MR. SMITH: Yes, sir.

THE COURT: Charles Thomas, is this your verdict?

MR. THOMAS: Yes, sir.

THE COURT: Okay. Is there any juror that I did not call out your name? Let the record reflect that all twelve jurors stated that this was their verdict.

Ladies and gentlemen, at this time I am going to ask you to retire back to the jury room before we decide or determine how we will proceed at this point. So if you would, go back with the bailiff in the jury room.

(JURY EXITS).

All right. On the record, and the jury has exited. I guess I'll ask if the Defendant is ready to proceed with the penalty phase?

MR. STEARNS: Judge, after conferring with our client he would instruct us not to put on anything in the penalty phase. If such is held we would like to have the Court inquire of him whether he desires to waive the penalty phase or to proceed and have us not put on anything.

THE COURT: Let me do this. Let me just state some things for the record regarding

THE COURT: The next phase would be to have a hearing in front of the Judge. Even if you had an advisory verdict from the jury you still have to have a sentencing hearing in front of the Judge. If you waive the jury's advisory verdict then there's a sentencing hearing in front of the Judge. Either way, there's going to be some sort of hearing in front of me.

DEFENDANT PERAITA: Okay.

THE COURT: And so with that said unless you consent to it we can't delay it until I receive a pre-sentence report. As I was telling you, it is my understanding that I cannot make a decision until I receive that pre-sentence report. So if you want to go forward with any type of hearing in front of the Court, if we don't do it today or tomorrow or Monday -- we will do it one of those three days, but we have still got to wait for the pre-sentence report or we can wait until I get the pre-sentence report and have the hearing.

DEFENDANT PERAITA: I have no problem with doing it now since we're all here and then

wait until you get your opinion of what you're going to do. Since we're here I don't see no reason to wait.

THE COURT: Well, I am not sure I am going to do it today. We might do it Monday. I might wait until Monday. Just don't wait until a pre-sentence report is received. Is that what you want to do rather than do it Monday?

DEFENDANT PERAITA: Fine with me.

THE COURT: Is that any problem for counsel?

MR. STEARNS: Yes, sir, it could be. We need to -- Of course, Dr. Haney is here today and we need to -- the last time we had spoken with Mr. Peraita is that he had instructed us not to put on mitigating evidence whatsoever and if that's still his wish then we won't need to bring Dr. Haney back on Monday or go ahead and hear from him today. Judge, we had intended on -- we're prepared to go forward but Mr. Peraita has instructed us not to.

THE COURT: Is that correct?

DEFENDANT PERAITA: Yeah.

THE COURT: You're in the position where you have instructed your attorneys not to present any mitigating testimony?

DEFENDANT PERAITA: (Nods Head).

COURT REPORTER: Would you answer out loud?

DEFENDANT PERAITA: Oh, yeah. I thought he was going to go forward.

THE COURT: I'm trying to decide where that puts us then as far as Dr. Haney.

DEFENDANT PERAITA: He can go home.

THE COURT: You don't want him to testify on your behalf?

DEFENDANT PERAITA: No, I don't. There's nothing further to say from this point on.

MR. STEARNS: He can go back to California today.

THE COURT: Can either of you think of anything that we need to cover concerning this issue?

MR. STEARNS: Judge, we would like to inform the Court of what we had intended to offer in way of mitigation just so it's a matter of record and Mr. Peraita hears

it and he can inform the Court after hearing that that he's further instructed us not to offer any mitigation whatsoever.

THE COURT: All right. What is it that you want to proffer?

MR. STEARNS: Dr. Haney had prepared a social history outline of the family history of Cuhuatemoc Peraita. We would of course not be offering the social history outline into evidence but in it are family backgrounds and circumstances that we would expect to elicit from either Dr. Haney or Cuhuatemoc's mother, Loretta Mancuso and his brother Edmundo who is here, both who are here and present in the courtroom. We expect that an extensive family background would have been developed through verbal testimony through Dr. Haney, Ms. Mancuso and Mr. Peraita and we would prove the social history outline prepared by Dr. Haney only for the purposes of showing what we would have expected to show and not as evidence itself.

THE COURT: Okay. Mr. Kirkland, do you

have any objection to that just to make sure the record reflects what is being done? Do you have anything that you want to add to that?

MR. KIRKLAND: I have not had the opportunity to review the entire document, Your Honor, but I understand that they are offering that simply as an offer of proof that they would have attempted to introduce as mitigation evidence in response to questions from various people what is set forth on that document. I have no problem with them offering it for that purpose. Just the little bit that I did look at I think that there are probably things contained in there that would not have been admitted into evidence, but if it's just being offered just to show that they would have attempted to elicit; that they would have asked questions to witnesses that, if allowed, would have -- these responses would have been given, I have no problem with that.

THE COURT: All right. It will be marked

for identification and submitted for that limited purpose only to show that the attorneys for the Defendant were prepared to go forward with mitigation testimony and evidence in this case.

Mr. Peraita, just to make sure, you understand that your attorneys were prepared to go forward with mitigation evidence, and you're not doing this because you didn't feel like they were prepared or didn't have any evidence on your behalf?

DEFENDANT PERAITA: No. I feel they did a very good job.

Are you going to read that?

THE COURT: Am I going to read it?

DEFENDANT PERAITA: Yeah.

THE COURT: I don't know.

DEFENDANT PERAITA: I mean what I was trying to say is I prefer for you not to. I would not -- I know what they are doing. They did a good -- I'm saying that they did a very good job but I would prefer that you not read that. I don't want mitigating evidence so why put it in? I

am saying right now they did a good job.

THE COURT: It's just to show that they were prepared to go forward and you're not doing this because of any dissatisfaction with them.

DEFENDANT PERAITA: No.

THE COURT: You understand that they were prepared to go forward with evidence on your behalf, and we just wanted the record to reflect that.

All right. Well, having waived the jury's advisory verdict and the State having consented and the Court having consented as well then I think what I could do is dismiss the jury. Then we can decide when we're going to have this hearing we need to have, whether it be today or some other time.

Is there anything else that y'all can think of that needs to be covered on the record at this time concerning this waiver of the right to an advisory verdict?

Do you have any questions about this Mr. Peraita?

DEFENDANT PERAITA: I just don't want you

reading none of my background.

THE COURT: I understand that. Do you have any questions about your waiver of an advisory verdict by this jury?

DEFENDANT PERAITA: No.

THE COURT: You feel like you understand it and you understand the law and that this is what you want to do?

DEFENDANT PERAITA: Yes, sir.

THE COURT: Do you feel this is in your best interest?

DEFENDANT PERAITA: Yes, sir.

MR. HARTLEY: Judge, may I ask him a few questions?

THE COURT: Yes.

MR. HARTLEY: You understand the only factors that the Judge will have will be aggravating factors?

DEFENDANT PERAITA: Yes.

MR. HARTLEY: You understand that there will not be any mitigating factors submitted to the Judge whatsoever?

DEFENDANT PERAITA: Uh-huh.

MR. HARTLEY: You understand that he'll have to make his decision regarding a

sentence based solely on aggravating factors and there won't be anything else?

DEFENDANT PERAITA: (Nods Head).

COURT REPORTER: Can you answer out loud?

DEFENDANT PERAITA: Yes, ma'am. I just -- I don't want him to read that because I don't want him to read it.

MR. STEARNS: You don't want to weigh any mitigating circumstances against the aggravating?

DEFENDANT PERAITA: No. I'm fine where I'm at.

THE COURT: All right. Let me dismiss the jury and rather than -- do y'all have any objection if I go and dismiss them and not bring them back in here? Do you feel like we need to bring them back in here?

MR. STEARNS: We have no objection, Judge.

MR. KIRKLAND: Technically the jury hasn't been dismissed and for the purposes of the record it might be best to conduct that in the presence of the Defendant.

THE COURT: All right. Good point.

MR. KIRKLAND: One other thing that I wanted to mention in connection with the

questions that Mr. Hartley just asked the Defendant is -- And of course I am not privy to what they have talked to him about and what they have advised him and what they haven't advised him, but I know we're probably not exactly to that point but as I understand it Mr. Haney is fixing to leave and go back to California. I wanted to make sure that the Defendant understood that by the guilty verdict on Count One and Two that as a matter of law this jury has already found the existence of two aggravating circumstances.

THE COURT: Okay. I'll ask him that.

Do you understand that by the verdict rendered by this jury that they've found two aggravating circumstances to exist that is ---

MR. KIRKLAND: Committed by a person under a sentence of imprisonment and Defendant was previously convicted of another capital offense of a felony involving the use of threat or violence to a person.

THE COURT: Okay. Do you understand that by their verdict they have found those two

aggravating circumstances to exist and that for the purposes of sentencing those aggravating circumstances have been proven? You understand that?

DEFENDANT PERAITA: Yes, sir.

THE COURT: Okay. I just wanted to make sure you understood that by their verdict they have found those two aggravating circumstances to exist.

DEFENDANT PERAITA: Yes.

THE COURT: All right. I am going to bring the jury back in and excuse them and then we will see where we're at after I excuse them. Okay. You can bring them back in. Wait just a minute.

Mr. Peraita, for the record, how old are you?

DEFENDANT PERAITA: Twenty-five.

THE COURT: Okay, and how far did you go in school?

DEFENDANT PERAITA: Well, I feel that my schooling ability has improved since I have been incarcerated. I haven't been to school but to the 9th grade but I feel like at least that I have a 12th grade

education now.

THE COURT: All right, and you can read?

DEFENDANT PERAITA: Yes, sir.

THE COURT: Okay. Are you under any kind of -- are you on any medication at this time?

DEFENDANT PERAITA: Don't have that privilege.

THE COURT: Okay. You're not under the influence of any alcohol or anything like that?

DEFENDANT PERAITA: Unfortunately, no.

THE COURT: Do you feel like you're under any kind of mental disability or anything like that that would affect your ability to make a clear judgment today?

DEFENDANT PERAITA: No, sir.

THE COURT: You haven't been diagnosed with having any kind of mental disorder or problem that would affect your ability to make decisions like what you're making today?

DEFENDANT PERAITA: No, sir, no problems.

THE COURT: And nobody is forcing you to do this; is that right?

DEFENDANT PERAITA: That's right.

MR. STEARNS: Judge, just for the record as well we have also -- Mr. Peraita has also consulted with Aaron McCall who is our mitigation specialist who works with the Alabama Prison Project and who has worked on many capital cases. Mr. McCall has well informed Mr. Peraita about the consequences of his actions and both Mr. Hartley and I have well informed him of the consequences of his actions here today. He's also had discussions with his mother about this as well, and we have all advised him not to take this course of action. He's proceeding on his own wishes.

THE COURT: All right. You can bring them in.

(JURY IN BOX).

Ladies and gentlemen of the jury, the Defendant and the State and the Court have waived the -- or the Court has consented to the Defendant's waiver of the penalty phase before the jury. In other words, there will be no jury recommendation as to

yourself while incarcerated on the Etowah County capital murder charges.

The Court has considered the defendant's difficult family history and childhood, the abuse, neglect and absence of a stable home environment during his formative years.

The Court has also weighed your abuse of alcohol and drugs when you were a teenager. In fact, the Court has searched all the evidence in the case for evidence of mitigation, whether or not raised by the defense, in view of the fact that this is a capital case.

The Court has considered all non-statutory mitigating circumstances presented throughout this proceeding which involved any aspect of your character or record and any of the circumstances of the offense.

The Court has weighed the aggravating and mitigating circumstances in an organized process by which circumstances relevant to the sentence have been marshalled and considered in an organized fashion for the purpose of determining whether the proper sentence is life imprisonment without parole or death. The evidence proves beyond a reasonable doubt the existence of three statutory aggravating circumstances. No statutory mitigating circumstance is present. The Court has weighed the non-statutory mitigating circumstances

against the statutory aggravating circumstances and the Court determines that the statutory aggravating circumstances far outweigh the mitigating circumstances.

It is ordered, adjudged and decreed that judgment be entered in accordance with the guilty verdict rendered by the jury as to count one and count two of the indictment. And it is further ordered, adjudged and decreed that the sentence -- that the defendant be sentenced to death. This is dated the first day of November 2001.

That is the order of this Court. Of course, you have an automatic right of appeal and if counsel decides to file post-trial motions then that will be entertained by the Court as well.

Anything else?

MR. KIRKLAND: No, sir.

THE COURT: Mr. Stearns? Mr. Hartley?

MR. HARTLEY: No, sir.

THE COURT: Okay. That concludes this hearing.

(Whereupon, the foregoing proceedings were concluded)

C E R T I F I C A T E

STATE OF ALABAMA)

COUNTY OF ESCAMBIA)

I, the undersigned, hereby certify that the foregoing pages contain a true and correct transcript of the aforementioned proceedings, as is herein above set out, as the same was stenographically recorded by me and later transcribed by me.

This the 23rd day of April, 2002.

Susan Krehbiel

Susan Krehbiel, Official Court Reporter

APPENDIX G

ORIGINAL

IN THE CIRCUIT COURT OF ESCAMBIA COUNTY, A

CUHUATEMOC HINRICKY PERAITA,	*	
Petitioner,	*	
v.	*	CC-00-293
STATE OF ALABAMA,	*	
Respondent.	*	

FIRST AMENDED PETITION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 32 OF THE ALABAMA RULES OF CRIMINAL PROCEDURE

FILED

JUL 03 2006

Circuit Clerk
Escambia County, AL

by these errors, and, accordingly, Mr. Peraita's conviction and sentence should be vacated.

A. Trial Counsel Failed To Conduct An Adequate Investigation And Presentation Of The Self-Defense Case.

49. Trial counsel's failure to conduct an adequate investigation and presentation of Mr. Peraita's substantial and compelling self-defense claim was deficient performance that prejudiced Mr. Peraita and constituted ineffective assistance of counsel that violated the United States and Alabama Constitutions, and Alabama State law. *See* U.S. Const. Amends. V, VI, VIII, and XIV; *Rompilla*, 125 S. Ct. at 2466-67; *Wiggins*, 539 U.S. at 524; *Williams*, 529 U.S. at 390-91; *Strickland*, 466 U.S. at 686-87; Ala. Const. art. I § 6.

1. Trial Counsel Failed To Investigate Or Present Evidence That Mr. Peraita's Life Had Been Threatened Days Before The Incident Resulting In Mr. Lewis' Death.

50. Trial counsel made no effort to present evidence that Mr. Peraita's life had been threatened days before the incident resulting in Mr. Lewis' death.

51. On December 2, 1999, a "reliable source" advised Officer Darrell Owens that Mr. Peraita "was going to get stabbed down if [Officer Owens] did not get [Mr. Peraita] out of population."

52. Correctional officers were concerned enough by this report that they immediately removed Mr. Peraita from population for further investigation by Captain Pouncey, Officer Darrell Owens, Officer Eugene Edwards, Officer Terry Stallworth and Officer Melvin Hall. After a limited investigation, Mr. Peraita was returned to popula

53. Investigation by Officer Melvin Hall revealed that the threat to Mr. Peraita's life was related to his relationship with Mr. Castillo.

54. The threat against Mr. Peraita's life and the results of the subsequent DOC investigation were recorded in an Institutional Incident Report, which was provided to trial counsel in discovery.

55. Trial counsel neglected to interview Officers Owens, Edwards or Hall, neglected to call any of these officers as witnesses at trial, and neglected to introduce the Institutional Incident Report into evidence at trial. The Institutional Incident Report is a business record, and thus is not considered hearsay under Alabama Rule of Evidence 803(6).

56. Trial counsel's complete failure to investigate this incident and introduce at trial evidence of this concrete, documented threat on Mr. Peraita's life, which occurred just days before the incident resulting in Mr. Lewis' death, was objectively unreasonable and severely prejudiced Mr. Peraita's defense.

57. Evidence that Mr. Peraita's life was in danger would have buttressed a theory of self-defense in that it would have supported the reasonableness of Mr. Peraita's belief that both his and Mr. Castillo's lives were in danger during the altercation with Mr. Lewis on December 10, 1999.

58. Trial counsel's deficient performance in failing to introduce evidence that Mr. Peraita's life was in danger prejudiced the defense, and there is a reasonable probability that the result of the proceedings would have been different were it not for this error.

IN THE CIRCUIT COURT OF ESCAMBIA COUNTY, ALABAMA

CUHUATEMOC HINRICKY PERAITA,	*	
Petitioner,	*	
v.	*	CC-00-293
STATE OF ALABAMA,	*	
Respondent.	*	

SECOND AMENDED PETITION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 32 OF THE ALABAMA RULES OF CRIMINAL PROCEDURE

incapable of making a knowing and voluntary waiver of his right to present mitigation evidence during his sentencing phase.

309. The trial record does not reflect that Mr. Peraita's purported waiver was a rational or reasoned decision based on an understanding of the sentencing phase or of the consequences of his decision. R. 1301 – 06.

310. Neither before nor during trial, did trial counsel secure the services of a neuropsychologist to assess Mr. Peraita's capacity to make a knowing and voluntary waiver of his right to present mitigation evidence. If trial counsel had done so, trial counsel would have been advised that Mr. Peraita did not (and does not) have the capacity to make such a waiver.

311. If trial counsel had been advised of Mr. Peraita's inability to make a knowing and voluntary waiver, and had shared the same with the Court, despite Mr. Peraita's purported waiver, either the Court would have suspended proceedings or trial counsel would have been required to present during the sentencing phase (over Mr. Peraita's apparent objection) the extensive mitigation evidence that would have supported the imposition of a sentence other than death.

IV. MR. PERAITA'S SENTENCE IS DISPROPORTIONATE WHEN COMPARED TO THE SENTENCE OF HIS MORE CULPABLE CO-DEFENDANT.

312. The Eighth Amendment of the United States Constitution guarantees that those convicted of crimes will not be subject to "cruel and unusual punishment." *See* U.S. Const. Amends. VIII and XIV.

313. The Eight Amendment is violated when a less culpable co-defendant is sentenced to death, while the more culpable party receives something less than a death sentence. *See LaSamuel Gamble v. State*, Case No. CC-96-813-60 (Shelby County Circuit Court, Sept. 5, 2001) (attached hereto as Ex. 1) at 130-131 ("Proportionality in sentencing between co-defendants is a major, independent element under the Eight Amendment in assessing a death sentence.")

314. In fact, "the Supreme Court directs reviewing courts to not only evaluate the defendant's culpability individually, but also relative to his co-defendants and accomplices in the same case." *Id.* at 128, *citing Enmund v. State*, 458 U.S. 782, 788, 798 (1982).

315. In *Enmund*, the U.S. Supreme Court found that imposing the death penalty on co-defendants who had "plainly different" levels of culpability for the killings ran afoul of the Eighth and Fourteenth Amendments. *Enmund*, 458 U.S. at 788, 792.

316. In *Gamble v. State*, the Court held that the death sentence of Mr. Gamble was "arbitrary, capricious , and disproportionate" because his more culpable co-defendant, Mr. Presley, was constitutionally barred from receiving a death sentence. *Id.*

317. Shelby County District Attorney Robert Owens, who prosecuted Mr. Gamble, testified in Mr. Gamble's Rule 32 hearing that "it's not fair to leave the person on death row who didn't kill anyone and take the person off death row who did." *Id.* at 125.

318. The Court in *Gamble* agreed, finding that "it would be fundamentally unfair to continue to seek the death of Gamble when [his co-defendant's] sentence has now been commuted to life without the possibility of parole." *Id.* at 126.

319. Alabama appellate courts have long considered the appropriateness of imposing the death penalty by comparing the conduct of a particular defendant to the conduct of capital defendants in similar cases. *See Beck v. State*, 396 So.2d 645, 664 (Ala. 1980).

320. It is only reasonable, therefore, that "[a]t a constitutional minimum [] is the requirement that appellate courts avoid arbitrariness within the same case by comparing the sentence received by defendants with the sentences received by co-defendants or accomplices." *Gamble* at 127, *citing Enmund v. Florida*, 458 U.S. 782. *See also Ex Parte Burgess*, 811 So.2d 617, 628 (Ala. 2000) (finding that trial court should have given "greater weight" to the fact that defendant was only one of six participants in the offense who was prosecuted).

321. The inequity of sentencing Mr. Peraita to death is even more egregious than the circumstances in Mr. Gamble's case because here Mr. Peraita's co-defendant, Michael Castillo, received a sentence of only 20 years for manslaughter which added only eight years to the sentence he was already serving.

322. There is voluminous evidence that Mr. Castillo was far more culpable than Mr. Peraita for the death of Mr. Lewis.

323. Eddie John Campbell, a Holman inmate at the time of Mr. Lewis' death, told Department of Corrections investigators that Mr. Castillo, not Mr. Peraita, stabbed Mr. Lewis.

324. Mr. Campbell also told investigators that Mr. Castillo gave Mr. Peraita the murder weapon after he finished stabbing Mr. Lewis and told Mr. Peraita not to give the knife to anyone.

325. Upon information and belief, Holman inmate Jimmy Hardin will testify that Mr. Peraita told him that Mr. Castillo stabbed Mr. Lewis and later convinced Mr. Peraita to take the rap and repeatedly thanked him for it.

326. Holman inmate Edward Junior told Department of Corrections investigators that Mr. Castillo, not Mr. Peraita, was "the one who did the killing."

327. Holman inmate Jack King told investigators that he saw Mr. Castillo stabbing Mr. Lewis and that Mr. Lewis was laying on top of Mr. Peraita on his bed.

328. Holman inmate Charles Davis, an eyewitness of the events leading to Mr. Lewis' death, told Holman investigators that Mr. Peraita did not stab Mr. Lewis, he only held him around the neck.

329. Drawings made by the Alabama Department of Forensic Services and by the nursing staff at Atmore Community Hospital who attended to Mr. Lewis further demonstrate that it was Mr. Castillo, not Mr. Lewis, that stabbed Mr. Lewis.

330. The stark differences between the culpability of Mr. Peraita and Mr. Castillo do not stop at their alleged conduct and the night of December 11, 1999.

331. Upon information and belief, inmates at Holman who were privy to the relationship between Mr. Peraita and Mr. Castillo – including Bennie Daley, Tommy Tunstall, and Victor Ayler -- will testify that Mr. Castillo was manipulative and exercised a great deal of psychological control over Mr. Peraita.

332. For example, Mr. Campbell told investigators that Mr. Castillo was in control of the relationship and was jealous when Mr. Lewis and Mr. Peraita talked.

333. Mr. Knight also told investigators that Mr. Castillo was in charge of the relationship and always told Mr. Peraita what to do.

334. Mr. Peraita's background and upbringing, including the persistent abuse and neglect he suffered during childhood, made him particularly susceptible for manipulation.

335. Indeed, fellow Holman inmate Michael Best stated that Mr. Peraita had a reputation for being "passive prey."

V. ALABAMA'S METHOD OF EXECUTION VIOLATES THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION AS A MATTER OF LAW AND AS APPLIED TO MR. PERAITA.

336. The method of execution by lethal injection as applied by the State of Alabama constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 15 of the Constitution of the State of Alabama.

IN THE CIRCUIT COURT OF ESCAMBIA COUNTY, ALABAMA

STATE OF ALABAMA	)	
	)	
V.	)	Case No.: CC-2000-000293.60
	)	
PERAITA CUHUATEMOC HINRICKY	)	
Defendant.	)	

ORDER ADDRESSING THE REMAINING CLAIMS IN PERAITA'S SECOND AMENDED RULE 32 PETITION

On April 26 and 28, 2016, this Court held an evidentiary hearing on the remaining claims in Petaita's Second Amended Rule 32 Petition ("petition") attacking his conviction for capital murder and death sentence.[1] Counsel for Peraita and the State filed post-hearing arguments with this Court on October 24, 2016, and January 18, 2017, respectively. This Court, having considered the remaining claims, the State's responses, the testimony and exhibits presented at the evidentiary hearing, and the post-hearing arguments of the parties, finds as follow:

EVIDENCE PRESENTED AT PERAITA'S TRIAL

This Court adopts the summary of evidence contained in the Alabama Court of Criminal Appeals' opinion on direct appeal.[2]

EVIDENCE PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, counsel for Peraita presented eight witnesses and admitted twenty-four exhibits and the State presented one rebuttal witness and admitted six exhibits. This Court will refer to testimony and exhibits as necessary in this order to address the remaining claims.

I. CLAIM THAT PERAITA IS ENTITLED TO POST-CONVICTION RELIEF DUE TO JUROR MISCONDUCT.

convictions, so if Mr. Preyer was aware of Peraita's prior convictions he had no obligation to disclose it.[9] Peraita failed to show the comment by Mr. Preyer constituted information from an external authority or process.

This Court finds that Peraita failed to prove the comment purportedly made by Mr. Preyer constituted extrinsic evidence. Therefore, Peraita's claim of juror misconduct is denied by this Court.

B. Peraita Failed To Prove Claim That The Comment Purportedly Made By Mr. Preyer Prior To The Jury's Guilt Phase Deliberations Might Have Caused Him To Be Prejudiced.

Alternatively, this Court finds that, even if Mr. Preyer's comment could be characterized as extraneous information, Peraita would still not be entitled to relief. The Alabama Supreme Court has held that "[t]he proper standard for determining whether juror misconduct warrants a new trial, as set out by this Court's precedent, is whether the misconduct might have prejudiced, not whether it actually did prejudice, the defendant."[10] "The might-have-been-prejudiced standard, although on its face a light standard, actually requires more than simply showing that juror misconduct occurred."[11]

"[T]he question whether the jury's decision *might* have been affected is answered not by a bare showing of juror misconduct, but rather by an examination of the circumstances particular to the case."[12] In addition to proving that Mr. Preyer's comment was improper extraneous information, Peraita had the burden of proving that the comment might have caused him to be prejudiced.

Ms. Jones testified that the comment by Mr. Preyer was made before jurors began their guilt phase deliberations and that she did not discuss the comment with any other jurors.[13] Peraita failed to present any evidence demonstrating that any jurors discussed or considered Mr. Preyer's isolated comment during the jury's guilt phase deliberations or that the comment might have had any effect on any juror's decision to find him guilty of capital murder.[14]

Moreover, this Court notes that the trial court repeatedly instructed the jurors during the court's guilt-phase charge that they could not consider evidence that Peraita may have been

serving a life sentence or may have been convicted of some crime that led to a life sentence as evidence that he committed the capital murder for which he was being tried.[15] Peraita presented no evidence at the evidentiary hearing demonstrating that any juror failed to follow the trial court's explicit instructions.[16]

This Court finds that Peraita failed to prove that the isolated comment purportedly made by Mr. Preyer prior to the jury's guilt-phase deliberations was, in fact, considered, discussed, or even mentioned by jurors during their guilt-phase deliberations or that it might have affected the outcome of the guilt-phase of trial. Therefore, Peraita's claim of juror misconduct is denied by this Court.

C. Peraita Failed To Establish That Ms. Jones' Testimony Was Admissible Over The State's Hearsay Objection.

In part I.B of his brief Peraita argued that Ms. Jones' testimony regarding the comment by Mr. Preyer was admissible over the State's hearsay objection because her testimony constituted non-hearsay. According to Peraita, Ms. Jones' testimony was not offered to prove the matter asserted, but to show the trial court's instruction - that jurors were not to discuss information that was not introduced as evidence in the case - was violated.

The Alabama Supreme Court has held that:

> evidence of declarations or admissions made by jurors after the rendition of the verdict may not be received or considered in support of a motion for new trial, for the purpose of showing such matters as incompetency of jurors to act in the particular case, misconduct of jurors, the effect of misconduct on the verdict, the method of reasoning by which the jury arrived at the verdict, or that the verdict was corruptly secured."[17]

The Alabama Court of Criminal Appeals has held that "'[t]o have a statement admitted under Rule 804[, Ala.R.Evid.], a proponent of a hearsay statement must do more than simply show that

the declarant is unavailable; he must additionally meet one of the requirements of Rule 804(b). Ala.R.Evid.'"[18]

"The Alabama Rules of Evidence apply to Rule 32 proceedings. Rule 804, Ala.R.Evid., specifically excludes hearsay evidence."[19] This Court finds that Ms. Jones' testimony about what Mr. Preyer purportedly said prior to guilt phase deliberations was clearly hearsay and that Peraita failed to identify any exception to the hearsay rule. Peraita's argument that Ms. Jones' testimony concerning Mr. Preyer's comment was admissible is without merit.

Moreover, even if Ms. Jones' testimony was non-hearsay, this Court finds that Peraita would still not be entitled to relief. As stated above, Peraita presented no evidence affirmatively proving that Mr. Preyer's pre-deliberation comment might have affected any juror's guilt phase verdict.

II. CLAIMS THAT PERAITA WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF TRIAL.

Peraita was represented by Mr. Todd Stearns and Mr. Wade Hartley.[20] In part II of his post-hearing brief, Peraita claimed that trial counsel were ineffective when, after he informed them that he did not want mitigation evidence presented at penalty phase, trial counsel did not have him evaluated by a mental health professional to determine if he had the capacity to waive the presentation of mitigation evidence.[21] To support this claim, Peraita relied on the hearing testimony of Dr. Daniel Marson, a professor of neurology in the Department of Neurology at the University of Alabama in Birmingham.[22] Dr. Marson interviewed Peraita at Holman Prison on multiple occasions and administered certain cognitive and psychological tests. A copy of Dr. Marson's written report was admitted at the evidentiary hearing as Petitioner Exhibit Two without objection from the State. Dr. Marson found that for the first 12 years of Peraita's life he endured traumatic physical and sexual abuse as well as severe neglect. According to Dr. Marson,

APPENDIX H

CIRCUIT COURT FOR THE COUNTY OF ESCAMBIA

TWENTY-FIRST JUDICIAL CIRCUIT

CRIMINAL DIVISION

CUHUATEMOC H. PERAITA,

Petitioner,

Vs. CASE NO.:CC-00-293.60
DIVISION:II

STATE OF ALABAMA,

Respondent.

_____/

COURT REPORTER'S OFFICIAL TRANSCRIPT OF MOTIONS & EVIDENTIARY HEARING ON APPEAL

BEFORE:
The Honorable Bradley E. Byrne, Circuit Court Judge, on April 19, 2011 and July 18, 2011, Circuit Court Judge, Brewton, Alabama, and The Honorable J. David Jordan, Circuit Court Judge, Brewton, Alabama, on the 26th and 28th days of April, 2016.

DENISE CARLEE, AL-CCR-64, Official Court Reporter

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A Yes.

Q Did the other jurors and yourself have an opportunity to hear what was said by the one juror?

MR. HAYDEN: I am going to object to what other jurors heard, Your Honor. Calls for speculation.

THE COURT: Well, given the form, as I understood it, I am going to overrule the objection and allow her to answer.

Go ahead, ma'am.

THE WITNESS:

A All of us heard it.

BY MR. DOSS:

Q Pardon me?

A We all heard it.

MR. HAYDEN: I'm sorry, Ma'am.

I'm going to object to the answer and move that it be stricken, Your Honor.

THE COURT: If I heard your question correctly Mr. Doss, the question was: Did all have an opportunity to hear it. Now her answer suggest more than that; suggest that they physically heard it. So sustain the objection.

MR. DOSS: I'll follow up, Your Honor.

BY MR. DOSS:

Q Could you describe for us what the other jurors and yourself were doing when the one juror made a statement about Mr. Peraita's prior convictions?

A We was just all sitting down, and he just made that statement. That was it.

Q I'm sorry?

A I said we were all sitting down and one person just made a statement.

Q Was there any other conversation taking place when the statement was made?

A No, not as I know of.

Q Were the other jurors -- were you -- how close were you to the juror when such a statement was made?

A Maybe about -- I don't know, about three or four persons. We was all sitting at the table.

Q You were all sitting at a conference table?

A Yes.

Q And were the other jurors present also at the conference table?

A Yes.

Q To your knowledge were the other jurors

attentive to the speaker in that they were watching him or viewing him when he was talking?

A They were viewing him, yes.

Q Who was the speaker? What juror was it?

A His name was a Emanuel Preyer.

Q Excuse me?

A Emanuel Preyer.

Q Did he serve as the foreperson?

A Yes.

Q What the foreperson said about Mr. Peraita's prior convictions had that been evidence that was actually introduced at trial?

MR. HAYDEN: I am going to object, Your Honor. I think the question or the answer itself would call for hearsay as opposed to what he said.

THE COURT: Let me let you rephrase Mr. Doss.

MR. DOSS: Well, I want to press this issue, Your Honor, so the record is clear.

BY MR. DOSS:

Q Ms. Jones, can you tell us what the foreperson of the jury said in the jury room with the other jurors present concerning Mr. Peraita's prior convictions?

MR. HAYDEN: Objection, hearsay.

THE COURT: So Mr. Doss, it's clearly hearsay. You have not identified any exception to the hearsay rule but your earlier statement was your ---

MR. DOSS: I can elaborate.

THE COURT: Sure. Go ahead.

MR. DOSS: Your Honor, the statement is not being introduced for the truth of the matter ascertained. It is being introduced as it would be introduced in a case of fraud or any other instance. The meaningful aspect of this testimony is that the juror said something to the other jurors concerning Mr. Peraita's prior convictions. If the statement was false it would be just as meaningful for our claim as if the statement were true. So the truth of whether or not what the foreperson said in the room is irrelevant to our claim. What is relevant is that the foreperson made a statement to the other jurors that concerned Mr. Peraita's prior convictions which were not presented as evidence at trial. That is the core of our juror claim. On that topic we believe it should come in.

If the Court has reservations, if I may, since we have a juror present and the Court is the factfinder in this proceeding, if the Court could indulge us to allow the testimony to come in and if the Court continues to have reservations about its admissibility following briefing, we could -- you could rule on the admissibility of that testimony after it has been received into evidence.

So that would be an alternative approach. We believe it's clearly admissible as non-hearsay because it's not being introduced for the truth of the matter asserted, simply that it was said in the jury room, but alternatively we would ask that it be received conditionally by the Court subject to briefing or consideration as to whether it should eventually be excluded.

THE COURT: Any objection to that Mr. Hayden?

MR. HAYDEN: If it's being offered, I guess, as a proffer as opposed to actual testimony I really don't know why I would object to that. I just certainly want my objection -- and I think Your Honor has ruled

on the record that the State does object to it as coming in as hearsay but to expedite the process and for the appellant process, the State would not object to it being offered as a proffer.

MR. DOSS: We would ask for an opportunity to present to the Court, perhaps in a very short brief that would explain our views as to the admissibility and the Court could simply reserve judgment on that topic and allow testimony to come in, and then we can at least have it in the record; and we can deal with it later.

THE COURT: Yes. Mr. Doss, I want to be careful -- and Mr. Hayden, to be careful obviously to follow the law and make sure I'm fair to both sides.

I'm going to allow you an opportunity, petitioner's counsel, to make your record, so I am going to accept Mr. Doss' alternative to this issue and with the limitations and the ground rules that Mr. Doss has identified I am now -- I am not overruling the State's objection. The State's objection is on the record but I am going to allow Mr. Doss to

proceed and make the record. I certainly will keep the matter open. If y'all want to brief it or whatever later I'll give you an opportunity to do that. I'll reserve ultimate ruling on the admissibility of this issue.

MR. HAYDEN: Yes, Your Honor.

THE COURT: Mr. Doss, you may proceed.

BY MR. DOSS:

Q Ms. Jones, can you tell us what the foreperson said concerning Mr. Peraita's prior convictions?

A He said that -- told us that, Do y'all know that this guy murdered three or four people there in Gadsden at Popeye's Chicken and put them in the freezer. You know, we heard that.

Q And I missed the last part. Did you say something about a freezer?

A Yeah. He said this guy, Peraita, had murdered three or four people and put them in a deep freeze. That's what he said.

Q Were you able to hear the foreperson clearly when that was said?

A I heard him clearly.

Q How was it said by him?

A Say that again.

Q How was it said? Was it said loudly or quietly; was it said to just his neighbor, or was it said to the whole room?

A The whole room.

Q What were the other jurors doing when the foreperson made this statement about the prior convictions?

A We was just all sitting at the table and that was it.

Q To the extent that you saw, what was the reaction of the other jurors to the statement?

A I really can't say cause I really didn't look at their faces.

Q Did you have any discussion with the other jurors concerning what the foreperson said about the prior convictions?

A No, I didn't.

Q Do you know whether or not the statement was made more than once?

A No.

Q Approximately when during the proceedings was this statement made by the foreperson concerning Mr. Peraita's prior convictions?

A Say that again.

Q When during the proceedings of the trial,

was it on the first day, second day?

A I think it was the second day.

Q Was it before you convened to rule on Mr. Peraita's guilt in that case?

A It was before.

Q Did this information concerning Mr. Peraita's prior convictions affect your personal decision on his guilt or innocence?

MR. HAYDEN: Objection, Your Honor. The mental capacity or the reason why someone voted guilt or innocence, going to the reasons for someone's verdict, Your Honor, that's -- any testimony about that I think should be expressly excluded.

THE COURT: Mr. Doss?

MR. DOSS: We can withdraw the question if the State wishes to object.

THE COURT: All right.

MR. DOSS: I have no additional questions for Ms. Jones. Thank you very much.

THE COURT: State?

MR. HAYDEN: I have no questions. Thank you for coming.

THE COURT: I am going to excuse Ms. Jones unless there's any reason you would like for

from that time. I think between six and nine there was an onset of childhood psychotic disorder that resulted in auditory hallucinations at different points.

I will say this for the Court that Mr. Peraita is not someone who is active schizophrenia but when you look at him through a psychological lens, when you do testing, you will see that he's on the schizophrenic spectrum. These were symptoms and problems that were unfortunately never responded to by his family or by mental health professionals during his life. As a result of this really horrific childhood he has intense personally shame about his past, about his childhood experiences that I think is a critical element in understanding his complete aversion to presenting any mitigation evidence on his behalf in 2001. He also has a paranoid personality disorder. Understandably, that is a product -- it's very hard for him to trust others. He's hypervigilant about assault as could well be understood, and also not surprisingly he has a persistent depressive disorder that I think colors his world. When a child goes through this kind of, again, unremitting sexual and physical abuse when he has no parental figures available to him there are

obvious developmental problems that also come forth.

By the age of six he was a very isolated child even his brothers were not associating with him. I think he was extremely alone. In testing with him later on he discusses how alone he felt both as a child and as an adult.

So summarizing for the Court -- I think of course in my psychological evaluation I believe there were a number of red flags already present in 2001 that trial counsel could have been aware of.

MR. HAYDEN: I'm going to object to any testimony or inference to what trial counsel should or should not have been aware of, Your Honor. Certainly the Doctor can testify to his opinion about red flags but I would object to his comment concerning trial counsels conduct or lack of conduct concerning any red flags.

THE COURT: Sustain.

BY MR. WARREN:

Q Dr. Marson, let me ask you this. Did you reach an opinion within a reasonable degree of medical certainty whether the disorders that you just explained to us would have influenced Peraita's unwillingness to present mitigation evidence as part of his 2001 sentencing?

A Yes, I did.

Q And what was that opinion?

A I think the constellation of psychiatric problems that I alluded to here and the intense personal shame he felt about his past was this driving force that -- I think he was probably unconscious of himself but that made it almost impossible for him to be -- to make any decision other than to try to exclude this information from the Court in mitigation. So I don't think that he was capable of giving a voluntary waiver because of the profound effects of these psychiatric problems.

Q So do you believe these psychiatric problems that you diagnosed in recent testing would have been present in 2001?

A Absolutely. Yes, they would have been.

Q Why do you believe that?

A Well, many of them arose in childhood and based on my evaluation after, you know, in 2007 -- certainly in 2011, 2012 they were manifest in a number of ways and they were like enduring chronic kinds of problems that I think he's been experiencing since he was a young child, certainly through adolescence and early adulthood; and they would have been present in 2001.

Q Would a psychological in 2001 have revealed the existence of these conditions?

A Yes. A very basic psychological evaluation involving standardized testing using the MMPI, the Rorschach, some of the other well established tests that I gave would have revealed this.

Q And it might be helpful. Is psychological testing the same thing as an IQ test or are those different kinds of tests?

A Those are very different. An IQ test is looking at your cognitive or intellectual aptitude. Psychological tests are tapping emotional and personality functioning which is a very distinct domain.

Q In your review of the prior evaluations of Mr. Peraita, were any prior psychological evaluations done of him?

A There where evaluations done of Mr. Peraita but they did not involve any psychological testing of any kind. There were clinical interviews conducted but no psychological testing was ever conducted.

Q Okay. And Dr. Marson, I am going to ask you to not -- let's disregard slide four of this

demonstrative in light of Mr. Hayden's objection.

Dr. Marson, let's step back and I want to talk -- give the Court some details about the basis for your opinions both from your personal history investigation and from the testing that you performed. Why don't we start with personal history investigation. Could you explain the events in Mr. Peraita's life history that are relevant to your psychological diagnoses, maybe start in early childhood like birth to age three or so?

A Yes. And in fact this is documented in my report beginning on page four towards the bottom but Mr. Peraita or Temoc was born into the family of Juan Peraita and his wife Loretta. He was born in 1976. He was the third child of this union. He was born into a very abusive household. His father was a chronic alcoholic, extremely abusive to his wife but also to his three young boys.

Mr. Peraita's mother has testified that when he was only one year old his father threw him across the room as one example of the physical abuse that he was subjected to. His father was so abusive and so hostile that he was murdered by his wife and his wife's sister, I think, in 1977 or '78.

Q So how old was Mr. Peraita at that time?

A He was one-and-a-half years old. So he never knew his father and he's reported that he has no memory of his father. So he lost his father at a very early age.

The other aspect of this period of life between zero and three, in addition to just the physical abuse that was going on, is that he was already experiencing neglect. I think his mother was frequently absent. She was dealing drugs. Her sister-in-law, Kim Chism reported that he continually smelled of vomit and he was not well cared for. The mother would put vodka or tequila in his formula to sedate him. He had very poor dentition as a result. So between the ages of three -- zero and three he was born into this abusive household and he was, you know, neglected as a young baby.

Q What happened -- How long was he in the care of his mother and -- his father was killed when he was a year-and-a-half. For how long was he in the care of his mother?

A Just over three years and then in July of 1979 -- of course this was after the death of the father -- the mother abandoned the family. Basically just disappeared one day, left the

children in the care of a babysitter; said she was coming back but never did come back. Basically she disappeared from the scene although she subsequently was incarcerated I think later that year for her involvement in that murder.

Q So she abandoned the family before she was incarcerated?

A That's exactly right.

Q And after she was incarcerated where did Mr. Peraita live?

A Well, first of all he was -- he and the other boys where transferred to the care of the California Foster Care System because the grandmother could not take care of them. So after loosing his mother he also lost the other potential parental figure in his grandmother and eventually between the ages of three and six he was then transferred with his brothers to the foster care of his wife's sister Nancy Dinwiddie and her husband Gordon Dinwiddie. So between ages three and six he and his brothers lived in the household of Gordon and Nancy Dinwiddie. Again, Nancy Dinwiddie was his mother's sister.

Q Can you describe Mr. Peraita's life during the time he was at the Dinwiddie household?

A This was -- in a very, very terrible childhood this was the worst period. The Dinwiddies had four sons of their own. Two of them were teenagers, Carl and Tommy, and then there were the three Peraita boys and they were often left unattended by the parents who worked and during this time the young Temoc was subjected to continuous physical but also sexual abuse, in particular, by Tommy Dinwiddie, one of the adolescent boys where he was, on a daily basis, raped in a bedroom closet by Tommy Dinwiddie and also violently assaulted in other ways. This went on without any intervention for three years. In addition to that horrible string of events he was humiliated by the family. He was not toilet trained. He was only three years old when he came and he was forced to eat feces. He was forced to roll in feces. He was humiliated in front of the family. He was placed in front of the fireplace and the family would actually throw stones at him by his report. He has scars reportedly that still attest to this. He was also terrorized by the father Gordon Dinwiddie who, for example, once held him over a balcony several floors up or at least one floor up with the threat of dropping him so he reported to me in the interview that he had, you

know, immediate fear that he was going to die. Again, as a three or four year old that's a horrible thing.

He was also beaten with a 2x4 by Gordon Dinwiddie at various times. In addition to this there was also just plain neglect. The Dinwiddies were receiving three checks from California for foster care but very little of that or those resources were going to the children. She would not give them the food that she was providing her own children. They lived on oatmeal reportedly for much of this time and actually went out and stole food to help supplement their nutrition on their own. They also were not given clothes and so there was really no redeeming feature to this foster care placement. There was rampant abuse that the parents apparently treated indifferently or participated in. There was also rampant neglect.

Q And Dr. Marson how long was Mr. Peraita in this foster care placement?

A He was there for three years from 1979 to 1982. Then mercifully this placement came to an end because James and Kim Chism -- James is his mother's brother -- came and visited and detected the abuse and were appalled by it, I believe, and they

basically threatened the Dinwiddies and said unless you give up custody immediately we're going to report your son Tommy to the police for his abusive activities. So the records from the California Foster Care System reflect that there was an abrupt change of placement that occurred in 1982 where custody of them was moved to the Chisms, James and Kim Chism.

Q In 1992 ---

A I'm sorry, 1982.

Q No. You spoke correctly. I did not.

In 1982 how old was Mr. Peraita?

A He was six years old.

Q Could you -- was there any physical abuse in the Chism household?

A The physical abuse continued in the form of -- in particular Kim Chism, the wife of James Chism, beating Temoc and the evidence we have is that she would basically straddle him and slap him until his nose bleed. There's some suggestion that James may have disciplined him as well but most of the beating apparently came threw Kim Chism. But the abuse continued. I think that's the important point here.

Q How would you describe Mr. Peraita's

behavior at this time of his life, starting around age six?

A I think by age six we begin to see the psychiatric consequences of this horrific childhood. The ages in particular between three and six is a critically important developmental period for a child where you begin to internalize the values and behaviors of your parental figures and clearly Mr. Peraita didn't have anyone available for that. He had lost his mother and his father and his grandmother between ages zero and three. Then the Dinwiddies certainly didn't provide anything like that. He had also been subjected to horrors that no person should be subjected to much less a three year old or six year old. So we begin to see wanton and distractive behaviors emerge.

He was living in the mobile home park with the Chisms, and he was breaking into other campers or other mobile homes and destroying things. He was setting fields on fire. I believe there was some evidence of animal cruelty at this time which is often a behavior you will see in people who have been very badly abused. So you could see physical distractedness, physical aggression emerge.

In addition, at this time, he developed

what we would call in psychology a dissociative disorder, if you wish, or behavior where at times when he was threatened as he had been threatened so many times before he would go into a dissociative state where he would lose consciousness of what he was doing. Basically he would defend himself but would have no recollection of what was going on. It was kind of a protective dissociative period in which he would essentially act to protect himself when he felt threatened. This kind of dissociation where you lose touch with consciousness and don't recall what you do are the kinds of psychiatric problems that stem, again, from, you know, intense abuse where the child can't psychologically process or handle it. They are too young for it.

So the other aspect of his behavior at this time was he had become a very isolated child by age six. He was basically running on his own. His Uncle James Chism said Temoc was in his own world. He was going off and doing these destructive things, and he was isolated from his brothers. He was not able to fit in at school. He was not toilet trained at school. He was using the closet in the school classroom as a bathroom. Again, you know, going back to his period with the Dinwiddies.

So he was a child who was now on a very different developmental path as a product of this abuse and neglect.

Q Now how long did Mr. Peraita live with the Chisms?

A He lived with them for about two years, and I do want to say to be ---

MR. HAYDEN: Objection, Your Honor, unresponsive.

THE COURT: Next question.

BY MR. WARREN:

Q How long did you say?

A About two years.

Q Is there anything else about his time with the Chisms that you think is relevant to the development of your psychological opinions?

A Yes. I think that there were some positives to this time period as well. I think that he bonded with his uncle in ways he felt -- in an interview with me he said his uncle was one person he learned to love during his life. His uncle introduced him to art and to drawing which have been lifelong passions for Mr. Peraita. So he mentioned that for the first time he and his brothers enjoyed Christmases where they would have a Christmas

holiday and celebration that had never happened at the Dinwiddies. So this was -- although it was an abusive situation in many ways and he was acting out there were also some positives to this placement for him.

Q Now after the age eight -- you mentioned that he lived with them from ages six to eight -- who did he live with after age eight?

A Well, in 1984 his mother, who had been incarcerated, Loretta Peraita, she was released from prison on parole and although there was supposed to be a gradual family reunification it happened more quickly because she had no other place to stay so she moved in with the Chisms. This actually caused a great deal of stress both for the Chisms and for the Peraita boys who didn't really know their mother and were really not ready to receive her back.

During this time the abuse, I guess, expanded because his mother started beating him regularly as well. She was not -- just as she had not been available earlier in his life she was not available now. She was frequently gone, frequently seeking the company of other men, dealing drugs. So this was not a good situation but in spite of all of that, after a year, she was released from parole and

she was granted parental rights again.

Between 1984 and 1988 she had basically continued to have custody of her three children again. So they left the Chism household and they moved to an area of Southern Sacramento which was impoverish, riddled with drug dealing and just a very dangerous place which was appropriately named Danger Island. During this, this was a chaotic period because the mother was frequently absent. The three boys -- Mr. Peraita now -- this was between the ages of eight and twelve -- was basically in the custody of his older brothers because the mother is frequently gone and defending for themselves.

Q And was there a point in time Dr. Marson when Mr. Peraita's mother no longer lived with them?

A Yes. It came a little bit later. So what happened was that during this time -- Well, it's important to point out that ---

MR. HAYDEN: I'm going to object to the form of the question. I think that the Doctor has gone into a narrative. I have been patient but I think he should respond to specific questions and not answer in a narrative.

THE COURT: Sustain. If you would, answer

the question, please.

THE WITNESS:

A Yes. There was another time where at age thirteen Mr. Peraita was abandoned again by his mother.

BY MR. WARREN:

Q And what do you mean when you say that he was abandoned? Where did she go?

A Well, this was in 1989. So he was thirteen years old. They were living in Sacramento, as I described, and she decided to take a job as a long-term trucker with her boyfriend. So she just left her boys and she took up this life and that brought her actually to Gadsden, Alabama, where she and her boyfriend lived. So Mr. Peraita was left basically in the custody of his older brother Jesse and his girlfriend who was sixteen. Jesse was seventeen and his girlfriend was sixteen.

Q Now where did Mr. Peraita live -- I mean I think you have given us a lot of detail. I think we can start summing this up.

Where did Mr. Peraita live between -- starting around age thirteen to age eighteen?

A He seemed isolated between Sacramento with his teenage brothers, and then he would live for

short periods of time with his mother in Gadsden, Alabama and back and forth occurred several times. During this period he was increasingly involved in infractions with the law, stealing, stealing things, property crimes of various types. So he was in juvenile detention of various kinds in both Sacramento and in the Gadsden area.

Q All right. And did that continue until he was arrested in Gadsden for murder?

A It did with one interesting interlude in that he was given the opportunity by the California juvenile system to do what was called a Rite of Passage program in Nevada, that was a wilderness program, at the time for four months and after he returned from that he lived with his mother in Gadsden. That was the period of time that led up to the crime and incident in Gadsden in 1994.

Q Has Mr. Peraita ever attempted suicide?

A On multiple occasions, yes.

Q When did he first attempt suicide?

A First record of evidence of that was at age eleven when he was cutting his arm and that continued through age thirteen. Then there were two, I think, more serious attempts when he was at age seventeen following his arrest in Gadsden where

there was a drug overdose and an attempted hanging at that time.

Q Is there a history of psychiatric problems in Mr. Peraita's family?

A There is.

THE COURT: Mr. Warren, I'm sorry to interrupt you. We need to take a break so is this a good time for a break?

MR. WARREN: Yes. This is a fine time.

THE COURT: Let's take a ten minute recess.

(BRIEF RECESS)

THE COURT: You're still under oath. You may proceed Mr. Warren.

BY MR. WARREN:

Q Dr. Marson, when we took a break, I was asking you about the Peraita family history of psychiatric problems. Could you describe any history of psychiatric problems in Mr. Peraita's family?

A Yes. Record reflects that his mother has severe psychiatric problems and I think has been diagnosed at one time with schizophrenia and reported in her life hearing voices. She also has had, as I noted, substance abuse problems.

Q Does Mr. Peraita himself have a history of psychiatric treatment?

A He has a limited history of psychiatric treatment that was reflected in his inpatient hospitalization at Taylor Hardin in June of 1995. But otherwise he did not have the kind of treatment that I think he needed.

Q Dr. Marson, you have explained in detail the social history investigation you did based on clinical interviews, the factors in Mr. Peraita's life history that have formed your opinions.

I would now like to orient you toward what you discussed earlier which is the testing that you administered. At this time I think what we identified as demonstrative "A" might be useful for us to look at on slide five, page five.

A So this reflects the testing that was administered to Mr. Peraita over the course of my three visits to Holman.

Q Dr. Marson, did you personally administer these tests?

A I administered some of them. My assistant -- well, my assistant and I, Dr. Triebel administered the cognitive tests in 2007, and then I administered the other tests that were given in 2011

and 2012.

Q Do you think that the results of these tests that you performed are reliable?

A Yes. Mr. Peraita gave excellent effort through all three visits there. He was very cooperative and I didn't have any concerns clinically in that regard. Some of these tests have ways of evaluating effort and Mr. Peraita performed well on all of the cognitive validity dimensions of the tests so we felt the tests were valid and interpretable.

In addition, with respect to mood and personality tests, some of those also have validity scales and he also passed all of those. There was one scale that was elevated on the MMPI but it had to do with unusual experiences and given his past I felt that an elevation on that scale was completely expectable. So in some, yes, the testing was valid and interpretable.

Q So can you identify -- you mentioned the MMPI as a test that happened, an internal validity scale. Could you identify any other tests that had that sort of internal validity scale?

A Personality Assessment Inventory has those kind of validity scales.

Q Could you explain to a lay person what an internal validity scale is?

A Well, these are subscales within say a personality test that help the administrator determine whether or not a valid performance is occurring. So for example on the MMPI there's a scale called the -- it's a psychiatric validity scale. It assesses whether or not someone is faking psychiatric symptoms. Mr. Peraita's performance on that indicated it was low elevation. There was no evidence that he was trying to malinger, if you will, psychiatric symptoms. The MMPI has a number of other validity scales besides that one.

Q In drawing your attention to page five of demonstrative "A", did you administer each of the test listed here to Mr. Peraita?

A I administered all of the mood and personality tests. I administered some of the neuro cognitive tests. My assistant, Dr. Triebel, administrated some of the neuro cognitive tests while I was there.

Q So you were present for the administration of all of these tests?

A That's exactly right.

Q And the tests that you didn't personally

administer were they administered under your supervision?

A Yes.

Q All right. And without going into each individual test -- Well, first let me ask you this. Are these -- the tests that are listed on demonstrative "A", are these tests also listed in your report?

A Yes, they are.

Q Do you know at what page of your report the tests that you administered are listed?

A Well, some of the summaries of the tests are on pages twenty-eight and twenty-nine but the actual tests list is on page sixteen of the report.

Q Okay. Thank you. Could you -- what are the four categories of testing that you have broken out both at page sixteen of your report and here on the demonstrative slide five?

A We have tried to group the tests in a useful way. So some of the tests -- these were given in 2007 -- had to do with intelligence and just sort of academic achievements. Those are listed there. We also, in 2007, gave a number of neuro cognitive tests that test different areas of cognitive functioning like memory, organizationally

abilities and executive function and language abilities.

Then the psychological tests, again, as I said concerned mood and personality and there were a number of different tests there including the Rorschach and the MMPI.

Then I mentioned that some of these tests have validity measures associated with them and I listed several of those at the bottom of page five or Exhibit 5.

Q And these tests that you performed, are they generally accepted as valid tests in the psychological community?

A Yes, they all are well accepted.

Q Are they commonly available to psychologist?

A Yes, they are available throughout the country and are used in daily practice throughout the country.

Q Were versions of these tests available in 2001?

A Yes, they were. Some of them might have been earlier versions of the testing but I believe all of them were available at that time.

Q All right. What did the intelligence

testing show generally?

A Well, I think the intelligence testing showed that Mr. Peraita had average level intelligence. Let me just -- turning now to page eighteen in my report. His overall intellectual functioning fell in the average range with a full scale IQ of a hundred and two which is at the fifty-five -- fifty-fifth percentile which is squarely in the average range.

Q And what did the neuropsychological testing show?

A The neuropsychological testing showed that he had verbal disabilities in the areas of reading, math and spelling that I think went along with this developmental set back that I described earlier. Despite having average intelligence because of his psychosocial circumstances, because of his emotional circumstances he was actually in special education for most of his education from third grade on. He was actually main stream in math but he continued to have problems in the area of reading and spelling. The neuropsychological testing also showed some areas of relative cognitive weakness in high level attention, concept formations and visual planning which were -- one of them was actually severely

impaired and another fell into the low avenue range. Otherwise though, the testing outside of those areas of diminished performance, the testing was basically in the average range for a number of other cognitive abilities such as attention, language, memory and what we call executive function or planning and organizational abilities.

Q No, what did the mood and personality testing show?

A Well, that, you know, showed us something very different in that the mood and personality measures I think were tapping directly into the consequences again of that childhood history of abuse between the ages one and twelve.

You know, to summarize, the testing I think helped support the fact that there was a childhood onset of posttraumatic stress disorder. There was a childhood onset I think of psychotic thinking disorder. I think there was a childhood onset of paranoid personality. I think a childhood onset of depressive disorder and all are products of that childhood of his.

Q And are those diagnoses, are those reflected on page six of demonstrative "A"?

A Yes. The one that I did not mention is --

I think they are also related to the depressive disorder -- but these life long periods visceral feelings of shame, just very exquisite sensitivity to having any personal information particularly from his childhood shared with others in a public way.

Q And you explained these diagnoses further in your report?

A I do.

Q Could you walk -- could we go through these one at a time and, you know, I would like for you to tell me about -- when you say that you have diagnosed post traumatic stress disorder, what are you relying on for that diagnosis?

A Well, I am relying on the record information that we have. I am relying on personal interviews with Mr. Peraita, the social history and documents that we have, the interview summaries that I was provided and then in most of these cases I am relying on direct psychological testing evidence that we elicited during our visits.

Q What direct psychological testing evidence supports your diagnosis of PTSD?

A Well, if you're going through the history -- and we know of course about the history of abuse, the dissociative episodes, the flashbacks

that his mother reported. We gave two personality inventories, one the MMPI, one the Personality Assessment Inventory and both are very well established objective personality inventories that give rise to a number of clinical scales that tap different symptoms and different disorders.

On the MMPI there's a scale. It's a supplementary scale, not one of the main scales that, you know, has developed and has proven sensitive to posttraumatic stress disorder. It's called the PK Scale. Mr. Peraita, in June 2011 when we tested him on this measure, had a T-score elevation of ninety-three which put him at the severely impaired performance level on this. In other words, it was a very highly elevated scale for someone like Mr. Peraita and it was strongly indicative of high levels of PTSD based, emotional distress and anxiety. What's interesting is that on the Personality Assessment Inventory which is, again, a very different -- it's a similar test but a different test, he demonstrated a very similar elevation on what's called the ARDT Scale which is anxiety related disorder trauma. There he was also in the severely impaired range. So both reflected, in reporting, positively on items that tap PTSD

symptomology. So these I thought were very direct indications and corroborations of what the record was telling us.

Q Dr. Marson, what is the DSM5?

A The DSM5 is the Diagnostic Statistical Manual 5 which is published by the American Psychiatric Association but really the diagnostic handbook for mental disorders that mental health professionals, not just psychiatrics but psychologist use for arriving at mental health disorders -- I'm sorry -- mental health diagnoses.

Q Did you consult the DSM5 in your report for this case?

A I did and specifically in relation to PTSD. The DSM5 sets out criteria both for childhood onset PTSD as well as the presence in adulthood of PTSD. So there are a number of criteria both for childhood onset and then for adult presentation.

Q And does page seven of demonstrative "A" show that childhood PTSD symptoms that you cite in your report?

A Yes. This is the criteria that the DSM5 is setting forth for childhood onset.

Q And in your opinion does Mr. Peraita meet these criteria?

A Yes, he does.

Q And taking them one at time do you believe that Mr. Peraita meets the criteria for exposure to actual and threatened death, serious injury or sexual violation?

A Yes. He clearly does through obviously repeated sexual violations between age three and six but also the fact that he was threatened with imminent death by Gordon Dinwiddie who held him over the balcony, serious injury in the form of being beaten with a 2x4. Those would all qualify, I think.

Q Does he meet the second criteria, presence of one or more specified intrusion symptoms in association with traumatic events?

A Yes, he does. I think he's had flashbacks particularly earlier in his life. He also has this dissociative disorder that I described earlier where he, at times, of perceived threat would lose consciousness and kind of go into a rage mode.

Q So what is meant by intrusion symptoms in this criteria?

A I think the fact that the prior trauma is intruding itself into the current situation or circumstances in the form of a flashback or an

autonomic reaction or some sort of psychiatric symptom.

Q What is an autonomic reaction?

A Panic attack, rapid heart beat in spite of the fact there might not be any overt threat.

You know, if you are a Vietnam war vet and you hear a car backfire you might have a spike in your blood pressure and your autonomic system changes because in spite of no real overt threat you are perceiving that there's an intrusion into the prior stimuli into your personal space.

Q And to block out some flashbacks that you just described, in your opinion, are those intrusions symptoms?

A I believe they are, yes.

Q And moving to the third criteria. Do you believe that Mr. Peraita has symptoms indicating either persistent avoidance of stimuli associated with a traumatic event or negative alterations in cognitions and mood associated with the events?

A Yes. I think the whole pattern of behavior in regards to his adamant refusal to present any mitigating evidence in his 2001 trial is, I think, a very clear indication of this because it represented the threat of reintroduction of all

of this material and the shame and the horrible feelings of anxiety and fear. All of those were associated with the idea that this information would be presented in a public place with him present.

Q And do you believe he meets the fourth criteria of having marked alterations and arousal in reactivity associated with the traumatic events?

A Yes.

Q What evidence do you rely upon to say that?

A Well, again, just the blackouts, for example, are, I think, a classic example of an extreme psychological reaction to, say, perceived threat of assault.

Q And do you believe that he meets the criteria of having a duration of the disturbance exceeding one month?

A Yes, I believe he does because I think this has been present from age six on.

Q Do you believe that he meets the next criteria of having clinically significant distress or impairment in relationships with parents, siblings, peers or caregivers or in school behavior?

A Yes. I think, again, from age six on you can see that, you know, emerging in the sense of his

(BRIEF RECESS)

On the record. Are we prepared to move forward now?

MR. DOSS: We are, Your Honor. I want to thank the courtroom security for addressing the issues which seems to have satisfied the issue with his hands. Thank you for that.

THE COURT: All right. Very good.

MR. DOSS: One item, I have an exhibit that I wish to submit for admission. It's Petitioner's Exhibit 26 which was a copy of which was provided to counsel for the State before lunch. Petitioner's Exhibit 26, and I'll hand it to the Court so the Court can see it -- is a certified copy of the death of Emanuel Preyer. The testimony this morning from the juror Vann Jones was that the foreperson Mr. Preyer was the individual who made the statement that has been the subject of the hearsay objection from the State, and I wish to submit Exhibit 26 to establish that Mr. Preyer was and is unavailable to testify at this proceeding. It is a certified copy of a death certificate and therefore is accepted under Alabama Rules as a public record.

MS. HALES: We can move back, yeah.

MR. HAYDEN: Ask another question. I understand he's doing the best he can and doing well. If she could just ask another question. I think it has gotten into the narrative.

THE COURT: Yeah, go ahead with that.

BY MS. HALES:

Q So what you know how -- appreciating you don't remember at the time because you were so small -- did your Aunt Joy and her husband or boyfriend -- did they kill your father?

A Yes, or the husband did. Joy was, you know ---

Q She was there but you're not exactly sure what happened but did Joy go to prison for that murder?

A Yeah. She just got out a couple of years ago.

Q And did your mom go to prison for that murder?

A Yes. My grandma went too and the guy who shot him. They all got out four, five years except for Joy. She kept denying she was there or had any part about it. She spent thirty-seven years in prison. She just recently got out about a couple of

STATE OF ALABAMA

IN THE CIRCUIT COURT FOR THE COUNTY OF ESCAMBIA

TWENTY-FIRST JUDICIAL CIRCUIT

CUHUATEMOC H. PERAITA,

Petitioner,

Vs. CASE NO.:CC-00-293.60
DIVISION:II

STATE OF ALABAMA,

Respondent.

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COURT REPORTER'S OFFICIAL TRANSCRIPT OF RULE 32 PROCEEDINGS

BEFORE:
The Honorable J. David Jordan, Circuit Court Judge, Brewton, Alabama, on the 26th and 28th days of April, 2016.

APPEARANCES:
For The Petitioner:
MICHAEL P. DOSS, ESQUIRE
MATTHEW J. WARREN, ESQUIRE
STEPHANIE HALES, ESQUIRE
JAMES BAILEY, ESQUIRE
For The Respondent:
JON B. HAYDEN, ASST. ATTORNEY GENERAL

DENISE CARLEE, AL-CCR-68, Official Court Reporter

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EXHIBITS FOR THE PETITIONER:

that? Was it one of the Dinwiddie boys?

A Yeah. It was Tom Dinwiddie. I guess he was about fifteen.

Q About fifteen at the time?

A Sixteen.

Q Tommy was?

A Yeah, I believe so.

Q And Temoc would have been around three, four, five years old?

A Yeah.

Q And so what did Tommy do?

A He sodomized my kids and he would put the baby up on the ice box and make him stay there. He would -- all of them would kind of torture him.

Q The baby is Temoc?

A Yeah.

Q And you say they would put him on the ice box and keep him there?

A Yeah.

Q And you said they would all torture him. What do you mean by torture?

A Well, Tom would mess -- you know, be hitting on him, Temoc and messing around, you know. Sometimes even on my oldest one, and Temoc didn't catch onto going to the bathroom by himself so once

in a while he would, you know -- but not that often.

Q He would have an accident, toileting accident?

A Yeah. They would -- if he messed his pants they would put it in the living room on the floor and make him roll over the smashed -- you know, get it all over his face, all over his body.

Q And they told you about all of this and this was happening while you were in prison?

A Yeah. And when Nancy -- whenever I was just about ready to get out Nancy didn't -- she told ---

MR. HAYDEN: I'm going to object. I don't think this is in response to a particular question.

THE COURT: I sustain. Next question.

BY MS. HALES:

Q So while in the Dinwiddie house Temoc was sodomized by Tommy?

A Yes.

Q And was that -- did they go -- was that daily? Did it happen a lot?

A It happened a lot.

Q A lot?

A A lot.

Q You're referring to the Dinwiddies?
A Yeah.
Q The things that happened there?
A That, yeah.
Q And even before that he was beaten by Juan, correct?
A Well, Juan would slap him around.
Q Right.
A But that's abuse.
Q Understood. So all of these things that we have been talking about today -- Just to recap, you were here in 2001?
A Yeah.
Q For his sentencing hearing before?
A Yeah.
Q And you were prepared to testify as a mitigation witness?
A Yes.
Q Did anyone ask you to testify as a mitigation witness?
A No.
Q If someone would have asked you would you have talked about all of these things?
A Definitely, yes.
MS. HALES: Thank you so much. No further

interpretation, as I am looking at it now, would be only the convictions, the capital murder, life without parole sentence and the twenty years -- murder within twenty years.

Q Is it also fair to say that your understanding of the order is that the State could not introduce evidence that in that Gadsden Popeye's Chicken, in those murders the restaurant employees had been herded into a freezer and shot and killed?

A I think that would be a reasonable interpretation.

Q Was it your understanding that Mr. Peraita was not the shooter in the Gadsden Popeye's Chicken killings?

A I don't know. I don't recall what the details of that were. There was at least one co-defendant but I don't recall.

Q There was at least one co-defendant in that action?

A Best of my recollection, yes, sir.

Q At the time of your representation of Mr. Peraita in 2001, is it fair to say that the Gadsden Popeye's Chicken murders had been highly publicized?

A I don't know.

Q Do you recall whether you were aware that the Gadsden Popeye's Chicken restaurant murders were well known within the state of Alabama?

A I don't.

Q For purposes of attempting to refresh your recollection to the extent that it can be refreshed I'll show you a document that I'll mark as Petitioner's Exhibit 27 for identification. And for the record, Exhibit 27, on its face, is a Birmingham news article from April 17, 1994. Third page is a reflection of the first page of that paper and the first two pages are an article.

If you can, review that document to determine whether or not it refreshes your recollection as to whether or not the Gadsden Popeye's Chicken murders had been highly publicized?

A I don't know if it was highly publicized. I see it made the Birmingham news but I am down here in South Alabama.

Q Isn't it correct that the Gadsden Popeye's Chicken murders were reported in the New York Times, USA Today, Los Angeles Times and the Philadelphia Inquirer.

A I just don't recall Mr. Doss.

MR. DOSS: Your Honor, I would move to

admit Exhibit 27.

MR. HAYDEN: State would object, Your Honor. It's not on their list. Also they have not laid any foundation that the Birmingham News has or had circulation at the time of the offense in Etowah. There's no indication as to the number of -- if there is circulation down here, which I have no idea if there was any number of papers or if anyone in attendance at the trial or anyone that may have served on the jury read anything about -- read this particular article. So the State would object.

THE COURT: Mr. Doss?

MR. DOSS: I believe the witness does not challenge the authenticity of the Birmingham News report. We believe it can be accepted into evidence for whatever the purpose the Court might later deem its relevance. I believe, that given that this is a bench trial I would request they it be accepted subject to the objections of the State in terms of its weight or meaning given that Mr. Stearns has denied having seen it. So its weight can be judged by the Court.

THE COURT: In inverse order, I agree with

that, Mr. Doss.

As far as Mr. Hayden, the fact that it's not on Petitioner's list, that's a valid point. However, things -- we all know things occur during the course of a trial and the purpose for which Mr. Doss offered this for past recollection refreshed is valid. So I am going to allow it in. Again, with the objection.

The second part of Mr. Hayden's objection going to the weight that I'll give the exhibit. All right go ahead Mr. Doss.

BY MR. DOSS:

Q Mr. Stearns, is it correct that at the time of the Gadsden Popeye's Chicken murders Mr. Peraita was a minor; he was seventeen?

A I don't know how old he was. The newspaper article says he was seventeen, yes, sir.

Q And I am really simply trying to get your memory at the time and I recognize it's some time ago.

A About fifteen years ago.

Q If I could, is it your memory that Mr. Peraita was the first individual in the state of Alabama charged under the statute that allowed for charging a minor with a capital offense as an adult?

A I don't have any knowledge of that.

Q Is it correct, Mr. Stearns, that in your motion in limine and your motion to stipulate your concern was that if the jury received any detailed information concerning the number of prior murder convictions Mr. Peraita had against him and the details of those prior murders that they would be prejudiced against your client and potentially prejudge his guilt in this case?

A Sure. You want the jury trying the facts of this particular case and not relying on previous events and holding that against your client. Yes, sir.

Q Before the conviction was returned by the jury in the case that you represented Mr. Peraita in in 2001, had you personally heard anything about the jurors receiving any information about Mr. Peraita's prior conviction for the Popeye's Chicken murders other than what was introduced at trial?

A No, sir. If that had come to our attention we would have brought it to Judge Byrne's attention.

Q And I'll be more specific. Mr. Stearns, had you heard of any information before the conviction was returned that a foreperson on the

jury in your action in defense of Mr. Peraita had told the other jurors during a break that Mr. Peraita was in fact the murderer involved in the Popeye's Chicken restaurant murders in Gadsden where employees were put into a freezer and killed?

A No, sir, we had not heard that.

Q To your knowledge, during the course of your representation of Mr. Peraita, your understanding was the only information available to the jury concerning Mr. Peraita's prior convictions was the evidence that was introduced during trial by the State subject to the Court's prior orders?

A That was the only thing I was aware of, yes, sir.

Q Mr. Stearns, if you had learned prior to the conviction in this case that the foreperson had advised the other jurors during a break that Mr. Peraita was the murderer involved in the Gadsden Popeye's Chicken murders what would you have done?

A Moved for a mistrial.

Q In your representation of Mr. Peraita would you have consented to a curative instruction in lieu of a mistrial under the facts that I have just described?

A I would not have consented to it but we

would have requested it obviously but still would have moved for a mistrial because of the prejudice involved to our client, yes, sir.

Q And recognizing I am providing you a hypothetical situation but could you articulate as you sit here today what you anticipate you would have argued in requesting a mistrial under the scenario I described?

A Okay. Your hypothetical is that the foreperson on a break had told -- had obviously gained some knowledge outside of the trial; is that correct?

Q Yes.

A And had spoken with the other jurors or at least one of the jurors?

Q All of the other jurors.

A We would have brought that to the Court's attention. We would have moved for a mistrial based on that that either they had knowledge that they didn't reveal during the examination of the jurors or they had learned something during the pendency of the trial in, you know, some sort of investigation and would have moved for a mistrial on that basis. If the Judge denied the motion for mistrial we would have asked for a curative instruction and then --

I said it was consistent with the sexual abuse but specifically I don't recall that.

Q But you do recall evidence of sexual abuse as a child?

A Yes, sir.

Q Do you recall evidence that Mr. Peraita was forced to roll in his own feces and eat his feces?

A Yes, sir, I do recall that. Yes, sir.

Q Do you recall that as a consequence of the sexual abuse that Mr. Peraita endured during his childhood, that he had difficulty controlling his bowel movements until the age of ten?

A I don't recall that specifically.

Q Is it fair to say that you viewed the mitigation evidence concerning -- the sexual abuse against Mr. Peraita to be horrific?

A Yes.

Q I'll show you a document that's been admitted as defense or Petitioner's Exhibit 16. What is Petitioner's Exhibit 16?

A That's the social history outline that I believe Dr. Haney put together or Dr. Haney did in conjunction with Aaron McCall. I forget who assembled the document but we proffered this to the

convictions that Mr. Peraita was under were for murder that occurred in Gadsden, Alabama at a Popeye's Chicken restaurant?

A That would appear what the order says.

Q What was the rationale, from your perspective, from the defense side, for seeking to exclude details of the prior convictions that Mr. Peraita was in Holman prison for?

A Simply to keep out prejudicial facts.

Q What do you mean by that?

A He had been convicted of capital murder for killing multiple people in that Popeye's murder and we didn't want that information to be before the jury.

Q And why is that?

A Potentially could prejudice them.

Q And is it fair to say that you were concerned that it would cause the jurors to prejudge Mr. Peraita on the case that was currently before the Court?

A That's definitely fair to say.

Q Before the conviction was returned in the trial that you worked on on Mr. Peraita's behalf had you personally heard anything about the jurors having received information that Mr. Peraita's prior

conviction was in fact from the Gadsden Popeye's Chicken restaurant murders?

A No, sir.

Q Had you heard anything before the conviction was returned that the foreperson had informed the other jurors during a break that Mr. Peraita was responsible for the murder in Gadsden at the Popeye's Chicken where employees were put into the freezer?

A No, sir.

Q If information -- if that information had come to your attention before the jury returned a verdict in the case what would you have done?

A I would have ask the Court for a mistrial.

Q What would the basis for your mistrial motion be?

A Extraneous evidence coming before the jury that's outside their purview that was not introduced during the trial.

Q Would you have agreed, under the scenario I described, to a curative instruction as a means to remedy the jury from such information?

A I would definitely have asked for a mistrial. I would not have agreed to a curative instruction. I would have asked for a mistrial

first.

Q Let's move to a different topic.

During the course of your representation of Mr. Peraita is it correct that you received, in discovery, information concerning inmate interviews at Holman prison that were conducted following the stabbing death of Quincy Lewis?

A Yes.

Q Did you and Mr. Stearns review those statements in order to determine whether to conduct follow-up interviews of such inmates?

A We did.

Q Can you tell me what criteria you used to evaluate whether to do follow-up interviews with any of the inmate witnesses at Holman prison?

A We read through the statements that had been provided to see if they had any information that could be beneficial to our case. Then we conducted follow-up interviews by going to the prison and interviewing State inmates there.

Q I believe -- I'll put before you a document that's been previously marked for identification as Exhibit 6. These appear to be typewritten notes of interviews with inmates at Holman prison. If you could, are you able to take a

APPENDIX I

EXHIBIT tabbies Pet. 26

ALABAMA
Center for Health Statistics
ALABAMA CERTIFICATE OF DEATH

State File Number 101 2015-20551

1. DECEASED LEGAL NAME: Emanuel Preyer				2. DATE AND TIME OF DEATH: May 31, 2015 1220
3. ALIAS NAME(IF ANY): None Given				4. DATE AND TIME PRONOUNCED DEAD:
5. COUNTY OF DEATH: Escambia	6. CITY, TOWN OR LOCATION OF DEATH AND ZIP: Brewton, 36426		7. PLACE OF DEATH: 2548 Pea Ridge Rd	
8. HISPANIC ORIGIN: No	9. RACE: Black		10. SEX: Male	11. SERVED IN ARMED FORCES: Yes
12. AGE: 78	UNDER 1 YEAR: MONTHS / DAYS	UNDER 1 DAY: HRS / MINS	13. DATE OF BIRTH: Jul 22, 1936	14. STATE OF BIRTH: Alabama
15. SOCIAL SECURITY NUMBER: 218-32-9039				
16. MARITAL STATUS: Married	17. SURVIVING SPOUSE: Vallerese Cody			18. RESIDENCE STATE: Alabama
19. RESIDENCE COUNTY: Escambia	20. CITY, TOWN OR LOCATION AND ZIP: Brewton, 36426		21. STREET ADDRESS: 2548 Pea Ridge Rd	
22. INFORMANT NAME, RELATIONSHIP AND ADDRESS: Vallerese C Preyer, Relationship: Wife 2548 Pea Ridge Rd Brewton, Alabama 36426			23. OCCUPATION: Chemical Supervisor 24. BUSINESS OR INDUSTRY: Paper Mill	
25. FATHER'S NAME: Clinton Preyer			26. MOTHER'S MAIDEN NAME: Susie Evans	
27. DISPOSITION OF BODY: Burial	28. DATE OF DISPOSITION: Jun 6, 2015	29. CEMETERY OR CREMATORY: Oak Grove Cemetery	30. LOCATION: Brewton, Alabama	
31. FUNERAL HOME NAME AND ADDRESS: Presley-Fluker Funeral Directors, P O Box 303, Evergreen, AL 36401				32. LICENSE NUMBER:
33. FUNERAL DIRECTOR: John Meeks		34. LICENSE NUMBER:	35. DATE SIGNED: Jun 4, 2015	

36. **MEDICAL CERTIFICATION:** X CERTIFYING PHYSICIAN ___ MEDICAL EXAMINER ___ CORONER

37. NAME: Joe F Terrell MD	38. LICENSE NUMBER: 6698	39. DATE SIGNED: Jun 3, 2015
40. ADDRESS OF PERSON WHO COMPLETED CAUSE OF DEATH: 1121 Belleville Ave, Brewton, Alabama 36426		
41. REGISTRAR: Catherine Molchan Donald		42. DATE FILED: Jun 4, 2015

CAUSE OF DEATH

43. PART I. DISEASES, INJURIES OR COMPLICATIONS THAT CAUSED DEATH	INTERVAL
IMMEDIATE CAUSE — A. Prostate Cancer	Unknown
DUE TO (OR AS A CONSEQUENCE OF):	
UNDERLYING CAUSE — B.	
DUE TO (OR AS A CONSEQUENCE OF):	
C.	
DUE TO (OR AS A CONSEQUENCE OF):	
D.	

44. PART II. OTHER SIGNIFICANT CONDITONS CONTRIBUTING TO DEATH

45. MANNER OF DEATH	46. PREGNANCY IN LAST 42 DAYS	47. AUTOPSY	48. FINDINGS CONSIDERED	49. DATE AND TIME OF INJURY
Natural Cause	No	Unk		

50. HOW INJURY OCCURRED

51. INJURY AT WORK	52. PLACE OF INJURY	53. LOCATION OF INJURY

ADPH HS E2/REV 07-10

This is an official certified copy of the original record filed in the Center of Health Statistics, Alabama Department of Public Health, Montgomery, Alabama. 2016-235-058-1

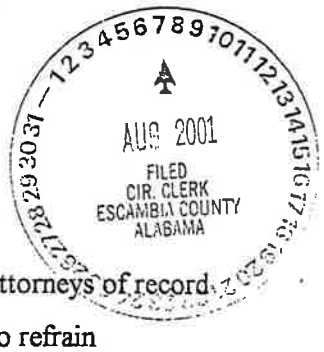
April 26, 2016

Catherine M. Donald
Catherine Molchan Donald
State Registrar of Vital Statistics

APPENDIX J

IN THE CIRCUIT COURT OF ESCAMBIA COUNTY, ALABAMA

STATE OF ALABAMA,	]	
	]	
VS.	]	**CASE NO. CC-00-293**
	]	
CUHUATEMOC PERAITA,	]	
	]	
Defendant.	]	



MOTION IN LIMINE

Comes now the Defendant, Cuhuatemoc Peraita, by and through his attorneys of record and moves the Court in limine for an Order instructing the District Attorney to refrain absolutely from making any direct or indirect inference whatsoever in person, by counsel, or through a witness, to the specified evidence or testimony specified below on the following grounds:

1. The trial will involve a determination of guilt or innocence of the Defendant on the charge of Capital Murder alleged to have been committed on or about December 11, 1999, in Escambia County, Alabama.

2. The Defendant believes and alleges that at his trial the State will attempt to introduce evidence, make reference to, or otherwise leave the jury with the impression that this Defendant is a hardened criminal.

To the best of the undersigned's knowledge, information, and belief, Mr. Peraita has the following felony convictions:

a. Capital Murder, Circuit Court of Etowah County, Alabama , CC-94-927.01, March 19, 1996.

b. Capital Murder, Circuit Court of Etowah County, Alabama , CC-94-927.02, March 19, 1996.

c. Capital Murder, Circuit Court of Etowah County, Alabama , CC-94-927.03, March 19, 1996.

d. Capital Murder, Circuit Court of Etowah County, Alabama , CC-94-927.04, March 19, 1996.

e. Attempted Murder, Circuit Court of Etowah County, Alabama , CC-94-927.05, March 19, 1996.

f. Robbery 1st degree, Circuit Court of Etowah County, Alabama , CC-94-927.05, March 19, 1996.

4. The fact that Mr. Peraita has six felony convictions is immaterial and unnecessary to the disposition of this case and contrary to the rules of evidence recognized by law in this State. The State, in it s burden of proof, only must show that a murder was committed while Mr. Peraita is under a sentence of life imprisonment, and that a murder was committed by Mr. Peraita, who has been convicted of any other murder in the twenty years preceding the murder at issue. To permit introduction of six prior felony convictions or any inference thereto would be highly prejudicial to Mr. Peraita in the minds of the jury in that an admission of such evidence would create in the minds of the jury an unfounded presumption of guilt.

5. An ordinary objection during the course of the trial, even if sustained with proper instructions to the jury, will not remove the prejudicial effect of this evidence. An instruction by the Court would not cure the effect that the reference to Mr. Peraita's prior criminal history would have on the average juror. Therefore, this motion is made prior to trial so that no prejudice will result from the use of any reference to his prior criminal history during trial.

WHEREFORE, the Defendant prays that the Court will instruct, prior to trial, the District Attorney and any and all witnesses called on behalf of the State to refrain from any mention of Mr. Peraita's six felony convictions.

JEFFREY TODD STEARNS
Attorney for Defendant

WADE L. HARTLEY
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August, 2001, I served a copy of the foregoing motion in limine on the Honorable Reo Kirkland, Assistant District Attorney, by hand delivery.

JEFFREY TODD STEARNS