No. _____

IN THE

Supreme Court of the United States

MARK ALLEN JENKINS,
Petitioner,

v.

JEFFERSON DUNN,
COMMISSIONER OF THE ALABAMA
DEPARTMENT OF CORRECTIONS,
Respondent.

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

PETITION APPENDIX VOLUME 3

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U.S. DISTRICT COURT
N.D. OF ALABAMA

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

MARK ALLEN JENKINS,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case no. 4:08-00869-VEH-SGC**
	)	
RICHARD ALLEN, Commissioner, Alabama Department of Corrections,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION

The petitioner, Mark Allen Jenkins ("Jenkins"), is an Alabama state inmate sentenced to death. Before the court is Jenkins's motion for an evidentiary hearing on the claim that he is mentally retarded under *Atkins v. Virginia*, 536 U.S. 304 (2002). (Doc. 49). For the following reasons, the petitioner's *Atkins* claim is without merit, and he is not entitled to an evidentiary hearing on this claim.

I. PROCEDURAL HISTORY

In June 1989, Jenkins was indicted in the St. Clair County Circuit Court on two counts of capital murder for the strangling death of Tammy Ruth Hogeland. (C.R. Vol. 10, Tab 27 at 23).[1] The indictment charged that Jenkins intentionally killed Ms.

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[1] The court will utilize the following method of citation to the record. References to specific pages of the court record on direct appeal are designated "(C.R.__)" and references to the transcript on direct appeal are designated "(R.__)." References to the court record of the Rule 32 proceedings

Hogeland during the course of a robbery[2] and kidnapping.[3] Jenkins was represented at trial by Douglas Scofield and Stan Downey. The guilt phase of the trial commenced on March 12, 1991. (C.R. Vol. 45, Tab 73 at 1). On March 19, 1991, Jenkins was convicted as charged. (*Id*.). After a twenty-minute recess, the court proceeded with the penalty phase of the trial.[4] (*Id*.). Later that day, the jury recommended by a vote of 10-2 that Jenkins be sentenced to death. (*Id*.; R. Vol. 9, Tab 24 at 1763). At the April 10, 1991 sentencing hearing,[5] the trial court followed the jury's recommendation and sentenced Jenkins to death. (R. Vol. 9, Tab 26 at 1795).

Jenkins was represented by Douglas Scofield on direct appeal. He raised a variety of issues on appeal, including: (1) insufficiency of the evidence; (2) the

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are designated "(Rule 32 C.R. __)" and references to the transcript of the Rule 32 hearing are designated "(Rule 32 R. __)." The court will strive to list any page number associated with the court records by reference to the numbers at the bottom of each page of a particular document, if said numbers are the most readily discoverable for purposes of expedient examination of that part of the record. Otherwise, the page numbers shall correspond with those listed at the upper right hand corner of the record. Additionally, the court has cited to any easily identifiable tab numbers close to any cited material for the reader's benefit.

[2] *See Ala. Code* § 13A-5-40(a)(2) (1975).

[3] *See Ala. Code* § 13A-5-40(a)(1) (1975).

[4] Jenkins's friend Lonnie Seal was the only witness at the penalty phase. She testified that Jenkins was a good friend, who was helpful, generou,s and kind. Seal further testified that he trusted Jenkins, even with his wife and baby. (R. Vol. 9, Tab 19 at 1718-27).

[5] The transcript of the sentencing hearing is located at R. Vol. 9, Tabs 25-26.

court's failure to suppress physical evidence; (3) the admission of testimony from several prosecution witnesses; (4) the selection of the jury; (5) alleged violations of *Batson v. Kentucky*, 476 U.S. 79 (1986); (6) the court's findings on aggravating and mitigating circumstances; (7) prosecutorial misconduct during closing arguments in the guilt and sentencing phases; and (8) the court's jury instructions. (C.R. Vol. 12, Tabs 28, 30, 32). The Alabama Court of Criminal Appeals affirmed Jenkins's convictions and sentence on February 28, 1992. *Jenkins v. State*, 627 So. 2d 1034 (Ala. Crim. App. 1992). On May 28, 1993, the Alabama Supreme Court affirmed Jenkins's capital murder convictions and death sentence. *Ex parte Jenkins*, 627 So. 2d 1054 (Ala. 1993). On March 28, 1994, the United States Supreme Court denied Jenkins's petition for a writ of certiorari. *Jenkins v. Alabama*, 511 U.S. 1012 (1994).

On May 26, 1995, Jenkins, through counsel,[6] filed a Rule 32 petition in the St. Clair County Circuit Court. (Rule 32 C.R. Vol. 17, Tab. 42). Jenkins filed an amended petition on November 26, 1996. (Rule 32 C.R. Vol. 18, Tab 47). Evidentiary hearings were held on December 10, 1996, and January 20-21, 1997. (Rule 32 R. Vol. 19, Tab 48; Rule 32 R. Vol. 22). On December 31, 1997, the trial court denied the petition. (Rule 32 R. Vol. 45, Tab 77).

[6] Jenkins was represented by his current counsel, Joseph T. Flood, Esq.

Jenkins appealed the denial of his Rule 32 petition to the Alabama Court of Criminal Appeals, which affirmed the trial court on February 27, 2004. In affirming, the Court of Criminal Appeals specifically found that Jenkins's death sentence did not violate *Atkins*. *Jenkins v. State*, 972 So. 2d 111, 154-55 (Ala. Crim. App. 2004). The Alabama Court of Criminal Appeals denied Jenkins's application for rehearing on May 21, 2004. *Jenkins v. State*, 972 So. 2d 111 (Ala. Crim. App. 2004). On April 8, 2005, the Alabama Supreme Court affirmed the Court of Criminal Appeals' affirmance of the trial court's denial of the *Atkins* claim.[7] *Ex parte Jenkins*, 972 So. 2d 159 (Ala. 2005). The United States Supreme Court denied Jenkins's petition for a writ of certiorari on January 22, 2008. *Jenkins v. Alabama*, 552 U.S. 1167 (2008).

On August 11, 2008, Jenkins, through counsel, filed an amended § 2254 petition in this court. (Doc. 12). The respondent filed an answer to the amended petition on October 29, 2008. (Doc. 20). On November 12, 2008, the action was stayed to allow the petitioner to pursue a second state Rule 32 petition based upon *Ex Parte Burgess*, 21 So.3d 746 (Ala. 2008). (Doc. 25). On June 20, 2013, Jenkins filed an amended petition raising his newly exhausted juror misconduct claim. (Doc. 36). The respondent filed an answer to the amendment on September 3, 2013. (Doc. 40). Jenkins filed a reply brief on November 14, 2013. (Doc. 48).

[7] The Alabama Supreme Court reversed the judgment of the Alabama Court of Criminal Appeals on an unrelated claim and remanded the case for further proceedings on that claim. *Id*.

On November 14, 2013, Jenkins filed a Motion for an Evidentiary Hearing on his *Atkins* claim. (Doc. 49). The respondent filed an opposition to the motion on September 22, 2014. (Doc. 51). On October 8, 2014, Jenkins filed a reply to the respondent's opposition. (Doc. 52). The matter is now ripe for resolution.

II. THE MOTION

In his motion, Jenkins requests that the court "issue a writ of habeas corpus on his *Atkins* claim" or, in the alternative, hold an evidentiary hearing allowing him "to present evidence in support of his claim that he is mentally retarded under *Atkins v. Virginia*." (Doc. 49 at 11). Jenkins argues "the evidence introduced during the Rule 32 proceedings in support of his claims of ineffective assistance of counsel conclusively establishes his mental retardation." (*Id*. at 5-6). Jenkins only requests an evidentiary hearing to the extent this court finds the record insufficient to grant relief, "as he was diligent in requesting a hearing in state court." (*Id*. at 6).

III. PRESENTATION OF THE CLAIM IN STATE COURT

A. Pre-Atkins Review

Jenkins's trial took place in 1991, more than a decade prior to the *Atkins* decision in June 2002. Jenkins made no argument concerning his mental capacity at trial. However, in his amended Rule 32 petition, filed May 25, 1995, Jenkins argued trial counsel was ineffective for failing to investigate and present mitigating evidence

showing: (1) he was developmentally impaired since birth; (2) he possessed learning disabilities, low intelligence, poor comprehension, and retarded socialization skills that prevented him from achieving academically and forming normal relationships; and (3) he had a long history of mental health problems. (Rule 32 C.R. Vol. 18, Tab 47 at 16-17).

The trial court conducted evidentiary hearings on December 10, 1996, and January 20-21, 1997. (Rule 32 R. Vol. 19, Tab 48; Rule 32 R. Vol. 22). Among the witnesses at the hearings were two mental health experts, Dr. David Lisak and Dr. Karl Kirkland. On December 31, 1997, the trial court denied the petition. (Rule 32 R. Vol. 45, Tab 77). The mental health evidence presented to the trial court is summarized below.

1. Dr. Lisak: Jenkins's Mental Health Expert

Dr. David Lisak, the clinical psychologist[8] retained by Jenkins, testified at the Rule 32 hearing that he evaluated Jenkins from August 22-23, 1996, and again on October 11, 1996, for a total of at least 12 hours. (Rule 32 R. Vol. 21 at 432-33). Dr. Lisak also reviewed the transcript of the witnesses who testified earlier in the evidentiary hearing. He also interviewed: Lonnie and Sherry Seal (friends Jenkins lived with when he first moved to Alabama); Virginia Price and Bonnie Adams (the

[8] Dr. Lisak testified that his area of research and expertise is psychological trauma, the study of the impact of traumatic events on individuals. (Rule 32 R. Vol. 21 at 440).

guards who watched over Jenkins while he was in the St. Clair County Jail); Betty Delavega (Jenkins's second cousin); Anna Clark (a family friend); Sharon Roberts (Jenkins's aunt); Steven Michael Jenkins (Jenkins's brother); Donna Jo Jenkins (Jenkins's mother); Steven Jenkins, Sr. (Jenkins's step-father); Jerry White (Jenkins's step-father's sister); Eva Dano (a family friend); and Dorothy Hodge (Jenkins's step-father's mother). (*Id*. at 432-34).

Dr. Lisak also reviewed various records in preparation for the hearing, including: Jenkins's birth certificate; hospital records from Jenkins's birth; Jenkins's juvenile records; records from the San Bernardino Department of Mental Health; school records for both Jenkins and his siblings; records from Jenkins's time at Taylor Hardin Secure Medical Facility; Jenkins's medical records from Holman Prison; records from the Department of Corrections; the psychiatric records of Jenkins's sister, Pammy Jo Montez; the Lunacy Commission's Report on Jenkins; the pre-sentence investigation report on Jenkins; large portions of original trial transcript; newspaper reports concerning Jenkins's crime; the District Attorney's file; the police report regarding an interview with Jenkins while in custody at the Los Angeles County Jail; and the transcript of the earlier portion of the evidentiary hearing. (*Id*. at 435-38).

Dr. Lisak did not perform any psychiatric testing. (Rule 32 R. Vol. 21 at 467-68). Rather, he explained that he evaluated Jenkins for the purpose of constructing a developmental history and "to evaluate the abuse he had suffered and describe and interpret for his attorneys the impact of those traumas on his development." (Rule 32 R. Vol. 22 at 575). Dr. Lisak determined Jenkins: (1) was a slow learner; (2) was physically, emotionally, and sexually abused; (3) was neglected both medically and in terms of nurturing and basic loving and care; and (4) suffered from pervasive adverse impacts to his cognitive development due to chronic and severe trauma suffered during childhood. (Rule 32 R. Vol. 21 at 443-49). Further, based upon his interviews of third-parties, review of the records, and evaluation of Jenkins, Dr. Lisak concluded Jenkins: (1) had suffered from emotional, psychiatric, and psychological disturbances all his life; (2) was severely depressed for much of his life; and (3) suffered post-traumatic stress symptoms throughout his life. (Rule 32 R. Vol. 22 at 486-492). Finally, Dr. Lisak testified that he did not diagnose Jenkins as suffering from any mental disease or defect because he was not asked to make a diagnosis. (*Id.* at 571). However, Dr. Lisak concurred with Dr. Kirkland's test results indicating Jenkins had borderline intellectual capacity. (Rule 32 R. Vol. 21 at 467-68).

2. Dr. Kirkland: The State's Mental Health Expert

Dr. Karl Kirkland, a licensed psychologist retained by the state to evaluate Jenkins, testified that he performed a "general post conviction appeal evaluation" of Jenkins. (Rule 32 R. Vol. 22 at 610-11, 618). In conjunction with the evaluation, Dr. Kirkland reviewed the Rule 32 petition, the original trial transcript, and administrative and medical records from the Department of Corrections. Dr. Kirkland also attended the earlier portion of the evidentiary hearing on the Rule 32 petition, observed Jenkins's prison cell, and spoke with Jenkins's therapist. (*Id*. at 618). On September 5, 1996, Dr. Kirkland met with Jenkins at Holman Prison and administered a number of psychological tests over a four or five hour period. (*Id*. at 619). Dr. Kirkland found that Jenkins: (1) maintained a clean and organized cell; (2) had good relationships with guards; (3) was depressed; and (4) was taking a mild tranquilizer and anti-depressant. (*Id*. at 619-21). Dr. Kirkland stated that, although Jenkins did not seem to trust him, he seemed to understand who he was and why he was there. (*Id*. at 620-21).

Dr. Kirkland administered a Bach Depression Inventory test, which is a questionnaire relating to symptoms of depression in numerous categories. (*Id*. at 621-22). The results of the Bach Depression Inventory test showed severe depression. (*Id*. at 622).

Dr. Kirkland explained that the Minnesota Multiphasic Personality Inventory test is a 399-item self-reported true-false inventory. When scored, it produces a profile that can be used to evaluate the subject's validity or test-taking attitude, clinical characteristics, as well as past and current emotional functioning. (*Id*. at 622-23).[9] Dr. Kirkland testified Jenkins produced an invalid profile on this test "in that he answered the questions in a way that tended to over-emphasize psycho-pathology, much like he did on the Bach Depression Inventory." (*Id*. at 623). Dr. Kirkland indicated the results did not match Jenkins's clinical presentation. (*Id*.)

Dr. Kirkland also performed a Competency to Stand Trial Assessment on Jenkins. It is a structured interview that assesses a person's understanding of the trial process and the legal system. The results indicated that Jenkins "had an adequate understanding of the trial process and did not evidence a mental disorder that would interfere with that process." (*Id*. at 623-24).

The Wechsler Adult Intelligence Scale is an intelligence test commonly administered and accepted in the field. (*Id*. at 624). Jenkins "scored in the range of borderline intellectual functioning which is between mild mental retardation and low average intellectual functioning." (*Id*. at 624, 670). Jenkins's overall IQ score was 76. (*Id*.). Dr. Kirkland opined that Jenkins "cooperated and was not malingering or

[9] Because Jenkins reads at a third grade level, Dr. Kirkland had to read the test questions to him. (*Id.* at 641).

trying to throw the results a certain way," which was "consistent with his school records that Dr. Lisak testified about and consistent with other reports of his difficulties with academic functioning." (*Id*. at 624). Further, Dr. Kirkland noted in the following testimony that an IQ of 76 is two standard deviations below the norm, placing Jenkins in the bottom ten percent of the population:

> Q: What is [Jenkins's] IQ?
>
> A: Borderline range.
>
> Q: Did you testify it was 76?
>
> A: Yes.
>
> Q: Is IQ a measurement of intelligence or intelligence potential that [is] fairly constant over a lifetime?
>
> A: It tends to be, yes.
>
> Q: Do you know how many standard deviations with an IQ of 76 is below that?
>
> A: Two.
>
> Q: Approximately two standard deviations – that would place [Jenkins] in what percentile of the population?
>
> A: Under ten percent – it is getting pretty low.
>
> Q: Do you know what the cut-off for being considered mentally retarded is?
>
> A: Under seventy.

> Q: Is that the only standards [sic] ? Are there national standards that recognizes [sic] mental retardation at 75 and below?
>
> A: I'm not aware of that. The other standard would be integrating, social and adaptive behavior into that, which I did not do in this case. That is really not what I was looking for.
>
> Q: Would it be fair to characterize [Jenkins's] performance on this testing as consistently in the bottom percentile?
>
> A: Yes.

(*Id*. at 670-71).

The RAT-3 is a test of achieved knowledge or actual academic achievement. On this test, Dr. Kirkland found Jenkins was "functioning on a third grade level in both reading, spelling and arithmetic, which placed him at the first percentile," which is "generally consistent with the [WAIS-R] Results and generally consistent with his clinical presentation and also consistent with his history." (*Id*. at 625; *see* 669). Dr. Kirkland concluded Jenkins was "not technically learning disabled, as much as he is just a slow learner overall." (*Id*.).

The Short Category Test Booklet Format is used as a neuro-psychological screening instrument. It is a shortened version of a much longer neuro-psychological test that is part of a battery of tests. (*Id*. at 626). This test measures brain damage, flexibility, and problem solving ability. (*Id*. at 669-70). Jenkins scored at the first

percentile on this test, which is in an impaired range. (*Id*. at 626, 669). Dr. Kirkland testified that in his experience "often inmates that have been incarcerated for a while tend to have difficulty with this particular test, not necessarily because of brain damage, but because they have trouble shifting gears and get easily frustrated with the task." (*Id*. at 626).

Finally, Dr. Kirkland administered the Forensic Assessment of Criminal Responsibility Procedure on Jenkins. (*Id*.). It is "a procedure that involves or is present in any mental state at the time of offense or forensic evaluation that involves assigning some type of criminal responsibility." (*Id*.). It involves reviewing "trial transcripts or the D.A. file, taking a statement from the defendant about his feelings, actions, and behavior surrounding the time of the offense as well as post-offense behavior which would in this case include leaving the State and requesting an alibi if one assumes those facts are true." (*Id*. at 627). From his review of the D.A. file, Dr. Kirkland concluded Jenkins's behavior showed an "awareness of wrongfulness or criminality after the offense and that his behavior was not entirely consistent with what [Jenkins] told [Dr. Kirkland] about being in a black-out the entire time." (*Id*.).

Dr. Kirkland also reviewed Jenkins's records from Taylor Hardin, including the diagnosis reached by the Lunacy Commission. He summarized the findings of the Lunacy Commission as follows:

> They basically concluded that he was capable of proceeding toward trial, and they did not find the presence of a disorder that would have detracted from criminal responsibility. At least two of the three people suggested that was their finding.[10]

(*Id*. at 634). Dr. Kirkland noted the Lunacy Commission conducted its evaluations approximately fourteen months after the offense. This was significant to Dr. Kirkland because it is "a lot easier to do a retrospective analysis fourteen months after an offense rather than several years after an offense." (*Id*. at 635).

Dr. Kirkland's opinion ultimately was that Jenkins did not suffer from a mental disease or disorder at the time of the murder that would have detracted from his ability to appreciate the criminality of his acts. (*Id*. at 636, 687). Dr. Kirkland added that, because Jenkins's IQ and achievement scores are roughly in the same vicinity, Jenkins does not have a learning disability but is a slow learner.[11] (*Id*. at 675-76).

B. Post-*Atkins* Review

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[10] The Lunacy Commission's evaluations took place in 1990, the year after the murder was committed. Dr. Wolfram Glaser found that Jenkins suffered no substantial cognitive impairment. Dr. Glaser further found an Axis II diagnosis of borderline intellectual functioning. (Rule 32 C.R. Vol. 25 at 557-63). Dr. James F. Hooper also found no evidence of any significant cognitive impairments but did not reach an Axis II diagnosis. (*Id*. at 564-68). The third member of the commission, Dr. Kamal A. Nagi, was unable to make an assessment of Jenkins, who announced to Dr. Nagi that he was "getting tired of talking about the same damn thing" and was not going to talk any more. (*Id*. at 556). Additionally, in the admission summary prepared at Taylor Hardin, staff social worker Carol Williams and Dr. Glaser noted that Jenkins displayed no obvious cognitive impairment but that he appeared to be of limited intellectual capabilities and possibly had borderline intellectual functioning. (*Id*. at 545-55).

[11] However, Dr. Kirkland went on to state that he did not test Jenkins for dyslexia and would not refute that diagnosis if school records revealed Jenkins was dyslexic. (*Id*. at 676).

Jenkins appealed the denial of his Rule 32 petition to the Alabama Court of Criminal Appeals. Both sides briefed the issues raised by Jenkins and argued them before the appellate court. On June 20, 2002, before the Alabama Court of Criminal Appeals issued an opinion, the United States Supreme Court handed down its opinion in *Atkins v. Virginia*, 536 U.S. 304 (2002). In *Atkins,* the Court held that the execution of mentally retarded criminals violates the Eighth Amendment's prohibition of cruel and unusual punishment. Thus, while Jenkins's collateral appeal was still pending, the Alabama Court of Criminal Appeals ordered the parties to file supplemental briefs, addressing the possible impact of *Atkins* on Jenkins's case.[12]

The parties both submitted supplemental briefs on August 15, 2002. The State contended any claim by Jenkins that he is mentally retarded is procedurally barred and that Jenkins is not mentally retarded. (*Appellee's Supplemental Brief*, Rule 32 C.R. Vol. 39, Tab 55). Jenkins argued that, because his mental retardation is supported by the record and because Alabama has no procedure for adjudicating mental retardation in capital cases, the court should either: (1) stay his appeal until the Alabama Legislature enacts appropriate legislation in light of *Atkins*; or (2) vacate his death sentence and remand the case to the trial court with directions to stay the case until the legislature enacts such legislation. (*Appellant's Supplemental Brief*,

[12] The *Atkins* decision announced a new rule of constitutional law made retroactive to cases on collateral review. *See In re Holladay*, 331 F.3d 1169, 1172 (1lth Cir. 2003).

Rule 32 C.R. Vol. 39, Tab 56). The state submitted a reply brief on September 19, 2002. (*Appellee's Supplemental Reply Brief*, Rule 32 C.R. Vol. 39, Tab 57). Simultaneously, Jenkins submitted a supplemental reply brief, arguing: (1) his *Atkins* claim was not procedurally barred; (2) his case should be stayed pending the enactment of appropriate *Atkins* legislation; and (3) it would be cruel and unusual punishment to execute Jenkins because he is mentally retarded. (*Appellant's Supplemental Reply Brief*, Rule 32 C.R. Vol. 39, Tab 58).

The Alabama Court of Criminal Appeals affirmed the trial court's denial of Jenkins's amended Rule 32 petition on February 27, 2004. *Jenkins v. State*, 972 So. 2d 111 (Ala. Crim. App. 2004). With regard to Jenkins's *Atkins* claim, the court found the following:

> Neither is there any indication that Jenkins's death sentence violates the United States Supreme Court's holding in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). The United States Supreme Court held in *Atkins v. Virginia*, that it was cruel and unusual punishment in violation of the Eighth Amendment to execute a mentally retarded individual. Though Alabama has not enacted legislation addressing the holding in *Atkins*, our Supreme Court in *Ex parte Perkins*, 808 So.2d 1143 (Ala.2001), has applied the most liberal view of mental retardation. To be considered mentally retarded a defendant must have a significantly subaverage intellectual functioning (an IQ score of 70 or below), significant deficits in adaptive behavior, and the problems must have manifested themselves before the defendant reached the age of 18. *Perkins*.

> Dr. Kirkland testified that he performed psychological tests on Jenkins and that Jenkins's IQ was 76. There was evidence presented at Jenkins's trial indicating that Jenkins maintained relationships with other individuals and that he had been employed by P.S. Edwards Landscaping Company, Cotton Lowe 76 Service Station, and Paramount Painting Company. The record fails to show that Jenkins meets the most liberal view of mental retardation adopted by the Alabama Supreme Court in *Perkins*. Jenkins's death sentence does not violate *Atkins v. Virginia*.

Id. at 154-55.

Jenkins next raised the claim in an application for rehearing. *(Brief in Support of Petition for Writ of Certiorari*, Rule 32 C.R. Vol. 39, Tab 59 at 58). The Alabama Court of Criminal Appeals denied his application for rehearing on May 21, 2004. *Jenkins v. State*, 972 So. 2d 111 (Ala. Crim. App. 2004). Jenkins then presented the claim to the Alabama Supreme Court in a petition for writ of certiorari, arguing that because he made a prima facie showing of mental retardation, it was unreasonable for the Alabama Court of Criminal Appeals to refuse to remand his case to the trial court for an evidentiary hearing. (*Petition for Writ of Certiorari*, Rule 32 C.R. Vol. 40, Tab 60 at 57; *Brief in Support of Petition for Writ of Certiorari*, Rule 32 C.R. Vol. 40, Tab 61 at 109). On April 8, 2005, the Alabama Supreme Court affirmed the Court of Criminal Appeals' affirmance of the trial court's denial of this claim. *Ex parte Jenkins*, 972 So. 2d 159 (Ala. 2005).

IV. THE HABEAS CLAIM

Jenkins contends he is mentally retarded and ineligible for execution under *Atkins*. Because this claim was denied on the merits in the state court, this court must first determine whether the state court's decision can survive review under 28 U.S.C. § 2254(d). Unless Jenkins prevails on his claim under § 2254(d), he is not entitled to present new evidence to this court and is not entitled to an evidentiary hearing on his mental retardation claim. *See Cullen v. Pinholster*, 131 S. Ct. 1388, 1398-99 (2011). The review of Jenkins's *Atkins* claim in this court is "limited to the record that was before the state court that adjudicated the claim on the merits." *Id*. at 1398. Further, the "backward-looking language" of the statute requires an examination of the state court's decision on the date it was made. *Id.*

A. Title 28 U.S.C. § 2244(d)

"By its terms § 2254(d) bars relitigation of any claim adjudicated on the merits in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." *Harrington v. Richter*, 131 S. Ct. 770, 784 (2011)(internal quotations omitted).[13] Those sections provide that when a state court has made a decision on a petitioner's constitutional claim, habeas relief cannot be granted unless the state court's adjudication of the claim either:

[13] It does not matter whether the state court decision contains a lengthy analysis of the claim or is a summary ruling "unaccompanied by explanation." *Id.*

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The "contrary to" and "unreasonable application" clauses of § 2254(d) have been interpreted as "independent statutory modes of analysis." *Alderman v. Terry*, 468 F.3d 775, 791 (11th Cir. 2006) (citing *Williams,* 529 U.S. at 405-07).[14] When considering a state court's adjudication of a petitioner's claim, therefore, the *habeas* court must not conflate the two modes of analysis.

1. The meaning of § 2254(d)(1)'s "contrary to" clause

A state-court determination can be "contrary to" clearly established Supreme Court precedent in at least two ways:

> *First*, a state-court decision is contrary to this Court's precedent if the state court arrives at a conclusion opposite to that reached by this Court on a question of law. *Second*, a state-court decision is also contrary to this Court's precedent if the state court confronts facts that are

[14] *See also Williams*, 529 U.S. at 404 (O'Connor, J., majority opinion) ("Section 2254(d)(1) defines two categories of cases in which a state prisoner may obtain federal *habeas* relief with respect to a claim adjudicated on the merits in state court. Under the statute, a federal court may grant a writ of *habeas* corpus if the relevant state-court decision was either (1) *'contrary to* . . . clearly established Federal law, as determined by the Supreme Court of the United States,' or (2) '*involved an unreasonable application of* . . . clearly established Federal law, as determined by the Supreme Court of the United States.'") (emphasis supplied).

> materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours.

Williams, 529 U.S. at 405 (emphasis added); *see also*, *e.g.*, *Brown v. Payton*, 544 U.S. 133, 141 (2005) (same); *Early v. Packer*, 537 U.S. 3, 8 (2002) (*per curiam*) (same); *Putman v. Head*, 268 F.3d 1223, 1240-41 (11th Cir. 2001) (same).

The Eleventh Circuit has observed that the majority opinion in *Williams* does not limit the construction of § 2254(d)(1)'s "contrary to" clause to the two examples set forth above.[15] Instead, the statutory language "simply implies that 'the state court's decision must be substantially different from the relevant precedent of [the

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[15] Indeed, as one commentator has observed, the possible permutations are not just two, but at least four in number:

> The word "contrary" denotes incompatibility or logical inconsistency. Two propositions are incompatible with one another if both cannot be true or correct. Thus, a state court decision is contrary to federal law if that decision and the applicable federal law cannot both be true or correct. Given this premise, there appear to be four possible combinations of state court adjudications and resulting decisions that are pertinent to this textual inquiry:
>
> - the state court applies the correct federal standard and arrives at a correct outcome;
> - the state court applies an incorrect federal standard and arrives at an incorrect outcome;
> - the state court applies an incorrect federal standard and arrives at a correct outcome; and
> - the state court applies the correct federal standard and arrives at an incorrect outcome.

Allan Ides, *Habeas Standards of Review Under 28 U.S.C. § 2254(d)(1): A Commentary on Statutory Text and Supreme Court Precedent*, 60 WASH. & LEE L. REV. 677, 685 (2003) (footnotes omitted).

Supreme] Court.'" *Alderman*, 468 F.3d at 791 (quoting *Williams*, 529 U.S. at 405) (alteration supplied).

2. The meaning of § 2254(d)(1)'s "unreasonable application" clause

A state court's determination of a federal constitutional claim can result in an "unreasonable application" of clearly established Supreme Court precedent in either of two ways:

> *First*, a state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. *Second*, a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.

Williams, 529 U.S. at 407 (emphasis added) *see also*, *e.g., Putman*, 268 F.3d at 1240-41 (same).

It is important to note that "an *unreasonable* application of federal law is different from an *incorrect* application." *Williams*, 529 U.S. at 410 (emphasis in original). A federal *habeas* court "may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law *erroneously* or *incorrectly*. Rather, that application must also be *unreasonable*." *Id*. at 411 (emphasis added).

In other words, the question is *not* whether the state court "correctly" applied Supreme Court precedent when deciding the federal constitutional issue but whether the state court's determination was "unreasonable." *Id*. at 409 ("[A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable."); *see also*, *e.g*., *Bell*, 535 U.S. at 694 (observing the "focus" of the inquiry into the reasonableness of a state court's determination of a federal constitutional issue "is on whether the state court's application of clearly established federal law is objectively unreasonable," and stating that "an unreasonable application is different from an incorrect one"); *Harrington v. Richter*, 131 S. Ct. 770, 785-87 (2011) (same).[16]

In order to demonstrate that a state court's application of clearly established federal law was "objectively unreasonable," the *habeas* petitioner "must show that the state court's ruling on the claim being presented in federal court was so lacking

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[16] The Eleventh Circuit has observed that § 2254(d)(1)'s "unreasonable application" provision is the proper statutory lens for viewing the "run-of-the-mill state-court decision applying the correct legal rule." *Alderman v. Terry*, 468 F.3d 775, 791 (11th Cir. 2006).

> In other words, if the state court identified the correct legal principle but unreasonably applied it to the facts of a petitioner's case, then the federal court should look to § 2254(d)(1)'s "unreasonable application" clause for guidance. "A federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was *objectively* unreasonable."

Id. (quoting *Williams*, 529 U.S. at 409) (emphasis in original).

in justification that there was an error well understood and comprehended in existing law *beyond any possibility for fairminded disagreement*." *Id.* at 786-87 (emphasis added). Stated another way, if the state-court's resolution of a claim is debatable among fairminded jurists, it is not "objectively unreasonable."

"By its very language, [the phrase] 'unreasonable application' refers to mixed questions of law and fact, when a state court has 'unreasonably' applied clear Supreme Court precedent to the facts of a given case." *Neelley v. Nagle*, 138 F.3d 917, 924 (11th Cir. 1998) (citation and footnote omitted). Mixed questions of constitutional law and fact are those decisions "which require the application of a legal standard to the historical-fact determinations." *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963).

3. The meaning of § 2254(d)(2)'s clause addressing an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding"

"28 U.S.C. § 2254(d)(2) imposes a 'daunting standard — one that will be satisfied in relatively few cases.'" *Cash v. Maxwell*, 132 S. Ct. 611, 612 (2012) (quoting *Maxwell v. Roe*, 628 F.3d 486, 500 (9th Cir. 2010) (internal quotation marks omitted in original)).

> As we have observed in related contexts, "[t]he term 'unreasonable' is no doubt difficult to define." *Williams v. Taylor,* 529 U.S. 362, 410, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). It suffices to say, however, that

> a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance. *Cf. Id.,* at 411, 120 S. Ct. 1495.

Wood v. Allen, 558 U.S. 290, 301 (2010). Therefore, "even if reasonable minds reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the trial court's . . . determination." *Id.* (quoting *Rice v. Collins,* 546 U.S. 333, 341-42 (2006)) (punctuation omitted). Conversely:

> when a state court's adjudication of a habeas claim results in a decision that is based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, this Court is not bound to defer to unreasonably-found facts or to the legal conclusions that flow from them.

Atkins v. Warden, Holman Correctional Facility, 710 F.3d 1241, 1249-50 (11th Cir. 2013) (quoting *Jones v. Walker*, 540 F.3d 1277, 1288 n.5 (11th Cir. 2008) (*en banc*) (punctuation omitted)).

Jenkins maintains the state court's adjudication of his mental retardation claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law and was an unreasonable determination of the facts in light of the evidence presented in state court. *(Jenkins' Amended Petition*, Doc. 12 at 24; *Jenkins' Reply Brief*, Doc. 48 at 23).

B. The *Perkins* Standard

Alabama uses the definition of mental retardation adopted by the Alabama Supreme Court in *Ex parte Perkins*, 851 So.2d 453 (Ala. 2002). *Perkins* held that to be considered mentally retarded for purposes of the Eighth Amendment's prohibition on execution, a defendant "must have significantly subaverage intellectual functioning (an IQ of 70 or below), and significant or substantial deficits in adaptive behavior" that "manifested themselves during the developmental period (i.e., before the defendant reached age 18)." *Id*. at 456. Later, in *Smith v. State*, No. 1060427, 2007 WL 1519869 at *8 (Ala. May 25, 2007), the Alabama Supreme Court "reaffirmed the definition of mental retardation it identified in *Perkins*" and "clarified that it is implicit in that definition that the IQ and deficits in adaptive behavior exist not only prior to the age of eighteen but also both at the time of the crime and currently." *Powell v. Allen*, 602 F.3d 1263, 1272 (11th Cir. 2010) (*citing Smith*, 2007 WL 1519869 at *8).

Jenkins contends the state appellate court's use of the *Perkins* standard in rejecting his *Atkins* claim was either contrary to, or an unreasonable application of, clearly established federal law:

> In denying relief on this claim, the state applied an erroneous legal standard that violated *Atkins* and the prevailing clinical standards, and constitutes an unreasonable application of federal law. *See Id.* at 398 ("Our difference is as to the cases in which, at first blush, a state-court judgment seems entirely reasonable, but thorough analysis by a federal

court produces a firm conviction that that judgment is infected by constitutional error. In our view, such an erroneous judgment is 'unreasonable' within the meaning of the Act even though that conclusion was not immediately apparent.").

Rather than apply the "broadest definition of mental retardation," as required, *see Jenkins II*, 972 So.2d at 154, the CCA erroneously used an IQ cutoff of 70, in violation of the prevailing scientific standards which were expressly relied upon by *Atkins*. 536 U.S. at 309 n. 3, 318; *see* footnote 8, *supra*, at 23. In defining mental retardation *Atkins* did so without implementing a specific IQ cut-off and it drew extensively from clinical sources that reject such cut-offs and expressly require IQ be expressed within a "confidence interval." *See Atkins*, 536 U.S. at 318, 309 n.3, 309 n.5 (*citing* Kaplan & Sadock's Comprehensive Textbook of Psychiatry, at 2952). Specifically, the creators of WAIS-R, the very test utilized by Dr. Kirkland, advised its instruments are not capable of giving bright line scores and instead employ a confidence interval of 95% with a Standard Error of Measurement of + or – five points. David Wechsler, WAIS-R Manual; Wechsler Adult intelligence Scale 0 Revised 31 (1981); *see* WAIS-IV Administrative and Scoring Manual Tables A.3-A.7, at 220-25. This is so because the instrument is not capable of providing a bright-line Full Scale IQ score. *Id*. Accordingly, the WAIS technical manual provides:

> The standard error of measurement is used to calculate the confidence interval, or the band of scores, around the observed score in which the individual's true score is likely to fall. . . . The examiner can use confidence intervals to report an individual score as an interval that is likely to contain the individual's true score. Confidence intervals also serve as a reminder that *measurement error is inherent in all test scores and that the observed test score is only an estimate of true ability*.

Wechsler, *WAIS-R Manual*, at 31 (emphasis added).

. . .

No reasonable interpretation of *Atkins* would allow the use of a particular standardized intelligence test to assess intellectual disability divorced from the very Technical Manual created for scoring and interpreting that test. The WAIS-R, selected by the State's expert to test Mr. Jenkins, is a very precise instrument and for it to be effective and the results to be reliable, it must be administered and interpreted as designed. The test administrator must take into account the SEM. Currently no testing instrument has been created that measures IQ with so much precision that confidence intervals can be ignored. Thus, the Alabama courts erred in inventing out of whole cloth a bright line cutoff for determining mental retardation where no instrument exists that can measure IQ with that level of precision. Indeed, the state courts unreasonably ignored that the instrument utilized by the State's expert expressly prohibits that practice. The State of Alabama may not make standardized IQ results more precise than the test's creators determined is reasonable; to do so is both unscientific and unreasonable.

While the Court in *Atkins* indicated that states would be allowed leeway in crafting appropriate procedures to implement the constitutional restriction against executing the mentally retarded, *see Atkins*, 536 U.S. at 342, it did not authorize the use of definitions unmoored from sound science and accepted clinical practice. In *Atkins* itself, the Court acknowledged a lack of precision in IQ testing and the need for confidence intervals implicitly rejecting a hard cutoff. For instance, the Court stated that "[m]ild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70." *Id*. at 308 n.3 (*citing* DSM-IV, at 42-43 (2000)). Even more significant, the Court noted "an IQ between 70 and 75 or lower . . . is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." *Id*. at 309 n.5. Nowhere in *Atkins* did the Court allow states to alter the clinical definition of mental retardation by eliminating the use of the SEM and confidence intervals which the creators of the WAIS-R have consistently stated are necessary for the proper interpretation of the test. By applying the wrong standard, one that contained a strict IQ cut-off, the state court unreasonably

> determined Mr. Jenkins was not mentally retarded. *Jenkins II*, 972 So. 2d at 155.

(*Jenkins's Reply Brief*, Doc. 48 at 35-38) (parentheticals and footnote omitted). Jenkins further alleges that *Smith v. State*, clarifying that the IQ and deficits in adaptive behavior must also be present at the time of the crime and at the time the *Atkins* claim is raised, is unconstitutional and was improperly applied to his case.[17] (*Id.* at 23, n.8).

"Although the *Atkins* Court alluded to clinical definitions propounded by the American Association on Mental Retardation[18] ('AAMR') and the American Psychiatric Association ('APA'), it left to the states the development of standards for courts to employ in making a determination of whether an offender is mentally retarded." *Thomas v. Allen*, 607 F.3d 749, 752 (11th Cir. 2010)(*citing Atkins*, 536 U.S. at 317)(footnote added).[19] The Eleventh Circuit has repeatedly applied the

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[17] The court notes that *Smith v. State* was not applied to Jenkins's case since it was not decided until 2007, well after the Alabama Court of Criminal Appeals' 2004 opinion on his *Atkins* claim.

[18] The American Association on Mental Retardation is now known as the American Association on Intellectual and Developmental Disabilities.

[19] The *Atkins* court noted:

> The American Association on Mental Retardation (AAMR) defines mental retardation as follows: "Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." Mental Retardation: Definition,

Alabama standard. In doing so, it has never indicated that any of that standard's regarding deficits in IQ and adaptive behavior are inconsistent with *Atkins* or otherwise unconstitutional. *See Id.* at 752, 756-57; *Burgess v. Comm'r, Ala. Dept. of Corr.*, 723 F.3d 1308, 1314, 1321 (11th Cir. 2013); *Powell v. Allen*, 602 F.3d 1263, 1272 (11th Cir. 2010); *Holladay v. Allen*, 555 F.3d 1346, 1353, 1357 (11th Cir. 2009); *Wood v. Allen*, 542 F.3d 1281, 1285-86 (2008). Therefore, this court finds Alabama's standard for establishing mental retardation applies to Jenkins's case. Jenkins has offered nothing to show the state appellate court's use of Alabama's mental retardation standard was contrary to, or an unreasonable application of, clearly established federal law.

C. Application of *Atkins* and *Perkins*

> Classification, and Systems of Supports 5 (9th ed. 1992). The American Psychiatric Association's definition is similar: "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed.2000). "Mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70. *Id.*, at 42-43.

Atkins, 536 U.S. at 308 n.3.

Jenkins maintains the Alabama Court of Criminal Appeals' decision that he is not mentally retarded is contrary to, and involved an unreasonable application of, clearly established federal law. Jenkins further contends this decision was an unreasonable determination of the facts in light of the evidence presented in state court. Jenkins divides his arguments among the three criteria for determining mental retardation: (1) significantly subaverage intellectual functioning (an IQ of 70 or below); (2) significant or substantial deficits in adaptive behavior; and (3) the manifestation of those deficits before the age of eighteen.

1. Intellectual Functioning

Jenkins acknowledges that Dr. Karl Kirkland administered the Wechsler Adult Intelligence Scale to him in 1996, resulting in a IQ of 76. (*Jenkins's Reply Brief*, Doc. 48 at 24). He emphasizes that Dr. Kirkland stated Jenkins's IQ score was two standard deviations below the mean. (*Id.*). Jenkins argues that when "the "Flynn Effect'[20] and standard error of measurement[21] are considered, Mr. Jenkins's actual IQ

[20] The Flynn Effect is "a method that recognizes the fact that IQ scores have been increasing over time" and "acknowledges that as an intelligence test ages, or moves farther from the date on which it was standardized, or formed, the mean score of the population as a whole on that assessment instrument increases, thereby artificially inflating the IQ scores of individual test subjects." *Thomas v. Allen*, 607 F.3d 749, 753 (11th Cir. 2010).

[21] The Standard Error of Measurement ("SEM") is an index of the variability of test scores produced by persons forming the normative sample.

> In other words, the SEM is a statistical measure that allows the evaluator to know the amount of error that could be present in any test. The AAMR acknowledges that the

is between 65 and 75 . . . and satisfies even Alabama's unconstitutionally rigorous interpretation of *Atkins's* first prong." (*Id.*).

This court finds Jenkins has failed to provide clear and convincing evidence to overcome the presumption of correctness that attaches to the state appellate court's factual findings. Jenkins also has not demonstrated that the state court unreasonably applied federal law in connection with the assessment of his intellectual functioning or that the decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Further, Jenkins did not raise his Flynn Effect argument in the state court.

a. The Flynn Effect

As previously stated, when a state court has adjudicated a claim on the merits, this court must judge the decision on the record before that court. Since Jenkins did not raise the Flynn Effect as an issue during collateral review, this court cannot now consider it. However, even if Jenkins had raised the Flynn Effect as a concern on collateral review, neither *Atkins* nor Alabama law *requires* that a court take the phenomenon into account when evaluating a defendant's IQ test scores. The cases

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> SEM has been estimated to be three to five points for well-standardized measures of general intellectual functioning. Hence, the IQ standard score is bounded by a range that would be approximately three to four points above and below the obtained scores.

Thomas, 607 F.3d at 753.

cited by Jenkins in support of the Flynn Effect[22] are not binding authorities of the Supreme Court, Eleventh Circuit, or State of Alabama, and *none* of them have held that the Flynn Effect *must* be taken into account when examining an IQ test score. Moreover, this court finds that, to the extent the appellate courts of the State of Alabama have discussed the Flynn Effect, they have stated that consideration of the phenomenon lies in the discretion of the trial judge. For example, the Alabama Court of Criminal Appeals observed in its 2009 opinion in the case of *Beckworth v. State*, No. CR-07-0051, 2009 WL 1164994 (Ala. Crim. App. May 1, 2009), that it had not previously

> addressed the "Flynn effect," see *James R. Flynn, Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect*, 12 Psych., Pub. Pol'y, & L., 170-78 (2006), which posits that IQ scores increase over time in certain populations. However, the Texas Court of Appeals recently stated: "We have previously refrained from applying the Flynn effect . . . noting that it is an 'unexamined scientific concept' that does not provide a reliable basis for concluding that an appellant has significant sub-average general intellectual functioning." *Neal v. State*, 256 S.W.3d 264, 273 (Tex. Crim. App. 2008).

Beckworth, 2009 WL 1164994 at *38 n.5 (some citations omitted), *reversed on other grounds*, *Ex parte Beckworth*, No. 1091780, 2013 WL 3336983 (Ala. July 3, 2013).

A more recent decision of the Alabama Court of Criminal Appeals, *Albarran v. State*, 96 So. 3d 131 (Ala. Crim. App. 2011), makes it clear that consideration of

[22] (*Jenkins's Reply Brief*, Doc. 48 at 24-26).

the Flynn Effect is not a *requirement* when applying Alabama's criteria for determining whether a criminal defendant suffers from mental retardation. That opinion states:

> First, this Court cannot, based on the record, say that the circuit court abused its discretion in determining that Albarran failed to meet the definition of mental retardation adopted by the Alabama Supreme Court in *Perkins* based on Albarran's IQ score. Although Dr. Weinstein also testified that, when adjusted for the "Flynn effect," Albarran's IQ was around 68, the circuit court could have reasonably rejected the "Flynn effect" and determined that Albarran's IQ was 71. *Gray v. Epps*, 616 F.3d 436, 446 n.9 (5th Cir. 2010) (quoting *In re Mathis*, 483 F.3d 395, 398 n.1 (5th Cir. 2007) ("[T]he Flynn Effect 'has not been accepted in this Circuit as scientifically valid.'")); *Bowling v. Commonwealth*, 163 S.W.3d 361, 375 (Ky. 2005) (holding that "*Atkins* did not discuss margins of error or the 'Flynn effect' and held that the definition [of mental retardation] in KRS 532.130(2) 'generally conform[ed]' to the approved clinical definitions" so the court could not consider the Flynn effect); *Thomas v. Allen*, 607 F.3d 749, 758 (11th Cir. 2010) [(observing that:] "[T]here is no uniform consensus regarding the application of the Flynn effect in determining a capital offender's intellectual functioning, and there is no Alabama precedent specifically discounting a court's application of the Flynn effect . . . ."). Because the circuit court could have reasonably determined that Albarran's IQ was 71, a score that places him outside the Alabama Supreme Court's definition of mental retardation, this Court cannot say that the circuit court abused its discretion in denying Albarran's *Atkins* motion.

Albarran, 96 So.3d at 199-200 (second alteration supplied, all others in original, footnote omitted).

b. Standard Error of Measurement

Jenkins argued to the Alabama Court of Criminal Appeals that, given the Standard Error of Measurement ("SEM") of plus or minus five points, Jenkins meets the threshold for mental retardation. (*Appellant's Supplemental Reply Brief*, Rule 32 C.R. Vol. 39, Tab 58). However, neither the appellate court nor Dr. Kirkland indicated that they took the SEM into account.

It is undisputed that Jenkins scored 76 on the IQ test administered by Dr. Kirkland. Thus, considering the SEM, Jenkins's IQ falls within a range of 71-81, which is still above the threshold established in *Perkins*. Further, the record of the Rule 32 proceedings indicates that testing performed on Jenkins in 1980, when he was twelve years old, calculated his IQ at 90 on the Peabody Picture Vocabulary Test and Raven Progressive Matrices Test, and 83 on the Wechsler Intelligence Scale for Children - Revised.[23] The record of the Rule 32 proceedings also indicates that testing performed in 1981, when Jenkins was fourteen years old, calculated his IQ at

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[23] The preparer of the Re-Evaluation Report prepared in conjunction with the 1980 testing noted that Jenkins is dyslexic. Additionally, the preparer of the report rated Jenkins's intellectual capacity as average as opposed to below average or borderline and offered the following comments:

> Frequent moves, changes in schools and family instability have made it difficult for [Jenkins] to achieve success in academic subjects. Low ability coupled with a specific learning disability add to his problems so that, at times, behavior is reflection of inferiority feelings, rejection by peers and general lack of success in school life. Lack of responsibility for self control and poor use of time contribute to lack of learning as well as some social problems.

(Rule 32 C.R. Vol. 27 at 955-58).

81 on the Shipley Institute of Living Scale, and 86 on the Peabody Picture Vocabulary Test.[24] (Rule 32 C.R. Vol. 27 at 845-48; 955-58). Furthermore, Jenkins's school records consistently indicate that his poor performance was a result of excessive absences, late assignments, and lacking fundamental skills in math, reading and language. (*Id.* at 877-964).

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[24] The psychological report prepared by the San Bernardino County, California Probation Department, in conjunction with the 1981 testing, concluded that:

> [Jenkins] is functioning in the Dull-Normal range of intelligence according to the Shipely [*sic*] Institute of Living Scale and the Peabody Picture Vocabulary Test. [Jenkins] appears to be suffering from a definite learning disability. It is important to note that [his] scores on his testing reflect a wide discrepancy in his performance level. He appears to have erratic comprehension in the verbal/reading skills and to be easily distracted on tasks which require sustained concentration. A full-scale Wechsler Intelligence Test and a Nebraska Psychoneurological Battery is recommended to better define [his] specific learning disabilities. [Jenkins] is in need of special education designed for the emotionally disturbed adolescent with definite learning disabilities.
>
> . . .
>
> Testing indicates that [Jenkins] is a very emotionally disturbed adolescent. [He] does not appear to be psychotic but to be functioning at a marginal, borderline state of emotional adjustment. It is important to note, that [he] is presently under psychiatric care and receiving medication for bedwetting (Elavil). The possible benefit of medication needs to be noted in regards to testing results. [Jenkins's] testing data indicates strong fluctuations in consistency, he performs well on some tasks and extremely poor on others. Testing suggests an innate dull normal or lower level of average normal intelligence. However, his difficulty with verbal comprehension and ability to concentrate suggest a learning disability, possibly a factor of emotional interference in his cognitive processes. Therefore, in his present emotional state, he may appear to be less intelligent than is actually the case.

(Rule 32 C. R. Vol. 27 at 846-47).

None of the mental health experts who have evaluated Jenkins over the course of his life has concluded Jenkins has significant limitations in his intellectual functioning or that he is mentally retarded. Further, none of his IQ scores, adjusted for the SEM, puts Jenkins below a 71 IQ score. Thus, the state appellate court's finding that Jenkins's IQ does not meet the *Perkins* standard for "significantly subaverage intellectual functioning (an IQ of 70 or below)" is not unreasonable.

c. Two Standard Deviations Below the Mean

Jenkins also argues that Dr. Kirkland's conclusion that Jenkins's IQ is two standard deviations below the mean is enough, on its own, to establish the "sufficiently subaverage intellectual functioning" prong of the *Perkins* test. (*Jenkins's Motion for an Evidentiary Hearing*, Doc. 49 at 3). However, it is apparent that Dr. Kirkland simply misspoke when he made this statement. According to the AAMR, an IQ of 100 is the mean IQ score, and the standard deviation is fifteen. AAMR, Mental Retardation 36-67 (9th ed. 1992). Thus, two deviations from the mean (30) indicates an IQ score of 70. Dr. Kirkland clearly stated that Jenkins's IQ is 76.

2. Adaptive Behavior

Because Jenkins's IQ test scores fall within the SEM, he must also "be able to present additional evidence of intellectual disability, including testimony regarding

adaptive deficits." *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014). "The AAMR defines the term 'adaptive behavior' as the collection of conceptual, social, and practical skills that people learn in order to function in their everyday lives." *Thomas v. Allen*, 607 F.3d 749, 754 (11th Cir. 2010) (*citing Holladay v. Allen*, 555 F.3d 1346, 1353 (11th Cir. 2009). "[S]ignificant or substantial deficits in adaptive behavior are defined as 'concurrent deficits or impairments in present adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety.'" *Holladay*, 555 F.3d at 1353. "The American Association on Mental Retardation (AAMR) defines mental retardation as follows: 'Mental retardation refers to substantial limitations in present functioning.'" *Atkins*, 536 U.S. at 308 n. 3. Therefore, in order for Jenkins to be considered mentally retarded in the *Atkins* context, he must currently (at the time the *Atkins* claim was adjudicated) exhibit deficits in adaptive behavior. Moreover, these problems must have manifested themselves before the age of eighteen.

In concluding that Jenkins did not exhibit significant or substantial deficits in his adaptive behavior, the Alabama Court of Criminal Appeals stated there was "evidence presented at Jenkins's trial indicating that Jenkins maintained relationships with other individuals and that he had been employed by P.S. Edwards Landscaping

Company, Cotton Lowe 76 Service Station, and Paramount Painting Company." *Jenkins*, 972 So. 2d at 955. Jenkins argues that the state court's "focus on only two skill areas was an unreasonable application of *Atkins*." (*Jenkins's Response to the State's Opposition to Motion for Evidentiary Hearing*, Doc. 52 at 11).

Jenkins maintains that the state court record contains overwhelming evidence of his significant adaptive deficits in the areas of functional academic skills, communication skills, self-care, home living, social/interpersonal skills, use of community resources, and self-direction. (*Jenkins's Reply Brief*, Doc. 48 at 28-34).

With respect to functional academic skills, Jenkins notes the following:

> Mr. Jenkins exhibited absolute failure in school, placing him consistently several grade levels behind, despite a demonstrated and concerted effort. Despite his diligence Mr. Jenkins's grades were always poor prompting his fifth grade teacher to note that he "work[s] very hard," "always tries to get his work done on time," "but most of the time finds it very difficult." (RHCC, vol. 27, p. 940.) A county health care services report observed that "[i]n spite of his academic failures," he "expressed liking for school and intends to graduate." (*Id*. at 846.) Yet, his secondary school records showed very poor grades, mostly Ds and Fs in fifth and sixth grade academic classes and noted he was below grade level in all the major subjects. (*Id*. at 883, 887, 940, 944.) His fifth grade test scores fell in the very low percentiles, including the fifth percentile in math concepts and fourth percentile in math application. His seventh grade scores on the California Test of Basic Skills (CTBS) also fell in the very low percentiles, including the fourth percentile in reading comprehension. (*Id*. at 895, 936.) One teacher sent letters home to his parents indicating Mr. Jenkins was failing for several reasons, including deficiencies in his oral work. (*Id*. at 927, 931.) In addition, Mr. Jenkins was held back multiple times and never completed the

> seventh grade. (RHCC, Tab #R-48, TR. 470; vol. 27, pp. 846, 883, 886, 895, 902, 905, 915, 916, 922, 927, 931, 940, 944, 958, 962, 973.)
>
> State expert Dr. Kirkland confirmed this bleak picture, noting that Mr. Jenkins had very poor problem solving abilities, was functioning in the bottom one percentile in the most important academic subjects, and was a very slow learner. (RHCC, Tab #R-48, TR. 624-25, 670.) Kirkland administered the Wide Range Achievement Test, a test of academic achievement, and found that at age 29, Mr. Jenkins was only functioning at the third grade level in reading, spelling, and arithmetic. (Id. at 624-25.) Kirkland's testing corroborates the observation of one of Mr. Jenkins's teachers who observed some twenty years earlier that he lacked the "fundamental skills in reading, math, and language," to be successful, was scoring in the bottom percentiles in virtually every category, that "[t]he work is too hard for" him and that "[g]rading him isn't fair." (RHCC, vol. 27, pp. 895, 905, 940, 944.)

(*Id*. at 28-30).[25]

With respect to communication skills, Jenkins argues the following:

> Mr. Jenkins has significant cognitive deficits as well as poor reading skills. His cognitive deficits prevented him from concentrating and sitting still as a child. (RHCC, Tab #R-48, TR. 94,[26] 470; vol. 27, p. 941.) A county health care services report described his concentration and attention spans as "poor." (*Id*. at 846-47.) Another report noted that he was "quite concrete in his thinking." (*Id*.; see also vol. 25, p. 566.) Throughout his limited schooling Mr. Jenkins's teachers consistently noted that he had poor reading skills, erratic comprehension. (*Id*. at 895,

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[25] However, the state court record lacks any finding that Jenkins's performance in school was below borderline and generally reflected that his poor performance was at least partially attributable to his abysmal family life, frequent moves, changes in schools, frequent absences from school, and dyslexia. (Rule 32 C.R. Vol. 27 at 877-964). Additionally, both Dr. Lisak and Dr. Kirkland concluded that Jenkins functioned at a borderline intelligence level. (Rule 32 R. Vol. 21 at 467-68; Rule 32 R. Vol. 22 at 624).

[26] This cite refers to the portion of the testimony of Michael Jenkins, Jr., Jenkins's brother, stating Jenkins could not sit still while his father was beating him because it hurt.

> 902, 940, 944.) One teacher made clear to his parents that Mr. Jenkins was failing in school partially due to his lack of verbal communication skills. (*Id*. at 927, 931.) Likewise, by the seventh grade, Mr. Jenkins scores on a standardized test revealed that his reading comprehension was in the bottom fourth percentile. (*Id*. at 846, 936, 895.) At the time of his evaluation in 1996, Mr. Jenkins's reading skills were so poor that Dr. Kirkland had to read aloud all of the tests he administered to insure that he understood them. (RHCC, Tab #R-48, TR. 641.) Dr. Kirkland estimated he was reading at a third grade level at the time of his evaluation, consistent with his academic records and deficits in the area of communication. (*Id*.)

(*Jenkins's Reply Brief*, Doc. 48 at 30).

With respect to self-care, Jenkins argues:

> The unrebutted evidence presented in Rule 32 shows Mr. Jenkins has significant deficits in self-care skills. For instance, as a child Mr. Jenkins was filthy, lived in a filthy room, wet the bed and regularly defecated in his underwear. His bladder and bowel control problems persisted into adulthood and created significant problems for him socially. (RHCC, Tab #R-48, TR. 86, 89, 91, 104-10, 113, 117-18, 171, 197-200, 230-231; vol. 27, pp. 859, 891, 934-35.[27]) Indeed, when he was living with Sharon and Lonnie Seal in Alabama as a nineteen year-old and it appeared that they would discover that he wet the bed, Mr. Jenkins left their trailer to avoid having his enuresis found out. This decision led to a rapid deterioration in his life and overall mental health as he began to use drugs and alcohol to the degree that it severely impaired his functioning and evidenced profound limitations in the area

[27] No part of the record cited here by Jenkins supports his claim that, "[h]is bladder and bowel control problems persisted into adulthood and created significant problems for him socially." Rather, all of the evidence cited pertains to Jenkins's childhood.

> of self-care. (RHCC, Tab #R-48, TR. 58-59[28], 486[29]; vol. 25, p. 565[30]; vol. 26, p. 760[31]; vol. 27, pp. 859, 860.[32])

(*Jenkins's Reply Brief*, Doc. no. 48 at 30-31).

With respect to home living, Jenkins notes:

> In addition to living in filth as a child, Mr. Jenkins was dependent upon others to provide shelter. As a child he fled his home, rather than

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[28] Sherry Seal testified that while Jenkins was living with her family, she noticed that he wet the bed several times. She discussed the problem with Jenkins and offered to help if she could. The Seals had told Jenkins that when their baby was born, they wanted to switch bedrooms with him because he had the largest bedroom, which was closest to the bathroom and the front door. Jenkins moved out shortly after the Seals planned to swap bedrooms with him. When asked at the Rule 32 hearing if Jenkins moved out because he wanted to be near the bathroom, Sherry Seal replied, "That could be. I couldn't say exactly what his reasons were." *Id*. at 57-59. There is nothing in the record indicating that Jenkins moved out of the Seals' home to avoid their discovery of his enuresis. In fact, Sherry Seal testified that she knew about Jenkins's problem and discussed it with him before he moved out.

[29] This cite references the following testimony from Dr. David Lisak:

> Q. Is there anything from the events following [Jenkins] leaving the Seals that supports your conclusions here today?
> A. I think when he left the Seals, and that being a very positive environment for him, he moved back into a lifestyle that began to mimic more and more the kind of lifestyle he had in California. He drank more and started using drugs more. He was around people who did not have the kind of positive influence on him that Lonnie Seal had.

[30] This cite references the following portion of the June 8, 1997 Lunacy Commission report:

> It is noted from prior records that the patient has a very significant history of alcohol dependence with alcoholic blackouts in the last several years prior to his arrest. In addition, he has used heroin, speed, inhalants, LSD, and PCP.

[31] This cite references a page from a probation report prepared on May 11, 1983, when Jenkins was 16 years old.

[32] This cite references a page from a probation report prepared on September 21, 1981, when Jenkins was 14 years old.

> be abused, and ended up being homeless because he lacked skills to locate lodging. (RHCC, Tab #R-48, TR. 118-24, 200; vol. 25, pp. 546, 573, 574, 575; vol. 26, p. 760; vol. 27, pp. 804, 822, 844, 845, 847, 857, 860.) While living with the Seals, he contributed where he was able but had no significant home living responsibilities such as taking care of the home, paying bills, buying groceries or other chores.[33] After fleeing the safety of their trailer when he feared that they might discover he was a bed-wetter, he lived in squalor – taking up residence in a filthy mess of a[] dwelling that had been provided by an employer, thereby confirming his lack of home living skills and that his life totally deteriorated without the limited structure of the Seals[’] home. (RHCC, Tab #R-48, TR. 58-59, 486.)[34]

(*Jenkins’s Reply Brief*, Doc. 48 at 31).

With respect to social and interpersonal skills, Jenkins maintains that:

> Mr. Jenkins suffers significant deficits in social and interpersonal skills. He was a social outcast who was rejected and exploited by his peers. (RHCC, Tab #R-48, TR. 108, 110, 124, 184, 194; vol. 27, pp. 847, 891, 935.) Mr. Jenkins had no friends during childhood. (RHCC, Tab #R-48, TR. 108, 494.) In addition, because he often urinated and defecated in his pants, Mr. Jenkins’s peers ostracized and ridiculed him. (*Id.* at 110, 111.) Even his own family treated him differently. (*Id*. at 110, 192.) His parents never showed him any affection. (*Id*. at 111, 192.) During much of his early life, Mr. Jenkins’s parents physically prevented him from communicating by regularly “lock[ing him] in his room” and “not allow[ing him] to be around anybody.” (*Id*. at 112.)

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[33] Jenkins offers nothing to support this statement. However, Lonnie Seal testified at the sentencing phase of Jenkins’s trial that Jenkins contributed to the rent and other household expenses such as groceries. (R. Vol. 9, Tab 19 at 1721-22).

[34] These cites in no way support Jenkins’s statements that: “After fleeing the safety of their trailer when he feared that they might discover he was a bed-wetter, he lived in squalor – taking up residence in a filthy mess of a[] dwelling that had been provided by an employer, thereby confirming his lack of home living skills and that his life totally deteriorated without the limited structure of the Seal[‘]s home.”

> Others took advantage of him all the time. (*Id*. at 60.)[35] In response to the ostracism and exploitation, Mr. Jenkins did not stand up for himself. When beaten, he would cower, cry, and apologize, but would not fight back or run. (*Id*. at 193.) When asked to contribute on different occasions, Mr. Jenkins would "always give more than anybody else," and when others asked for help, often "he would end up doing the whole job." (*Id*. at 60.) He also did not receive fair wages at his job and was always working extended hours. (*Id.* at 61.) Mr. Jenkins was gullible and easily exploited. Mr. Jenkins's social isolation was a lifelong experience. He lacked the basic foundation for establishing peer relationships and had poor relationships with his family throughout his life. (RHCC, Tab #R-48, TR. 100-04, 112-14, 184-186, 192-96, 232, 452.) Notes from his elementary school records reveal that Mr. Jenkins was socially as well as mentally retarded with one evaluator opining that at age 12, Mr. Jenkins was five years behind the social level of his peers. (RHCC, vol. 27, pp. 879, 883, 944, 946, 955.) Indeed, the fact that Mr. Jenkins was isolated and rejected by his family of origin did not prevent the family from exploiting him. The evidence introduced in Rule 32 show that his mother extorted money from him while he was a homeless teenager, in exchange for her commitment not to report him to authorities. (RHCC, Tab #R-48, TR. 483.) According to the AAMR, "victimization of people with mental retardation, observed in social and economic exploitation, is 'a more central (and generally more subtle) problem that goes to the heart of why people with mental retardation are considered to need that label.'" AAIDD MANUAL at 84 (citing Stephen Greenspan, A Contextualist Perspective on Adaptive Behavior, in Adaptive Behavior and Its Measurement: Implications for the Field of Mental Retardation 69 (R.L. Schalock, ed., 1999)).

(*Jenkins's Reply Brief*, Doc. 48 at 31-33).

With respect to use of community resources and self-direction, Jenkins offers the following:

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[35] The record does not supports Jenkins's assertion that people took advantage of him "all the time."

Mr. Jenkins has significant deficits in the area of use of community resources and self-direction. Specifically, Mr. Jenkins could not protect himself and failed to succeed without considerable assistance. From a very young age, Mr. Jenkins suffered "severe" abuse, which escalated throughout his childhood and included at least one instance of sexual abuse from his grandfather. (RHCC, Tab #R-48, TR. 187-88, 454, 458, 462.) When Mr. Jenkins was abused, he would "ball" up, instead of fighting back. (*Id*. at 93, 96, 193.) Mr. Jenkins also ran away from home and lived on the streets. (Id. at 122.) In response to his troubles in school and at home, a county health care services report recommended that Mr. Jenkins, who was a ward of the court, stay in a structured special education program. (RHCC, vol. 27, pp. 844, 846, 847.) The report also noted that Mr. Jenkins would "have to deal with his feelings of rejection and worthlessness that he has received from his family and work to improv[e] his self-image." (*Id*.)

As evidenced by the testimony and records presented at the Rule 32 hearing, Mr. Jenkins did not utilize community resources after becoming homeless as a child – such as a homeless shelter or juvenile facility – and instead lived in the streets. (RHCC, Tab #R-48, TR. 118-24, 200.) Likewise, although his bladder and bowel control problems and chemical dependency significantly interfered with any efforts he made at normalcy, he was unable to avail himself to resources that would have assisted with these issues. Indeed, rather than be discovered as a bedwetter, Mr. Jenkins left the Seals' home. As an adult, Mr. Jenkins's peers took advantage of him regularly, which required him to subsist in the streets or rely on others. (*Id*. at 60, 61.[36]) During one of

[36] This cite references the testimony of Sherry Brown Seal, who stated that after Jenkins moved out of her house, he was taken advantage of on several occasions. She elaborated:

> A. On several occasions, when asked to contribute for different occasions, whether it was a meal or whatever, he would always give more than anybody else. There were times people would ask for help, and he would end up doing the whole job.
> Q. In his employment, was he taken advantage of?
> A. The employment in California, I don't know about. The employment while he was employed in Alabama, yes, he was.
> Q. Tell me how he was taken advantage of.
> A. He was not receiving fair wages. He was asked to work extended hours.

> the periods in which Mr. Jenkins had no place to live, he followed a family he befriended to Alabama and depended on them for transportation and lodging. (RHCC, Tab #R-9, TR. 1726; Tab #R- 48, TR. 151.)[37] Those with mental retardation tend to be "followers," and rely on others for direction and support. *Atkins*, 536 U.S. at 318. Further indicative of lack of his self direction, Mr. Jenkins found only "odd and ends" work doing painting, landscaping, and assisting a mechanic. (RHCC, vol. 29, p. 1255.)

(*Jenkins's Reply Brief*, Doc. no. 48 at 33-34).

The respondent maintains the evidence before the state court reveals that Jenkins does not have significant limitations in adaptive functioning. (*Respondent's Opposition to Motion for Evidentiary Hearing*, Doc. 51 at 19). The respondent first argues that Lonnie Seal's testimony at the penalty phase of the trial supports a finding that Jenkins does not have significant limitations in adaptive functioning:

> Mr. Seal testified that he met Jenkins when he started working at the garage where Jenkins was employed in California. (Vol. 9, p. 1719.) Mr. Seal described their job duties as consisting of "mostly heavy engine work," and he stated that Jenkins did whatever their boss needed him to do, from driving a wrecker to installing engines. *Id*. at 1720. He testified that they became "well acquainted" and added that Jenkins regularly stopped by his home to visit with him, his wife, and their child. *Id*.

Seal indicated that she did not believe Jenkins was paid enough for the hours he worked.

[37] Lonnie Seal testified at the sentencing phase of Jenkins's trial that he invited Jenkins to move to Alabama with his family and offered to let Jenkins live with him until he could obtain his own lodging, or if he did not like Alabama, he would help him "get a bus ticket back." He testified that Jenkins helped with the move by driving the Seals' truck to Alabama while Lonnie Seal drove his car with his wife and child. He further testified that it took him several weeks to find a job, while Jenkins found a job in two days, which allowed Jenkins to pay rent and contribute to household expenses such as groceries. (R. Vol. 9, Tab 19 at 1721-22).

Mr. Seal testified that he and his wife decided to move to Alabama to be closer to relatives after they discovered that she was pregnant with their second child. *Id*. at 1721. Jenkins volunteered to assist them with their move. *Id*. Jenkins drove their truck and attached trailer from California to Alabama while Mr. Seal drove himself, his wife, and their child to Alabama in his wife's car. *Id*. Once they arrived in Alabama, the Seals invited Jenkins to stay with them, and he accepted their offer. *Id*. at 1722. It took Mr. Seal "several weeks" to find a job, but Jenkins obtained a job just two days after they arrived in Alabama. *Id.*

When he was asked whether Jenkins paid rent and otherwise contributed to their household, Mr. Seal responded, "Yes, sir. He paid us about thirty dollars a week rent, and then he was constantly contributing, buying groceries, do whatever he could do. He was always offering more." *Id*. at 1722-1723. Mr. Seal recalled that Jenkins lived with them for approximately three weeks and then moved out of their residence because "he got his own mobile home in Vandiver." *Id*. at 1723. When he was asked whether they had close contact with Jenkins after he left their home, Mr. Seal replied, "Yes, sir. I saw Mark about every day." *Id*. Mr. Seal explained that Jenkins stopped by their home almost every day in the evening after his work shift to visit with them. *Id*. When he was asked whether Jenkins had any contact with their eight-month-old child during those visits, Mr. Seal testified, "Yes, sir, he always did. He would go in his room and sit in the floor and play with him. Every time Mark come to the house, he would bring something, you know. If Mark ate lunch at Hardees, or something, he would get the little toy, like the little raisin man or something, and bring it home. Every time Mark come to the house he had something. If it was just a sucker or candy, he would always spend time with Lon." *Id.* at 1724.

Mr. Seal's testimony reveals that Jenkins has good adaptive functioning in the areas of communication, self-care, home living, social and personal skills, use of community resources, and self-direction. Jenkins volunteered to drive Mr. Seal's truck and attached trailer from California to Alabama and successfully completed that task. He then

> wisely accepted the Seals' offer to live with them until he found a home of his own, which he did just three weeks after arriving in Alabama. Unlike Mr. Seal, who had to spend weeks searching for a job, Jenkins found a job just two days after they arrived in Alabama, and he used the money that he earned from that job to pay rent, buy groceries, and otherwise support the household that he shared with the Seals. Jenkins stayed in close contact with Mr. and Mrs. Seal after he moved into his own home, visiting them in the evenings after completing his work duties. Jenkins interacted well with their young child during these visits and remembered to bring gifts, such as the toy from Hardees, to the child. Thus, Mr. Seal's testimony reveals that Jenkins not only could but did live independently, that he provided for his own needs and the needs of others, and that he had no difficulties in the areas of self-care, self-direction, social, personal, and home living skills, communication, and use of community resources.

(*Id*. at 19-22).

The respondent further argues the facts surrounding Jenkins's crime also reveal that he does not have significant deficits in adaptive functioning:

> In the early-morning hours of April 18, 1989, Jenkins kidnapped, robbed, and murdered Tammy Hogeland. (Vol. 3, pp. 522-526; Vol. 4, pp. 672-673.) Later that morning, Jenkins approached Michael Brooks, who was working as a mechanic at the Alford Avenue Shell in Birmingham, and asked Brooks if he was willing to buy his car for $100 because, as he explained, he needed to travel to California to visit his ailing mother. (Vol. 6, pp. 1026, 1032.) After Brooks agreed to purchase the car for $80, Jenkins produced a bill of sale and signed the car over to him. *Id*. at 1026-1032. Jenkins's exchange with Brooks shows that he was able to fabricate a plausible reason for needing money and demonstrates that he understands proper sales transactions in light of the fact that he had the bill of sale with him and signed it over to the purchaser. Jenkins's encounter with Brooks also demonstrates his ability and willingness to bargain over a price to achieve what he wanted – in this case, cash that he could use to escape Alabama.

> Jenkins next persuaded Reba Wood, who also worked at the Alford Avenue Chevron, to take him to the Greyhound Bus Station. (Vol. 6, pp. 1035-1039.) At that time, Jenkins had with him a blue suitcase, a paper sack, and a duffel bag. Id. Jenkins boarded a bus leaving Birmingham at approximately 12:00 p.m. *Id*. On the following day, Jenkins awakened in Houston, Texas, and realized that his bus ticket was at the end of its use. *Id*. at 1157-1158. So, Jenkins proceeded to hitchhike to Los Angeles, California, where he ultimately was arrested some 22 days after the offense. *Id.* at 1106.
>
> Jenkins's flight from Alabama to California and his ability to avoid arrest for nearly three weeks after he committed the crime demonstrate that he, perhaps regrettably, has good adaptive functioning. By way of example, Jenkins's encounters with Brooks and Wood and the fact that he successfully hitchhiked from Texas to California demonstrate good adaptive functioning in the areas of communication, social and personal skills, and self-direction. And, Jenkins's use of a bus to flee Alabama demonstrates his ability to use community resources.
>
> Because the evidence in the state-court record demonstrates that he does not have significant limitations in his adaptive functioning, Jenkins cannot satisfy his burden of showing that he is mentally retarded and, therefore, ineligible for the death penalty under *Atkins*.

(*Id*. at 22-24).

Additionally, there was testimony at the evidentiary hearing concerning Jenkins's most recent adaptive behavior while he was incarcerated. Bonnie Adams, a jailer for the St. Clair County Sheriff, testified that while Jenkins was in the county jail from 1989 through 1991, she had constant contact with him. (Rule 32 R. Vol. 19, Tab 48 at 13-17). Ms. Adams stated that Jenkins was a model inmate, the best she ever supervised, who never complained about anything or caused trouble while he

was in jail. (*Id*. at 18-27). Virginia Price, another jailer for the St. Clair County Sheriff, also testified that Jenkins was the model inmate, always polite and respectful. (*Id.* at 35-41). Finally, Dr. Kirkland testified that he reviewed Jenkins's cell and met with Jenkins at Holman Prison for several hours. (Rule 32 R. Vol. 22 at 618-19). Dr. Kirkland testified that Jenkins's cell was organized and clean and that Jenkins had good relationships with guards. (*Id*.).

Jenkins argues he has significant limitations in adaptive functioning in the following skill areas: academic, communication, self-care, home living, social/interpersonal, community resources, and self-direction. Almost all of the evidence cited by Jenkins pertains to his childhood. It is indisputable that Jenkins had a horrible childhood in which he was seriously abused, ignored, and mistreated by his parents. However, Jenkins's school records indicate his poor academic performance was due at least in part to his family problems, including frequent moves and multiple absences from school. (Rule 32 C.R. Vol. 27 at 877-964). Additionally, many of the behavioral deficits Jenkins now claims to possess were in no way attributable to Jenkins or his adaptive ability. Rather, they were the result of the way Jenkins was treated by his parents since his birth.[38]

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[38] Jenkins's brother, Michael Jenkins, Jr., testified to the following: Jenkins was regularly beaten as a child; he was often beaten for lying or messing in his bed; he was made to wear his soiled underwear to school or on his head; his father made Jenkins hang his soiled sheets on the fence for the neighbors to see; his father rubbed feces on Jenkins's face and made him eat feces; his father beat

With the exception of academic skills, the respondent provides facts to support an argument that Jenkins did not have significant limitations in adaptive functioning in other skill areas during both the time period leading up to the murder and time following the murder. Further, as the appellate court noted in its opinion on Jenkins's collateral appeal, there was testimony at trial indicating that during the time period surrounding the murder, Jenkins maintained relationships with others and was employed by a landscaping company, service station, and painting company. *Jenkins*, 972 So. 2d at 155.

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him more severely if he tried to run away or hide from beatings; he and Jenkins were forced to help their father work all night, holding lights for him to work in the dark; they often were too tired to go to school because of being required to stay up all night helping their father; Jenkins was never treated with affection; Jenkins was locked in his room with two dogs who were not house-trained and was required to clean up after the dogs who used his bedroom as their bathroom; Jenkins was locked in his room during meals, so he had to eat dog biscuits and other scraps that were thrown to the dogs; Jenkins and his siblings ran away regularly; he called Child Protective Services once, but his father threatened to kill him if he ever called them again; and their parents regularly used "speed or crystal methamphetamines." (Rule 32 R. Vol. 20 at 81-172).

Jenkins's cousin, Tammy Lynn Pitts testified to the following: she is five years older than Jenkins and lived with Jenkins and his family until she was in her twenties; Jenkins was beaten and mistreated as a child; his mother hid him from the family because his father was Mexican or Puerto Rican; his mother did not change his diapers regularly, so he was forced to sit in soiled diapers for several days at a time; he suffered bad diaper rash; his mother never bathed him; while he was a baby, his mother smacked and tossed him around like he was nothing; things got worse when Jenkins's step-father was released from prison; his step-father beat him daily until he left home; Jenkins tried to hide his soiled sheets and put clean sheets on his bed to avoid beatings; Jenkins's parents called him names such as "Puerto Rican puke" and "Bastard" and gave him no affection; he was forced to attend school in his soiled clothing; Jenkins begged his father not to beat him, telling him he loved him; Jenkins was locked in his room, filthy with dog feces and dirty clothes that were never washed, and was not let out of his bedroom except to go to school or do chores; after the family ate, they threw food into his bedroom for him, or he ate out of a trash can or ate dog food; his siblings were treated better than he was; he was forced to wear diapers at age 9; his parents drank a lot and used drugs; the living conditions in the home were filthy with dirty dishes and clothes; and the dogs destroyed the house and urinated inside. (*Id*. at 182-225).

Jenkins argues that the appellate court's "focus on only two skill areas was an unreasonable application of *Atkins*." (*Jenkins's Response to the State's Opposition to Motion for Evidentiary Hearing*, Doc. 52 at 11). However, the fact that the appellate court mentioned only two skill areas in its opinion does not necessarily mean that no other skill areas were considered. *See Harrington v. Richter*, 562 U.S. 86, 98 (2011) ("Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief. This is so whether or not the state court reveals which of the elements in a multipart claim it found insufficient, for § 2254(d) applies when a 'claim,' not a component of one, has been adjudicated.").

The state record is replete with evidence pertaining to the various skill areas. The evidence cited by Jenkins in support of his claim that he lacked skills in a number of areas pertains mainly to his childhood, which was unquestionably terrible. However, the record shows that Jenkins's deficit in academic skills was in part a result of matters that were beyond his control, such as his poor family life, frequent moves and changes in schools, and frequent absences. Similarly, the deficits Jenkins claims existed in other behaviors were in large part the result of the way his family abused, ignored, and mistreated him. Further, the evidence pertaining to the time of the offense and adjudication of the *Atkins* claim indicates Jenkins did not have

significant or substantial deficits in adaptive behavior during that period of time. Given the evidence before the state court, Jenkins is unable to establish that the Alabama Court of Criminal Appeals' decision–that Jenkins did not possess significant or substantial deficits in adaptive behavior–resulted in: (1) a decision that was contrary to, or involved an unreasonable application of, clearly established federal law; or (2) a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

3. Onset Before Age Eighteen

The final requirement in proving an *Atkins* claim is that the alleged mental retardation (significantly subaverage intellectual functioning and significant or substantial deficits in adaptive behavior) must have been present before the petitioner turned eighteen. *Perkins*, 851 So. 2d at 456. Jenkins argues that "all relevant evidence shows [his] mental retardation manifested before the age of eighteen and is a lifelong condition." (*Jenkins's Reply Brief*, Doc. 48 at 34). However, taking all evidence into account, Jenkins cannot demonstrate his alleged mental retardation manifested before he attained the age of eighteen.

School records clearly show Jenkins's poor performance in school was due in part to excessive absences, late assignments, and lack of fundamental skills in math, reading, and language. (Rule 32 C.R. Vol. 27 at 877-964). At age 12, officials

determined through extensive intelligence and adaptive functioning testing that Jenkins's intellectual capacity was average and that he was dyslexic, which impaired his ability to read. (*Id*. at 955). Officials noted that frequent moves, changes in schools, family problems, and a learning disability (dyslexia) all contributed to Jenkins's "problems." (*Id*. at 958). Additional testing performed when Jenkins was 14 years old concluded that he functioned in the dull-normal range of intelligence and was suffering from a "definite learning disability." (*Id*. at 846). School and court officials clearly determined that Jenkins's intelligence scores and adaptive functioning skills were attributable to his learning disability and other circumstances in his life, rather than mental retardation. Thus, Jenkins is unable to establish that the decision by the Alabama Court of Criminal Appeals–that his alleged mental retardation manifested itself before he was eighteen years old–was contrary to clearly established federal law. Neither can Jenkins show the Alabama Court of Criminal Appeals' decision either unreasonably applied clearly established federal law or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

V. CONCLUSION

Jenkins has failed to establish that the Alabama Court of Criminal Appeals' decision that he is not mentally retarded under *Atkins* was contrary to, or involved an

unreasonable application of, clearly established federal law, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Thus, his *Atkins* claim is due to be **DENIED**.

Because he cannot prevail on his *Atkins* claim, Jenkins is not entitled to an evidentiary hearing on that claim. *See Cullen v. Pinholster*, 131 S. Ct. at 1398-99. Thus, Jenkins's Motion for an Evidentiary Hearing on his *Atkins* claims (Doc. 49) is due to be **DENIED**.

An appropriate order will follow.

DONE this the 31st day of March, 2015.

VIRGINIA EMERSON HOPKINS
United States District Judge

we are convinced that the findings and conclusions are those of the trial court. The record reflects that the trial court was thoroughly familiar with the case and gave the appellant considerable leeway in presenting evidence to support his claims. While the practice of adopting the state's proposed findings and conclusions is subject to criticism, the general rule is that even when the court adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); *Hubbard v. State*, 584 So.2d 895 (Ala.Cr.App.1991); *Weeks v. State*, 568 So.2d 864 (Ala.Cr.App. 1989), cert. denied, [498] U.S. [882], 111 S.Ct. 230, 112 L.Ed.2d 184 (1990); *Morrison v. State*, 551 So.2d 435 (Ala.Cr. App.), cert. denied, 495 U.S. 911, 110 S.Ct. 1938, 109 L.Ed.2d 301 (1990)."

593 So.2d at 126. See also *DeBruce v. State*, supra; *Holladay v. State*, 629 So.2d 673 (Ala.Crim.App.1992); *Wright v. State*, 593 So.2d 111, 117–18 (Ala.Crim.App.1991).

The circuit court's findings are supported by the testimony and the evidence that was presented at the Rule 32 proceedings. There is no indication that the circuit court's findings are "clearly erroneous." See *Bell*, supra.

For the foregoing reasons, we affirm the circuit court's denial of Jenkins's petition for postconviction relief filed pursuant to Rule 32, Ala.R.Crim.P.

AFFIRMED.

McMILLAN, P.J., and COBB, BASCHAB, SHAW, and WISE, JJ., concur.

Ex parte Mark Allen JENKINS.

(In re Mark Allen Jenkins

v.

State of Alabama).

1031313.

Supreme Court of Alabama.

April 8, 2005.

Background: Defendant petitioned for postconviction relief from capital-murder conviction and death sentence. The Circuit Court, St. Clair County, No. CC-89-68.60, William E. Hereford, J., denied petition. The Court of Criminal Appeals, 972 So.2d 111, affirmed. Defendant petitioned for certiorari review.

Holding: The Supreme Court, Lyons, J., held that relation-back doctrine was a civil law derivative misapplied as to prevent defendant from amending his postconviction petition; overruling *Harris v. State*, 947 So.2d 1079; *McWilliams v. State*, 897 So.2d 437; *Giles v. State*, 906 So.2d 963; *Ex parte Mack*, 894 So.2d 764; *DeBruce v. State*, 890 So.2d 1068; *Charest v. State*, 854 So.2d 1102; and *Garrett v. State*, 644 So.2d 977.

Affirmed in part, reversed in part, and remanded.

On remand to, Ala.Cr.App., 972 So.2d 165.

Criminal Law ⇨1586

The "relation-back doctrine," limiting review of untimely raised issues only to those that relate back to original post-judgment petitions and appeals, was a civil law derivative misapplied to defendant's criminal case as to impede his abil-

ity to raise claim of juror misconduct for first time in his amended petition for postconviction relief from capital murder conviction and death sentence; despite civil nature of postconviction proceedings, criminal procedural rule governing amendment of postconviction pleadings permitted amendment of petition without incorporating limitations of doctrine, stating, "Amendments to pleadings may be permitted at any stage of the proceedings prior to the entry of judgment," and adding, "Leave to amend shall be freely granted"; overruling *Harris v. State,* 947 So.2d 1079; *McWilliams v. State,* 897 So.2d 437; *Giles v. State,* 906 So.2d 963; *Ex parte Mack,* 894 So.2d 764; *DeBruce v. State,* 890 So.2d 1068; *Charest v. State,* 854 So.2d 1102; and *Garrett v. State,* 644 So.2d 977. Fed.Rules Civ.Proc.Rule 15(c), 28 U.S.C.A.; Rules Crim.Proc., Rule 32.7.

See publication Words and Phrases for other judicial constructions and definitions.

Joseph T. Flood, Rochester, New York, for petitioner.

Troy King, atty. gen., and Tracy M. Daniel, asst. atty. gen., for respondent.

Bryan A. Stevenson, Randall S. Susskind, and Angela L. Setzer, Montgomery, for amicus curiae Equal Justice Initiative of Alabama, in support of the petitioner.

LYONS, Justice.

Mark Allen Jenkins was convicted in March 1991 of two counts of capital murder in the death of Tammy Hogeland, i.e., murder during a robbery in the first degree and murder during a kidnapping in the first degree. The jury recommended, by a vote of 10 to 2, that Jenkins be sentenced to death. The trial court followed its recommendation. On direct appeal, the Court of Criminal Appeals affirmed Jenkins's convictions and sentence. See *Jenkins v. State,* 627 So.2d 1034 (Ala. Crim.App.1992), *aff'd,* 627 So.2d 1054 (Ala. 1993).

Jenkins timely filed a postconviction petition pursuant to Rule 32, Ala. R.Crim. P., in May 1995. He filed an amended petition in April 1997, after the then applicable two-year period for filing set forth in Rule 32.2(c) had expired.[1] After an evidentiary hearing, the trial court denied the petition. Jenkins appealed. The Court of Criminal Appeals affirmed the judgment denying postconviction relief. *Jenkins v. State,* 972 So.2d 111 (Ala.Crim.App.2004). Jenkins then petitioned this Court for certiorari review. We granted Jenkins's petition to consider that aspect of the judgment of the Court of Criminal Appeals holding that a claim asserted in a Rule 32 petition is time-barred unless that claim satisfies the requirements for relation back, borrowed from Rule 15(c), Ala. R. Civ. P., and relates back to the date of the filing of the original Rule 32 petition. Jenkins argues that the Court of Criminal Appeals improperly applied principles taken from the Alabama Rules of Civil Procedure to the Alabama Rules of Criminal Procedure. We agree, and, as to that aspect of the Court of Criminal Appeals' judgment, we reverse.

The Court of Criminal Appeals' opinion states the following facts concerning the murder of Tammy Hogeland:

1. Rule 32.2(c), Ala. R.Crim. P., was amended effective August 1, 2002, to provide that in the case of a conviction appealed to the Court of Criminal Appeals a petitioner now has one year from the date on which that court issues its certificate of judgment in which to file a Rule 32 petition.

"At trial, the State's evidence tended to show that on April 21, 1989, a truck driver discovered Tammy Hogeland's nude body on the side of a highway near Birmingham, Alabama. Forensic tests showed that Hogeland died as a result of manual strangulation. Hogeland was last seen on April 18, 1989, at the Tenth Avenue Omelet Shoppe restaurant in Birmingham were she was working as a waitress. Some of the jewelry Hogeland had been wearing when she was last seen was missing when her body was discovered.

"At about 2:00 a.m. on April 18, 1989, a witness saw a red sports car, driven by Jenkins, enter the parking lot of the Omelet Shoppe. Sara Harris, an employee of the Omelet Shoppe, testified that she saw the victim drive off with Jenkins. Later that morning two witnesses saw Jenkins at a gasoline service station off I–59. They said that a female was also in the car and that she appeared to be 'passed out.' These two witnesses left the service station and Jenkins also left the station and followed them on I–59. They saw Jenkins pull off of I–59 in an area near where Hogeland's body was later discovered."

Jenkins v. State, 972 So.2d at 119–20 (footnote omitted).

Jenkins's initial Rule 32 petition was timely filed. It raised claims of ineffective assistance of counsel and violations of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), as well as other claims that were determined to be procedurally barred. Jenkins's amended Rule 32 petition added a claim of juror misconduct: Jenkins alleged that a juror in his trial failed to disclose during voir dire that two of her close relatives had been brutally murdered. The juror testified at the Rule 32 hearing that her only nephew had been murdered before she qualified as a juror in Jenkins's trial. Jenkins states that press accounts of that crime show that both the juror's nephew and his wife were murdered execution-style. The trial court denied relief on the juror-misconduct claim on the ground that it could have been, but was not, raised on appeal.

The Court of Criminal Appeals noted that Jenkins's juror-misconduct claim was raised for the first time in the amended petition, which was filed beyond the then two-year limitations period for filing a Rule 32 petition. Relying on *Charest v. State*, 854 So.2d 1102 (Ala.Crim.App.2002), the Court of Criminal Appeals held that the juror-misconduct claim presented in the amended petition would be considered timely only if it related back to a claim raised in the timely original petition; it concluded that Jenkins's original petition had included "no claim even remotely related to the venire members' failure to truthfully answer questions during voir dire examination." 972 So.2d at 121. Because the limitations period in Rule 32.2(c), Ala. R.Crim. P., is mandatory and jurisdictional, the court said, the trial court could not consider a nonjurisdictional claim filed beyond the limitations period; therefore, the court held that Jenkins's juror-misconduct claim was barred by the expiration of the limitations period of Rule 32.2(c).

In *Charest v. State*, the Court of Criminal Appeals employed an analysis of the relation-back doctrine drawn from Rule 15, Ala. R. Civ. P.:

"[T]he circuit court should have addressed only those claims raised in the first petition, which was timely filed on February 6, 1998, and any subsequently filed legitimate amendments to that [petition] that relate back to the original petition. *See Rodopoulos v. Sam Piki Enters., Inc.*, 570 So.2d 661, 664 (Ala. 1990) (' "'[W]here the amendment is

> merely a more definite statement, or refinement, of a cause of action set out in the original complaint, the amendment relates back to the original complaint in accordance with [Ala.] R. Civ. P. 15(c).' " ') (quoting *McCollough v. Warfield,* 523 So.2d 374 (Ala.1988), and quoted with approval in *Garrett v. State,* 644 So.2d 977, 980 (Ala.Crim.App. 1994))."

854 So.2d at 1104. In *Garrett v. State,* 644 So.2d 977 (Ala.Crim.App.1994), the only case we have found in which the Court of Criminal Appeals applied the relation-back doctrine before it did so in *Charest,* the court held that a petitioner who had filed a Rule 32 petition that was not in the proper form should be allowed to amend his petition to comply with the requirements of Rule 32, and that his amended petition would relate back to the filing of the original petition and thus would not be barred by the limitations period of Rule 32.2(c). The court stated in *Garrett:* "Although the cases [discussing the relation-back doctrine] in the preceding paragraph concerned the construction and application of a specific rule of the Alabama Rules of Civil Procedure, we find the relation-back principle addressed in those cases applicable to the situation presented in this case." 644 So.2d at 981.

Jenkins argues that Rule 32.7(b), Ala. R.Crim. P., permits an amendment to a Rule 32 petition without incorporating the limitations of the doctrine of relation back. Rule 32.7(b) states: "Amendments to pleadings may be permitted at any stage of the proceedings prior to the entry of judgment." Furthermore, Jenkins notes that Rule 32.7(d) provides: "Leave to amend shall be freely granted." Jenkins maintains that the wording of Rule 32.7 clearly indicates that the relation-back doctrine should not impede a petitioner's ability to file an amendment to a Rule 32 petition that asserts claims that were not raised in the original petition. Jenkins also points to Rule 32.4, which provides that Rule 32 proceedings "shall be governed by the Rules of *Criminal* Procedure." (Emphasis added.) If Rule 32 proceedings are governed by the Rules of Criminal Procedure, Jenkins argues, then principles taken from the Rules of Civil Procedure do not apply in Rule 32 proceedings.

The State argues in its brief to this Court that the Court of Criminal Appeals, in analyzing Jenkins's juror-misconduct claim under the relation-back doctrine, "followed a long line of state and federal precedent that has analogized to the relation-back principles of Rule [15, Ala. R. Civ. P.,] in determining whether amendments to Rule 32 petitions are appropriate." The only Alabama criminal cases the State cites, however, are *Charest* and *Garrett.* The State is correct that most federal courts apply the relation-back principles of Rule 15(c), Fed.R.Civ.P., to habeas corpus proceedings. See, e.g., *Davenport v. United States,* 217 F.3d 1341 (11th Cir. 2000). The State's reliance on federal precedent is misplaced, however, because federal habeas corpus proceedings are considered *civil* cases, and, consequently, it is appropriate to apply the Federal Rules of Civil Procedure to those cases. See, e.g., *Fama v. Commissioner of Correctional Servs.,* 235 F.3d 804 (2d Cir.2000). See also Rule 11, Rules Governing § 2254 Cases ("The Federal Rules of *Civil* Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." (Emphasis added.)) Although, as previously noted, Rule 32 postconviction proceedings in Alabama are considered civil in nature, Rule 32.4 specifically mandates that Rule 32 proceedings are governed by the Rules of *Criminal* Procedure. As Justice Stuart

explained in her dissent in *Ex parte Hutcherson*, 847 So.2d 386, 389 (Ala.2002) (Stuart, J., dissenting):

> "[W]hile a Rule 32 proceeding for postconviction relief is considered to be civil in nature, such a proceeding is distinct from a typical civil case. Rule 32, Ala. R.Crim. P., provides a defendant a method by which to seek postconviction relief; therefore, the rights to be accorded a defendant during a Rule 32 proceeding and the procedures pursuant to which such a proceeding is conducted are based upon the rule and caselaw."

847 So.2d at 389–90 (citation omitted).

This Court recently examined the principles applicable to the amendment of Rule 32 petitions in *Ex parte Rhone*, 900 So.2d 455 (Ala.2004). In *Rhone*, the petitioner moved to amend his Rule 32 petition 16 days after the trial court had received the original petition. In denying the petition, the trial court addressed only the claims in the original petition. The Court of Criminal Appeals affirmed the denial, holding that the trial court had not exceeded its discretion in failing to address the claims in the amendment to Rhone's petition because "Rhone failed to meet his initial burden of showing diligence in filing the amendment or that the facts underlying the amendment were unknown to him before filing his original petition." *Rhone v. State*, 900 So.2d 443, 448 (Ala.Crim.App. 2004). This Court granted certiorari review to consider Rhone's contention that the Court of Criminal Appeals' decision conflicted with the well-established principle stated by this Court in *Ex parte Allen*, 825 So.2d 271, 273 (Ala.2002), that although "[l]eave to amend a Rule 32 petition is within the discretion of the trial court, ... it should be freely granted."

In considering the nature of the factors that would provide a proper basis upon which a trial court could exercise the discretion to disallow an amendment to a Rule 32 petition, this Court stated in *Ex parte Rhone* that "it is clear that only grounds such as actual prejudice or undue delay will support a trial court's refusal to allow, or to consider, an amendment to a Rule 32 petition." 900 So.2d at 458. We concluded in *Rhone* that the Court of Criminal Appeals erred in imposing upon a Rule 32 petitioner an "initial burden" to show diligence in filing the amendment or that the facts underlying that amendment were unknown when the original petition was filed. We stated: "Such a burden is clearly inconsistent with the mandate of this Court, as expressed in both its decisions and in Rule 32, that leave to amend should be freely granted." 900 So.2d at 458–59.

This Court also responded in *Ex parte Rhone* to the Court of Criminal Appeals' statement that the only alternative to its holding in *Rhone v. State* would be " 'to allow a petitioner the *unfettered* right to amend his Rule 32 petition.' " 900 So.2d at 459. We responded:

> "That statement, however, is not correct. The right to amend is limited by the trial court's discretion to refuse an amendment based upon factors such as undue delay or undue prejudice to the opposing party. That limitation is, in this Court's opinion, sufficient to protect the rights of the parties, while allowing the trial court sufficient control over the management of its docket."

900 So.2d at 459. The State makes a similar argument in its brief in this case. If we do not apply the doctrine of relation back to Rule 32 proceedings, the State argues, "the result would be piecemeal, unpredictable litigation and effective obliteration of the limitation period in Rule 32.2(c)." The State further argues:

> "A convict could file a simple, one-claim Rule 32 petition, days after his convic-

> tion has become final, and then repeatedly amend the petition to add entirely new claims for as long as it takes the trial court to reach final judgment."

As we held in *Ex parte Rhone*, however, a petitioner does not have the unfettered right to file endless amendments to a Rule 32 petition. The right to amend is limited by the trial court's discretion to refuse to allow an amendment if the trial court finds that the petitioner has unduly delayed filing the amendment or that an amendment unduly prejudices the State. Such an exercise of the trial court's discretion would certainly be appropriate, for example, if, on the eve of an evidentiary hearing, a Rule 32 petitioner filed an amendment that included new claims of which the State had no prior notice and as to which it was not prepared to defend.

We emphasize that the concepts of "undue delay" and "undue prejudice" as discussed in this opinion and in *Ex parte Rhone* apply to the trial court's management of its docket and to the petitioner's attention to his or her case. Those concepts cannot be applied to restrict the petitioner's right to file an amendment clearly provided for in Rule 32.7 simply because it states a new claim that was not included in the original petition.

The United States Supreme Court has made it clear that neither the Eighth Amendment nor the Due Process Clause of the United States Constitution requires states to appoint counsel for inmates, including death-row inmates, who seek postconviction relief in state courts. *Murray v. Giarratano*, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989). See also *Mayes v. State*, 563 So.2d 38 (Ala.Crim.App.1990). Because most Rule 32 petitioners file their petitions without the assistance of legal counsel, they could encounter serious problems if the relation-back doctrine was applied to Rule 32 petitions.

The Alabama Rules of Criminal Procedure permit a trial court to appoint counsel to represent an indigent petitioner in a postconviction proceeding if it "appears that counsel is necessary to assert or protect the rights of the petitioner." Rule 32.7(c), Ala. R.Crim. P. Such an appointment occurs only after a petition has been filed. Therefore, inmates who are unable to find counsel to represent them before the limitations period for filing a Rule 32 petition expires, including inmates who are mentally ill, illiterate, or mentally retarded, must determine the date by which they must file their Rule 32 petition and prepare and file a petition in the proper form with the proper claims in the proper court. In 2002, this Court amended Rule 32, Ala. R.Crim. P., to reduce the limitations period for filing a Rule 32 petition from two years to one year. Because most Rule 32 petitioners are imprisoned, those petitions are often based on a preliminary and restricted investigation of the claims asserted. Furthermore, an incarcerated inmate who does not have legal counsel is obviously hampered in his or her ability to interview witnesses, to gather records, to investigate factual questions, and to conduct legal research. A strict application of the doctrine of relation back to prohibit reasonable amendments to Rule 32 petitions could exacerbate these problems.

Given the direction in the Alabama Rules of Criminal Procedure that amendments to Rule 32 petitions are to be allowed at any time before the trial court enters a judgment, Rule 32.7(b), and that leave to amend is to be freely granted, Rule 32.7(d), we conclude that a restriction on a Rule 32 petitioner's right to file an amendment by applying principles found in the Alabama Rules of Civil Procedure, such as the relation-back doctrine, should be the subject of careful consideration by the Standing Committee on the Alabama Rules of Criminal Procedure. We decline to rewrite the Rules of Criminal Procedure

by sanctioning the incorporation of the relation-back doctrine into those rules when nothing of that nature presently appears in them.

To the extent that the following cases applied the relation-back doctrine to proceedings governed by Rule 32, Ala. R.Crim. P., we overrule those cases: *Harris v. State*, 947 So.2d 1079 (Ala.Crim.App. 2004); *McWilliams v. State*, 897 So.2d 437 (Ala.Crim.App.2004); *Giles v. State*, 906 So.2d 963 (Ala.Crim.App.2004); *Ex parte Mack*, 894 So.2d 764 (Ala.Crim.App.2003); *DeBruce v. State*, 890 So.2d 1068 (Ala. Crim.App.2003); *Charest v. State*, 854 So.2d 1102 (Ala.Crim.App.2002); and *Garrett v. State*, 644 So.2d 977 (Ala.Crim.App. 1994).[2]

We reverse the judgment of the Court of Criminal Appeals insofar as it held that Jenkins's claim of juror misconduct, presented for the first time in his amended petition, could not be considered because it did not relate back to his original petition, and we remand the cause for further proceedings consistent with this opinion. We affirm the judgment of the Court of Criminal Appeals insofar as it affirmed the trial court's denial of the other claims presented in Jenkins's Rule 32 petition.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

NABERS, C.J., and SEE, HARWOOD, WOODALL, STUART, SMITH, BOLIN, and PARKER, JJ., concur.

Mark Allen JENKINS

v.

STATE of Alabama.

CR–97–0864.

Court of Criminal Appeals of Alabama.

Nov. 23, 2005.

Rehearing Denied April 14, 2006.

Certiorari Denied May 18, 2007
Alabama Supreme Court 1050972.

Background: Defendant convicted of capital murder and sentenced to death filed petition for postconviction relief. The Circuit Court, St. Clair County, No. CC–89–68.60, William E. Hereford, J., denied petition. Defendant appealed. The Court of Criminal Appeals, 972 So.2d 111, affirmed. The Supreme Court, 972 So.2d 159, affirmed in part, reversed in part, and remanded.

Holding: On remand, the Court of Criminal Appeals held that claim of jury misconduct was procedurally barred.

Affirmed.

Criminal Law ⇨1429(1, 2)

Capital-murder defendant's claim of jury misconduct was procedurally barred in postconviction-relief proceeding, where defendant failed to raise claim at trial or on direct appeal. Rules Crim.Proc., Rule 32.2(a)(3, 5).

2. We note that in *Ex parte Nesbitt*, 850 So.2d 228 (Ala.2002), this Court quoted from *Garrett v. State* and held that under the circumstances presented in *Nesbitt*, a Rule 32 petition that was "refiled" was a valid amendment to a timely filed Rule 32 petition. We stated in *Nesbitt*: "As a valid amended, or 'continued,' petition, obviously accepted by the trial court as such, Nesbitt's October 27, 2000, Rule 32 petition related back to his timely filed 1998 petition." 850 So.2d at 231. We did not address in *Nesbitt* the merits of the question whether the relation-back doctrine was appropriately applied to Rule 32 proceedings.

ty, the Helton Drive property never became marital property. In addition, as noted above, we agree with the wife that paragraph 7, contrary to the husband's argument, simply does not contain a requirement that the property acquired by a spouse after the execution of the agreement and titled in that spouse's sole name must be purchased with that spouse's separate funds in order for the property to be considered the separate property of the purchasing spouse. Thus, the interest in the Helton Drive property, which was deeded in the wife's sole name, is her separate property under the agreement.

[5] The final argument asserted by the husband is that he was entitled to a constructive trust on the wife's assets because he had not transferred his assets to her to be her separate property but, instead, had allowed the wife control over his separate property for the mutual benefit of the parties. This creative argument is, however, unavailing. The husband correctly explains that a constructive trust may " 'be imposed upon property whenever the circumstances under which it was acquired make it inequitable that it should be retained by the holder of legal title provided some confidential relationship exists. . . .' " *Herston v. Austin,* 603 So.2d 976, 979 (Ala.1992)(*quoting Cole v. Adkins,* 358 So.2d 447, 450 (Ala.1978)). We also agree that the husband presented sufficient evidence to overcome the wife's summary-judgment motion as to the intent of the parties concerning the wife's control of the husband's money for the benefit of both parties. *See Putnam v. Putnam,* 274 Ala. 472, 475–76, 150 So.2d 209, 213 (1963) (*quoting* 26 Am.Jur. *Husband and Wife,* § 102, at 729) (noting that a constructive trust in favor of a husband may arise when a wife uses the husband's income to " 'purchase[ ] property with the understanding that it is to be for the benefit of both of them' ").

[6] However, the husband's failure to adequately prove that specific items of property were purchased with his separate property (i.e., his salary or funds from his disability payments) is fatal to his constructive-trust claim. "[T]o enforce a constructive trust there must have been a tangible form of identifiable property which was received as consideration for the sale of trust property or into which it may be otherwise traced and identified." *Ex parte Morton,* 261 Ala. 581, 593, 75 So.2d 500, 512 (1954). The husband has not definitively traced the wife's expenditures of what he claims to have been his separate property into any particular assets; thus, he has not established a "tangible form of identifiable property" upon which a constructive trust in his favor could be imposed. Therefore, we conclude that the trial court did not err by entering a summary judgment in favor of the wife on the husband's constructive-trust claim.

AFFIRMED.

THOMPSON, P.J., and PITTMAN, BRYAN, and MOORE, JJ., concur.

Mark Allen JENKINS

v.

STATE of Alabama.

CR–97–0864.

Court of Criminal Appeals of Alabama.

Feb. 27, 2004.

Rehearing Denied May 21, 2004.

Background: Defendant convicted of capital murder filed petition for postconviction

relief. The Circuit Court, St. Clair County, No. CC-89-68.60, William E. Hereford, J., denied petition, and defendant appealed.

Holdings: The Court of Criminal Appeals held that:

(1) defendant was not entitled to postconviction review of claims not raised within two years of entry of judgment on direct appeal;

(2) defendant did not have right to counsel on second appeal to Supreme Court, overruling *Watkins v. State*;

(3) defendant failed to support claims of ineffective assistance of counsel during guilt phase;

(4) defendant failed to support claims of ineffective assistance of counsel during sentencing;

(5) testimony by defendant's clinical psychologist regarding effects of child abuse in adulthood was not relevant mitigating evidence;

(6) death sentence for defendant not mentally retarded was not cruel and unusual;

(7) State did not commit *Brady* violations; and

(8) trial court's adoption of State's proposed order was not reversible error.

Affirmed.

Judgment affirmed in part, reversed in part, and remanded, Ala., 972 So.2d 159, on remand to, Ala.Cr.App., 972 So.2d 165.

1. Criminal Law ⚿1134(6), 1147

When reviewing a circuit court's ruling on a petition for postconviction relief, the Court of Criminal Appeals applies an abuse-of-discretion standard; if the circuit court is correct for any reason, even though it may not be the stated reason, the Court will not reverse the circuit court's denial of the petition.

2. Criminal Law ⚿1042

The plain-error standard of review is not applied in postconviction proceedings challenging a death sentence.

3. Criminal Law ⚿1586

Defendant's claim in amended postconviction petition of juror misconduct during voir dire in capital-murder trial did not relate back to any claim raised in original petition, and, thus, trial court lacked jurisdiction to consider claim not brought within two-year limitations period for filing postconviction claims after entry of judgment on direct appeal. Rules Crim. Proc., Rule 32.2(c).

4. Criminal Law ⚿1586

A claim raised in an amended postconviction petition filed more than two years after entry of judgment on appeal would be considered timely if it relates back to a claim raised in the original timely filed petition. Rules Crim.Proc., Rule 32.2(c).

5. Criminal Law ⚿1586

The two-year limitations period for filing a postconviction claim after entry of judgment on direct appeal is mandatory and jurisdictional, and deprives a court from considering a nonjurisdictional claim filed beyond that period. Rules Crim. Proc., Rule 32.2(c).

6. Criminal Law ⚿641.13(1)

When reviewing a claim of ineffective assistance of counsel the court applies the *Strickland* two-pronged standard: the petitioner must show (1) that his counsel's performance was deficient, and (2) that he was prejudiced as a result of his counsel's performance. U.S.C.A. Const.Amend. 6.

7. Criminal Law ⚿641.13(1)

Judicial scrutiny of counsel's performance must be highly deferential. U.S.C.A. Const.Amend. 6.

8. Criminal Law ⇨641.13(1)

A fair assessment of attorney performance in reviewing a claim of ineffective assistance of counsel 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. U.S.C.A. Const.Amend. 6.

9. Criminal Law ⇨641.13(1)

In reviewing a claim of ineffective assistance of counsel, the reviewing court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. U.S.C.A. Const.Amend. 6.

10. Criminal Law ⇨641.13(2.1)

Strategic choices made by counsel after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable in a claim of ineffective assistance of counsel. U.S.C.A. Const. Amend. 6.

11. Criminal Law ⇨641.13(6)

Strategic choices made by counsel after less than complete investigation are reasonable, for the purposes of a claim of ineffective assistance of counsel, precisely to the extent that reasonable professional judgments support the limitations on investigation. U.S.C.A. Const.Amend. 6.

12. Criminal Law ⇨641.13(6)

Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. U.S.C.A. Const. Amend. 6.

13. Criminal Law ⇨641.13(6)

In any ineffectiveness-of-counsel case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

14. Criminal Law ⇨641.13(2.1)

Counsel's failure to object to State's use of peremptory challenges to strike all African-American members of venire did not state claim for ineffective assistance of counsel, in capital-murder trial of white defendant, under *Batson* rule in effect at time of trial that limited such claims to exercise of peremptory strikes against members of defendant's race. U.S.C.A. Const.Amends. 6, 14.

15. Criminal Law ⇨641.13(2.1)

Attorneys are not obliged to object based on possible future developments in the law in order to render effective assistance. U.S.C.A. Const.Amend. 6.

16. Criminal Law ⇨1077.3

Capital-murder defendant did not have constitutional right to counsel on second appeal to Supreme Court after direct appeal to Court of Criminal Appeals; overruling *Watkins v. State*, 632 So.2d 555. U.S.C.A. Const.Amend. 6.

17. Criminal Law ⇨641.13(7), 1077.3

A defendant is constitutionally entitled to effective assistance of counsel, which includes the filing of an appellate brief on first appeal as a matter of right. U.S.C.A. Const.Amend. 6; Code 1975, § 12–3–9.

18. Criminal Law ⇨1018, 1026

A criminal defendant is guaranteed one appeal from his conviction, and that appeal is to the Court of Criminal Appeals. U.S.C.A. Const.Amend. 6; Code 1975, § 12–3–9.

19. Criminal Law ⚿1077.3

An appeal of a conviction and sentence to the Alabama Supreme Court is a second appeal, for the purposes of the right to counsel, conducted after the Court of Criminal Appeals has considered and addressed the issues raised by an attorney in the brief to that Court. U.S.C.A. Const. Amend. 6; Code 1975, § 12–3–9.

20. Criminal Law ⚿1019, 1020

The primary responsibility for reviewing a capital-murder conviction and death sentence lies with the Court of Criminal Appeals. Code 1975, § 13A–5–53(a).

21. Criminal Law ⚿1077.3

The right to appointed counsel extends to the first appeal as of right, and no further. U.S.C.A. Const.Amend. 6; Code 1975, § 12–3–9.

22. Criminal Law ⚿641.13(7), 1077.3

There is no right to counsel when pursuing a second appeal of a criminal conviction and sentence before the Alabama Supreme Court; therefore, there is no right to the effective assistance of counsel. U.S.C.A. Const.Amend. 6; Code 1975, § 12–3–9.

23. Jury ⚿33(5.15)

Defendant's mere assertion that State struck three, or all, African-American prospective jurors from venire was not sufficient to establish prima facie claim of racial discrimination in exercise of peremptory strikes under *Batson*, in capital-murder trial. U.S.C.A. Const. Amends. 6, 14.

24. Jury ⚿33(5.15)

Numbers alone are not sufficient to establish a prima facie case of discrimination in the exercise of peremptory strikes under *Batson*. U.S.C.A. Const.Amend. 14.

25. Jury ⚿33(5.15)

It is important that the defendant come forward with facts, not just numbers alone, when asking the trial court to find a prima facie case of discrimination during jury selection. U.S.C.A. Const.Amend. 14.

26. Criminal Law ⚿1028

An appellate court will not consider an argument raised for the first time on appeal; its review is limited to evidence and arguments considered by the trial court.

27. Criminal Law ⚿641.13(6)

Counsel's failure to interview victim's coworker regarding her inability to identify defendant as man she saw victim leave with in order to impeach her identification of defendant at trial for capital murder did not constitute deficient performance that prejudiced defendant, as required to support claim of ineffective assistance of counsel; counsel thoroughly cross-examined coworker regarding her inability to identify defendant during two different pretrial lineups. U.S.C.A. Const.Amend. 6.

28. Criminal Law ⚿641.13(6)

The failure to interview or take the depositions of the State's witnesses for impeachment purposes is not prejudicial per se, for the purposes of sustaining a claim of ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

29. Criminal Law ⚿641.13(6)

Allegation that counsel failed to interview manager for restaurant where victim worked regarding inconsistent statement to police did not state claim of ineffective assistance of counsel, in capital-murder trial; counsel impeached manager with his inconsistent statements at trial. U.S.C.A. Const.Amend. 6.

30. Criminal Law ⚿641.13(6)

Unsupported allegation that counsel failed to interview victim's coworker who

could have testified that, when defendant was in restaurant, nobody mentioned that victim had been sent to work at the restaurant's other location, did not state claim for ineffective assistance of counsel, in capital-murder trial, insofar as coworker could not remember whether any conversation took place about victim being sent to work at other location. U.S.C.A. Const.Amend. 6.

31. Criminal Law ⇨641.13(6)

Counsel's alleged failure to review prosecutor's files and to discover that another person had been arrested for disappearance of victim did not support claim of ineffective assistance of counsel, in capital-murder trial; prosecutor had open-file discovery policy, counsel reviewed all of State's files, and police report from Mississippi indicating that other suspect had been arrested had not been included in file at time of review. U.S.C.A. Const.Amend. 6.

32. Criminal Law ⇨641.13(2.1)

Unsupported assertion that counsel failed to investigate allegedly systematic underrepresentation of African-Americans on both grand and petit jury venires did not state claim of ineffective assistance of counsel, in trial for capital murder. U.S.C.A. Const.Amend. 6.

33. Criminal Law ⇨1580(10)

Defendant's assertion in postconviction motion, "[t]he claim that trial counsel failed to object to actual conflict of interest in cocounsel's representation of material witness for state," could be dismissed for violating rule requiring clear and specific statement of grounds for relief. Rules Crim.Proc., Rule 32.6(b).

34. Criminal Law ⇨641.13(2.1)

Allegation that counsel failed to object to fact that initial cocounsel had conflict of interest due to his prior representation of material State witness did not state claim of ineffective assistance of counsel, in capital-murder trial; cocounsel became aware of potential conflict during pretrial discussions with defendant and counsel, at which time cocounsel moved to have himself withdrawn. U.S.C.A. Const.Amend. 6.

35. Criminal Law ⇨641.13(4)

Record did not support claim that counsel and cocounsel did not have requisite five years of experience to represent capital defendant; prior to appointment, counsel who handled guilt phase had notified court that he did not have requisite five years' experience, counsel was not appointed until he had completed requisite five years, and cocounsel who handled penalty phase was local attorney with more than five years in practice of criminal law. Code 1975, § 13A–5–54.

36. Criminal Law ⇨641.13(6)

Counsel's failure to use funds that had been approved to hire forensic expert did not constitute deficient performance that affected outcome of capital-murder trial, as required to support claim of ineffective assistance of counsel; counsel spent considerable time and effort learning about fiber analysis, which evidence State was using for purposes of identifying defendant as perpetrator, counsel interviewed State's fiber expert, expert's testimony was not a surprise to defense, and counsel thoroughly cross-examined fiber expert on known problems with fiber analysis. U.S.C.A. Const.Amend. 6.

37. Criminal Law ⇨641.13(2.1)

Counsel's failure to use funds granted to hire private investigator did not constitute deficient performance that prejudiced defendant, as required to support claim of ineffective assistance of counsel, in capital-murder trial; motion to hire investigator was brought with specific investigator in mind, and trial court informed counsel that

particular investigator was not credible. U.S.C.A. Const.Amend. 6.

38. Criminal Law ⚿641.13(6)

Counsel's failure to request funds for mental-health expert did not fall below wide range of reasonable professional assistance, as required to support claim of ineffective assistance of counsel, in capital-murder trial; counsel had no reason to question defendant's mental health after mental evaluation conducted by lunacy commission resulted in finding that defendant was competent to stand trial. U.S.C.A. Const.Amend. 6.

39. Criminal Law ⚿641.13(2.1)

Mere assertions that trial counsel failed to conduct adequate voir dire examination that would have disclosed biases of certain prospective jurors did not state claim of ineffective assistance of counsel, in capital-murder trial; defendant failed to call counsel who conducted voir dire to testify at evidentiary hearing on motion for postconviction relief, and defendant offered no evidence as to how voir dire should have been conducted. U.S.C.A. Const. Amend. 6.

40. Criminal Law ⚿641.13(6)

Allegation that counsel failed to adequately cross-examine 29 State witnesses did not state claim of ineffective assistance of counsel, in capital-murder trial; defendant merely provided laundry list of witnesses and presented no facts or argument to support claim. U.S.C.A. Const.Amend. 6.

41. Criminal Law ⚿641.13(2.1)

Counsel's alleged failure to make laundry list of objections did not state claim of ineffective assistance of counsel, in capital-murder trial, absent any presentation of facts to support defendant's claims as to each specific instance where he asserts counsel should have made objection. U.S.C.A. Const.Amend. 6.

42. Criminal Law ⚿641.13(2.1)

Effectiveness of counsel does not lend itself to measurement by picking through the transcript and counting the places where objections might be made. U.S.C.A. Const.Amend. 6.

43. Criminal Law ⚿641.13(2.1)

Even though there might have been several instances where counsel could have objected, that does not automatically mean that the defendant did not receive an adequate defense in the context of the constitutional right to counsel. U.S.C.A. Const. Amend. 6.

44. Criminal Law ⚿641.13(7)

In a challenge to the imposition of a death sentence, the prejudice prong of the ineffective-assistance-of-counsel inquiry focuses on whether the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. U.S.C.A. Const. Amend. 6.

45. Criminal Law ⚿641.13(7)

The reasonableness of counsel's investigation and preparation for the penalty phase often depends critically upon the information supplied by the defendant; counsel cannot be found ineffective for failing to introduce information uniquely within the knowledge of the defendant and his family which is not provided to counsel. U.S.C.A. Const.Amend. 6.

46. Criminal Law ⚿641.13(7)

Claim that counsel failed to call family members and friends to testify regarding child abuse suffered by defendant and violent family background as mitigating evidence during sentencing for capital murder did not create reasonable probability that, in balancing of aggravating and miti-

gating factors, death sentence was not warranted, as required to support claim of ineffective assistance of counsel; defendant presented no evidence of counsel's reasons for not calling witnesses, jury was presented substantial evidence of mitigating factors for lack of criminal history, age, and good character and was warned to be careful in choosing sentence because conviction was based solely on circumstantial evidence, and witnesses' testimony at hearing on motion for postconviction relief indicated that they were biased and not credible, and that they gave contradictory testimony regarding extent of alleged abuse and defendant's family background. U.S.C.A. Const.Amend. 6.

47. Criminal Law ⚿1158(1)

A trial court's determination regarding the credibility of witnesses is entitled to great weight on appeal, and such determination will not be disturbed unless clearly contrary to the evidence.

48. Criminal Law ⚿742(1), 747

When there is conflicting testimony as to a factual matter, the question of the credibility of the witnesses is within the sound discretion of the trier of fact.

49. Criminal Law ⚿641.13(7)

A defense attorney is not required to investigate all leads, and there is no per se rule that evidence of a criminal defendant's troubled childhood must always be presented as mitigating evidence in the penalty phase of a capital case. U.S.C.A. Const. Amend. 6.

50. Criminal Law ⚿641.13(7)

Counsel has no absolute duty to present mitigating character evidence at all, and trial counsel's failure to present mitigating evidence is not per se ineffective assistance of counsel. U.S.C.A. Const. Amend. 6.

51. Criminal Law ⚿304(16)

The Court of Criminal Appeals may take judicial notice of its previous records.

52. Criminal Law ⚿641.13(7)

Allegation that counsel failed to investigate and present evidence of defendant's good conduct in county jail while awaiting trial did not affect jury's decision to impose death for capital murder, as required to support claim of ineffective assistance of counsel; defendant presented no evidence as to counsel's reasons for not presenting evidence, jailers' testimony that defendant was always courteous and polite and that he was model prisoner was inconsistent with theory that abuse defendant suffered as child caused him to commit violence as adult, and jailers' observations occurred during time when defendant was confined alone in cell located directly across from guard's desk. U.S.C.A. Const.Amend. 6.

53. Sentencing and Punishment ⚿1721

Good conduct during pretrial incarceration is not necessarily a mitigating circumstance, for purposes of capital sentencing.

54. Sentencing and Punishment ⚿1777

Whether potentially mitigating evidence mitigates the offense is for the trial court to determine, in capital sentencing proceeding.

55. Sentencing and Punishment ⚿1653, 1658

While the trial court is required to consider all evidence submitted as mitigation, in capital sentencing proceeding, whether the evidence is actually found to be mitigating is in the discretion of the sentencing authority.

56. Criminal Law ⚿641.13(7)

Allegation that counsel failed to request continuance before start of penalty phase for capital murder did not state

claim of ineffective assistance of counsel, absent any evidence as to why counsel failed to do so. U.S.C.A. Const.Amend. 6.

57. Criminal Law ⚿641.13(7)

Counsel was not ineffective in arguing mitigating factors at separate hearing prior to sentencing for capital murder; counsel prepared detailed presentence memorandum containing information regarding alleged abuse that was included in presentence report, and counsel argued other mitigating factors that defendant had no significant criminal history, that he was intoxicated and impaired at time of murder, that murder was not premeditated, and that defendant did not have normal family life. U.S.C.A. Const.Amend. 6; Code 1975, § 13A–5–47(c).

58. Criminal Law ⚿1519(15)

Defendant was not entitled to postconviction relief on allegation that he received ineffective assistance of counsel on direct appeal from conviction and sentence for capital murder, absent any identification of issues that counsel should have raised. U.S.C.A. Const.Amend. 6.

59. Criminal Law ⚿641.13(7)

Double counting of element for capital murder as aggravating circumstance that warranted imposition of death sentence was not reversible error, and, thus, counsel was not ineffective for failing to object on that basis. U.S.C.A. Const.Amend. 6.

60. Criminal Law ⚿1134(3)

Claim that counsel was ineffective for failure to argue that execution by electrocution constituted cruel and unusual punishment was rendered moot by statute changing method of execution to lethal injection. U.S.C.A. Const.Amends. 6, 8; Code 1975, § 15-18-82.1.

61. Sentencing and Punishment ⚿1761, 1769

Testimony by defendant's retained clinical psychologist regarding effects of "abusive and brutal childhood," was not relevant mitigating evidence, in sentencing for capital murder; psychologist's opinion that there was no possibility that murder was not connected to abusive childhood was incredible and based purely on hearsay as to relative effects of child abuse in adulthood, insofar as psychologist never interviewed defendant about circumstances of murder or conducted any psychological tests or evaluation of defendant. Rules of Evid., Rule 801.

62. Sentencing and Punishment ⚿1642

Evidence that defendant had IQ score of above 70, and that he had maintained employment and relationships with other individuals indicated that he was not mentally retarded, and, thus, death sentence did not violate prohibition against cruel and unusual punishment. U.S.C.A. Const. Amend. 8.

63. Sentencing and Punishment ⚿1642

To be considered mentally retarded for the purposes of the prohibition against executing a mentally retarded defendant, the defendant must show that he has significantly subaverage intellectual functioning with an IQ score of 70 or below, significant deficits in adaptive behavior, and that the problems must have manifested themselves before the defendant reached the age of 18. U.S.C.A. Const.Amend. 8.

64. Criminal Law ⚿700(2.1)

To establish a *Brady* violation a defendant must show (1) that the prosecution suppressed evidence, (2) favorable to the defendant or exculpatory, and (3) material to the issues at trial.

65. Criminal Law ⚿700(3)

Prosecutor's alleged failure to disclose police report from Mississippi about "other suspect" did not constitute *Brady* violation, in trial for capital murder; prosecutor had open-file discovery policy, trial counsel was not denied right to copy anything from prosecutor's file, and report was not exculpatory evidence material to issues at trial, in that individual referred to in report was detained because he matched defendant's general description, not because individual was suspect and evidence of defendant's guilt was overwhelming.

66. Criminal Law ⚿700(3)

State did not commit *Brady* violation in capital-murder trial by allegedly withholding evidence of information regarding defendant's abusive childhood, about which defendant had personal knowledge.

67. Criminal Law ⚿700(2.1)

There is no *Brady* violation where the information in question could have been obtained by the defense through its own efforts.

68. Criminal Law ⚿700(2.1)

Evidence is not "suppressed" by the prosecution, in violation of *Brady*, if the defendant either knew or should have known of the essential facts permitting him to take advantage of any exculpatory evidence.

See publication Words and Phrases for other judicial constructions and definitions.

69. Criminal Law ⚿1427

Defendant was procedurally barred from consideration of postconviction claims that either were raised or could have been raised at trial or on direct appeal. Rules Crim.Proc., Rule 32.2(a).

70. Criminal Law ⚿1177

Trial court's adoption of State's proposed order denying defendant's motion for postconviction relief was not reversible error, where the findings were not clearly erroneous.

Joseph T. Flood, Manassas, Virginia, for appellant.

Troy King and William H. Pryor, Jr., attys. gen.; and A. Vernon Barnett IV, asst. atty. gen., for appellee.

PER CURIAM.

Mark Allen Jenkins, currently an inmate on death-row at Holman Penitentiary, appeals the circuit court's denial of his petition for postconviction relief filed pursuant to Rule 32, Ala.R.Crim.P.

In March 1991, Jenkins was convicted of two counts of capital murder for murdering Tammy Hogeland during the course of a kidnapping and a robbery. The jury, by a vote of 10 to 2, recommended that Jenkins be sentenced to death. The trial court sentenced Jenkins to death. Jenkins's conviction and death sentence were affirmed on direct appeal. See *Jenkins v. State,* 627 So.2d 1034 (Ala.Crim.App.1992), aff'd, 627 So.2d 1054 (Ala.1993). This Court issued its certificate of judgment on October 28, 1993. See Rule 41, Ala. R.App.P.

In May 1995, Jenkins filed a petition for postconviction relief pursuant to Rule 32, Ala.R.Crim.P. An amended petition was filed in April 1997. After an evidentiary hearing, the circuit court denied Jenkins's Rule 32 petition in a thorough 79–page order. This appeal followed.

At trial, the State's evidence tended to show that on April 21, 1989, a truck driver discovered Tammy Hogeland's nude body on the side of a highway near Birmingham, Alabama. Forensic tests showed that

Hogeland died as a result of manual strangulation. Hogeland was last seen on April 18, 1989, at the Tenth Avenue Omelet Shoppe restaurant in Birmingham where she was working as a waitress. Some of the jewelry Hogeland had been wearing when she was last seen was missing when her body was discovered.[1]

At about 2:00 a.m. on April 18, 1989, a witness saw a red sports car, driven by Jenkins, enter the parking lot of the Omelet Shoppe. Sara Harris, an employee of the Omelet Shoppe, testified that she saw the victim drive off with Jenkins. Later that morning two witnesses saw Jenkins at a gasoline service station off I–59. They said that a female was also in the car and that she appeared to be "passed out." These two witnesses left the service station and Jenkins also left the station and followed them on I–59. They saw Jenkins pull off of I–59 in an area near where Hogeland's body was later discovered.

Standard of Review

[1] When reviewing a circuit court's ruling on a petition for postconviction relief, we apply an abuse of discretion standard. "If the circuit court is correct for any reason, even though it may not be the stated reason, we will not reverse its denial of the petition. *See Roberts v. State,* 516 So.2d 936 (Ala.Cr.App.1987)." *Reed v. State,* 748 So.2d 231, 233 (Ala.Crim.App. 1999).

[2] This Court applied a plain-error standard of review when reviewing Jenkins's conviction and sentence on direct appeal. However, the plain-error standard of review is not applied in postconviction proceedings challenging a death sentence. *Hill v. State,* 695 So.2d 1223 (Ala. Crim.App.1997); *Neelley v. State,* 642 So.2d 494 (Ala.Crim.App.1993), writ quashed, 642 So.2d 510 (Ala.1994).

Last, this proceeding was initiated at Jenkins's direction. According to Rule 32.3, Ala.R.Crim.P., Jenkins has the "burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief."

I.

Jenkins first argues that he was deprived of his right to due process, his right to select an impartial jury, and his right to a fair trial when members of the venire failed to answer critical questions during voir dire examination.

In October 1993, this Court issued the certificate of judgment for Jenkins's direct appeal. Jenkins's Rule 32 petition was filed in May 1995. This juror-misconduct claim was not raised in Jenkins's original Rule 32 petition; however, it was raised in an amended petition filed in April 1997—more than three years after this Court issued the certificate of judgment for Jenkins's direct appeal.

When Jenkins filed his postconviction petition, Rule 32.2(c), Ala.R.Crim.P., provided that a petitioner had two years from this Court's issuance of the certificate of judgment in which to file a Rule 32 petition.[2] Jenkins's original petition was filed within two years of the issuance of the certificate of judgment. However, the ju-

1. Hogeland's body was so badly decomposed that dental records were used for the identification.

2. The two-year limitations period applies in this case because the Rule 32 petition was filed before Rule 32.2(c), Ala.R.Crim.P., was amended effective August 1, 2002, to shorten the limitations period to one year. The Alabama Supreme Court recently issued an opinion clarifying the effective date of the amendment changing the limitations period in relation to the issuance of the certificate of judgment. See *Ex parte Gardner,* 898 So.2d 690 (Ala.2004).

ror-misconduct claim was not raised until the amended petition was filed in April 1997—well past the two-year limitations period.

[3, 4] Nonetheless, this claim would be considered timely if it relates back to a claim raised in the original timely filed Rule 32 petition. However, the May 1995 petition had no claim even remotely related to the veniremembers' failure to truthfully answer questions during voir dire examination. See *Charest v. State*, 854 So.2d 1102 (Ala.Crim.App.2002).

[5] The limitations period in Rule 32.2(c), Ala.R.Crim.P., is mandatory and jurisdictional, *Williams v. State*, 783 So.2d 135, 137 (Ala.Crim.App.2000), and deprives a court from considering a nonjurisdictional claim filed beyond that period. Therefore, this constitutional claim is barred by the expiration of the limitations period. See Rule 32.2, Ala.R.Crim.P.[3]

II.

Jenkins next argues that he was deprived of the effective assistance of counsel at all stages of his trial and on appeal.

[6–13] When reviewing a claim of ineffective assistance of counsel we apply the two-pronged standard of review first announced by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The petitioner must show (1) that his counsel's performance was deficient and (2) that he was prejudiced as a result of his counsel's performance.

> "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. Cf. *Engle v. Isaac*, 456 U.S. 107, 133–34 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' See *Michel v. Louisiana*, [350 U.S. 91], at 101 [(1955)]. 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."

466 U.S. at 689, 104 S.Ct. 2052. As the United States Supreme Court further stated:

> "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

3. Jenkins does not argue that this claim meets the test for newly discovered evidence contained in Rule 32.1(e), Ala.R.Crim.P.

> In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."

466 U.S. at 690–91, 104 S.Ct. 2052.

During trial Jenkins was represented by attorneys Douglas Scofield and Stan Downey. Scofield testified at the post-conviction proceedings; Downey did not. Scofield said that he was responsible for preparing for the guilt phase of the trial and Downey was responsible for preparing for the penalty phase. Scofield also represented Jenkins on appeal. Jenkins makes the following claims related to his counsel's performance.

A.

[14] Jenkins argues that Scofield failed to object to the State's alleged discriminatory use of its peremptory strikes. He argues that Scofield failed to make a *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), objection after the jury was struck and after all of the blacks had been removed from the venire. The United States Supreme Court in *Batson* held that black prospective jurors could not be excluded from a black defendant's jury solely on the basis of their race.[4]

Jenkins was convicted on March 19, 1991. On April 1, 1991, the United States Supreme Court released its decision in *Powers v. Ohio,* 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), holding that "a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same race." 499 U.S. at 402, 111 S.Ct. 1364. Jenkins is white.[5]

The trial court made the following findings of fact concerning this issue:

> "On April 30, 1986, the United States Supreme Court decided *Batson v. Kentucky,* 476 U.S. 79 (1986), which held that a State denies a black defendant equal protection when it puts him on trial before a jury from which members of his race have been purposefully excluded. The jury which convicted Jenkins was struck and empaneled on March 13, 1991. On February 7, 1991, trial counsel for Jenkins filed a 'motion to enjoin the prosecution from utilizing his peremptory challenges to systematically exclude minorities from the jury panel.' In support of the motion, counsel asserted that Jenkins '[was] part Mexican-blood, and [was] charged with killing a white person.' Trial counsel argued that the motion addressed 'all minorities', including blacks, despite the fact that the law did not support that contention. At the relevant time, a defendant could establish a prima facie case of 'purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial.' *Batson,* 476 U.S. at 96. However, to establish such a case, 'the defendant first must show that he [was] a member of a cognizable racial group and that the prosecutor ha[d] exercised peremptory challenges to remove from the venire members of *the defendant's race.*' The claim in the

4. *Batson* has also been extended to defense counsel in *Georgia v. McCollum,* 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992), and to gender in *J.E.B. v. Alabama,* 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994).

5. All of the court documents reflect that Jenkins is white. However, witnesses at the Rule 32 proceeding testified that Jenkins is of Hispanic descent.

amended petition relates to 'African–American veniremembers.' Because Jenkins is not an African American, an objection to the striking of members of that race would have been meritless at the relevant time.

"Subsequent to Jenkins's conviction, the United States Supreme Court decided *Powers v. Ohio,* 499 U.S. 400, 404–17 (1991), which held that under the Equal protection clause, a criminal defendant may object to race-based exclusions of jurors through peremptory challenges whether or not the defendant and the excluded jurors share the same race. *Powers* was a change in the law. *Farrell v. Davis,* 3 F.3d 370, 371–72 (11th Cir.1993). Alabama courts on many occasions have refused to hold trial counsel's performance ineffective for failing to forecast changes in the law. *State v. Tarver,* 629 So.2d 14, 17–18 (Ala.Crim.App.1993), . . .; *Morrison v. State,* 551 So.2d 435 (Ala.Crim.App.1989), *cert. denied,* 495 U.S. 911 (1990). It appears, however, that trial counsel did forecast *Powers.* The trial court simply did not share trial counsel's foresight. Trial counsel's performance was certainly not outside 'the wide range of reasonable professional assistance.' *Strickland v. Washington,* 466 U.S. at 689. Finally, there is no reasonable probability that had a *Batson/Powers* motion been made and entertained by the trial court, the result of the trial would have been different."

(C.R. 307–09.)

[15] The trial court's findings are consistent with Alabama caselaw. We have frequently held that counsel's performance is not deficient for failing to "forecast changes in the law." See *Dobyne v. State,* 805 So.2d 733 (Ala.Crim.App.2000), aff'd, 805 So.2d 763 (Ala.2001); *Nicks v. State,* 783 So.2d 895 (Ala.Crim.App.1999), cert. quashed, 783 So.2d 926 (Ala.2000); *Lawhorn v. State,* 756 So.2d 971 (Ala.Crim.App.1999); *Davis v. State,* 720 So.2d 1006 (Ala.Crim.App.1998); *McArthur v. State,* 652 So.2d 782 (Ala.Crim.App.1994); *State v. Tarver,* 629 So.2d 14 (Ala.Crim.App. 1993). Jenkins's attorneys were not " 'obliged to object based on possible future developments in the law in order to render effective assistance.' " *Thompson v. State,* 581 So.2d 1216, 1236 (Ala.Crim. App.1991), quoting trial court's order, which this Court adopted.

B.

Jenkins also argues that Scofield failed to ensure that the record on direct appeal to this Court and on appeal to the Alabama Supreme Court was supplemented to support Jenkins's *Batson* claim. He relies heavily on this Court's decision in *Watkins v. State,* 632 So.2d 555 (Ala.Crim.App.1992) (Taylor and Montiel, JJ., dissenting),[6] in support of this contention.

When addressing this issue the circuit court stated:

"Trial counsel Doug Scofield testified at the evidentiary hearing that he continued to represent Jenkins on appeal. Although he was the attorney of record, Mr. Scofield stated that he was assisted a great deal by an attorney with the Capital Resource Center, Hillary Hoffman. The Court notes that the Capital Resource Center represented death row inmates almost exclusively and the majority of that representation was at the appellate level. Regarding the extent of

6. When the Alabama Supreme Court quashed the petition for certiorari review, four Justices dissented and stated that this Court's decision in *Watkins* should be reversed. The composition of the Supreme Court has changed since it decided *Watkins.*

Ms. Hoffman's involvement in the case, Mr. Scofield stated the following:

> " 'I continued to be involved in the sense of Hillary would prepare things. I would review them for signature and things like that. She did the majority of the work after that point. I reviewed court opinions. I reviewed her drafts and this, that and the other. Primarily, at that point, she became more involved in the actual appellate aspect of the case. I argued the case before the Courts. In terms of the actual preparation, she would make drafts, send them to me and I would review them.'
>
> "The Court does not find it to be insignificant that the Capital Resource Center was, in essence, raising the issues on appeal and preparing the supporting argument. The past experience of an attorney is an important consideration in evaluating ineffective assistance of counsel claims. *See State v. Whitley,* 665 So.2d 998, 999 (Ala.Crim.App.1995) (denying ineffective assistance of counsel claim while pointing out that '[d]efendant's attorney had extensive experience in the trial of criminal cases and specifically homicide cases.')"

(C.R. 309–10.)

In *Watkins v. State,* 632 So.2d 555 (Ala. Crim.App.1992), a majority of this Court held that an attorney's performance before the Alabama Supreme Court was deficient because the attorney failed to ensure that the record was supplemented to support Watkins's *Batson* argument that counsel pursued before the Alabama Supreme Court. We held that the failure to supplement the record in the Alabama Supreme Court to include the racial composition of the jury members constituted deficient performance and that "*the petitioner did not have to show any prejudice* other than the reasonable probability that the Alabama Supreme Court would have granted his motion to supplement the record to show that a *Batson* hearing was warranted had one been made." 632 So.2d at 563 (emphasis added).

[16] At first blush it appears that our holding in *Watkins* supports Jenkins's claim and warrants relief. However, a closer examination of our decision in *Watkins* reveals that our conclusion—that Watkins was denied the effective assistance of counsel when pursuing his appeal before the Alabama Supreme Court—was based on a faulty legal premise—that a defendant has a constitutional right to counsel when pursuing an appeal to the Alabama Supreme Court.

The United States Supreme Court in *Douglas v. California,* 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963), "held that denial of counsel to indigents on first appeal as of right amounted to unconstitutional discrimination against the poor." *Pennsylvania v. Finley,* 481 U.S. 551, 554, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The *Douglas* Court also noted, "We are not here concerned with problems that might arise from the denial of counsel for the preparation of a petition for discretionary or mandatory review beyond the stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court." 372 U.S. at 356, 83 S.Ct. 814. The United States Court of Appeals for the Eleventh Circuit, in *Williams v. Turpin,* 87 F.3d 1204, 1209 (11th Cir.1996), aptly stated the rationale behind the *Douglas* holding:

> "The right to effective assistance of counsel during the first appeal attaches because once a state has created a right of appeal, the state must ensure that all persons have an equal opportunity to enjoy the right. [*Douglas v. California,* 372 U.S. 353,] at 356–57, 83 S.Ct. [814]

at 816 [(1963)]. However, 'once a defendant's claims of error are organized and presented in a lawyerlike fashion' during the first appeal as of right, the obligation of ensuring equal access to the court system is no longer constitutionally required. *Ross v. Moffitt,* 417 U.S. 600, 615–16, 94 S.Ct. 2437, 2446–47, 41 L.Ed.2d 341 (1974). 'The duty of the State ... is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.' *Id.*"

We have consistently followed the *Douglas* holding and concluded that the right to counsel does not extend beyond the first appeal as of right. See *State v. Tarver,* 629 So.2d 14 (Ala.Crim.App.1993); *Jackson v. State,* 612 So.2d 1356 (Ala.Crim.App. 1992); *Cunningham v. State,* 611 So.2d 510 (Ala.Crim.App.1992); *James v. State,* 564 So.2d 1002 (Ala.Crim.App.1989); *Kinsey v. State,* 545 So.2d 200 (Ala.Crim.App. 1989); *Thomas v. State,* 511 So.2d 248 (Ala.Crim.App.1987); *Bies v. State,* 418 So.2d 940 (Ala.Crim.App.1982). We have also applied the *Douglas* holding to death-penalty cases. See *State v. Tarver,* supra, and *Thomas v. State,* 511 So.2d 248 (Ala. Crim.App.1987).

[17, 18] In Alabama, the right to appeal a criminal conviction is a statutory right. See § 12–22–130, Ala.Code 1975. A defendant convicted of a felony has the right to appeal his conviction to the Alabama Court of Criminal Appeals; therefore, the first appeal as of right is to this Court. See § 12–3–9, Ala.Code 1975 ("The Court of Criminal Appeals shall have exclusive appellate jurisdiction of all ... felonies."). "Appellant is constitutionally entitled to effective assistance of counsel, which includes the filing of an appellate brief on first appeal as a matter of right." *Johnson v. State,* 584 So.2d 881, 883 (Ala.Crim.App.1991). As we stated in *State v. Tarver,* 629 So.2d at 18, also a death-penalty case, "a criminal defendant is guaranteed one appeal from his conviction, and that appeal is to this court."

Recently, in *Ex parte Berryhill,* 801 So.2d 7, 11 (Ala.2001), the Alabama Supreme Court reiterated the principle that a defendant has a constitutional right to counsel in his first appeal:

> "Historically, courts have emphasized the importance of appellate review:
>
> " 'The need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to [the] appellate stage. Both stages ..., although perhaps involving unique legal skills, require careful advocacy to ensure that rights are not forgone and that substantial legal and factual arguments are not inadvertently [overlooked].'
>
> "*Penson v. Ohio,* 488 U.S. 75, 85, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988).
>
> " 'In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful. To prosecute the appeal, a criminal appellant must face an adversary proceeding that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding.'
>
> "*Evitts v. Lucey,* 469 U.S. 387, 396, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). Therefore, the constitutional right to effective assistance of counsel applies to appellate proceedings. *Id.,* 469 U.S. at 398, 105 S.Ct. 830 (criminal defendants have constitutional rights to effective counsel during the first appeal as of

right); *see Williams v. Turpin*, 87 F.3d 1204, 1209 (11th Cir.1996)."

801 So.2d at 11.

[19, 20] We are aware that the majority of Alabama cases that have followed *Douglas* are not death-penalty cases and that at the time our decision in *Watkins* was released a defendant convicted of a capital offense and sentenced to death was granted an automatic review by this Court and that a petition for a writ of certiorari was automatically granted by the Alabama Supreme Court. See Rule 39, Ala. R.App.P.[7] However, an appeal to the Alabama Supreme Court is a second appeal conducted after this Court has considered and addressed the issues raised by an attorney in the brief to this Court.[8] The State's obligation to provide counsel was satisfied by providing counsel on the first appeal to this Court. See *Douglas v. California*, 372 U.S. at 356, 83 S.Ct. 814; *Williams v. Turpin*, 87 F.3d at 1209. Moreover, the scope of the Alabama Supreme Court's certiorari review is limited to determining the correctness of this Court's decision. See Rule 39, Ala. R.App.P. The primary responsibility for reviewing all death-penalty convictions and sentences is with this Court. See § 13A–5–53(a), Ala.Code 1975.

[21, 22] In *Thomas*, 511 So.2d 248, this Court addressed a claim that an attorney's performance in his death-penalty appeal before the United States Supreme Court was deficient. In refusing to recognize the right to counsel beyond that which is constitutionally required, we stated:

> "While we quickly recognize the apparent differences between the two types of punishment [a sentence of death versus a sentence of life imprisonment], we know of no reason why the magnitude of the death sentence should distort the guarantee of effective counsel beyond the scope defined by the Supreme Court."

511 So.2d at 258. As the Ohio Supreme Court stated in *State v. Buell*, 70 Ohio St.3d 1211, 1211, 639 N.E.2d 110, 110 (1994):

> "[The defendant's] 1986 appeal to [the Ohio Supreme Court] was his second appeal. '[T]he right to appointed counsel extends to the *first* appeal as of right, *and no further*.' (Emphasis added.) *Pennsylvania v. Finley* (1987), 481 U.S. 551, 555, 107 S.Ct. 1990, 1993, 95 L.Ed.2d 539, 545. See, also, *Evitts v. Lucey* (1985), 469 U.S. 387, 394, 105 S.Ct. 830, 834–835, 83 L.Ed.2d 821, 828. Having no constitutional right to counsel on a second appeal, [the defendant] had no constitutional right to the effective assistance of counsel."

7. Effective May 19, 2000, Rule 39, Ala.R.App. P., was amended to provide that the review of death-penalty cases by the Alabama Supreme Court is discretionary. A petition for a writ of certiorari is no longer automatically granted in death-penalty cases.

8. Section 13A–5–53(a), Ala.Code 1975, specifically addresses appeals in death-penalty cases, and provides, in part: "In any case in which the death penalty is imposed, in addition to reviewing the case for any error involving the conviction, the Alabama Court of Criminal Appeals, subject to review by the Alabama Supreme Court, shall also review the propriety of the death sentence." This Code section places with this Court the primary responsibility for reviewing a capital-murder conviction and death sentence. The only provision for an automatic grant of a petition for a writ of certiorari in the Alabama Supreme Court was Rule 39, Ala. R.App.P. That provision was never codified. The Supreme Court pursuant, to the rule-making authority granted it by the Alabama Constitution, amended Rule 39 to delete the automatic-review provision of death-penalty cases.

There is no right to counsel when pursuing a second appeal before the Alabama Supreme Court; therefore, there is no right to the effective assistance of counsel. Our decision in *Watkins* improperly expands the holding of the *Douglas* court.

Moreover, we question the continued validity of our decision in *Watkins* given the Alabama Supreme Court's subsequent decision in *Ex parte Frazier,* 758 So.2d 611 (Ala.1999). The Alabama Supreme Court in *Frazier* abrogated in part the decision in *Watkins* by holding that a similar *Batson* claim did not constitute per se ineffective assistance of counsel. The *Frazier* court stated:

> "Frazier blames his attorneys for the fact that the record does not permit review of the *Batson* issue, and he urges us to remand this case for a new trial because his attorneys failed to preserve this issue for review.... *Failure to make a record of the race or gender of persons against whom the prosecution asserted peremptory strikes is not per se ineffective assistance of counsel; it would constitute ineffective assistance only if a prima facie case of purposeful discrimination existed.* See *Ex parte Yelder,* 575 So.2d [137] at 139 [(Ala. 1991)]."

758 So.2d at 616 (emphasis added).

[23–26] Accordingly, as the Alabama Supreme Court noted in *Ex parte Frazier,* the petitioner must establish a prima facie case of purposeful discrimination. Jenkins's only argument before the circuit court to support this contention was that the State struck three blacks, or all of the blacks, from the venire. Numbers alone; however, are not sufficient to establish a prima facie of discrimination. As the Alabama Supreme Court stated in *Sharrief v. Gerlach,* 798 So.2d 646 (Ala.2001):

> "The [defendant's] only objection regarding the [State's] strikes of women, if it can be characterized as an objection, was to the fact that only three women were left on the jury. However, ' " '[I]t is important that the defendant come forward with facts, not just numbers alone, when asking the [trial] court to find a prima facie case' " of ... discrimination.' *McElemore v. State,* 798 So.2d 693, 696 (Ala.Crim.App.2000) (*quoting Mitchell v. State,* 579 So.2d 45, 48 (Ala. Crim.App.1991), *in turn quoting United States v. Moore,* 895 F.2d 484, 485 (8th Cir.1990))."

798 So.2d at 655.[9]

For the reasons stated above, we overrule our decision in *Watkins,* 632 So.2d 555. As Justice Ingram wrote in his dissenting opinion in *Watkins v. State,* 632 So.2d 566 (Ala.1994), a 5–4 decision in which a majority of the Justices on the Alabama Supreme Court voted to quash the writ of certiorari:

> "I believe that society's expectation of its courts, under the law and within the rules, is that we should establish some reasonable point at which post-judgment review would end. At least we should preclude the same issue, once raised, reviewed, and decided, from recurring on appeal. I believe this case would be an appropriate one in which to establish that point.
>
> "The United States Supreme Court in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), stated that the proper standard for

9. In his brief to this Court Jenkins makes other arguments in support of this contention. However, those arguments were not presented to the circuit court. "This court will not consider an argument raised for the first time on appeal; its review is limited to evidence and arguments considered by the trial court." *Myrick v. State,* 787 So.2d 713, 718 (Ala.Crim. App.2000).

judging attorney performance in regard to ineffective-assistance-of-counsel-claims is 'simply reasonableness under prevailing professional norms.' 466 U.S. at 688, 104 S.Ct. at 2065. Further, it addressed the temptation of looking backward with the knowledge of current law:

"'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.'

"466 U.S. at 689, 104 S.Ct. at 2065. (Emphasis added.)"

632 So.2d at 567 (Ingram, J., dissenting).

Scofield's performance was not deficient because he failed to ensure that the record on appeal was supplemented to support an argument that had no legal foundation at the time the alleged error occurred in the trial court and that was not presented to the trial court. To hold otherwise would subject appellate counsel's performance to a stricter level of review than trial counsel's performance.

C.

Jenkins next argues that he was denied the effective assistance of counsel at the guilt stage of the proceedings. He makes many different arguments in support of this contention. Most of the allegations raised by Jenkins were directly contradicted by testimony at the evidentiary hearing.

1.

[27] Jenkins first argues that Scofield failed to interview Sara Harris—a coworker of the victim's who identified Jenkins as the man she saw the victim with on the night of April 18, 1989. Specifically, he argues that Scofield should have interviewed Harris so that he could have effectively cross-examined her on her failure to identify Jenkins in two different pretrial lineups.

The following occurred during the evidentiary hearing:

"Q [Defense counsel]: I'm talking specifically about Sara Harris. Did you not point that out to the trial court that she did not positively identify Mr. Jenkins?

"A [Scofield]: Yes, she was cross-examined on that item—no question about it. My assumption going into trial was she was not going to be able to identify him. She couldn't on two different occasions. All of a sudden she shows up, after having had a meeting with the [district attorney], and now she is saying, 'Yes, that is the guy' and identified him....

"Q: You made that argument, did you not?

"A: There is no question she was cross-examined and the jury was pointed that out on two prior occasions. Whether they believed and discredited her, I can't say."

(R. 381–82.)

[28] At the Rule 32 hearing Scofield was questioned about Harris's identification testimony. Scofield stated that he knew that Harris's identification of Jenkins was questionable because he had been present at one pretrial lineup where she was unable to identify Jenkins. He also stated—and the trial record supports his statement—that he thoroughly cross-examined Harris about the fact that although she was unable to identify Jenkins before trial she was able to identify him at trial.

"[T]he failure to interview or take the depositions of the State's witnesses for impeachment purposes is not prejudicial *per se*. *See McCleskey v. Kemp*, 753 F.2d 877, 900 (11th Cir.1985) (*en banc*) (holding no prejudice shown where at-

torney failed to interview two of State's witnesses and potential defense witnesses); *Boykins v. Wainwright*, 737 F.2d 1539, 1543 (11th Cir.1984) (holding no prejudice shown where attorney failed to interview prosecution's expert witnesses), *cert. denied*, [470] U.S. [1059], 105 S.Ct. 1775, 84 L.Ed.2d 834 (1985); *Solomon v. Kemp*, 735 F.2d 395, 402 (11th Cir.1984) (holding no prejudice shown where attorney failed to talk to all of the State's witnesses and did not seek funds for an investigator), *cert. denied*, [469] U.S. [1181], 105 S.Ct. 940, 83 L.Ed.2d 952 (1985)."

Aldrich v. Wainwright, 777 F.2d 630, 636–37 (11th Cir.1985). Jenkins has failed to show that his counsel's performance was deficient or that he was prejudiced by Scofield's failure to interview Sara Harris. Jenkins has failed to satisfy the *Strickland* test.

2.

[29] Jenkins argues that counsel was ineffective in failing to interview Doug Thrash—the manager of the Riverchase Omelet Shoppe where the victim worked. Thrash testified that he sent the victim to the Tenth Avenue Omelet Shoppe on the evening of April 18, 1989, because the Tenth Avenue location was short of personnel. The record shows that Thrash made a pretrial statement to police in which he said that he overheard Jenkins and another employee talking at the Riverchase Omelet Shoppe and that he did not hear any mention of the fact that the victim had been sent to work at another location that evening. At trial, Thrash testified that he overheard someone mention the Tenth Avenue Omelet Shoppe when Jenkins was in the Riverchase Omelet Shoppe.

The record shows that counsel did impeach Thrash with this information. Counsel questioned him as to why he did not tell police that the Tenth Avenue location was mentioned when Jenkins was at the Riverchase Omelet Shoppe. The record does not support Jenkins's contention.

3.

[30] Jenkins next argues that Scofield failed to interview Frieda Vines, an employee of the Riverchase Omelet Shoppe, who, he alleges, could have testified that when Jenkins was in that store no one mentioned the Tenth Avenue Omelet Shoppe.

Vines was called to testify at the Rule 32 hearing. She testified that she could not remember whether any conversation took place about the Tenth Avenue Omelet Shoppe. (R. 298–99.) Jenkins failed to present evidence to support this contention.

4.

[31] Jenkins argues that Scofield failed to review the prosecution's files. Specifically, he argues that Scofield should have discovered that another suspect had been arrested in connection with Hogeland's murder.[10]

Scofield testified at the evidentiary hearing that the State had an open-file discovery policy, that he reviewed the State's files, that he had conversations with the district attorney about the State's evidence, and that he had been mailed reports from the National Crime Information Center ("NCIC") regarding several of the State's witnesses. The following occurred at the evidentiary hearing:

10. Jenkins also argues that the State violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by failing to disclose this information to the defense. We note that Jenkins's arguments on this issue appear to be inconsistent.

"Q [Defense attorney]: Did you review the entire District Attorney file in this case?

"A [Scofield]: Yes, I did.

"Q: During the review of that evidence, was there any time at which you saw the State had any information regarding other suspects for this crime?

"A: No, I don't remember seeing anything in the file about other suspects.

"Q: Had there been information in the files, do you think you would have recalled that?

"A: That is definitely one of the things I would have been looking for.

"Q: Why is that?

"A: In an identification case like this, that is generally one of the things that is helpful. You are always looking for 'Is this guy the only person they have ever focused on?' Or 'Are there other people that match the description?' You are always looking at 'Do the descriptions match? How accurate are the identifications? Misidentifications. Suspects.' That is basic stuff you look for.

"Q: You described this as an identification case. What do you mean by that?

"A: The State's case, at the time prior to trial, they had no one who could positively identify Mark Allen Jenkins as the individual who left with Tammy Hogeland the night of the murders. They had one person who supposedly was an eyewitness, who previously could not pick Mark out of a photographic lineup or a live lineup. I actually attended that live lineup. She couldn't pick Mark out of that lineup. I was told she couldn't pick him out of a photographic lineup. There was one other witness whose identification was a little bit questionable—the older couple. There was some talk about maybe they saw something on Crime–Stoppers.[11] The question there was any subsequent identifications—were they identifying Mark as the person they saw on Crime–Stoppers or were they identifying him from the time. They had some real questionable issues with regard to being able to identify Mark as the individual who was at the Omelet Shoppe that night.

"Q: Were there any special circumstances which would have given you a heightened sensitivity to identification issues or other suspect evidence in this case?

"A: You know, one case I previously tried and had specific recollection, I had gotten a conviction overturned on a *Brady [v. Maryland*, 373 U.S. 83 (1963)], issue in which the State failed to disclose this type of evidence. In that particular case, the police failed to disclose two—

"[Assistant attorney general]: Your Honor, this other case is irrelevant.

"The Court: It really is. I understand you are showing he is aware of an issue. Let's move along.

"Q: I show you what has been marked—Your Honor, this is a document that has been turned over to me by the State of Alabama during the discovery process. It was represented this came out of the District Attorney's file. It was provided to me by opposing counsel. It has been in my custody and possession since I have received it.

"[Assistant attorney general]: We have some objections to this document being offered at this time.

"The Court: We'll see.

11. Crime–Stoppers' was a television segment that would be aired on the local newscast, seeking information from viewers to help police solve a recent crime.

"Q: Will you take a look at what is marked Petitioner's No. 4. Have you seen this before?

"A: Yes, I have.

"Q: Where did you see it the first time?

"A: At my office Saturday morning.

"Q: Prior to Saturday, January 18, 1997, had you seen this document before?

"A: I had not.

"Q: What does that document appear to be?

"A: It appears to be a police report from Jackson, Mississippi, in which an individual by the name of Potagly or something like that—Bragley or something—was arrested apparently in connection with Tammy Hogeland's disappearance. It appears from this document that the St. Clair County Sheriff's Office requested he be held on a warrant and extradited back to St. Clair County with regard to the missing person—the Tammy Hogeland case."

(R. 298–302.) The above testimony shows that Jenkins has failed to satisfy the *Strickland* test.

5.

[32] Jenkins argues that Scofield failed to conduct an investigation so that he could effectively challenge the systematic underrepresentation of blacks on both the grand and the petit jury venires in St. Clair County.

There was no evidence presented at the Rule 32 hearing in support of this contention. Moreover, the State presented evidence that at the time of Jenkins's trial St. Clair County jurors were selected from a random list of licensed drivers. This method of jury selection has consistently withstood constitutional attack. See *Sistrunk v. State*, 630 So.2d 147, 149 (Ala.Crim.App.1993), and *Stewart v. State*, 623 So.2d 413, 415 (Ala.Crim.App.1993).

6.

Jenkins argues that Scofield failed to object to the fact that one of Jenkins's initial attorneys, Luther Gartrell, who withdrew from the case, had an actual conflict of interest because he represented a material State witness.

[33] The circuit court stated the following about this issue:

"The claim that trial counsel failed to object to an actual conflict of interest in cocounsel's representation of a material witness for the state.

"This claim is set forth above precisely as it appears in Jenkins's amended petition for relief. This claim is dismissed because it violates the 'clear and specific statement of the grounds' requirement of Rule 32.6(b) of the Alabama Rules of Criminal Procedure."

(R. 322.)

[34] Moreover, the following occurred at the evidentiary hearing:

"Q: Did there come a time when Luther Gartrell move to withdraw from this case?

"A: Yes.

"Q: What were the circumstances under which he withdrew?

"A: Sometime during the course of the discussions that we were having with Mark, Luther Gartrell realized that he had represented an individual by the name of George Jeffcoat. George Jeffcoat was going to be a state's witness in this particular case. At that particular time, he said 'Wait a minute. I think I have a conflict.' He handled that. What he told Judge Holladay about that,

I don't know, but I know that was the basis of him withdrawing."

(R. 284–85.) There is no more information in the record on this issue. Clearly, Jenkins failed to meet his burden of proof on this claim. See Rule 32.6, Ala.R.Crim.P.

7.

[35] Jenkins argues that Scofield failed to inform the trial court that neither he nor Downey had the five years of experience required by statute to represent a capital defendant. See § 13A–5–54, Ala. Code 1975.[12]

The circuit court stated the following in its order on this issue:

"Mr. Scofield graduated from Cumberland Law School in 1984, and was admitted to the State Bar that same year. Upon graduation, Mr. Scofield went to work for the Birmingham law firm of Redden, Mills and Clark. The Court notes that this is an outstanding criminal defense firm. Mr. Scofield described Mr. Redden and Mr. Clark as top criminal defense attorneys whom he had the privilege of working with for almost five years. In addition to working with these more experienced attorneys, Mr. Scofield had, at the time of Jenkins's trial, acted as lead counsel in a number of felony trials. The types of cases in which Mr. Scofield assisted, ranged from Medicaid fraud to capital murder. At the time of Jenkins's trial, Mr. Scofield's practice was 80 percent criminal. Mr. Scofield additionally did a substantial portion of the criminal appellate work for the firm. . . .

"On September 14, 1989, the trial court appointed Mr. Scofield to represent Jenkins. . . . On October 2, 1989, Mr. Stan Downey was appointed to represent Jenkins. Mr. Scofield testified at the hearing that, by agreement, Mr. Downey was primarily responsible for the penalty phase of Jenkins's trial. Due to the fact that Mr. Downey did not testify, the Court was neither privy to his background and experience at the time of Jenkins's trial, nor to any actions taken and decision made before, during, and after the trial. However, the trial transcript reflects that he was a local attorney with more than five years experience in the practice of criminal law."

(C.R. 293–94.) Jenkins's argument regarding this issue is not supported by the record. Moreover, even though Scofield did have the required years of experience when he was appointed, before his appointment he did bring to the trial court's attention that at the point at which the trial court was considering appointing him he did not have five years' experience. The trial court did not appoint him until he had the required years of experience. This issue is without merit.

8.

Jenkins argues that Scofield failed to use funds that had been approved for a forensic expert and an investigator and that he failed to request funds for a mental-health expert.

Scofield filed three pretrial motions requesting funds and a mental evaluation of Jenkins. He requested funds for a forensic expert because the State relied on fiber-comparison evidence to connect Jenkins to the murder—that motion was approved. Scofield also filed a motion for funds to hire an investigator—that motion was approved. Scofield also moved

12. Section 13A–5–54, Ala.Code 1975, provides: "Each person indicted for an offense punishable under the provisions of this article who is not able to afford legal counsel must be provided with court appointed counsel having no less than five years' prior experience in the active practice of criminal law."

that Jenkins be evaluated before trial by the lunacy commission—that motion was granted.

[36] During the evidentiary hearing Scofield was questioned about his preparation for the State's forensic's fiber expert—Steve Drexler, trace-evidence examiner with the Alabama Department of Forensic Sciences. The following occurred:

"Q [Assistant attorney general]: How did you prepare for the anticipated fiber analysis testimony?

"A [Scofield]: In talking to Mr. Drexler, [the State's forensics expert], I think it was a telephone conversation I may have had with him. I asked him whether or not there were any treatises that might assist me in that preparation. He told me there was a doctor in Auburn—Dr. Hall or something like that—that had written a book on fiber analysis. I could probably get him. I contacted Dr. Hall and got a copy of his book. I bought a copy of his book on fiber analysis and identification.

"Q: Did you use that book?

"A: Yes, I did.

"Q: How much time did you spend preparing through the use of the book and talking to Mr. Drexler?

"A: It is hard to ballpark. I spent considerable time. I went through his book. I tried to learn as much as I could about fiber analysis. I did not specifically discuss the facts or issues with Dr. Hall. In other words, I didn't call him and say, 'Could you tell me about this?' I pretty much said, 'I understand you have a book. How much is it? Could you mail it to me?' He mailed me a copy of the book. I spent a lot of time on that. Drexler, I met with him on one occasion. He corresponded with me on another occasion when it turned out there was some other evidence that he learned or some information he learned that he supplied to me. I may have talked to him on the phone one time. In terms of overall time, I really don't know. It was pretty considerable. I did a good bit of preparation on the fiber analysis stuff.

"Q: Were you surprised in any way by the testimony he offered?

"A: No. It was precisely what he said it would be. He didn't pull any punches.

"Q: Did you come to a conclusion after all your preparation that Drexler would have testified to anything different?

"A: I can't say that. I came to the conclusion that I was satisfied about what Drexler would say. I also felt pretty satisfied that Drexler was going to confirm that fiber analysis was not an exact science. You can't really match this fiber and say this fiber came from here or here, like a fingerprint. I felt like, given the state of testimony of what Drexler was going to say, that would be the best I could hope for. I did not go get another expert to say or follow up on whether Drexler did his comparisons correctly. I was satisfied that Drexler—his testimony was going to hurt but it could be minimized by the mere nature of fiber analysis."

(R. 375–77.)

When addressing this issue in its order the circuit court stated:

"[O]n cross-examination by the State, Mr. Scofield testified concerning his preparation for the forensic evidence presented at trial by the State. The Court finds that Mr. Scofield's preparation was both extensive and significant. Mr. Scofield stated that he was in no way surprised by any of the forensic evidence presented at trial. He effectively cross-examined all of the State's forensic experts, pointing out discrepan-

cies and shortcomings which supported the chosen theory of defense. Trial counsel's actions, in relation to this claim, were not outside 'the wide range of reasonable professional assistance.' *Strickland*, 466 U.S. at 689. In presenting no forensic expert testimony at the Rule 32 hearing, Jenkins has shown no reasonable probability that, had a particular forensic expert been retained by the defense, the result of the trial would have been different. *Id.* at 694."

(C.R. 302.) Clearly, Jenkins has failed to satisfy the *Strickland* test.

[37] Moreover, Scofield specifically testified as to why he failed to use the allotted funds to hire an investigator. During cross-examination at the evidentiary hearing Scofield stated:

"I originally requested funds because I was contacted by a private investigator who indicated to me that he might have some contacts with the family and could do some work for me with regard to getting specific information. After I talked to him, I filed my motion. After the Judge granted the motion and gave me funds, the Judge basically said, 'You can use anybody you want to. I don't believe this particular guy is a credible investigator.' He had testified maybe in the Ricky Dale Adkins[13] case or something. Judge Holladay didn't think he was credible. One of the main reasons I went to even request funds was because I wanted to hire this guy. The Judge did not know this was who I was considering. Once he made that representation, I thought, 'Oh, well, there goes my investigator. He was the one going to help me. Judge was giving me money, and now he is saying he is not going to let him testify in this case.' "

(R. 378–79.)

The circuit court stated the following in its order:

"Mr. Scofield then testified that he conducted his own investigation in preparation for the trial. He stated that, as a result of his efforts, he came to believe that the case lent itself to a 'very strong' reasonable doubt defense. Among other theories, he related the reasonable doubt defense to the issues of identify, insufficient time to commit the charged offense in the manner alleged by the State, and insufficiency of the evidence as related to the kidnapping and robbery charges. The Court finds that the investigation conducted by trial counsel was more than sufficient considering the strategic choice to pursue a reasonable doubt theory of defense. The action or, under this claim inaction, of trial counsel was not outside 'the wide range of reasonable professional assistance.' *Strickland*, 466 U.S. at 689. In addition, Jenkins has not shown a reasonable probability that, but for trial counsel's failure to hire an investigator, the result of the proceeding would have been different. *Id.* at 694."

(R. 300–01.) We agree with the circuit court's findings.

[38] Last, Jenkins argues that Scofield failed to request funds for a mental-health expert. The record shows that Scofield filed a pretrial motion requesting that a mental evaluation of Jenkins be performed before trial. The report from the lunacy commission found that Jenkins was competent to stand trial. Based on this finding,

13. Ricky Dale Adkins was convicted in St. Clair County of capital murder for the death of a female real-estate agent. His trial was conducted in October 1988. Tammy Hogeland was murdered in April 1989. See *Adkins v. State*, 600 So.2d 1054 (Ala.Crim.App. 1990), remanded, 600 So.2d 1067 (Ala.1992), opinion on return to remand, 639 So.2d 515 (Ala.Crim.App.1993), aff'd, 639 So.2d 522 (Ala.1994).

Scofield had no reason to question Jenkins's mental health or to proceed further with a mental-health defense. Jenkins has failed to show how Scofield's performance was outside the wide range of reasonable professional assistance. Jenkins has failed to satisfy the *Strickland* test.

9.

[39] Jenkins argues that his attorneys failed to conduct an adequate voir dire examination that he says would have disclosed biases of certain prospective jurors. Specifically, Jenkins argues that the examination failed to disclose those jurors who favored capital punishment, failed to disclose jurors who were biased against individuals who consumed alcohol, failed to disclose jurors who believed that a defendant, if innocent, should testify, and failed to disclose those jurors who were opposed to capital punishment.

The circuit court stated the following concerning this general claim:

> "In setting forth this claim in his petition, Jenkins failed to include a 'full disclosure of the factual basis' of the grounds upon which he contends he is entitled to relief. Rule 32.6(b), A.R.Crim.P. Likewise, other than general questions of trial counsel about the jury selection, Jenkins presented no evidence relevant to this claim at the evidentiary hearing. In fact, it was established at the hearing that Stan Downey was primarily responsible for the selection of the jury due to his status as a 'local' attorney. However, Jenkins failed to call Mr. Downey as a witness. There was no indication that Mr. Downey was unavailable to testify.
>
> "Jenkins has offered nothing concerning how the voir dire of the jury panel should have been conducted. He has not shown that the voir dire, as handled by trial counsel, fell outside 'the wide range of reasonable professional assistance.' *Strickland v. Washington*, 466 U.S. at 668. Furthermore, Jenkins has not shown a reasonable probability that, had a different method of voir dire been employed, the result of the trial would have been different. *Id.* at 694–95. Jenkins has the burden to prove by a preponderance of the evidence the facts necessary to show that he was entitled to relief. Rule 32.3, A.R.Crim.P. He has failed to meet his burden."

(C.R. 306–07.)

As to the specific claims Jenkins raises in his brief to this Court, there was no evidence presented to support any of the grounds raised in the petition. Jenkins failed to present any evidence to support this claim; therefore, he failed to meet his burden of proof. See Rule 32.3, Ala. R.Crim.P.

10.

Jenkins argues that Scofield failed to make numerous objections at the guilt phase and failed to effectively cross-examine many witness for the State.

[40] Jenkins first argues that Scofield failed to adequately cross-examine 29 State witnesses. However, in his brief in support of this argument he merely provides a laundry list of 29 names; he presents no facts or argument in support of this claim. Nor did Jenkins present any facts or argument in support of this claim at the evidentiary hearing. Jenkins failed to satisfy his burden. See Rule 32.6, Ala. R.Crim.P.

[41] Jenkins also argues that Scofield failed to object to the repeated misconduct on the part of the prosecutor, failed to object to instances where the trial court misstated the law, failed to object and to ensure that a complete record was transcribed for appellate review, failed to object to allegedly improper venue, and

failed to make a laundry list on appeal of other objections that should have been made at trial. Again, Jenkins merely includes a laundry list of where he thinks objections could have been made and failed to offer any evidence to support each specific instance he alleges Scofield failed to make an objection. When addressing this issue, the circuit court stated:

> "Trial counsel testified that during the course of the trial, he objected to matters he felt were improper. He additionally testified concerning his extensive appellate experience and stated that he knew the importance of preserving and protecting a record. Trial counsel's performance cannot be said to have been 'outside the wide range of professionally competent assistance' simply because he failed to raise every available objection to argument. The Constitution does not guarantee a perfect trial but rather a 'fair and a competent attorney.' *Engle v. Isaac,* 456 U.S. at 134; *Stanley v. Zant,* 697 F.2d 955, 964 n. 7 (11th Cir. 1983), *cert. denied,* 467 U.S. 1219 (1984) ('[A] defendant is not entitled to perfection but to basic fairness.'). A lawyer's 'heat-of-trial decision,' concerning when to object, should not be second-guessed by those having the benefit of hindsight. *Fleming v. Kemp,* 748 F.2d 1435, 1450 (11th Cir.1984), *cert. denied,* 475 U.S. 1058 (1986). Finally, Jenkins has failed to show that a different outcome of the trial probably would have resulted but for counsel's allegedly ineffective performance. He has failed to meet the required showing of both deficient performance and prejudice pursuant to *Strickland.*"

(C.R. 313.)

[42, 43] As we stated in *Daniels v. State,* 650 So.2d 544, 555 (Ala.Crim.App. 1994):

> " ' "[E]ffectiveness of counsel does not lend itself to measurement by picking through the transcript and counting the places where objections might be made." ' *Stringfellow v. State,* 485 So.2d 1238, 1243 (Ala.Cr.App.1986). 'Even though there were several instances where counsel could have objected, "that does not automatically mean that the [appellant] did not receive an adequate defense in the context of the constitutional right to counsel." *Ex parte Lawley,* 512 So.2d 1370, 1373 (Ala.1987).' *O'Neil v. State,* 605 So.2d 1247, 1250 (Ala.Cr.App.1992). As this Court observed in *Graham v. State,* 593 So.2d 162, 166 (Ala.Cr.App.1991):
>
> > " 'The lawyer whose performance the appellant now attacks zealously and vigorously defended the appellant. No particular decision to object or not object, even if it is a bad decision, is in itself proof that counsel's performance fell below acceptable professional standards.' "

As the United States Court of Appeals for the Eleventh Circuit stated in *Marek v. Singletary,* 62 F.3d 1295 (11th Cir.1995):

> "We begin any ineffective assistance inquiry with 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' *[Strickland v. Washington,* 466 U.S. 668,] at 689, 104 S.Ct. [2052] at 2065 [(1984)]; *accord, e.g., Atkins v. Singletary,* 965 F.2d 952, 958 (11th Cir. 1992) ('We also should always presume strongly that counsel's performance was reasonable and adequate . . . .'), *cert. denied,* [515] U.S. [1165], 115 S.Ct. 2624, 132 L.Ed.2d 865 (1995). '[A] petitioner seeking to rebut the strong presumption of effectiveness bears a difficult burden.' *Waters v. Thomas,* 46 F.3d 1506, 1512 (11th Cir.1995) (en banc)."

62 F.3d at 1299. Jenkins has failed to satisfy the *Strickland* test.

D.

[44] Jenkins argues that his attorney was deficient at the penalty phase of his capital trial for failing to investigate, to obtain records, to interview Jenkins's family members, and to seek expert assistance.

> " 'In a challenge to the imposition of a death sentence, the prejudice prong of the *Strickland* inquiry focuses on whether "the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. *Stevens v. Zant*, 968 F.2d 1076, 1081 (11th Cir.1992), cert. denied, 507 U.S. 929, 113 S.Ct. 1306, 122 L.Ed.2d 695 (1993)."

Jones v. State, 753 So.2d 1174, 1197 (Ala. Crim.App.1999).

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

Stafford v. Saffle, 34 F.3d 1557, 1564 (10th Cir.1994).

Jenkins first argues that his attorneys never contacted any of his family members and that they failed to present mitigating evidence of his life and background.

Scofield testified at the Rule 32 hearing that he was in charge of the guilt phase and that Downey was in charge of the penalty phase. Downey did not testify nor did he execute an affidavit to explain his strategy and any preparation and investigation he conducted for the penalty phase. The record of the direct appeal also reflects that on October 1, 1989, Downey filed a motion for a continuance. In that motion he argued, "Further discovery and investigation (including a possible trip to California) [are] needed for proper preparation of the case, requiring more time than is available between this present day and the trial date now set on October 30, 1989." (Trial record, p. 68.) That motion was granted. The fee declaration Downey filed in circuit court for payment for his services is contained in the record. It reflects that Downey spent 171 hours on the case and that he spent over 25 hours talking with Jenkins in more than 10 visits to the jail where Jenkins was housed awaiting trial. It also shows that Downey spoke with Jenkins's grandmother. There was absolutely no testimony as to any conversations Downey had with Jenkins, although it is clear from Downey's itemization of hours in his attorney fee declaration that those conversations were extensive.

[45] Scofield did testify at the Rule 32 hearing that Jenkins told him about his abusive childhood, his abusive relationship with his stepfather, the trouble he was in when he was a juvenile, and the fact that he ran away from home as a child. Scofield testified that he could not recall whether Jenkins told him that he was beaten on a daily basis but that he thought that he would have remembered that information. (R. 394.) Last, Scofield testified that he did not know what preparations Downey had made for the penalty phase. (R. 406.)

> "The reasonableness of counsel's investigation and preparation for the penalty phase, of course, often depends critically upon the information supplied by the defendant. *E.g. Commonwealth v. Uderra*, 550 Pa. 389, 706 A.2d 334, 340–41 (1998) (collecting cases). Counsel

> cannot be found ineffective for failing to introduce information uniquely within the knowledge of the defendant and his family which is not provided to counsel."

Commonwealth v. Bond, 572 Pa. 588, 609–10, 819 A.2d 33, 45–46 (2002).

[46] At the evidentiary hearing Jenkins presented the testimony of his half brother, Michael Jenkins; two cousins, Tammy Pitts and Betty DeLavega; his grandmother, Doris Wagoner; and a friend, Sherry Seal. When addressing this issue the circuit court made very detailed findings of fact that related to the witnesses Jenkins called to testify at the evidentiary hearing. We quote extensively from those very thorough findings:

> "The Court initially finds that because Jenkins did not present any testimony from Stan Downey at the evidentiary hearing, he has not met his burden of proof under Rule 32.3. The record shows that Mr. Downey was responsible for the penalty phase of the trial. Yet, Mr. Downey, who was not shown to be unavailable to testify, was not called by Jenkins as a witness to support his claim of ineffectiveness at the penalty phase. Instead, Jenkins attempted to elicit testimony from Mr. Scofield concerning Mr. Downey's actions. The Court is puzzled as to why Jenkins did not call the one lawyer asserted to be responsible for that portion of the trial against which most of his criticism is levied. While this was Jenkins's choice, the Court finds that this choice resulted in Jenkins's failure to meet his burden of proof. The record is virtually silent as to what actions were or were not taken or what was or was not done by Mr. Downey at trial and why. It is possible that his actions could have been reasonable and strategic under the circumstances and, in large part, undertaken based upon what Jenkins told him. The Court, therefore, finds that Jenkins did not prove that Mr. Downey's representation was deficient or that he was prejudiced as a result of that representation.
>
> "The Court will, however, based upon the evidence presented at the hearing, attempt to address Jenkins's claim of ineffectiveness of counsel at the penalty phase. As previously stated in this order, Jenkins must show that counsel's representation was both deficient and that the deficient performance prejudiced the defense. The Court finds that Jenkins has not proven that, assuming counsel's deficiency, there was a reasonable probability that the sentencer, including the appellate court, to the extent it reweighs the evidence, would have concluded that a weighing of the aggravating and mitigating circumstances did not warrant death.
>
> "The Court notes that for the reasons that will follow, the evidence presented at the hearing would not have affected the sentence this Court would have imposed on Jenkins. The aggravating circumstances clearly outweighed any mitigation caused by Jenkins's 'abusive childhood', below average intelligence, lack of a criminal history, and his age. Jenkins kidnapped, robbed, and brutally murdered Tammy Hogeland. He then disposed of her nude body on the side of the interstate, leaving her to decompose beyond recognition. Death was the appropriate punishment in this case.
>
> "After listening to the evidence presented at the hearing and observing the demeanor of the witnesses, the Court finds that the witnesses were biased, that they grossly exaggerated their testimony, and that they were not credible for the following reasons:
>
> "The record reflects that, at the time of the trial, friends and family of Jenkins were contacted by a probation officer

regarding the preparation of a pre-sentence report. Nothing in the report indicated that Jenkins was abused to the extent alleged at the evidentiary hearing. Additionally, although numerous records were introduced at the hearing, there were no medical records which would corroborate the level of abuse alleged by several of Jenkins's witnesses.

"Jenkins's cousin, Tammy Lynn Pitts, was not a credible witness. Ms. Pitts testified that she lived with Jenkins and his family on a daily basis for the majority of her early life. She claimed that Jenkins was beaten 'daily' from the time he was an infant, to the time he left home around the age of thirteen. Ms. Pitts stated that Jenkins was 'pounded on' and that his stepfather would take whatever was in his hand, put all of his weight behind it, and hit Jenkins with 'full force.' She related one alleged incident where Jenkins's stepfather, a man over six feet tall, hit Jenkins more than once with a full size shovel on the back. Ms. Pitts described the incident as 'normal.' According to the witness, Jenkins would be laid up in bed for weeks at a time due to the severity of the beatings. Ms. Pitts even testified that Jenkins would receive additional beatings during the time he was laid up recovering from previous abuse. However, Jenkins was apparently never taken to the hospital and there were no medical records reflecting injuries consistent with the alleged severity of the abuse alleged by Ms. Pitts.

"The Court also finds significant school records which noted that Jenkins suffered from a rash and gingivitis, but contained absolutely no indication that he was beaten on a regular basis. Ms. Pitts additionally testified concerning Jenkins's difficulty in controlling his bowels. She stated that, as a result of this problem, Jenkins would be forced by his parents to wear 'soiled' clothing to school 'all the time.' Again, the Court finds it difficult to believe that school records would reflect the notice of a rash, but would be completely devoid of any indication that a child was regularly attending school in clothes soiled with feces. Ms. Pitts also testified that Jenkins was locked in his room 24 hours a day 7 days a week. According to her, he was not even allowed to come out to eat dinner with the rest of the family. This contradicted the testimony of Jenkins's brother who stated that Jenkins was sent to bed without dinner, 'on occasions,' because he was bad. If Ms. Pitts is to be believed, Jenkins eked a meager existence of scraps thrown to him after dinner by other members of the family.

"Ms. Pitts testified that she called Child Protection Services [(CPS)] on two occasions during her twenty plus years in the Jenkins household. She stated that the first time, CPS responded to the home but took no action. The second time, there was no response of any kind. The Court finds it to be unbelievable that Ms. Pitts would feel it necessary to call CPS on only two occasions when she claimed the abuse and maltreatment was a 'daily' occurrence. It is also unbelievable that child protective services would take no action.

"Finally, Ms. Pitts testified that she loved her cousin and felt it would be a tragedy if he were executed. She stated that she felt guilty about Jenkins's childhood and that she believed she was helping him by testifying at the hearing. Ms. Pitts displayed a strong bias in favor of Jenkins. During direct examination, Ms. Pitts appeared to be very emotional, often crying during her testimony. However, on cross-examination by the State, her demeanor changed dramatically. She became guarded and

far less emotional. After hearing the testimony of Ms. Pitts, weighing the interests of the witness and observing the witnesses' demeanor, the Court finds the testimony to be incredible.

"Not unlike the testimony of Tammy Lynn Pitts, the Court finds the testimony of Jenkins's half brother, Michael, biased and not credible. Not only did his testimony conflict with that of other witnesses, it was also self-contradictory. The Court will not discuss the testimony in its entirety, however, a few examples will make this point.

"Michael Jenkins testified that the family moved ten or fifteen times during his youth because his father did not work very much. This conflicted with Ms. Pitt's claim that the family moved maybe four times and that the stepfather was gainfully employed. Michael Jenkins stated that Jenkins would occasionally miss meals because he was sent to his room for 'being bad.' Ms. Pitts stated that Jenkins was not allowed to eat with the family and would leap up at the food thrown at him after dinner while locked in his room. Additionally, contrary to Ms. Pitts testimony that Jenkins was locked in his room 'twenty-four hours a day seven days a week,' Michael stated that Jenkins was locked in his room for 'a couple of hours or so . . . every time he done something."

"As noted above, the testimony of Michael Jenkins was also self-contradictory. Describing the frequency of the alleged beatings, Michael initially stated 'if it wasn't once a day, it would be every other day or every three days.' He then stated that Jenkins would get a whipping whenever he had a bowel movement in his pants and that his occurred 'once a day.' Subsequent to that, Michael described the discipline imposed stating that Jenkins 'would be sent to his room and a number of things happened,' including an *occasional* beating. The witnesses' testimony was in fact, filled with apparent confusion and contradictions. He originally testified that Jenkins was three or four years old at the time his stepfather went to prison for robbery. However, he subsequently testified that Jenkins was conceived while his stepfather was in prison. He also contradicted himself a number of times concerning whether Jenkins ever wrote to him requesting him to come to Alabama and testify during his capital murder trial. He finally stated conclusively that he received a letter mentioning that Jenkins might need him to testify at the trial. Michael stated that he had no 'curiosity or concern about what was going on.'

"Finally, Michael testified that he believed that Jenkins was innocent and that he could not have committed the crime. Michael himself had never committed an act of violence despite the fact that he was raised in an environment similar to that of Jenkins. He also testified concerning the problems his other two siblings were experiencing in their adult lives. The Court notes that all of the testimony indicated that these two individuals were never abused as children and were, in fact, babied and spoiled. They received this treatment despite the fact that Stephen Jenkins was not the biological father of either one of them. Any contention that a causal connection exists between the abuse allegedly suffered by Jenkins and the murder of Tammy Hogeland, is undercut by evidence within Jenkins's own family. After hearing the testimony of Michael Jenkins, weighing the interests of the witness and observing the witnesses demeanor, the court finds the testimony incredible and assigns it little weight.

"Jenkins also presented the testimony of a friend, Sharon Seal. Mrs. Seal stated that she came to know Jenkins through her husband, Lonnie Seal. The trial record reveals that Lonnie Seal testified at the penalty phase of his trial as a character witness. After reviewing the testimony of Mrs. Seal, the Court finds that her testimony would have been cumulative to that of her husband. Furthermore, Mrs. Seal testified at the evidentiary hearing that her husband knew Jenkins better than she did.

"The Court also noted contradictions in Mrs. Seal's testimony. For example, she testified that Jenkins's trial lawyers never talked to her or contacted her about being a witness at the trial. However, on cross-examination, Mrs. Seal stated that she did not attend the trial because 'I was told by Mark's lawyers that we were not allowed in the courthouse because we might be potential witnesses.' She specifically stated that she was told this by Mr. Downey. Because Mr. Downey did not testify at the hearing, the Court can only speculate as to why Mrs. Seal was not called to testify.

"The witness in question also displayed a strong bias in favor of Jenkins. She stated that she believed that he was innocent, that he did not get a fair trial, and that it would be a tragedy if he were executed. The Court would also point out that Mrs. Seal's testimony directly contradicted other theories of mitigation presented by counsel for Jenkins at the hearing. Her testimony related to the good character of Jenkins, his non-violent nature, his generous and caring attitude, his love for her children, and other qualities of a similar nature. Other evidence presented at the hearing, instead, dealt with Jenkins's abusive childhood, and culminated in Dr. David Lisak's testimony that abused children are at risk to commit violence. The evidence suggested on one hand that Jenkins was a wonderful person who would never hurt anyone. However, on the other hand, evidence was presented to support a theory that Jenkins's violent and chaotic background led him to murder Tammy Hogeland. Regarding the later theory, the Court finds it significant that the only documented act of violence committed by Jenkins was the murder of Tammy Hogeland. Based on all of the foregoing, the Court finds that Jenkins has proven neither deficient performance nor prejudice related to the failure to call Sharon Seal as a witness.

". . . .

"The Court also finds that Betty DeLavega, Jenkins's second cousin, was not a credible witness and was biased. Ms. DeLavega had only seen Jenkins on two occasions in her life. Once when Jenkins and his family visited her in Indiana and once when she went to California to visit. Jenkins was very young when he came to Ms. DeLavega's home, and he was 11 or 12 when she visited in California. Ms. DeLavega testified that she stayed in the Jenkins home for five months with her husband and her four children.

"Ms. DeLavega informed the Court that when Jenkins and his family visited her in Indiana, Jenkins was not beaten by his stepfather because she 'wouldn't have stood for that.' However, Ms. DeLavega testified that Jenkins's stepfather was cruel to both Jenkins and his brother Michael, and specifically recounted an incident where she claimed that Jenkins's stepfather forced Jenkins to eat his own feces, in front of her and her family, out of his underwear with a spoon. Although claiming to be horrified at seeing this, Ms. DeLavega did nothing. She did not call the authorities

and she and her four children continued to live in the Jenkins's home. Ms. DeLavega and Jenkins's brother, Michael, were the only two persons to recount that Jenkins was forced to eat his own feces with a spoon.

"Ms. DeLavega also testified, demonstrating her bias, that she did not believe that Jenkins could hurt anybody and that he was innocent of the crime for which he was convicted. Ms. DeLavega testified that it would be a terrible thing for Jenkins to be executed. She also stated that she was asked to come and testify at the evidentiary hearing by Jenkins's grandmother, Doris Wagoner, 'to get him off death row.'

"The Court finds that Ms. DeLavega basically had no knowledge of any long-term abuse Jenkins suffered because she had only seen Jenkins on two very brief occasions in her life. At the time of her testimony, she had not seen Jenkins since he was 11 or 12 years old. The Court finds it to be beyond belief that Ms. DeLavega could witness Jenkins being forced to eat his own feces with a spoon and do nothing. It is also beyond belief that she would remain in the home with her four children after witnessing such a horrifying event. After observing Ms. DeLavega and listening to her testimony, the Court finds her to be a biased and incredible witness, giving her testimony no weight.

"The petitioner's grandmother, Doris Wagoner, was also biased and incredible witness. She testified that Jenkins was 'slow' as an infant and could not sit up at the age of four months. Mrs. Wagoner was not offered as an expert in early childhood development and this Court does not accept her as such. She testified that she never witnessed any physical abuse and offered nothing which would establish 'that the balance of aggravating and mitigating circumstances did not warrant death.' *Strickland*, 466 U.S. at 695.

"Most importantly, Mrs. Wagoner testified that she was not available to testify at the penalty phase of Jenkins's trial. . . . Trial counsel can not be labeled ineffective for failure to present the testimony of a witness who, by her own admission, was unavailable and uninterested. Nothing in the testimony of Doris Wagoner mitigated Jenkins's crime."

(C.R. 325–35.)

[47, 48] Initially, Jenkins takes issue with the credibility choices that the circuit court made based on the witnesses' testimony at the Rule 32 hearing.

"The resolution of . . . factual issue[s] required the trial judge to weigh the credibility of the witnesses. His determination is entitled to great weight on appeal. . . . 'When there is conflicting testimony as to a factual matter . . ., the question of the credibility of the witnesses is within the sound discretion of the trier of fact. His factual determinations are entitled to great weight and will not be disturbed unless clearly contrary to the evidence.' "

Calhoun v. State, 460 So.2d 268, 269–70 (Ala.Crim.App.1984) (quoting *State v. Klar*, 400 So.2d 610, 613 (La.1981)).

Jenkins's grandmother, Doris Wagoner, testified that she did talk to Scofield about representing her grandson and to several other people, whom she could not identify, and that she was in constant communication with Jenkins before his trial. She also testified: "Mark never had a chance. He didn't have a home life. He was badly mistreated and then he left. I was told by others—this is hearsay. I didn't see it." (R. 254.) Wagoner testified that she didn't come to his trial because, "I don't know why. I'm a very busy person—and still today even at my age. I don't know why.

When the attorney started asking me for money, I didn't feel I could come down here and hire attorneys and this sort of thing." (R. 259.) Last, on cross-examination, Wagoner testified that Jenkins's mother did not "want anything to do with Mark." (R. 261.) Her testimony shows that she did not witness any abuse. Wagoner also testified that she was not available to testify at Jenkins's trial.

Michael Jenkins, Jenkins's stepbrother, testified that Jenkins was frequently beaten by his stepfather. When questioned on cross-examination as to whether Jenkins had communicated with him about possibly testifying at his trial, the following occurred:

"Q [Assistant attorney general]: In your earlier testimony—I'm just trying to clarify some things. You seemed to indicate in a response to [Jenkins's attorney's] question that you thought Mark wrote you about testifying at his trial. Is that correct or are you not sure?

"A [Michael Jenkins]: Before we go any further, I would like to clarify for the record, if I can. I had a severe accident in 1983 and I have a problem thinking. That is why I can't remember. I had a cracked skull in three places. I think he did, yes.

"Q: And specifically one of his letters mentioned that he might need you to testify in his trial?

"A: Yes.

"Q: From that, would it appear you were back in contact before he actually went to trial?

"A: You are confusing me.

"Q: You do recall you got a letter from him.

"A: Yes.

"Q: Were you still in California at the time?

"A: Yes.

"Q: You do recall there was some reference to you testifying at this trial?

"A: From Mark?

"Q: Yes.

"A: Yes."

(R. 161–62.) From the above-quoted portion of Michael Jenkins's testimony it is clear why the circuit court gave Michael Jenkins's testimony little weight.

Jenkins's cousin, Tammy Pitts, testified that Jenkins had been abused and neglected 24 hours a day, 7 days a week and that out of the 20 years that she lived with Jenkins she reported Jenkins's situation to Child Protective Services on two occasions. Pitts stated that the first time they investigated and took no action and that the second time they did not come to the house.

Betty DeLavega, Jenkins's cousin, testified; however, she stated that she had been around Jenkins on only two occasions and that she had not seen him since he was 11 years old. The following occurred on cross-examination:

"Q [Assistant attorney general]: How did you come to be here today? Were you contacted by [Jenkins's attorney]?

"A: My aunt contacted me.

"Q: Which aunt?

"A: Doris, his grandmother.

"Q: Doris Wagoner.

"A: Yes.

"Q: What did she tell you?

"A: She told me what had happened and that Mark was on death row.

"Q: So you didn't even know he had been convicted of anything?

"A: No.

"Q: What did she say—'He was on death row and what' "

"A: They was trying to get a hearing.

"Q: For what reason?

"A: To get him off death row."

(R. 241–42.) This witness had had very limited contact with Jenkins and could not testify about any extended and significant abuse he might have suffered.

Sharon Seal,[14] a friend of Jenkins's, testified that Jenkins was very generous and that he had helped her family move from California to Alabama. Seal also testified that Jenkins's attorneys did not contact her about her being a possible witness in the case. However, on cross-examination the following occurred:

"Q [Assistant attorney general]: Did you attend the trial of Mr. Jenkins?

"A [Seal]: I was told by Mark's lawyers that we were not allowed in the courthouse because we might be potential witnesses.

"Q: So you were a potential witness?

"A: He said we might be called on as potential witnesses.

"Q: So he did talk to you about being a witness in this case?

"A: To me directly, no.

"Q: You knew there was a possibility you might be called as a witness?

"A: Correct.

"Q: Who knew Mr. Jenkins better—you or your husband?

"A: My husband.

"Q: And your husband testified at the sentencing phase?

"A: Yes."

(R. 63–64.) Seal's husband did testify at the penalty phase of Jenkins's trial. His testimony was virtually identical to Sharon Seal's testimony at the Rule 32 hearing.[15]

[49, 50] The trial court made a finding after listening to and viewing all of Jenkins's witnesses that none of the witnesses was credible and that they had exaggerated the level of abuse that Jenkins had been exposed to when he was child. This was based on contradictions in the witnesses' own testimony and on the fact no medical or school records memorialized such abuse. The circuit court noted that the school records were very detailed and even referenced that Jenkins had suffered from a rash and gingivitis but the circuit court found it hard to believe that the records made no reference to any injuries that Jenkins had sustained as a child. The circuit court's ruling is supported by the testimony at the Rule 32 hearing and is consistent with the findings made by the probation officer in the presentence report. The probation officer described the level of abuse as "moderate."

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

Marek v. Singletary, 62 F.3d at 1300.

Also, many courts have observed that evidence of child abuse can be a "double-

14. This individual's name is spelled differently throughout the records and the briefs. We have chosen the spelling used by the court reporter in the certified record of the Rule 32 proceedings.

15. Sharon and Lonnie Seal are described in the presentence report as "part time local pastors for the United Methodist Church."

edged sword" because it cuts both ways; therefore, it may be a strategic choice not to present this type of evidence. See *Kitchens v. Johnson*, 190 F.3d 698, 705 (5th Cir.1999) (evidence of childhood abuse and alcoholism may be more effective than a plea for mercy, "[y]et, it is equally possible that such evidence would have only served to inflame the jury"); *Stanley v. Zant*, 697 F.2d 955, 969 (11th Cir.1983) ("[M]itigation may be in the eye of the beholder."); *United States ex rel. Cloutier v. Mote*, (No. 00–C–5476, January 8, 2003) (N.D.Ill.2003) (not published in F.Supp.2d) ("This court recognizes that some mitigation testimony contains material that a jury may consider as aggravating instead of mitigating."); *Johnson v. Cockrell*, 306 F.3d 249, 253 (5th Cir.2002) (evidence of brain injury, abusive childhood, and drug and alcohol abuse was "double edged" because it would support a finding of future dangerousness). See also cases upholding the failure to present evidence of child abuse given the horrific facts surrounding the murder. See *Santellan v. Cockrell*, 271 F.3d 190, 198 (5th Cir.2001)("Considering ... history in light of the horrific nature of this offense, a reasonable court could conclude that there was no substantial likelihood that the outcome of the punishment phase would have been altered by evidence that [the defendant] suffered organic brain damage."); *Callins v. Collins*, 998 F.2d 269, 279 (5th Cir.1993) ("Some evidence of [the defendant's] good character already had been admitted through his mother; the wantonness of the murder and [the defendant's] violent escapades after it, however, swamped this evidence, and we believe it equally would have overwhelmed the minimal mitigating evidence that [the defendant] now argues should have been introduced at the capital sentencing phase."); *People v. Rodriguez*, 914 P.2d 230, 296 (Colo.1996) ("Given the brutal circumstances surrounding the murder of [the victim] and the overwhelming evidence of aggravation against [the defendant], we are not persuaded that trial counsel's failure to present the proposed mitigating evidence of child abuse materially affected the imposition of [the defendant's] death sentence."). See also *Rompilla v. Horn*, 355 F.3d 233 (3d Cir.2004); *Byram v. Ozmint*, 339 F.3d 203 (4th Cir. 2003); *Lovitt v. Warden*, 266 Va. 216, 585 S.E.2d 801 (2003).

[51] It is apparent from the record of Jenkins's trial that Scofield thoroughly prepared for the guilt phase. However, Downey was in charge of the penalty phase. Because we do not have the benefit of Downey's testimony as to what occurred and why, we are left with examining the record of Jenkins's trial.[16]

The record shows that in his opening statement in the penalty phase Downey detailed all of the statutory mitigating circumstances and informed the jury that it was not limited to considering the mitigating circumstances contained in the statute but that it could consider any mitigating evidence that had been presented. The trial court also instructed the jury that any evidence presented in the guilt phase could be considered in mitigation. One witness was called to testify in Jenkins's behalf at the penalty phase.[17] Lonnie Seal testified

16. This Court may take judicial notice of our previous records. See *Ex parte Salter*, 520 So.2d 213, 216 (Ala.Crim.App.1987).

17. It appears from a review of the record that another witness, who is not identified, was also scheduled to testify; however, this witness did not. Neither the identity of this witness nor the reason for this witness's not testifying is contained in the trial record. Nor was Scofield questioned about this at the Rule 32 hearing.

However, the record of the Rule 32 hearing indicates that Jenkins had been talking with his grandmother about testifying at his trial

that he traveled from California to Alabama with Jenkins, that Jenkins was a very giving and generous person, that Jenkins lived with his family when they arrived in Alabama, that Jenkins obtained work before he did and that he would give his entire paycheck to Seal's family, and that Jenkins was very helpful with Seal's children.[18] In closing, Downey argued that according to his interpretation of the Bible the jury should be cautious when sentencing Jenkins because his conviction was based solely on circumstantial evidence. The record shows that counsel argued residual doubt and Jenkins's good character at the penalty phase.

As we noted above, great effort was expended in preparing for the guilt phase.

> "A lawyer's time and effort in preparing to defend his client in the guilt phase of a capital case continues to count at the sentencing phase. Creating lingering doubt has been recognized as an effective strategy for avoiding the death penalty. We have written about it. *See, e.g., Stewart v. Dugger*, 877 F.2d 851, 855–56 (11th Cir.1989). In addition, a comprehensive study on the opinions of jurors in capital cases concluded:
>
> > " 'Residual doubt' over the defendant's guilt is the most powerful 'mitigating' fact.—[The study] suggests that the best thing a capital defendant can do to improve his chances of receiving a life sentence has nothing to do with mitigating evidence strictly speaking. The best thing he can do, all else being equal, is to raise doubt about his guilt.
>
> "Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 Colum.L.Rev. 1538, 1563 (1998) (footnotes omitted); *see* William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 Am.J.Crim.L. 1, 28 (1988) ('[t]he existence of some degree of doubt about the guilt of the accused was the most often recurring explanatory factor in the life recommendation cases studied.'); *see also* Jennifer Treadway, Note, '*Residual Doubt' in Capital Sentencing: No Doubt it is an Appropriate Mitigating Factor*, 43 Case W. Res.L.Rev. 215 (1992). Furthermore, the American Law Institute, in a proposed model penal code, similarly recognized the importance of residual doubt in sentencing by including residual doubt as a mitigating circumstance. So, the efforts of Tarver's lawyer, during trial and sentencing, to create doubt about Tarver's guilt may not only have represented an adequate performance, but evidenced the most effective performance in defense to the death penalty."

Tarver v. Hopper, 169 F.3d 710, 715–16 (11th Cir.1999).

Evidence was presented at the guilt phase that Jenkins had been drinking at the time of the murders. (One witness testified that she saw Jenkins drink three beers and four quarts of wine on the night Hogeland was murdered.) In closing argument in the guilt phase, Scofield vigorously argued that based on the amount of alcohol that Jenkins had consumed before the murder it was impossible for Jenkins to have formed the intent to kill. He argued that Jenkins left a friend's house between 1:30 a.m. and 2:00 a.m., that when he left the house he fell down a flight of

but Jenkins later told his attorneys that she was not going to be able to attend the trial. (R. 396.)

18. This was evidence that humanized Jenkins—evidence that has been classified as mitigation. See *Emerson v. Gramley*, 883 F.Supp. 225, 245 (N.D.Ill.1995).

stairs, got into an old car, and backed into another car. He argued that Jenkins would have had to go to the Rocky Ridge Shell gasoline station, the location where the red Mazda automobile that was linked to Hogeland's murder had been stolen, and get to the Omelet Shoppe by 2:00 a.m.[19] Also, there was evidence presented that Jenkins was 21 years of age at the time of the murder. (R. 1148.)

The trial court in its sentencing order found that Jenkins had no significant history of prior criminal activity—he had two misdemeanor convictions—that he was 21 at the time of the murder, and that he did consume alcohol at the time of the murder although he was not so impaired that he could not appreciate the criminality of his conduct.[20] The trial court also considered the mitigation evidence of Jenkins's childhood contained in the presentence report and the presentence memorandum that was prepared by Scofield; however, it gave this evidence little weight. The trial court found that the aggravating circumstances—that the murder was committed during the course of a robbery and a kidnapping—outweighed the mitigating circumstances and warranted a sentence of death.

We believe that Downey's decision to concentrate on reasonable doubt and to portray Jenkins as a good person was reasonable under the circumstances. Moreover, the evidence that Jenkins submits should have been introduced—his abusive childhood and the fact that that abuse made him a violent adult—would have been in direct conflict with the evidence presented. Every witness questioned about Jenkins's demeanor at the Rule 32 hearing stated that Jenkins was meek and mild. We cannot say that counsel's conduct fell outside the wide range of professional conduct. See *Strickland.*

Last, Jenkins cannot show any prejudice. As the United States Supreme Court recently stated in *Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), when reviewing a claim of ineffective assistance of counsel at the penalty phase of a capital murder trial:

> "In *Strickland [v. Washington,* 466 U.S. 668 (1984)], we made clear that, to establish prejudice, a 'defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' *Id.,* at 694, 104 S.Ct. 2052. In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence."

539 U.S. at 534, 123 S.Ct. at 2542.

The circuit court stated the following in its order denying relief:

19. Scofield testified that his approach to this case was to create a reasonable doubt in the minds of the jurors.

20. The trial court specifically stated the following regarding Jenkins's alcohol consumption before the murder:

> "The Court does find that there was evidence that the defendant, at some time during the night of April 17 or morning of April 18 had consumed alcoholic beverage, but the Court does not find that at the time of the commission of the capital offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. The defendant's conduct, at approximately 5:00 a.m. on [April 18] at the service station, and his conversation with the two ... witnesses and his later recollection of the events that occurred surrounding the commission of the offense, would indicate that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired to the extent as required in this mitigating circumstance."

"The Court notes that for the reasons that will follow, the evidence presented at the hearing would not have affected the sentence this Court would have imposed on Jenkins. The aggravating circumstances clearly outweighed any mitigation caused by Jenkins's 'abusive childhood', below average intelligence, lack of criminal history, and his age. Jenkins kidnapped, robbed, and brutally murdered Tammy Hogeland. He then disposed of her nude body on the side of the interstate, leaving her to decompose beyond recognition. Death was the appropriate punishment in this case."

(C.R. 326.) We, like the circuit court, have independently reweighed the alleged mitigating evidence against the aggravating circumstances that were proven by the State. Given the aggravating circumstances that were proven by the State and the facts surrounding Hogeland's murder, we, like the circuit court, are confident that death was the appropriate punishment for Jenkins's actions.

E.

[52] Jenkins argues that his trial counsel was ineffective for failing to investigate and introduce evidence of his good conduct while he was incarcerated in the county jail awaiting trial. At the Rule 32 hearing, Jenkins presented the testimony of two jailers who worked in the St. Clair County jail where Jenkins was housed for 18 months before he was tried. The two jailers stated that Jenkins was polite, courteous, and respectful and that he never complained.

The circuit court, when considering this issue, stated:

"The inconsistencies in the different theories of mitigation presented through Sharon Seal's testimony is also true concerning the testimony of the two St. Clair County jailers who testified. Both jailers testified that Jenkins was an absolute model prisoner who was always courteous and respectful. Again, the Court finds this to be inconsistent with the theory that the abuse Jenkins allegedly suffered as a child caused him to commit violence as an adult. Additionally, the Court notes that the behavior observed by the jailers occurred after the crime. The observation also took place during time when Jenkins was confined alone to a prison cell, directly across from the guard desk. The Court finds nothing in the testimony of the jailers which mitigates Jenkins's crime."

(C.R. 331.) Jenkins argues that the circuit court's findings are inconsistent with the United States Supreme Court's holding in *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), because, he argues, a court must consider this type of evidence to be mitigating evidence.

[53–55] The United States Supreme Court in *Skipper* held that evidence of Skipper's good behavior in prison was improperly excluded from the penalty phase of his capital trial after the State had introduced evidence of his assaultive behavior. The trial court refused to allow two jailers and one regular jail visitor to testify about Skipper's good behavior and his good adjustment to prison life. In reversing the lower court's ruling, the Supreme Court stated, "[E]vidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating." 476 U.S. at 5, 106 S.Ct. 1669. Since *Skipper*, the United States Supreme Court has stated that its holding in *Skipper* was founded on due-process considerations. In *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), the United States Supreme Court stated:

"In *Skipper v. South Carolina*, 476 U.S. 1 (1986), this Court held that a

> defendant was denied due process by the refusal of the state trial court to admit evidence of the defendant's good behavior in prison in the penalty phase of his capital trial. Although the majority opinion stressed that the defendant's good behavior in prison was 'relevant evidence in mitigation of punishment,' and thus admissible under the Eighth Amendment, *id.*, at 4, citing *Lockett v. Ohio*, 438 U.S. [586], at 604 [(1978)] (plurality opinion), the *Skipper* opinion expressly noted that the Court's conclusion also was compelled by the Due Process Clause. The Court explained that where the prosecution relies on a prediction of future dangerousness in requesting the death penalty, elemental due process principles operate to require admission of the defendant's relevant evidence in rebuttal. 476 U.S., at 5, n. 1. See also *id.*, at 9 (Powell, J., opinion concurring in judgment) ('[B]ecause petitioner was not allowed to rebut evidence and argument used against him,' the defendant clearly was denied due process)."

512 U.S. at 164, 114 S.Ct. 2187. Good conduct during pretrial incarceration is not necessarily a mitigating circumstance. *State v. Spears*, 184 Ariz. 277, 279, 908 P.2d 1062 (1996). Whether potentially mitigating evidence mitigates the offense is for the trial court to determine. See *Ex parte Ferguson*, 814 So.2d 970 (Ala.2001). " 'While *Lockett* and its progeny require consideration of all evidence submitted as mitigation, whether the evidence is actually found to be mitigating is in the discretion of the sentencing authority.' " *Ex parte Slaton*, 680 So.2d 909, 924 (Ala.1996), quoting *Bankhead v. State*, 585 So.2d 97, 108 (Ala.Crim.App.1989).

Jenkins argues that his counsel was ineffective for failing to investigate and present evidence of his good conduct while he was incarcerated and awaiting trial. In order to show that counsel was ineffective, the petitioner must satisfy the two-pronged test articulated in *Strickland v. Washington*. The petitioner must show that counsel's performance was deficient and that he was prejudiced by the deficient performance. Here, neither attorney was questioned about this issue—there is no explanation in the record as to whether counsel was in possession of this information, and, if so, why this evidence was not presented as potential mitigation at the penalty phase. Therefore, Jenkins failed to meet his burden of proof.

Moreover, evidence of Jenkins's conduct while in jail awaiting trial was at most "minimally mitigating." *State v. Spears*, supra. A defendant facing trial on capital charges is more likely to be well-behaved in prison than an individual who has already been convicted of a capital offense and has no incentive to cooperate with his jailers. Also, as the trial court noted the good conduct exhibited by Jenkins was when Jenkins was alone in a cell that was located directly across from a guard desk. We are confident that had this information been presented to the jury it would have had no impact on the jury's recommendation of death in this case.

F.

[56] Jenkins argues that counsel was ineffective in failing to request a continuance before the start of the penalty phase.

There was no testimony presented concerning this issue at the Rule 32 hearing. Scofield was asked whether he and Downey requested a continuance; however, he was not asked why they failed to do so. Jenkins has failed to meet his burden of proof in regards to this issue. See Rule 32.3., Ala.R.Crim.P.

G.

[57] Jenkins argues that his counsel failed to effectively argue his case in the

separate sentencing hearing that was held before the trial court pursuant to § 13A–5–47(c), Ala.Code 1975.

Here, counsel prepared a detailed presentence memorandum that mirrored information about Jenkins's childhood contained in the presentence report. Counsel also argued at the hearing before the trial court that Jenkins had no significant history of prior criminal activity, that Jenkins was intoxicated and was impaired at the time of the murder, that the murder was not premeditated, that Jenkins had been abused in his childhood, and that Jenkins lacked a normal family life.

The trial court's sentencing order shows that it considered evidence of Jenkins's abusive childhood but that it chose to give this evidence little weight. It found that the aggravating circumstances outweighed the mitigating circumstances. We can find no evidence indicating that counsel's performance before the sentencing hearing held before the trial court was deficient. Jenkins has failed to satisfy the *Strickland* test.

H.

[58] Jenkins argues that he was denied the effective assistance of counsel on direct appeal before this Court. Scofield represented Jenkins on appeal.

The circuit court made the following findings concerning this issue:

> "Mr. Scofield testified at the evidentiary hearing that he continued to represent Jenkins on appeal. Although he was the attorney of record, Mr. Scofield stated that he was assisted a great deal by an attorney with the Capital Resource Center, Hillary Hoffman. The Court notes that the Capital Resource Center represents death-row inmates exclusively and the majority of that representation occurs at the appellate level. Regarding the extent of Ms. Hoffman's involvement in the case, Mr. Scofield stated the following:
>
> " 'I continued to be involved in the sense of Hillary would prepare things. I would review them for signatures and things like that. She did the majority of the work after that point. I reviewed court opinions. I reviewed her drafts and this, that and the other. Primarily, at that point, she became more involved in the actual appellate aspect of the case. I argued the case before the Courts. In terms of the actual preparation, she would make drafts, send them to me and I would review them.'
>
> "The Court does not find it to be insignificant that the Capital Resource Center was, in essence, raising the issue on appeal and preparing the supporting argument. The past experience of an attorney is an important consideration in evaluating ineffective assistance of counsel claims. *See State v. Whitley,* 665 So.2d 998, 999 (Ala.Crim.App.1995) (denying ineffective assistance of counsel claim while pointing out that '[d]efendant's attorney had extensive experience in the trial of criminal cases and specifically homicide cases.').
>
> "Finally, Jenkins offered no relevant evidence in support of this claim at the evidentiary hearing. Jenkins has the burden to prove by a preponderance of the evidence the facts necessary to show that he is entitled to relief. Rule 32.3, Ala.R.Crim.P., in order to do so successfully, in relation to an ineffective assistance of counsel claim, he must show both deficient performance and prejudice. In presenting no evidence, he has shown neither. This claim is dismissed."

(C.R. 344–45.)

As this Court stated in *DeBruce v. State,* 890 So.2d 1068, 1093–94 (Ala.Crim.App. 2003):

"A defendant has the right to the effective assistance of counsel in his appeal to this Court. See *Cochran v. State,* 548 So.2d 1062 (Ala.Crim.App.), cert. denied, 493 U.S. 900 (1989). DeBruce argues on appeal that his appellate counsel should have raised an additional 33 issues before this Court. Mathis represented DeBruce on appeal and signed the brief prepared by the anti-death-penalty organization known as the Equal Justice Initiative. The brief presented 13 issues, and this Court issued a very lengthy opinion addressing those issues. ' "[W]e emphasize that the right to effective assistance of appellate counsel does not require an attorney to advance every conceivable argument on appeal which the trial record *supports.*" *Gray v. Greer,* 778 F.2d 350 at 353 (7th Cir.1985) (emphasis added [in *Cochran*]), citing *Evitts v. Lucey,* 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985).' *Cochran,* 548 So.2d at 1069–70.

> " ' "[E]xperienced advocates have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. Selecting the most promising issues for review has assumed a greater importance in an era when the time for oral argument is strictly limited in most courts and when page limits on briefs are widely imposed." '

"*Boyd v. State,* 746 So.2d 364, 403 (Ala. Crim.App.1999), quoting *Jones v. Barnes,* 463 U.S. 745, 746 (1983)."

In his appellate brief submitted on Jenkins's direct appeal Jenkins raised 13 issues. This Court addressed those issues in a lengthy opinion. In neither his Rule 32 petition nor his brief on this appeal has Jenkins identified any issues that his appellate counsel failed to raise. Jenkins presented no evidence that his appellate counsel's performance was deficient.

I.

[59] Jenkins argues that Scofield failed to object to the fact that an element of the offense was also the aggravating circumstance that warranted the imposition of the death penalty.

This Court's opinion on direct appeal addressed the substantive claim and found that there was no error in double counting an element of the offense as an aggravating circumstance. *Jenkins,* 627 So.2d at 1052. Therefore, because the substantive claim is without merit, Jenkins cannot satisfy the *Strickland* test.

J.

[60] Jenkins argues that counsel failed to object to the fact that electrocution as a means of execution constitutes cruel and unusual punishment.

Recently, the Alabama Legislature adopted § 15–18–82.1, Ala.Code 1975, which changed Alabama's method of execution from electrocution to lethal injection. This legislation applies to all persons currently on Alabama's death row. See § 15–18–1, Ala.Code 1975. See *Adams v. State,* 955 So.2d 1037 (Ala.Crim.App.2003). Therefore, the substantive issue has been rendered moot by the adoption of § 15–18–82.1; Jenkins cannot satisfy the *Strickland* test.

III.

[61] Jenkins next argues that the circuit court erred in discounting the testimony of his expert, Dr. David Lisak, a clinical psychologist. Dr. Lisak was retained to testify about the effects of "growing up in an abusive, brutal household." (R. 423.)

The circuit court correctly discounted all of the hearsay factual statements brought

out during Dr. Lisak's testimony. Rule 801, Ala.R.Evid. The circuit court stated that it discounted Dr. Lisak's conclusions for the following reasons:

> "One of the most incredible aspects of Dr. Lisak's testimony was his answer to a question posed by the State on re-cross-examination. Dr. Lisak was asked whether he could rule out the possibility that Jenkins might have committed his crime for a reason unrelated to any abuse he might have suffered as a child and adolescent. Dr. Lisak ruled out such a possibility. He did so even though he had not considered Jenkins's mental state at the time of the crime or even inquired into the circumstances surrounding the crime itself. The Court finds that this response further supports the witness's lack of credibility.
>
> "The Court will lastly comment on Dr. Lisak's testimony concerning the cycle of violence. The cycle of violence generally refers to the connection between childhood abuse and the later perpetration of violence by persons who were abused as children. Dr. Kirkland, the psychological expert for the State, whose testimony will be discussed further in this order, correctly pointed out that under Dr. Lisak's theory of the cycle of violence, it would be hard to ever hold anyone responsible for doing anything if they had been abused. Dr. Kirkland stated, and the Court agrees, that it was more than a possibility that Jenkins committed the crime for some reason unrelated to any abuse he suffered.
>
> "In summary, Dr. Lisak was nothing more than a conduit through which to admit hearsay who was paid $5,000. He did not evaluate Jenkins, he administered no psychological tests to him, and offered no expertise to assist the trier of fact. Dr. Lisak had no firsthand knowledge of any of the facts to which he testified and most of those facts were already before the Court through the testimony of the lay witnesses. The Court finds that this evidence, in the form that it was presented, was not credible and discounts altogether the testimony of Dr. Lisak as an expert. While Jenkins may well have been abused as a child, Dr. Lisak's testimony does not show that, but the failure to present his testimony to the jury, the result of the proceedings would have been different."

(C.R. 338–39.)

The trial court did not consider Dr. Lisak as an expert; it stated that he did not assist the trier of fact. The trial court also found that Dr. Lisak's conclusions would not constitute mitigation. That ruling is correct. Dr. Lisak stated that he did not interview Jenkins or speak with him about the circumstances surrounding the murder but that it was his conclusion that Hogeland's murder was connected to Jenkins's abusive childhood. Dr. Lisak's conclusion was based on general observations concerning abused children and the possible effect that such abuse may manifest itself in their adult years.

Recently, in *DeBruce v. State,* supra, we held that a trial court correctly found that evidence from a sociologist about the effects of growing up in a high-crime area was not mitigating evidence. We stated:

> "Alabama has never specifically addressed whether a sociologist may properly testify to establish mitigating evidence. Section 13A–5–52, Ala.Code 1975, addresses nonstatutory mitigating evidence and states:
>
> " 'In addition to the mitigating circumstances specified in Section 13A–5–51, mitigating circumstances shall include any aspect of a defendant's character or record and any of the

circumstances of the offense that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death, and any other relevant mitigating circumstance which the defendant offers as a basis for a sentence of life imprisonment without parole instead of death.'

" 'The Eighth Amendment requires an individualized sentencing determination in a death penalty case.' *Sneed v. State,* 783 So.2d 841, 853 (Ala.Crim.App.1999), rev'd on other grounds, 783 So.2d 863 (2000), citing *Stringer v. Black,* 503 U.S. 222 (1992), and *Lockett v. Ohio,* 438 U.S. 586 (1978). Allowing a sociologist to testify concerning the general affect of environmental conditions violates the right to an individualized sentencing determination.

"The North Carolina Supreme Court in *State v. Taylor,* 354 N.C. 28, 550 S.E.2d 141 (2001), cert. denied, 535 U.S. 934 (2002), had occasion to address whether the circuit court properly excluded a sociologist's testimony when that testimony was offered to prove mitigation. The *Taylor* court stated:

" 'While [the sociologist] was clearly qualified to give his opinion as to the possible cultural affects living in a drug-infested environment would have had on defendant, he was not qualified to give what is in essence a medical opinion as to any possible mental defect, as his training and experience were insufficient to allow the court to admit this portion of his testimony. The trial judge properly exercised his discretion in excluding testimony that was unreliable for its intended purpose. Although the courts have often properly allowed the testimony of psychiatrists and psychologists to address mitigating circumstances focused on a particular defendant's mental state, we do not believe it proper to allow a sociologist who studies the functions and patterns of groups to give this type of testimony. Indeed, the above portions of testimony could have applied to any family member or associate of defendant who grew up in the same environment. The primary purpose of mitigating circumstances is, as defendant notes, to treat the capital defendant with "that degree of respect due the uniqueness of the individual." *Lockett v. Ohio,* 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973, 990 (1978). The witness' testimony lacked the requisite uniqueness regarding this defendant, and the trial court did not err in excluding the testimony.'

"354 N.C. at 43, 550 S.E.2d at 152. See also *State v. Rose,* 120 N.J. 61, 65, 576 A.2d 235 (1990)."

890 So.2d at 1097–98.

Dr. Lisak did not discuss the murder with Jenkins, yet he testified at the Rule 32 hearing to his conclusions about the murder. The trial court correctly determined that Dr. Lisak's testimony would not constitute mitigating evidence because it was not relevant to an "individualized sentencing determination." [21] See *DeBruce.*

The trial court instead relied on the testimony of Dr. Karl Kirkland, the State's

21. Dr. Lisak testified that Jenkins suffered from no mental disease or defect, that he suffered from post-traumatic stress disorder and depression. Dr. Lisak subscribed to the theory that Jenkins's abusive childhood led to his violent behavior as an adult.

The State's expert, Dr. Kirkland, testified that Jenkins suffered from depression, as do the majority of individuals on death row, and that his IQ is 76. Dr. Kirkland did not subscribe to the theory that any abuse in Jenkins's childhood contributed to his violent acts as an adult.

expert, because Dr. Kirkland had interviewed Jenkins about the murder and had administered psychological tests. The trial court stated:

"Testifying in rebuttal for the State was Dr. Karl Kirkland, a clinical psychologist who had participated in over 500 forensic evaluations, 322 of which were in criminal cases. Dr. Kirkland had testified 146 times as a forensic psychologist, 29 of those cases being capital murder cases. Of those 29 cases, Dr. Kirkland was retained by the defendant at least a dozen times. Dr. Kirkland evaluated Jenkins and administered a number of psychological tests. Dr. Kirkland found that Jenkins showed signs of severe depression, which in the Court's experience, is not unusual for death row inmates. Dr. Kirkland also found that some of the test results produced an invalid profile in that Jenkins answered the questions in a way that tended to over-emphasize and exaggerate his symptoms. Jenkins scored in the range of borderline intellectual functioning, with an IQ of 76. Dr. Kirkland described Jenkins as a slow learner though not technically learning disabled. In his expert opinion, this had no effect on Jenkins's ability to appreciate the criminality of his conduct. In fact, Dr. Kirkland stated that, in his opinion, Jenkins did appreciate the criminality of his conduct.

"Dr. Kirkland, in contrast to Dr. Lisak, testified that, while not denying that Jenkins was abused, his observation of the witnesses was that they inflated and exaggerated the degree of abuse. In his opinion, this was done possibly out of feelings of shame and guilt and in an attempt to help a loved one. The Court agrees. Dr. Kirkland found that Jenkins did not suffer from any mental disorder that would detract from his ability to appreciate the criminality of his conduct and he also did not think that Jenkins suffered from any mental disorder at the time of the murder.

"The Court finds, as did Dr. Kirkland, that there was no causal connection between the abuse allegedly suffered by Jenkins and the brutal murder he committed. Absent some causal connection either making Jenkins less culpable or mitigating some circumstance of the crime, the allegedly mitigating evidence does not mitigate the crime at all. It is not the case here that Jenkins suffered abuse which resulted in a mental disorder that caused him to commit the murder. There was ten years between the end of the alleged abuse and the murder of Tammy Hogeland. This fact severely undercuts the weight of the evidence presented at the hearing."

(C.R. 339–340.) These conclusions are supported by the record.

[62, 63] Neither is there any indication that Jenkins's death sentence violates the United States Supreme Court's holding in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). The United States Supreme Court held in *Atkins v. Virginia*, that it was cruel and unusual punishment in violation of the Eighth Amendment to execute a mentally retarded individual. Though Alabama has not enacted legislation addressing the holding in *Atkins*, our Supreme Court in *Ex parte Perkins*, 808 So.2d 1143 (Ala.2001), has applied the most liberal view of mental retardation. To be considered mentally retarded a defendant must have a significantly subaverage intellectual functioning (an IQ score of 70 or below), significant deficits in adaptive behavior, and the problems must have manifested themselves before the defendant reached the age of 18. *Perkins*.

Dr. Kirkland testified that he performed psychological tests on Jenkins and that Jenkins's IQ was 76. There was evidence presented at Jenkins's trial indicating that Jenkins maintained relationships with other individuals and that he had been employed by P.S. Edwards Landscaping Company, Cotton Lowe 76 Service Station, and Paramount Painting Company. The record fails to show that Jenkins meets the most liberal view of mental retardation adopted by the Alabama Supreme Court in *Perkins*. Jenkins's death sentence does not violate *Atkins v. Virginia*.

IV.

Jenkins argues that the State failed to comply with *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by failing to disclose exculpatory evidence. Specifically, he argues that police failed to disclose that another individual had been arrested and detained for the murder and that the State also withheld evidence about Jenkins's background and character.

The circuit court made the following findings about this issue:

> "Jenkins alleged ... that the prosecution failed to make available to him 'exculpatory materials' and 'mitigating evidence' in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Jenkins specifically claims: (1) that the prosecution failed to provide him with evidence that another suspect had been questioned about Tammy Hogeland's murder, and (2) that the prosecution withheld mitigating evidence at the penalty phase. This mitigating evidence included aspects of Jenkins's allegedly abusive childhood. Although not specifically referenced in his amended petition, this mitigating evidence was apparently contained in Jenkins's Taylor Hardin [Secure Medical Facility] records and in the pre-sentence report.
>
> "Turning first to the 'other suspect' information, the Court finds that Jenkins did not meet his burden of proving this *Brady* claim at the evidentiary hearing. A *Brady* violation occurs where (1) the prosecutor suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material to the issues at trial. Initially, Jenkins did not prove that the evidence was suppressed.
>
> "The St. Clair County District Attorney and prosecuting attorney at Jenkins's trial, Van Davis, testified at the evidentiary hearing that his discovery policy now, and at the time of Jenkins's trial, was an 'open-file policy.' Anything in the file was available to defense counsel for inspection and copying. When shown Petitioner's Exhibit 4, the alleged 'other suspect' information, Mr. Davis testified that he recognized the document, that it was part of the file, and that it was absolutely not withheld from Jenkins's trial counsel. Mr. Davis testified that it was his policy at the time of Jenkins's trial to make the entire file available to the defense. Defense counsel would then be allowed to go through the file and identify and mark any material they wanted copied. The D.A.'s office would then make photocopies for defense counsel. This testimony contradicted Jenkins's trial counsel's earlier testimony that he was not permitted to photocopy the file, but instead had to copy by hand the information he wanted. According to both parties, defense counsel was permitted to spend as much time looking at the file as was needed.
>
> "Mr. Davis further testified that he never removed anything from Jenkins's file and considered nothing in a capital case to be work product. He stated that nothing had been added to the file in the time period between the end of Jen-

kins's trial and the turning over of the file to the Attorney General's Office, unless it was some type of post-conviction pleadings.

"The Court also finds contradictions in Mr. Scofield's testimony concerning the police report of the 'other suspects.' Mr. Scofield initially testified at the evidentiary hearing that he did not 'remember seeing anything in the file about other suspect,' but subsequently testified that he was 'absolutely positive' that he did not see the police report in the file. Based upon the testimony presented at the evidentiary hearing, the observation of the witnesses, and credibility determinations, it is the Court's finding that Jenkins has failed to prove that the 'other suspect' report was withheld by the prosecution in violation of *Brady.*

"Even assuming arguendo that the 'other suspect' information was withheld, the Court further finds that Jenkins has failed to prove that the information was either exculpatory or material. The 'other suspect' information consisted of a Jackson, Mississippi, 'Police Department Offense/Supplementary,' wherein there was information from a Mississippi officer that an individual had been detained in that State. According to the report, the man had been traveling on a bus, reportedly talking about killing and shooting people, and was taking pills. The individual had signs of scars or scratches on his left forearm, and had in his possession bus tickets to continue on to Dallas, El Paso, San Diego, and San Francisco. He also had in his possession tickets that had been used from Richmond, Philadelphia, and Washington, D.C. The tickets had been purchased in Fort Lauderdale.

"The individual had been detained because Mississippi officials had received a teletype from St. Clair County concerning Jenkins. The individual told the officer that he thought he began riding the bus on April 19, 1989. He stated that he was asleep on the bus when it arrived in Birmingham and he could not remember if he had gotten off the bus. The supplement also contained information that the individual detained in Mississippi matched Jenkins's description except for his weight. The individual detained in Mississippi weighed 250 pounds, almost 100 pounds more than the 165–pound Jenkins.

"The Court finds that this information was not exculpatory. The fact that an individual was detained in Mississippi who resembled Jenkins in no way exculpated Jenkins in Tammy Hogeland's murder. Van Davis testified at the evidentiary hearing that a [be on the lookout] had been sent to agencies between Alabama and California that Jenkins was possibly traveling by bus. Mr. Davis further testified that they were not looking for an unknown suspect, but that they were looking for Jenkins. The person detained in Mississippi, although generally matching Jenkins's physical description, did not match Jenkins's weight. As previously noted, Jenkins, at the time of his arrest, weighed approximately 100 pounds less than the individual detained in Mississippi.

"The amount of evidence incriminating Jenkins in Tammy Hogeland's murder, at the time the individual in Mississippi was detained, was overwhelming. Once it was determined that the individual detained in Mississippi was not Jenkins, the authorities continued to search for Hogeland's murderer. The detention of the individual in Mississippi did not exculpate Jenkins and, thus, no *Brady* violation occurred.

"Although unnecessary, the Court will go yet another step further to show that,

even assuming that the evidence was both suppressed and exculpatory, Jenkins did not prove that it was material. The other suspect information would have been material 'only if there [was] 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.' *United States v. Bagley,* 473 U.S. 667, 682 (1985). Jenkins has offered no evidence that the 'other suspect' information would have, to a reasonable probability, changed the outcome of his trial. The evidence establishing Jenkins's guilt was overwhelming, and the information would not have influenced the outcome of his trial.

"Moreover, the report was inadmissible hearsay and Jenkins could not prove that it would have been admissible at his trial. Alabama law provides that 'other suspect' information is *not* admissible. 'It is recognized that an accused is not entitled to prove, without more, that another has been suspected of committing the crime for which the accused is being tried.' *Land v. State,* 678 So.2d 201, 207 (Ala.Crim.App.1995). 'The general rule in Alabama is that an accused is not entitled to introduce testimony that someone else was suspected of committing the crime for which he is being tried.' *Land,* 678 So.2d at 207. Here, the 'other suspect' was not a suspect at all. He was detained because there was a possibility that he was Mark Allen Jenkins, the one and only suspect. For the above reasons, there was no *Brady* violation concerning the 'other suspect' information.

"Turning next to the alleged withholding of mitigating evidence at the penalty phase, the Court again finds that there was no *Brady* violation. The information that Jenkins complains was withheld, allegedly mitigating aspects of his childhood and adolescent years that are detailed on page 28 of the amended petition, was information that was within Jenkins's knowledge and could not have been suppressed by the prosecution. There is no *Brady* violation where the information was available to the defense at the time of trial. *Carr v. State,* 505 So.2d 1294, 1297 (Ala.Crim.App.1987). Moreover, defense counsel testified at the evidentiary hearing that he had some knowledge of most of the information that Jenkins now claims was withheld."

(C.R. 283–88.) The circuit court's findings are correct.

[64] To establish a *Brady* violation a defendant must show (1) that the prosecution suppressed evidence, (2) favorable to the defendant or exculpatory, and (3) material to the issues at trial. *Martin v. State,* 931 So.2d 736, 744 (Ala.Crim.App. 2003).

[65] Here, the record shows that Jenkins was identified as the individual who was last seen with the victim. The police were never looking for another suspect. A BOLO (be on the lookout) was issued for Jenkins, and a person who resembled Jenkins was arrested in Mississippi. This information was not exculpatory evidence.

[66–68] Moreover, any evidence about Jenkins's childhood that he alleges was withheld was information within his knowledge.

" 'There is no *Brady* violation where the information in question could have been obtained by the defense through its own efforts.' *Johnson [v. State*], 612 So.2d [1288] at 1294 [(Ala.Crim.App.1992)]; see also *Jackson v. State,* 674 So.2d 1318 (Ala.Cr.App.1993), aff'd in part and rev'd

in part on other grounds, 674 So.2d 1365 (Ala.1995). ' "Evidence is not 'suppressed' if the defendant either knew ... or should have known ... of the essential facts permitting him to take advantage of any exculpatory evidence." *United States v. LeRoy,* 687 F.2d 610, 618 (2d Cir.1982)[, cert. denied, 459 U.S. 1174, 103 S.Ct. 823, 74 L.Ed.2d 1019 (1983)].' *Carr v. State,* 505 So.2d 1294, 1297 (Ala.Cr.App.1987) (noting, 'The statement the appellant contends was suppressed in this case was his own, and no reason was set forth to explain why he should not have been aware of it.'). Where there is no suppression of evidence, there is no *Brady* violation. *Carr,* 505 So.2d at 1297."

Freeman v. State, 722 So.2d 806, 810–11 (Ala.Crim.App.1998). Jenkins has failed to prove that the State violated *Brady.*

V.

[69] Jenkins makes several arguments in his brief that the circuit court correctly determined were procedurally barred in this postconviction proceeding. The following issues are procedurally barred:

A. Whether the trial court erred in denying defense counsel's motion for individually sequestered voir dire;

B. Whether the trial court's jury instructions on robbery were erroneous;

C. Whether the evidence against Jenkins was insufficient to convict him of capital murder;

D. Whether the trial court erred in failing to give several requested jury instructions;

E. Whether the trial court's admission of illegal and inflammatory evidence prejudiced Jenkins and warrants a reversal of his conviction;

F. Whether the trial court failed to take sufficient steps to limit the effects of prejudicial publicity;

G. Whether emotional outbursts by the victim's family at trial denied Jenkins his constitutional rights;

H. Whether the failure to fully transcribe all of the proceedings warrants reversal;

I. Whether the prosecutor used his peremptory strikes in a discriminatory manner;

J. Whether a sentence of death in this case is disproportionate;

K. Whether electrocution as the means of execution is cruel and unusual punishment;

L. Whether African–American women were systematically underrepresented in the jury pool in St. Clair County;

M. Whether use of an element of capital offense as an aggravating circumstances violates his constitutional rights; and

N. Whether the cumulative effect of these errors entitles him to a new trial.

These issues are all barred in a Rule 32 proceeding because they could have been raised at trial or on appeal. See Rule 32.2(a)(3) and 32.2(a)(5), Ala.R.Crim.P. Additionally, issues C, I, E, G, and M are procedurally barred because they were raised and addressed on direct appeal. See Rule 32.2(a)(4), Ala.R.Crim.P.

VI.

[70] Jenkins argues that the circuit court erred in its wholesale adoption of the State's proposed order denying relief. Jenkins's argument on this point consists of only three paragraphs in his brief to this Court.

In *Bell v. State,* 593 So.2d 123 (Ala.Crim. App.1991), we stated:

"The trial court did adopt verbatim the proposed order tendered by the state; however, from our review of the record,

we are convinced that the findings and conclusions are those of the trial court. The record reflects that the trial court was thoroughly familiar with the case and gave the appellant considerable leeway in presenting evidence to support his claims. While the practice of adopting the state's proposed findings and conclusions is subject to criticism, the general rule is that even when the court adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); *Hubbard v. State*, 584 So.2d 895 (Ala.Cr.App.1991); *Weeks v. State*, 568 So.2d 864 (Ala.Cr.App. 1989), cert. denied, [498] U.S. [882], 111 S.Ct. 230, 112 L.Ed.2d 184 (1990); *Morrison v. State*, 551 So.2d 435 (Ala.Cr. App.), cert. denied, 495 U.S. 911, 110 S.Ct. 1938, 109 L.Ed.2d 301 (1990)."

593 So.2d at 126. See also *DeBruce v. State*, supra; *Holladay v. State*, 629 So.2d 673 (Ala.Crim.App.1992); *Wright v. State*, 593 So.2d 111, 117–18 (Ala.Crim.App.1991).

The circuit court's findings are supported by the testimony and the evidence that was presented at the Rule 32 proceedings. There is no indication that the circuit court's findings are "clearly erroneous." See *Bell*, supra.

For the foregoing reasons, we affirm the circuit court's denial of Jenkins's petition for postconviction relief filed pursuant to Rule 32, Ala.R.Crim.P.

AFFIRMED.

McMILLAN, P.J., and COBB, BASCHAB, SHAW, and WISE, JJ., concur.

Ex parte Mark Allen JENKINS.

(In re Mark Allen Jenkins

v.

State of Alabama).

1031313.

Supreme Court of Alabama.

April 8, 2005.

Background: Defendant petitioned for postconviction relief from capital-murder conviction and death sentence. The Circuit Court, St. Clair County, No. CC-89-68.60, William E. Hereford, J., denied petition. The Court of Criminal Appeals, 972 So.2d 111, affirmed. Defendant petitioned for certiorari review.

Holding: The Supreme Court, Lyons, J., held that relation-back doctrine was a civil law derivative misapplied as to prevent defendant from amending his postconviction petition; overruling *Harris v. State*, 947 So.2d 1079; *McWilliams v. State*, 897 So.2d 437; *Giles v. State*, 906 So.2d 963; *Ex parte Mack*, 894 So.2d 764; *DeBruce v. State*, 890 So.2d 1068; *Charest v. State*, 854 So.2d 1102; and *Garrett v. State*, 644 So.2d 977.

Affirmed in part, reversed in part, and remanded.

On remand to, Ala.Cr.App., 972 So.2d 165.

Criminal Law ⇨1586

The "relation-back doctrine," limiting review of untimely raised issues only to those that relate back to original post-judgment petitions and appeals, was a civil law derivative misapplied to defendant's criminal case as to impede his abil-

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IN THE CIRCUIT COURT FOR ST. CLAIR COUNTY, ALABAMA

MARK ALLEN JENKINS,
Petitioner,

versus

CASE NO: 89-68.60

STATE OF ALABAMA,
Respondent.

ORDER

Based on the evidence presented at trial and at the evidentiary hearing on Jenkins's Rule 32 petition, the Court enters the following findings of fact and conclusions of law:

I. PROCEDURALLY BARRED CLAIMS

Rule 32.1 of the Alabama Rules of Criminal Procedure states that, subject to the limitations of Rule 32.2, "any defendant who has been convicted of a criminal offense may institute a proceeding in the court of original conviction to secure appropriate relief' on various grounds that are set out in Rule32.1(a)-(e). Rule32.1 expressly states that relief under Rule 32 is limited to the extent that the claims raised by a Rule 32 petition may be procedurally defaulted from a circuit court's review. The Alabama Rules of Criminal Procedure, at Rule 32.2(a), unambiguously state which category of claims raised by a Rule 32 petitioner are procedurally defaulted from this Court's review. Rule 32.2(a) states as follows:

C-A.G.

BLANK

> (a) PRECLUSION OF GROUNDS. A petitioner will not be given relief under this rule based upon any ground:
>
> (1) Which may still be raised on direct appeal under the Alabama Rules of Appellate Procedure or by post-trial motion under Rule 24; or
>
> (2) Which was raised or addressed at trial; or
>
> (3) Which could have been but was not raised at trial, unless the ground for relief arises under Rule 32.1(b); or
>
> (4) Which was raised or addressed on appeal or in any previous collateral proceeding; or
>
> (5) Which could have been but was not raised on appeal, unless the ground for relief arises under Rule 32.1(b).

The rules of procedural default apply with equal force to all cases, including those in which the death penalty has been imposed. State v. Tarver, 629 So.2d 14, 20 (Ala. Crim. App. 1993), cert. denied, 511 U.S. 1078, 114 S.Ct. 1664 (1994). The Court intends to apply the above rules of preclusion to Jenkins's Rule 32 petition. The breakdown of the specific claims coincides with the manner in which they are set forth in the State's answer to the petition.

At the onset of the discussion of the claims raised in Jenkins's Rule 32 petition, the Court notes that claims raising a specific, see Rule 32.7(b), claim of ineffective assistance of counsel have been recognized to be cognizable under Rule 32.1. Gholston v. Attorney General, 947 F.2d 908, 910 (11th Cir. 1991). The Court will only discuss the merits of those claims of ineffective assistance of counsel that have been properly raised according to the Alabama Rules of Criminal Procedure. The Court notes that Rule 32.1(e) allows a Rule 32

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petitioner to avoid a procedural default if the factual claim presented is newly discovered evidence. To be considered newly discovered evidence, the claim presented must meet the five criteria stated in Rule 32.1(e)(1)-(5). At the evidentiary hearing, Jenkins did not attempt to make a showing that any of his procedurally defaulted claims qualified as newly discovered evidence as defined in Rule 32.1(e)(1)-(5).

A. Claims Which Were Raised At Trial Are Barred From Review

Seven of the claims raised in Jenkins's amended Rule 32 petition are barred from review, at least in part, because they were raised or addressed at trial. These seven claims are as follows:

Claim A - Guilt Phase Jury Instructions Misstated The Law (part 3)

> 3. The claim that the trial court erred in refusing Jenkins's requested jury instruction to the effect that the jury could not convict him of capital murder-robbery if it found that he took the victim's property as an afterthought

Claim B - The claim that the evidence was insufficient to support Jenkins's conviction for capital murder-robbery and was insufficient to support the finding of the robbery as an aggravating circumstance

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Claim C - The claim that the evidence was insufficient to support Jenkins's conviction for capital murder-kidnapping and was insufficient to support the finding of the kidnapping as an aggravating circumstance

Claim G - The claim that the trial court erroneously admitted into evidence a business card found in Jenkins's wallet in violation of his right to be free from warrantless searches and seizures

Claim I - (part c)

c. The claim that Jenkins's clothing was improperly identified by Jenkins's roommate, Mitchell Babb

Claim J - The claim that the trial court violated Jenkins's due process rights by permitting an in-court identification which arose from an unduly suggestive pretrial line-up

Claim X - The claim that the trial court's denial of Jenkins's motion for individually sequestered voir dire violated his constitutional rights

Rule 32.2(a)(2) of the Alabama Rules of Criminal Procedure provides that claims which were raised or addressed at trial are barred from further Rule 32 proceedings. See, e.g., Daniels v. State, 650 So.2d 544, 551 (Ala. Crim. App.), cert. denied, 650 So.2d 544 (Ala. 1994), cert. denied, 115 S.Ct. 1375 (1995); Cochran v. State, 548 So.2d 1062, 1068 (Ala.

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Crim. App.), cert. denied, 548 So.2d 1062 (Ala. 1989); Baldwin v. State, 539 So.2d 1103, 1105 (Ala. Crim. App. 1988), cert. denied, 539 So.2d 1103 (Ala. 1989), cert. denied, 110 S.Ct. 206 (1989); Dobard v. State, 455 So.2d 281, 283 (Ala. Crim. App. 1984); Bell v. State, 518 So.2d 840 (Ala. Crim. App. 1988), cert. denied, 486 U.S. 1036 (1988); Richardson v. State, 419 So.2d 189, 191 (Ala. Crim. App.), cert. denied, 419 So.2d 289 (Ala. 1982), cert. denied, 460 U.S. 1017 (1983). Accordingly, the above seven claims are barred from review by this Court, at least in part, because they were raised or addressed at trial.

B. Claims Which Could Have Been But Were Not Raised At Trial Are Barred From Review

Twenty-six of the claims raised in Jenkins's amended Rule 32 petition are barred from review, at least in part, because he failed to raise the claims at trial. These twenty-six claims are as follows:

Claim A - Guilt Phase Jury Instructions Misstated The Law (parts 1, 2a, 2b, and 4-9)

1. The claim that the trial court failed to adequately instruct the jury on the lesser included offenses of felony or unintentional murder

2a. The claim that the error resulting from the trial court's allegedly inadequate instructions on lesser included offenses was compounded by the trial court's and prosecutor's misstatements of the law regarding the elements of capital murder

2b. The claim that the prosecutor misstated to the jury the elements of capital murder

4. The claim that the failure to give Jenkins's requested jury instruction, that the jury could not convict him of capital murder-robbery if it found that he took the victim's property as an afterthought, was compounded by the prosecutor's misstatements of the law that a robbery occurring as an afterthought to a murder constitutes capital murder

5. The claim that the trial court erroneously failed to instruct the jury that the determination of the voluntariness of Jenkins's statements was for the jury to decide

6. The claim that the trial court's instruction on Jenkins's failure to testify denied him the benefit of the principle that no adverse inferences should be drawn from his silence

7. The claim that the trial court's instructions on circumstantial evidence were prejudicial and misleading because they shifted the burden of proof to Jenkins and suggested that circumstantial evidence was entitled to the same weight as direct evidence only when it points to the guilt of the accused

8. The claim that the trial court improperly instructed the jury on reasonable doubt

9. The claim that the trial court's alleged error in its jury instruction on reasonable doubt was compounded by the prosecutor's misstatements of the law on the State's burden of proof

Claim E - The claim that the trial court's jury instruction on flight was misleading

Claim F - The claim that the trial court failed to prohibit the jury from exposure to publicity about the case after Jenkins waived sequestration

Claim H - The claim that the trial court improperly admitted into evidence highly inflammatory and prejudicial photographs of the victim's body

Claim I - (parts a and b)

a. The claim that fibers taken from the stolen automobile, fibers taken from his clothing, and his boots were improperly admitted at trial because they lacked a proper predicate or chain of custody

b. The claim that the admission into evidence of Jenkins's clothing and his boots was improper because they were linked to Jenkins solely upon inadmissible hearsay

Claim L - The claim that Jenkins was denied his right to grand and traverse jury pools that were representative of the community

Claim M - The claim that the trial court failed to provide funds for expert and investigatory assistance

Claim N - The claim that Alabama's manner of execution is cruel and unusual punishment

Claim O - The claim that emotional outbursts by the victim's family violated Jenkins's constitutional rights

Claim P - The claim that Jenkins's death sentence was disproportionate punishment under state and federal law

Claim Q - The claim that the trial court improperly instructed the jury at the penalty phase that its verdict was merely advisory

Claim R - The claim that Jenkins was deprived of his right to strike a petit jury from a panel of impartial jurors because a juror failed to answer voir dire questions

Claim T - The claim that the prosecution used its peremptory strikes in a racially discriminatory manner

Claim U - The claim that Jenkins was provided counsel with insufficient criminal and capital litigation experience

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Claim V - The claim that Jenkins was deprived of a full appeal from and an appropriate review of his conviction and sentence because all trial proceedings were not transcribed

Claim W - The claim that St. Clair County lacked jurisdiction to prosecute Jenkins because the State failed to prove that the offense occurred in St. Clair County where the victim's body was found

Claim Y - The claim that permitting the jury to infer an abduction/kidnapping of the victim from the identical act that resulted in her murder - her strangulation - fails to narrow the class of persons eligible for the death penalty

Rule 32.2(a)(3) of the Alabama Rules of Criminal Procedure provides that claims which could have been but were not raised at trial are barred from this Court's review. See Daniels v. State, 650 So.2d 544, 551 (Ala. Crim. App.), cert. denied, 650 So.2d 544 (Ala. 1994), cert. denied, 115 S.Ct. 1375 (1995); Russ v. State, 640 So.2d 21, 22 (Ala. Crim. App. 1994). Accordingly, the above twenty-six claims in Jenkins's amended petition are not properly before this court, at least in part, because Jenkins could have but did not raise them at trial.

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C. Claims Which Were Raised Or Addressed On Appeal Are Barred From Review

Eighteen of Jenkins's claims in his amended Rule 32 petition are barred from review, at least in part, because the claims were raised or addressed on appeal. These eighteen claims are as follows:

Claim A - Guilt Phase Jury Instructions Misstated The Law (parts 1, 2b, and 3-9)

1. The claim that the trial court failed to adequately instruct the jury on the lesser included offenses of felony or unintentional murder

2b. The claim that the prosecutor misstated to the jury the elements of capital murder

3. The claim that the trial court erred in refusing Jenkins's requested jury instruction to the effect that the jury could not convict him of capital murder-robbery if it found that he took the victim's property as an afterthought

4. The claim that the failure to give Jenkins's requested jury instruction, that the jury could not convict him of capital murder-robbery if it found he took the victim's property as an afterthought, was compounded by the prosecutor's misstatements of the law that a robbery occurring as an afterthought to a murder constitutes capital murder

5. The claim that the trial court erroneously failed to instruct the jury that the determination of the voluntariness of Jenkins's statements was for the jury to decide

6. The claim that the trial court's instruction on Jenkins's failure to testify denied him the benefit of the principle that no adverse inferences should be drawn from his silence

7. The claim that the trial court's instructions on circumstantial evidence were prejudicial and misleading because they shifted the burden of proof to Jenkins and suggested that circumstantial evidence was entitled to the same weight as direct evidence only when it points to the guilt of the accused

8. The claim that the trial court improperly instructed the jury on reasonable doubt

9. The claim that the trial court's alleged error in its jury instruction on reasonable doubt was compounded by the prosecutor's misstatements of the law on the State's burden of proof

Claim B - The claim that the evidence was insufficient to support Jenkins's conviction for capital murder-robbery and was insufficient to support the finding of the robbery as an aggravating circumstance

Claim C - The claim that the evidence was insufficient to support Jenkins's conviction for capital murder-kidnapping and was insufficient to support the finding of the kidnapping as an aggravating circumstance

Claim G - The claim that the trial court erroneously admitted into evidence a business card found in Jenkins's wallet in violation of his right to be free from warrantless searches and seizures

Claim H - The claim that the trial court improperly admitted into evidence inflammatory and prejudicial photographs of the victim's body

Claim I - (parts a and c)

a. The claim that fibers taken from the stolen automobile, fibers taken from his clothing, and his boots were improperly admitted at trial because they lacked a proper predicate or chain of custody

c. The claim that Jenkins's clothing was improperly identified by Jenkins's roommate, Mitchell Babb

Claim J - The claim that the trial court violated Jenkins's due process rights by permitting an in-court identification which arose from an unduly suggestive pretrial line-up

Claim O - The claim that emotional outbursts by the victim's family violated Jenkins's rights

Claim T - The claim that the prosecution used its peremptory strikes in a racially discriminatory manner

Rule 32.2(a)(4) of the Alabama Rules of Criminal Procedure provides that claims which were raised or addressed on appeal are barred from review by this Court. See also Ex parte Ford, 630 So.2d 113, 115 (Ala. 1993), cert. denied, 114 S.Ct. 1664 (1994); Baldwin v. State, 539 So.2d 1103, 1105 (Ala. Crim. App. 1988), cert. denied, 539 So.2d 1103 (Ala. 1989), cert. denied, 110 S.Ct. 206 (1989); Bell v. State, 518 So.2d 840 (Ala. Crim. App. 1988), cert. denied, 486 U.S. 1036 (1988); Richardson v. State, 419 So.2d 289, 291 (Ala. Crim. App.), cert. denied, 419 So.2d 289 (Ala. 1982), cert. denied, 460 U.S. 1017 (1983). Accordingly, the above eighteen claims are procedurally defaulted, at least in part, because they were raised or addressed on appeal.

D. Claims Which Could Have Been But Were Not Raised on Appeal Are Barred From Review

Fifteen of the claims raised in Jenkins's amended Rule 32 petition are barred from review, at least in part, because of Jenkins's failure to raise the claims on appeal. These fifteen claims are as follows:

Claim A - Guilt Phase Jury Instructions Misstated The Law (part 2a)

2a. The claim that the error resulting from the trial court's allegedly inadequate instructions on lesser included offenses was compounded by the trial court's and prosecutor's misstatements of the law regarding the elements of capital murder

Claim E - The claim that the trial court's jury instruction on flight was misleading

Claim F - The claim that the trial court failed to prohibit the jury from exposure to publicity about the case after Jenkins waived sequestration

Claim I - (part b)

b. The claim that the admission into evidence of Jenkins's clothing and his boots was improper because they were linked to Jenkins solely upon inadmissible hearsay

Claim L - The claim that Jenkins was denied his right to grand and traverse jury pools that were representative of the community

Claim M - The claim that the trial court failed to provide funds for expert and investigatory assistance

Claim N - The claim that Alabama's manner of execution is cruel and unusual punishment

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Claim P - The claim that Jenkins's death sentence was disproportionate punishment under state and federal law

Claim Q - The claim that the trial court improperly instructed the jury at the penalty phase that its verdict was merely advisory

Claim R - The claim that Jenkins was deprived of his right to strike a petit jury from a panel of impartial jurors because a juror failed to answer voir dire questions

Claim U - The claim that Jenkins was provided counsel with insufficient criminal and capital litigation experience

Claim V - The claim that Jenkins was deprived of a full appeal from and an appropriate review of his conviction and sentence because all trial proceedings were not transcribed

Claim W - The claim that St. Clair County lacked jurisdiction to prosecute Jenkins because the State failed to prove that the offense occurred in St. Clair County where the victim's body was found

Claim X - The claim that the trial court's denial of Jenkins's motion for individually sequestered voir dire violated his constitutional rights

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Claim Y - The claim that permitting the jury to infer an abduction/kidnapping of the victim from the identical act that resulted in her murder - her strangulation - fails to narrow the class of persons eligible for the death penalty

Rule 32.2(a)(5) of the Alabama Rules of Criminal Procedure provides that claims which could have been but were not raised on appeal are barred from review by this Court. See also Ex parte Singleton, 548 So.2d 167, 169-70 (Ala. 1989); Daniels v. State, 650 So.2d 544, 551 (Ala. Crim. App.), cert. denied, 650 So.2d 544 (Ala. 1994), cert. denied, 115 S.Ct. 1375 (1995); Jackson v. State, 612 So.2d 1356, 1357 (Ala. Crim. App. 1992). Accordingly, the above fifteen claims are procedurally defaulted, at least in part, because they could have been but were not raised on appeal.

II. BRADY CLAIM

Jenkins alleged, in Claim K of his amended petition, that the prosecution failed to make available to him "exculpatory materials" and "mitigating evidence" in violation of Brady v. Maryland, 373 U.S. 83 (1963). Jenkins specifically claims: (1) that the prosecution failed to provide him with evidence that another suspect had been questioned about Tammy Hogeland's murder, and (2) that the prosecution withheld mitigating evidence at the penalty phase. This mitigating evidence included aspects of Jenkins's allegedly abusive childhood. Although not specifically referenced in his amended petition, this mitigating evidence was apparently contained in Jenkins's Taylor Hardin records and in the pre-sentence report.

Turning first to the "other suspect" information, the Court finds that Jenkins did not meet his burden of proving this Brady claim at the evidentiary hearing. A Brady violation occurs where: (1) the prosecutor suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material to the issues at trial. Initially, Jenkins did not prove that the evidence was suppressed.

The St. Clair County District Attorney and prosecuting attorney at Jenkins's trial, Van Davis, testified at the evidentiary hearing that his discovery policy now, and at the time of Jenkins's trial, was an "open-file policy." Anything in the file was available to defense counsel for inspection and copying. (EH. 539)[1] When shown Petitioner's Exhibit 4, the alleged "other suspect" information, Mr. Davis testified that he recognized the document, that it was part of the file, and that it was absolutely not withheld from Jenkins's trial counsel. (EH. 540, 545, 546) Mr. Davis testified that it was his policy at the time of Jenkins's trial to make the entire file available to the defense. Defense counsel would then be allowed to go through the file and identify and mark any material they wanted copied. The D.A.'s office would then make photo copies for defense counsel. (EH. 542) This testimony contradicted Jenkins's trial counsel's earlier testimony that he was not permitted to photocopy the file, but instead had to copy by hand the information he wanted. (EH. 325, 541-42) According to both parties, defense counsel was permitted to spend as much time looking at the file as was needed. (EH. 374)

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[1]"EH." denotes references to the transcript from the Rule 32 hearing.

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Mr. Davis further testified that he never removed anything from Jenkins's file and considered nothing in a capital case to be work product. (EH. 556) He stated that nothing had been added to the file in the time period between the end of Jenkins's trial and the turning over of the file to the Attorney General's Office, unless it was some type of post-conviction pleadings. (EH. 559-60)

The Court also finds contradictions in Mr. Scofield's testimony concerning the police report of the "other suspects." Mr. Scofield initially testified at the evidentiary hearing that he did not "remember seeing anything in the file about other suspects," (EH. 298), but subsequently testified that he was "absolutely positive" that he did not see the police report in the file. (EH. 325) Based upon the testimony presented at the evidentiary hearing, the observation of the witnesses, and credibility determinations, it is the Court's finding that Jenkins has failed to prove that the "other suspect" report was withheld by the prosecution in violation of Brady.

Even assuming arguendo that the "other suspect" information was withheld, the Court further finds that Jenkins has failed to prove that the information was either exculpatory or material. The "other suspect" information consisted of a Jackson, Mississippi, "Police Department Offense/Supplementary," wherein there was information from a Mississippi officer that an individual had been detained in that State. According to the report, the man had been travelling on a bus, reportedly talking about killing and shooting people, and was taking pills. The individual had signs of scars or scratches on his left forearm, and had in his

possession bus tickets to continue on to Dallas, El Paso, San Diego, and San Francisco. He also had in his possession tickets that had been used from Richmond, Philadelphia, and Washington, D.C. The tickets had been purchased in Fort Lauderdale.

The individual had been detained because Mississippi officials had received a teletype from St. Clair County concerning Jenkins. The individual told the officer that he thought he began riding the bus on April 19, 1989. He stated that he was asleep on the bus when it arrived in Birmingham and he could not remember if he had gotten off the bus. The Supplement also contained information that the individual detained in Mississippi matched Jenkins's description except for his weight. The individual detained in Mississippi weighed 250 pounds, almost 100 pounds more than the 165 pound Jenkins. (C. 52)[2]

The Court finds that this information was not exculpatory. The fact that an individual was detained in Mississippi who resembled Jenkins in no way exculpated Jenkins in Tammy Hogeland's murder. Van Davis testified at the evidentiary hearing that a BOLO had been sent to agencies between Alabama and California that Jenkins was possibly travelling by bus. (EH. 559) Mr. Davis further testified that they were not looking for an unknown suspect, but that they were looking for Jenkins. (EH. 559) The person detained in Mississippi, although generally matching Jenkins's physical description, did not match Jenkins's weight. As previously noted, Jenkins, at the time of his arrest, weighed approximately 100 pounds less than the individual detained in Mississippi.

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[2]"C." denotes references to the Clerk's record on appeal.

The amount of evidence incriminating Jenkins in Tammy Hogeland's murder, at the time the individual in Mississippi was detained, was overwhelming. Once it was determined that the individual detained in Mississippi was not Jenkins, the authorities continued to search for Hogeland's murderer. The detention of the individual in Mississippi did not exculpate Jenkins and, thus, no Brady violation occurred.

Although unnecessary, the Court will go yet another step further to show that, even assuming that the evidence was both suppressed and exculpatory, Jenkins did not prove that it was material. The other suspect information would have been material "only if there [was] 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." United States v. Bagley, 473 U.S. 667, 682 (1985). Jenkins has offered no evidence that the "other suspect" information would have, to a reasonable probability, changed the outcome of his trial. The evidence establishing Jenkins's guilt was overwhelming, and the information would not have influenced the outcome of his trial.

Moreover, the report was inadmissible hearsay and Jenkins could not prove that it would have been admissible at his trial. Alabama law provides that "'other suspect' information is not admissible. 'It is recognized that an accused is not entitled to prove, without more, that another has been suspected of committing the crime for which the accused is being tried.'" Land v. State, 678 So.2d 201, 207 (Ala. Crim. App. 1995). "The general rule

in Alabama is that an accused is not entitled to introduce testimony that someone else was suspected of committing the crime for which he is being tried." Land, 678 So.2d at 207. Here, the "other suspect" was not a suspect at all. He was detained because there was a possibility that he was Mark Allen Jenkins, the one and only suspect. For the above reasons, there was no Brady violation concerning the "other suspect" information.

Turning next to the alleged withholding of mitigating evidence at the penalty phase, the Court again finds that there was no Brady violation. The information that Jenkins complains was withheld, allegedly mitigating aspects of his childhood and adolescent years that are detailed on page 28 of the amended petition, was information that was within Jenkins's knowledge and could not have been suppressed by the prosecution. There is no Brady violation where the information was available to the defense at the time of trial. Carr v. State, 505 So.2d 1294, 1297 (Ala. Crim. App. 1987) Moreover, defense counsel testified at the evidentiary hearing that he had some knowledge of most of the information that Jenkins now claims was withheld. (EH. 319, 393)

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III. INEFFECTIVE ASSISTANCE OF COUNSEL

On December 10, 1996, and on January 20-21, 1997, an evidentiary hearing was held on Jenkins's claim that he was denied effective assistance of counsel at trial and on appeal. At the Rule 32 hearing, Jenkins was represented by counsel and presented evidence, in the form of testimony and exhibits, in support of his ineffective assistance of counsel claims. Based upon the evidence presented at the hearing, including the Court's observations and evaluation of the witnesses' demeanor and credibility, Jenkins failed to prove that trial counsel rendered ineffective assistance.

A. Standard Of Review

Ineffective assistance of counsel claims are governed by the United States Supreme Court's decision in Strickland v. Washington, 466 U.S. 668 (1984). After recognizing that the benchmark for judging any claim of ineffectiveness must be "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result," the Supreme Court announced in Strickland that there were two components to an ineffective assistance of counsel claim:

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

> performance is an objective one: "simply reasonableness under prevailing professional norms."

Id. at 688.

> 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. Cf. Engle v. Isaac, 456 U.S. 107, 133-134 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Micheal v. New York, supra, 350 U.S. at 101. 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. See Goodpastor, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299, 343 (1983).

Id. at 689-690 (emphasis added). After a petitioner has identified the specific acts or omissions which he alleges were not the result of reasonable professional judgment, the court must determine whether those acts are "outside the wide range of professionally competent assistance." Id. at 690. In making this determination, "the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (emphasis added). The

Supreme Court said that courts must also recognize that strategic choices made after reasonable investigation are virtually unchallengeable, and the reasonableness of a counsel's actions may be determined or substantially influenced by what the defendant has told him. Id.

Even when a counsel's performance is outside the wide range of professional reasonableness, the judgment in question is not to be set aside unless the petitioner affirmatively proves prejudice. Id. at 691-693. It is not enough that a defendant "show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. Instead:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. at 694 (emphasis added). More specifically, the Supreme Court held:

> When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Id. at 695. In making a prejudice determination, the totality of the evidence that was before the judge must be considered.

Three additional Supreme Court decisions have a bearing on evaluating Jenkins's ineffective assistance of counsel claims. The first is Engle v. Isaac, 456 U.S. 107 (1982), in which the Supreme Court held:

> Every trial permits a myriad of possible claims. Counsel might have overlooked or chosen to omit respondent's due process argument while pursuing other avenues of defense. We long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim, ...

Id. at 134 (emphasis added).

The second is United States v. Cronic, 466 U.S. 648 (1984), in which the Supreme Court held:

> The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted -- even if defense counsel may have made demonstrable errors -- the kind of testing envisioned by the Sixth Amendment has occurred.

Id. at 656 (footnotes omitted). The Cronic decision also held that: "[b]ecause we presume that the lawyer is competent to provide the guiding hand that the defendant needs ... the burden rests on the accused to demonstrate a constitutional violation." Id. at 658 (footnote omitted) (emphasis added).

The third Supreme Court decision is Smith v. Murray, 106 S.Ct. 2261 (1986). In that case, the Court recognized that the process of winnowing out weaker arguments on

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appeal and focusing on those more likely to prevail is the hallmark of effective appellate advocacy. Id. at 2667. The Court concluded:

> It will often be the case that even the most informed counsel will fail to anticipate a state appellate court's willingness to reconsider a prior holding or will underestimate the likelihood that a federal habeas court will repudiate an established state rule. But, as Strickland v. Washington made clear, "[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." 466 U.S., at 689, 104 S.Ct., at 2065.

477 U.S. at 536.

Jenkins has raised numerous allegations of allegedly ineffective assistance of counsel at trial and on appeal. These allegations are found in Claim D of the amended petition. Jenkins was represented at trial by Doug Scofield and Stan Downey. Mr. Scofield testified at the hearing on Jenkins's Rule 32 petition; however, Mr. Downey was not called as a witness. The Court is unaware of any reason why Mr. Downey would have been unavailable to testify.

Mr. Scofield graduated from Cumberland Law School in 1984, and was admitted to the State Bar that same year. Upon graduation, Mr. Scofield went to work for the Birmingham law firm of Redden, Mills and Clark. The Court notes that this is an outstanding criminal defense firm. Mr. Scofield described Mr. Redden and Mr. Clark as top criminal defense attorneys whom he had the privilege of working with for almost five years. In addition to working with these more experienced attorneys, Mr. Scofield had, at the time of Jenkins' trial, acted as lead counsel in a number of felony trials. The types of cases in which Mr. Scofield assisted, ranged from Medicaid fraud to capital murder. At the time of Jenkins's

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trial, Mr. Scofield's practice was 80 percent criminal. Mr. Scofield additionally did a substantial portion of the criminal appellate work for the firm. He handled a wide variety of cases and successfully obtained several reversals on appeal. Mr. Scofield stated that this experience taught him the importance of preserving and protecting a record.

Mr. Scofield was first contacted concerning this case by Jenkins's landlord, John Anguine. Subsequently, he was put in touch with Jenkins's grandmother, Doris Wagoner. Mr. Scofield informed Mrs. Wagoner of what fees he would need to accept Jenkins as a client. Mrs. Wagoner informed him that she would cover his costs and pay him for work rendered until she decided if she wanted to retain his services. Mr. Scofield attended a line-up and conducted the preliminary hearing prior to being retained or appointed in the case. At some later time, Mrs. Wagoner informed Mr. Scofield that he would not be retained.

On September 14, 1989, the trial court appointed Mr. Scofield to represent Jenkins. Also appointed was Luther Gartrell, a local attorney. Mr. Gartrell subsequently withdrew due to a conflict of interest. On October 2, 1989, Mr. Stan Downey was appointed to represent Jenkins. Mr. Scofield testified at the hearing that, by agreement, Mr. Downey was primarily responsible for the penalty phase of Jenkins's trial. Due to the fact that Mr. Downey did not testify, the Court was neither privy to his background and experience at the time of Jenkins's trial, nor to any actions taken and decisions made before, during, and after the trial. However, the trial transcript reflects that he was a local attorney with more than five years experience in the practice of criminal law.

Mr. Scofield and Mr. Downey were also Jenkins's attorneys of record on appeal. However, Mr. Scofield testified that he was assisted tremendously by Hillary Hoffman, an attorney with the Capital Resource Center. In fact, the evidence indicated that Ms. Hoffman

did the majority of the work at the appellate level. Mr. Scofield's involvement was limited to reviewing Ms. Hoffman's preparation for "signatures and things of that nature". The Court notes that the Capital Resource Center represented death row inmates almost exclusively, and the majority of that representation took place at the appellate level. The quality of representation an inmate received from the organization is difficult to question.

The Court will separate and address Jenkins's claims of ineffective assistance of counsel below in the following manner: ineffective assistance of counsel at the guilt phase; ineffective assistance of counsel at the penalty phase; and ineffective assistance of counsel on appeal.

B. Ineffective Assistance Of Counsel At The Guilt Phase

The specific claims of ineffective assistance of counsel at the guilt phase will be addressed in accordance with the lettering used by Jenkins in the amended petition. Some of these claims, as worded in the petition, contain both guilt and penalty phase ineffective assistance of counsel claims. As previously noted, the Court will address the penalty phase ineffective assistance claims separately below.

(a) The claim that trial counsel did not properly prepare or investigate in order to present an appropriate defense and a proper case against the imposition of the death penalty

The only contention asserted by Jenkins under this claim, related to the guilt phase, is that "[c]ounsel's ineffectiveness included, but was not limited to, conducting interviews with guilt-phase witnesses to support the defense...." (Jenkins's amended petition at p. 9) The claim is clearly subject to dismissal because it violates the "clear and specific

statement of the grounds" requirement of Rule 32.6(b) of the Alabama Rules of Criminal Procedure. However, based upon evidence presented at the evidentiary hearing and representations made by counsel for Jenkins, this Court will address a specific contention even though it was not properly pleaded.

During the evidentiary hearing on his petition, Jenkins called Frieda Vines as a witness. (EH. 362) The State objected because the amended petition contained no claim related to Ms. Vines. (EH. 362-365) Counsel for Jenkins responded that her testimony was relevant to his claim that trial counsel was ineffective "for failure to investigate." (EH. 364) Such a claim does not constitute "a clear and specific statement of the grounds upon which relief is sought" and certainly does not include "full disclosure of the factual basis of those grounds." Rule 32.6(b) A.R.Crim.P. Despite Jenkins's failure to adhere to the law, this Court will attempt to address the claim. However, due to the paucity of the contention, the Court does so at the risk of misinterpreting the claim and the relevance of the evidence offered to support it.

Frieda Vines was a waitress employed by the Omelet Shop at the time of Tammy Hogeland's murder. (EH. 366) Ms. Vines knew the victim in her capacity as a co-worker and was also familiar with Jenkins as a customer of the Omelet Shop. (EH. 365-366) The evidence at trial showed that, on the night of the murder, Ms. Vines was working at the Riverchase Omelet Shop. (R. 959)[3] Tammy Hogeland had also come to work at the Riverchase Omelet Shop that night. (R. 963-64) However, Ms. Hogeland was subsequently sent to the 10th Avenue location by Manager Doug Thrash. (R. 963-64) Mr. Thrash testified at trial concerning what he observed at the Riverchase Omelet Shop on the night of the crime.

[3]"R." denotes references to the record on appeal.

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(R. 958-976) Specifically, Mr. Thrash testified that Jenkins came into the Omelet Shop and appeared to be intoxicated. (R. 959-961) He observed Jenkins talking with both Frieda Vines and another waitress named Shirley Harrison. (R. 962) Mr. Thrash further testified that he overheard someone mention the 10th Avenue Omelet Shop. (R.962) However, Mr. Thrash could not recall which waitress was involved in that particular conversation. (R. 962) Frieda Vines did not testify at Jenkins's trial.

Because there is no relevant claim in the petition, the Court will address the testimony of Frieda Vines based on the following assertions of counsel for Jenkins at the evidentiary hearing:

> MR. FLOOD: [counsel for petitioner] Subject to connection, it is my position that Doug Thrash was not only an important witness in reality to this trial, but was an important defense witness. He had information for the defense in this case. Going into the trial, Mr. Scofield was under a certain impression as to what Mr. Thrash was going to testify to. I'm trying to elicit what his impression was of Durwood Thrash as a witness prior to trial and then what happened at trial that changed.
>
> MS. DANIEL: [counsel for state] Well, Your Honor, that is in the trial transcript. I'm sure he impeached him on whatever he testified to differently. That is all in the record.

MR. FLOOD: This issue is ineffective assistance of counsel. It is our position Mr. Scofield should have called witnesses to rebut certain State evidence.

MS. DANIEL: That claim is nowhere in the petition. Durwood Thrash's name appears nowhere in the petition.

THE COURT: I don't recall it either. Does it?

MR. FLOOD: Durwood Thrash's name does not. We have pled this. They failed to investigate and prepare witnesses to rebut the State's case. That is clearly in there.

THE COURT: Durwood Thrash testified at the trial?

MR. FLOOD: Yes. Frieda Vines, who would have contradicted Durwood Thrash's testimony, did not testify. She was interviewed by the police in this case. She gave a statement that was exculpatory to Mr. Jenkins, but was not produced as a witness.

(EH. 331-32) Counsel for Jenkins subsequently called Frieda Vines to testify at the evidentiary hearing. (EH. 365) Testimony was elicited from Ms. Vines that she did not recall a conversation between herself and Jenkins regarding the 10th Avenue Omelet Shop. (EH. 365-69) The claim that trial counsel was ineffective for not presenting this testimony at trial is meritless.

Trial counsel for Jenkins impeached Mr. Thrash by pointing out on cross-examination that he did not mention the "10th Avenue" comment in his statement to the police. (R. 973) On cross-examination at the evidentiary hearing, Ms. Vines additionally stated that although she did not recall mentioning the 10th Avenue location to Jenkins, she had no idea whether someone else might have. (EH. 369-70) Contrary to Jenkins's assertion at the evidentiary hearing, nothing in Frieda Vines statement to police was exculpatory.

Trial counsel's failure to call Ms. Vines was not outside "the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. There is also no reasonable probability that, had Ms. Vines testified, the resulting conviction would have been different. Id. at 694.

(b) The claim that trial counsel failed to utilize funds provided by the trial court to retain a private investigator

The trial record reveals that prior to trial, counsel for Jenkins requested and was granted funds to obtain a private investigator. (R. 3, 56) At the Rule 32 evidentiary hearing, trial counsel testified that he never made use of the granted funds. (EH. 311) However, Jenkins failed to prove that this inaction constituted deficient performance or resulted in prejudice as required by Strickland.

During the evidentiary hearing, counsel for Jenkins merely asked Mr. Scofield whether a private investigator would "have been helpful" and whether he had a "need" for one. (EH. 311) Mr. Scofield's responses were, respectively, "[c]ould have been" and "I could

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have used one probably." (EH. 311) As Strickland made clear, "[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." Strickland, 466 U.S. at 689.

On cross-examination, the State brought out more detail as to why the allotted funds were never put to use. Specifically, Mr. Scofield related the following:

> I originally requested funds because I was contacted by a private investigator who indicated to me that he might have some contacts with the family and could do some work for me with regard to getting specific information. After I talked to him, I filed my motion. After the Judge granted the motion and gave me the funds, the Judge basically said "You can use anybody you want to. I don't believe this particular guy is a credible investigator." He had testified maybe in the Ricky Dale Adkins case or something. Judge Holladay didn't think he was credible. One of the main reasons I went to even request funds was because I wanted to hire this guy. The Judge did not know this was who I was considering. Once he made that representation, I thought, "Oh, well, there goes my investigator. He was the one going to help me. Judge was giving me money, and now he is saying he is not going to let him testify in this case."

(EH. 378-79) Mr. Scofield then testified that he conducted his own investigation in preparation for the trial. (EH. 379) He stated that, as a result of his efforts, he came to believe that the case lent itself to a "very strong" reasonable doubt defense. Among other theories, he related the reasonable doubt defense to the issues of identity, insufficient time to commit the charged offense in the manner alleged by the State, and insufficiency of the evidence as related to the kidnapping and robbery charges. (EH. 380-384) The Court finds that the investigation conducted by trial counsel was more then sufficient considering the

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strategic choice to pursue a reasonable doubt theory of defense. The action or, under this claim inaction, of trial counsel was not outside "the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. In addition, Jenkins has not shown a reasonable probability that, but for trial counsel's failure to hire an investigator, the result of the proceeding would have been different. Id. at 694.

(c) The claim that trial counsel failed to utilize funds provided by the trial court for the purpose of retaining a forensic expert at Mr. Jenkins's trial

At the evidentiary hearing, Jenkins presented no evidence in support of this claim. The claim, as set forth in the petition, alleges that the failure to retain a forensic expert allowed "critical evidence ... to go unrebutted." (Jenkins's amended petition at p. 10) However, due to the sparse nature of the allegation itself, and the fact that no relevant evidence was presented at the hearing, this Court is unaware of what "critical evidence" Jenkins is referring to in the claim.

The State presented three witnesses at trial who could fairly be classified as forensic experts. It is unclear if Jenkins's claim relates to the testimony of one specific expert or to all three. Rule 32.6(b) of the Alabama Rules of Criminal Procedure requires that a claim for relief include "full disclosure of the factual basis" of the grounds upon which relief is sought. This claim clearly fails to meet that requirement.

Jenkins failed to present any evidence at the hearing to clear up the ambiguity of the claim as set forth in the petition. Counsel for Jenkins merely asked trial counsel if "a forensic expert could have been helpful in this case?" (EH. 312) Mr. Scofield responded, "[o]bviously, when I asked for the money, I am thinking it could be." Id. Again, there was no

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indication as to what type of forensic expert was being referenced. Jenkins has the burden to prove by a preponderance of the evidence the facts necessary to show that he is entitled to relief. Rule 32.3, A.R.Crim.P. Jenkins did not meet the required burden.

Finally, on cross-examination by the State, Mr. Scofield testified concerning his preparation for the forensic evidence presented at trial by the State. (EH. 374-78, 384-85) The Court finds that Mr. Scofield's preparation was both extensive and significant. Mr. Scofield stated that he was in no way surprised by any of the forensic evidence presented at trial. He effectively cross-examined all of the State's forensic experts, pointing out discrepancies and shortcomings which supported the chosen theory of defense. Trial counsel's actions, in relation to this claim, were not outside "the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. In presenting no forensic expert testimony at the Rule 32 hearing, Jenkins has shown no reasonable probability that, had a particular forensic expert been retained by the defense, the result of the trial would have been different. Id. at 694.

(d) The claim that trial counsel failed to challenge the systematic underrepresentation of African-Americans on both the grand jury and petit jury venires

Jenkins has failed to include a "full disclosure of the factual basis" of the grounds upon which relief was sought. Likewise, he presented no evidence in support of this claim at the evidentiary hearing. He has, therefore, failed to meet the burden placed on him by Rules 32.3 and 32.6(b), A.R.Crim.P. Furthermore, the State presented uncontradicted evidence that, at the time of Jenkins's trial, jury panels were selected at random from a list of licensed

drivers. (EH. 540-41) The appellate courts have repeatedly held that this method of selection is constitutionally proper. Clemons v. State, [CR-94-0270, December 20, 1996, slip op. at 16-17] ___ So.2d ___ (Ala. Crim. App. 1996); Inabinett v. State, 668 So.2d 170, 173 (Ala. Crim. App. 1995); Hogan v. State, 663 So.2d 1017 (Ala. Crim. App. 1994); Sistrunk v. State, 630 So.2d 147, 149 (Ala. Crim. App. 1993); Stewart v. State, 623 So.2d 413, 415 (Ala. Crim. App. 1993); Joyce v. State, 605 So.2d 1243, 1245 (Ala. Crim. App. 1992); Rayburn v. State, 495 So.2d 733, 735 (Ala. Crim. App. 1986); Vaughn v. State, 485 So.2d 388, 388-89 (Ala. Crim. App. 1986). "A failure to include the name of every qualified person on the jury roll is not a ground to quash an indictment or a venire, absent fraud or purposeful discrimination." Joyce, 605 So.2d at 1245. Counsel can not be deemed ineffective for failing to object to an unobjectionable matter. Palmer v. Wainwright, 725 F.2d 1511, 1523 (11th Cir. 1984) Therefore, Jenkins has proven neither deficient performance nor prejudice.

(e) The claim that trial counsel failed to adequately voir dire and strike for cause jurors who expressed strong beliefs in favor of the death penalty

Jenkins presented no evidence relevant to this claim at the evidentiary hearing. (EH. 286-89) It was established at the Rule 32 hearing that Stan Downey was primarily responsible for the selection of the jury due to his status as a "local" attorney. (EH. 287) The Court notes that Jenkins did not call Mr. Downey as a witness at the hearing. This is true despite the fact that there was nothing to indicate that Mr. Downey was unavailable to testify.

Jenkins has the burden to prove by a preponderance of the evidence the facts necessary to show he is entitled to relief. Rule 32.3, A.R.Crim.P. In presenting no evidence,

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he has failed to prove deficient performance and certainly has not shown a reasonable probability that, had the voir dire been conducted differently, regarding the jurors in question, the result of the proceedings would have been different. Strickland, 466 U.S. at 694.

(f) The claim that trial counsel failed to adequately voir dire and strike for cause jurors who stated that they believed a man should testify if he is innocent

Excluding general questions of trial counsel about the jury selection, Jenkins presented no evidence relevant to this claim at the evidentiary hearing. (EH. 286-89) At the hearing, it was established that Stan Downey was primarily responsible for the selection of the jury due to his status as a "local" attorney. (EH. 287) The Court again notes that Jenkins did not call Mr. Downey as a witness at the hearing, and there was nothing to indicate that Mr. Downey was unavailable to testify. The record reveals that the trial court instructed the jury as follows:

> THE COURT: Ladies and gentlemen, the defendant in this case has elected not to testify. That is his right. The State has the burden of proving the defendant's guilt beyond a reasonable doubt. The defendant is not required to prove his innocence. Therefore, I instruct you that you are not permitted to draw any inference or conclusion from the defendant's failure to testify in this case.

(R. 1687-88) Jurors are presumed to follow there instructions. Taylor v. State, 666 So.2d 36, 70 (Ala. Crim. App. 1994), aff'd, 666 So.2d 73 (Ala. 1995), cert. denied, 116 S.Ct. 928 (1996).

Jenkins has the burden to prove by a preponderance of the evidence the facts necessary to show he is entitled to relief. Rule 32.3, A.R.Crim.P. In presenting no evidence, he has failed to prove deficient performance and certainly has not shown a reasonable probability that, had the voir dire, of the potential jurors in question, been conducted differently, the result of the proceeding would have been different. Strickland, 466 U.S. at 694.

(g) The claim that trial counsel failed to adequately voir dire jurors who expressed some opposition to the death penalty

In his petition for relief, Jenkins specifically relates this claim to two particular veniremembers, C.E. and M.E. (Jenkins's amended petition at p. 11) At the evidentiary hearing, Jenkins failed to present any evidence in support of this claim and did not question trial counsel concerning the matter. Jenkins who, under Strickland and the Alabama Rules of Criminal Procedure, has the burden of proof, failed to meet that burden.

Additionally, the trial record directly refutes this claim. Both C.E. and M.E. expressed strong, if not unequivocal, opposition to the death penalty. (R. 216, 221-225) Specifically, the two veniremembers stated that they were "irrevocably committed to vote against the death penalty regardless of the evidence." (R. 382-83) Despite these responses, trial counsel requested, and was granted permission, to question the potential jurors further on an individual basis. (R. 402-414) Defense counsel's attempts to "rehabilitate" the two

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veniremembers were unsuccessful. They were properly removed for cause over the objection of defense counsel.

The appellate courts rejected Jenkins's claim that C.E. was improperly removed for cause. Jenkins v. State, 627 So.2d 1034, 1042-43 (Ala. Crim. App. 1992) aff'd, 627 So.2d 1054 (Ala. 1993). The Court finds M.E.'s responses even more unequivocal than those of C.E. (R. 409-411) Jenkins has offered nothing to indicate what would constitute an "adequate" voir dire, and trial counsel can not be deemed ineffective for failing to change the opinion of an individual expressly opposed to capital punishment. The efforts which were undertaken to rehabilitate the two veniremembers can not be labeled "outside the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Additionally, in presenting no evidence regarding the claim, Jenkins has failed to prove prejudice.

(h) The claim that trial counsel failed to conduct a thorough and probing voir dire

In setting forth this claim in his petition, Jenkins failed to include a "full disclosure of the factual basis" of the grounds upon which he contends he is entitled to relief. Rule 32.6(b), A.R.Crim.P. Likewise, other than general questions of trial counsel about the jury selection, Jenkins presented no evidence relevant to this claim at the evidentiary hearing. (EH. 286-89) In fact, it was established at the hearing that Stan Downey was primarily responsible for the selection of the jury due to his status as a "local" attorney. (EH. 287).

However, Jenkins failed to call Mr. Downey as a witness. There was no indication that Mr. Downey was unavailable to testify.

Jenkins has offered nothing concerning how the voir dire of the jury panel should have been conducted. He has not shown that the voir dire, as handled by trial counsel, fell outside "the wide range of reasonable professional assistance." Strickland v. Washington, 466 U.S. at 668. Furthermore, Jenkins has not shown a reasonable probability that, had a different method of voir dire been employed, the result of the trial would have been different. Id. at 694-95. Jenkins has the burden to prove by a preponderance of the evidence the facts necessary to show that he was entitled to relief. Rule 32.3, A.R.Crim.P. He has failed to meet his burden.

(i) The claim that trial counsel failed to take action to have the record reflect the race of the venire-members struck from Jenkins's jury

This claim is meritless for the reasons set forth in (j), infra.

(j) The claim that trial counsel failed to object to the prosecution's use of peremptory challenges against African-American veniremembers in a racially discriminatory fashion in violation of Batson v. Kentucky, 476 U.S. 79 (1986) and Ex parte Branch, 526 So.2d 609 (Ala. 1987)

On April 30, 1986, the United States Supreme Court decided Batson v. Kentucky, 476 U.S. 79 (1986), which held that a State denies a black defendant equal protection when it puts him on trial before a jury from which members of his race have been purposefully

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excluded. The jury which convicted Jenkins was struck and empanelled on March 13, 1991. (R. 443-51) On February 7, 1991, trial counsel for Jenkins filed a "motion to enjoin the prosecution from utilizing his peremptory challenges to systematically exclude minorities from the jury panel." (C. 88; R.38) In support of the motion, counsel asserted that Jenkins "[was] part Mexican-blood, and [was] charged with killing a white person." Id. Trial counsel argued that the motion addressed "all minorities", including blacks, despite the fact that the law did not support that contention. (R.39) At the relevant time, a defendant could establish a prima facie case of "purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." Batson, 476 U.S. at 96. However, to establish such a case, "the defendant first must show that he [was] a member of a cognizable racial group and that the prosecutor ha[d] exercised peremptory challenges to remove from the venire members of the defendant's race." Id. The claim in the amended petition relates to "African-American veniremembers." (Jenkins's amended petition at p. 37) Because Jenkins is not an African American, an objection to the striking of members of that race would have been meritless at the relevant time.

Subsequent to Jenkins's conviction, the United States Supreme Court decided Powers v. Ohio, 499 U.S. 400, 404-17 (1991), which held that under the Equal protection clause, a criminal defendant may object to race-based exclusions of jurors through peremptory challenges whether or not the defendant and the excluded jurors share the same race. Powers was a change in the law. Farrwell v. Davis, 3 F.3d 370, 371-72 (11th Cir. 1993). Alabama

courts on many occasions have refused to hold trial counsel's performance ineffective for failing to forecast changes in the law. State v. Tarver, 629 So.2d 14, 17-18 (Ala. Crim. App. 1990), aff'd, 590 So.2d 369 (Ala. 1991), cert. denied, 112 S.Ct. 1594 (1992); Morrison v. State, 551 So.2d 435 (Ala. Crim. App. 1989), cert. denied, 495 U.S. 911 (1990). It appears, however, that trial counsel did forecast Powers. The trial court simply did not share trial counsel's foresight. Trial counsel's performance was certainly not outside "the wide range of reasonable professional assistance." Strickland v. Washington, 466 U.S. at 689. Finally, there is no reasonable probability that had a Batson/Powers motion been made and entertained by the trial court, the result of the trial would have been different.

(k) The claim that trial counsel failed to supplement the record before the Alabama Court of Criminal Appeals and the Alabama Supreme Court with facts to show that the prosecution removed all of the African-Americans from the venire to support his Batson argument

Trial counsel Doug Scofield testified at the evidentiary hearing that he continued to represent Jenkins on appeal. (EH. 403) Although he was the attorney of record, Mr. Scofield stated that he was assisted a great deal by an attorney with the Capital Resource Center, Hillary Hoffman. (EH. 405) The Court notes that the Capital Resource Center represented death row inmates almost exclusively and the majority of that representation was at the appellate level. Regarding the extent of Ms. Hoffman's involvement in the case, Mr. Scofield stated the following:

> I continued to be involved in the sense of Hillary would prepare things. I would review them for signatures and things like that.

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> She did the majority of the work after that point. I reviewed court opinions. I reviewed her drafts and this, that and the other. Primarily, at that point, she became more involved in the actual appellate aspect of the case. I argued the case before the Courts. In terms of the actual preparation, she would make drafts, send them to me and I would review them.

(EH. 404) The Court does not find it to be insignificant that the Capital Resource Center was, in essence, raising the issues on appeal and preparing the supporting argument. The past experience of an attorney is an important consideration in evaluating ineffective assistance of counsel claims. See State v. Whitley, 665 So.2d 998, 999 (Ala. Crim. App. 1995)(denying ineffective assistance of counsel claim while pointing out that "[d]efendant's attorney had extensive experience in the trial of criminal cases and specifically homicide cases.")

Regarding the specific claim of "failure to supplement the record," Mr. Scofield testified that he attempted to do so but was unsuccessful. (EH. 421) The relevant testimony reads as follows:

> A. [Mr. Scofield] I attempted to get Van Davis to stipulate to the number of blacks that were on the general jury panel, and the number that were removed.
>
> Q. [counsel for Jenkins] Did you know you needed to somehow provide that information in the record in order to support a Batson claim?
>
> A. Based on the Court's opinion that it was not in there, we felt it was necessary to supplement. Again, pursuant to the Rules, we proceeded

to try to get a stipulation of counsel to provide that information for the Appellate Court.

Q. Did Van Davis agree to stipulate to that?

A. No, he did not.

(EH. 421) This Court will not find appellate counsel ineffective because, for whatever reason, the D.A. would not agree to the requested stipulation.

Finally, Jenkins has failed to prove that, if the record had been supplemented, the result of the appeal would have been different. Strickland, 466 U.S. at 694. Jenkins has the burden to prove by a preponderance of the evidence the facts necessary to show that he is entitled to relief. Rule 32.3, A.R.Crim.P. Viewing the evidence in a light most favorable to Jenkins, he has merely shown that the prosecutor removed three African-Americans from the venire through the use of peremptory strikes. A party making a Batson challenge bears the burden of proving a prima facie case and, in the absence of such proof, the prosecution is not required to state its reasons for its peremptory challenges. Ex parte Bird, 594 So.2d 676, 679 (Ala. 1991); Harrell v. State, 571 So. 2d 1270, 1271-1272 (Ala. 1990). In other words, the burden shifts to the responding party only after a prima facie case of discrimination has been established. Batson v. Kentucky, 476 U.S. 79, 97-98; Ex parte Branch, 526 So.2d 609, 623 (Ala. 1987). In determining whether there is a prima facie case, a court is to consider all relevant circumstances which could lead to an inference of discrimination. Id. at 622. In Branch, the Alabama Supreme court set forth a nonexhaustive list of nine types of evidence

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that could be used to raise such an inference. Id. at 622-623. The only evidence Jenkins has asserted is that the State removed three African-Americans from the venire. A defendant must offer some evidence in addition to the striking of blacks that would raise an inference of discrimination. Jenkins, who has the burden of proof, has not presented sufficient evidence to establish a finding of prima facie discrimination. Therefore, the claim is dismissed.

(l) The claim that trial counsel failed to secure transcription of critical portions of the proceedings including numerous bench conferences and thereby failed to adequately preserve the record for review

Jenkins claims that trial counsel failed to secure "critical" portions of the proceedings and thereby failed to preserve the record for review. This claim is merely followed by various cites to the record. However, no evidence was presented by Jenkins at the Rule 32 hearing concerning this claim. Nothing was offered concerning the substance of any untranscribed exchanges, much less why they were "critical." An indication that they may not have been "critical," was trial counsel's testimony on cross-examination that he had extensive appellate experience and, therefore, knew the importance of preserving and protecting a record. (EH. 341-42) Jenkins has the burden to prove by a preponderance of the evidence the facts necessary to show that he is entitled to relief. Rule 32.3, A.R.Crim.P. In presenting no testimony or evidence, Jenkins failed to meet the burden of proof required by the Rules of Criminal Procedure. Additionally, he has shown no reasonable probability that,

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if the proceedings in question existed and they had been transcribed, the result of the trial or subsequent appeal would have been different. Strickland, 466 U.S. at 694.

(m) The claim that trial counsel failed to object to the improper arguments, misleading statements of facts and law, and other misconduct of the prosecuting attorneys throughout trial

Jenkins did not question trial counsel in any manner related to this claim at the evidentiary hearing. Based on that fact and the lack of an underlying factual basis for the claim, Jenkins has failed to meet the requirements placed upon him by Rules 32.3 and 32.6(b), A.R.Crim.P.

Trial counsel testified that during the course of the trial, he objected to matters he felt were improper. (EH. 391) He additionally testified concerning his extensive appellate experience and stated that he knew the importance of preserving and protecting a record. (EH. 341-42, 391) Trial counsel's performance can not be said to have been "outside the wide range of professionally competent assistance" simply because he failed to raise every available objection to argument. The Constitution does not guarantee a perfect trial but rather a "fair trial and a competent attorney." Engle v. Issac, 456 U.S. at 134; Stanley v. Zant, 697 F.2d 955, 964 n. 7 (11th Cir. 1983), cert. denied, 467 U.S. 1219 (1984) ("[A] defendant is not entitled to perfection but to basic fairness."). A lawyer's "heat-of-trial decisions," concerning when to object, should not be second-guessed by those having the benefit of hindsight. Fleming v. Kemp, 748 F.2d 1435, 1450 (11th Cir. 1984), cert. denied, 475 U.S. 1058 (1986).

Finally, Jenkins has failed to show that a different outcome of the trial probably would have resulted but for counsel's allegedly ineffective performance. He has failed to meet the required showing of both deficient performance and prejudice pursuant to Strickland.

(n) The claim that trial counsel failed to object to the limitations which the trial court imposed upon Mr. Jenkins's right to confrontation and cross-examination

Jenkins has set forth no relevant facts, supporting argument, or even record cites to assist the Court in evaluating this claim. Likewise, Jenkins presented no evidence relevant to the claim at the evidentiary hearing. Rule 32.6(b) requires that the petition "contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds." A "bare allegation that a constitutional right has been violated" does not meet the requirements of the Rule. Therefore, this claim is dismissed.

(o) The claim that trial counsel failed to object to improper "victim impact" testimony by, and improper references to, members of the victim's family throughout trial, including comments made during opening and closing arguments

This claim is followed by record cites, but is not accompanied by a supporting factual basis or legal argument. Likewise, Jenkins presented no evidence relevant to this claim at the evidentiary hearing. Jenkins has not met his burden of proof. Rule 32.3, A.R.Crim.P.

Alternatively, there was no improper "victim impact" testimony presented at Jenkins's trial. Based on the records cites included in the petition, this Court presumes that the claim relates to the testimony of the victim's mother and sister. The Court of Criminal Appeals addressed this issue, finding that "[t]he testimony was relevant to the state's case and was correctly received into evidence." Jenkins v. State, 627 So.2d 1034, 1050 (Ala. Crim. App. 1992), aff'd, 627 So.2d 1054 (Ala. 1993).

Regarding the portion of the claim related to prosecutorial argument, Jenkins has presented no evidence and has pleaded no facts to show that he is entitled to relief. Rules 32.3 and 32.6(b), A.R.Crim.P. Jenkins has proven neither deficient performance nor prejudice.

(p) The claim that trial counsel failed to adequately develop and present a coherent and consistent defense strategy

As part of this claim, Jenkins asserts that "[t]rial counsel's ineffectiveness included, but is not limited to, failing to adequately investigate and cross examine critical witnesses for the prosecution, failing to object to improper questioning of state witnesses, and failing to develop and argue a coherent defense theory of the case." (Jenkins's amended petition at p. 14) To the extent that any of the general claims above relate to specifically pled claims found elsewhere in Jenkins's petition, this Court incorporates by reference any applicable portions of this order. However, in so far as the above quoted contentions are set forth as independent claims, they are dismissed for failure to meet the "clear and specific

statement of the grounds" requirement of Rule 32.6(b), which requires that a claim for relief include "full disclosure of the factual basis" of the grounds upon which relief is sought. Jenkins has failed to meet this requirement.

(q) The claim that trial counsel failed to seek appropriate expert assistance for the pretrial, trial, and sentencing proceedings

Jenkins has specifically related this claim to "the assistance of a defense pathologist and mental health experts." (Jenkins's amended petition at p. 14) In so far as this claim relates to the sentencing phase of the trial, this court has addressed that portion of the trial elsewhere in this order. Regarding the guilt phase of Jenkins's trial, this claim has no merit.

At the evidentiary hearing, Jenkins presented no evidence related to an expert in pathology. Counsel for Jenkins merely asked Mr. Scofield if he thought "a forensic expert could have been helpful in the case." (EH. 312) The response was "[o]bviously, when I asked for the money, I was thinking it could be." (EH. 312) The question did not even specify a particular type of "forensic expert." There was no evidence presented to the Court related to how a "defense pathologist" would have been helpful. A Rule 32 petitioner has the burden to prove by a preponderance of the evidence the facts necessary to entitle him to relief. Rule 32.3, A.R.Crim.P. Jenkins has failed to meet his burden. Additionally, based on the testimony of Mr. Scofield, the Court finds that trial counsel spent extensive and significant time in preparation for the testimony of the forensic pathologist. (EH. 377-78) The

preparation undertaken was not outside "the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Based upon that finding, and Jenkins's failure to prove prejudice, this claim is dismissed.

This claim is likewise meritless as it relates to "mental health experts." At the evidentiary hearing, Jenkins presented the testimony of Dr. David Lisak, a clinical psychologist from Boston, Massachusetts. (EH. 428) Dr. Lisak testified that, as part of his evaluation, he assumed that the facts introduced at trial, which led to the conviction of Jenkins, were true. (EH. 438) Dr. Lisak also stated that he did not ask Jenkins about the facts surrounding the crime nor did he consider Jenkins's mental state at the time of the murder. (EH. 600-01) His testimony was replete with hearsay. The Court finds that Dr. Lisak's testimony would have been both irrelevant and inadmissible at the guilt stage of Jenkins's trial. Therefore, Jenkins has failed to meet the prejudice prong of Strickland.

Finally, trial counsel testified that he filed a pretrial motion to determine Jenkins's competency to stand trial. (EH. 352) Regarding the motion Mr. Scofield stated, "I think it would not be an unfair assessment to say that was more a routine motion than there being a specific event that triggered that need." (EH. 353) Mr. Scofield further stated that the lunacy commission issued a report finding Jenkins competent. (EH. 353) The Court finds that trial counsels' failure to request funds for a mental health expert was not outside "the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689-690. For all of the foregoing reasons, this claim is dismissed.

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(r) The claim that trial counsel failed to object to the trial court's one-sided flight instruction which was misleading to the jury

Jenkins has failed to offer any supporting factual basis or legal argument for this claim. Likewise, no relevant evidence or testimony was presented at the evidentiary hearing. The relevant instruction reads as follows:

> Now ladies and gentlemen, there is one other proposition of law that I think has been some evidence presented to this jury concerning the possible flight after the alleged murder was committed and the flight on the part of the defendant. There has been evidence offered tending to show that after the alleged homicide, the defendant fled from the State of Alabama. Of course, it is always permissible for such evidence of flight to be offered. But it is for the jury to decide whether or not the defendant did flee after the alleged offense was committed. And if so, whether his flight was from the consciousness of guilt or from some other reason. If a jury finds the defendant's flight after the alleged offense was from a consciousness of guilt then that is a circumstances which may be weighed against such a defendant. But if the jury finds his flight was for some other reason and not from the consciousness of guilt, then the fact that he did leave the State of Alabama as the evidence would be the alleged, or fled therefrom would not be weighed or taken against him.

(R. 1672-73)

The Alabama Rules of Criminal Procedure place the burden on Jenkins to show that he is entitled to relief. By merely asserting error, Jenkins has shown nothing. Rules 32.3 and 32.6(b), A.R.Crim.P. Finally, the Court has reviewed the instruction and does not find that it was improper.

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(s) The claim that trial counsel failed to object to the trial court's failure to prohibit the jury from reading or watching news about the case during the trial

Jenkins presented no evidence in support of the above claim at the evidentiary hearing. He has, therefore, failed to show deficient performance and prejudice as required by Strickland. Additionally, the jury was instructed extensively about the importance of remaining free from extraneous influences. (R. 452-460, 1347-50) This claim is meritless.

(t) The claim that trial counsel failed to properly object to the admission of physical evidence including but not limited to evidence lacking a proper chain of custody, and evidence introduced based on hearsay

This claim is set forth above precisely as it appears in Jenkins's petition. Jenkins has set forth no relevant facts, supporting argument, or even record cites to assist the Court in evaluating the claim. Rule 32.6(b) of the Alabama Rules of Criminal Procedure requires that the petition "contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds." Jenkins has the burden of proving that he is entitled to relief. Rule 32.3, A.R.Crim.P. Jenkins has not identified what evidence he claims was improperly admitted at his trial and the Court is unaware of any relevant evidence offered in support of this claim at the evidentiary hearing. The claim is, therefore, meritless and due to be dismissed.

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(u) The claim that trial counsel allowed improper and prejudicial evidence to be admitted by failing to stipulate to the identity of the victim

The claim above is set forth precisely as it appears in Jenkins's petition for relief. Jenkins failed to include a "full disclosure of the factual basis" of the grounds upon which relief is sought. Likewise, no evidence relevant to the claim was presented at the evidentiary hearing. The Court will not speculate as to what evidence Jenkins is referring to as "improper and prejudicial." Jenkins has failed to meet the burden placed upon him by Rules 32.3 and 32.6(b), A.R.Crim.P. Therefore, the claim is meritless.

(v) The claim that trial counsel failed to object to the trial court's erroneous instructions which misstated the law, mislead the jury or otherwise denied Mr. Jenkins a fair trial

In support of the above claim, Jenkins listed in his petition several portions of the trial court's instructions alleged to be erroneous. Specifically, he set forth "the trial court's instructions on lesser included offenses, reasonable doubt, robbery as an afterthought, voluntariness, circumstantial evidence, and the jury's role in capital cases." (Jenkins's amended petition at p. 15) However, he has set forth nothing to enlighten this Court as to what portions of the instructions were erroneous, much less why they should be labeled as such. No factual basis nor legal argument is set forth in support of this claim. Likewise, Jenkins presented no evidence relevant to the claim at the evidentiary hearing. Jenkins has

failed to meet the requirements placed upon him by the Alabama Rules of Criminal Procedure. See Rules 32.3 and 32.6(b). Additionally, the Appellate Courts reviewed the contested instructions and found no error. Ex parte Jenkins, 627 So.2d 1054, 1054 (Ala. 1993). This claim is meritless.

(w) The claim that trial counsel failed to make other necessary objections to preserve Mr. Jenkins's right to a fair trial

Following the claim as set forth above, Jenkins states that "[s]uch failure include, but are not limited to, trial counsel's failure to object to the improper and illegal introduction of inflammatory photographs, emotional outbursts from the victim's family, to prosecutorial misstatements of the law, prosecutorial references to inadmissible evidence and failing to object to the grand and petit jury compositions." (Jenkins's amended petition at pp. 15-16) To the extent that any of the above listed contentions relate to claims found elsewhere in Jenkins's petition, the Court incorporates by reference any applicable portions of this order. However, the claims as listed under Claim D, paragraph 28(w) of Jenkins's amended petition, are entirely devoid of any factual basis as required by Rule 32.6(b) of the Alabama Rules of Criminal Procedure. Because Jenkins has failed to meet the burden of proof placed upon him, the claims are due to be dismissed. Rules 32.3 and 32.6(b), A.R.Crim.P.

(ll) The claim that trial counsel failed to properly object to the use of electrocution as cruel and unusual punishment

Jenkins claims that trial counsel was constitutionally ineffective for not "properly" objecting to the use of electrocution as cruel and unusual punishment. Initially, Jenkins has set forth nothing to assist the Court in evaluating the difference between a "proper" and an "improper" objection to electrocution. Nevertheless, trial counsel was not ineffective for failing to make such an objection because death by electrocution does not constitute cruel and unusual punishment. Lindsey v. Smith, 820 F.2d 1137, 1155 (11th Cir. 1987), cert. denied, 489 U.S. 1059 (1989); Scott v. State, CR-94-763 (Ala. Crim. App. January 17, 1997). A lawyer is not required to raise meritless objections. Palmer v. Wainwright, 725 F.26 1511, 1523 (11th Cir. 1984).

(nn) The claim that trial counsel failed to object to an actual conflict of interest in co-counsel's representation of a material witness for the state

This claim is set forth above precisely as it appears in Jenkins's amended petition for relief. (Jenkins's amended petition at p. 20) This claim is dismissed because it violates the "clear and specific statement of the grounds" requirement of Rule 32.6(b) of the Alabama Rules of Criminal Procedure.

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(oo) The claim that trial counsel failed to challenge the trial court's refusal to allow individually sequestered voir dire

The trial record reveals that trial counsel filed a motion for individually sequestered voir dire. (C. 90; R. 44) The trial court denied the motion. (R. 45) The law is well settled that such a determination is within the discretion of the trial court. Ex parte Anderson, 602 So.2d 898, 899 (Ala. 1992). Jenkins offered no evidence relevant to this claim and has provided the Court with no indication as to what is meant by "challenge." He has failed to convince the Court that had an appropriate "challenge" been made, the result of the proceeding would have been different. This claim is dismissed.

(pp) The claim that trial counsel failed to object to the case being venued in St. Clair County when the state failed to prove that the crime occurred there

The evidence at trial showed that the victim's body was discovered near mile marker 151 on I-59 in St. Clair County. (R. 670-74) The appellate courts have "repeatedly held that finding the body of a murder victim in a certain county is sufficient evidence that venue in that county is proper." Cox v. State, 660 So.2d 233, 235 (Ala. Crim. App. 1994), citing, Meyer v. State, 575 So.2d 1212 (Ala. Crim. App. 1990). A lawyer is not required to raise meritless objections. Palmer v. Wainwright, 725 F.2d 1511, 1523 (11th Cir. 1984) Therefore, this claim is dismissed.

B. Ineffective Assistance Of Counsel At The Penalty Phase

In numerous subsections of paragraph 28 in Claim D of the amended petition, Jenkins claims that trial counsel was ineffective because they did not investigate and interview family members to elicit allegedly mitigating evidence for the penalty phase of the trial. More specifically, Jenkins claims counsel was ineffective for failing to investigate and obtain records, interview family members, and seek expert assistance to show the following allegedly mitigating evidence: that Jenkins was developmentally impaired since birth; that he suffered a long history of physical and emotional abuse by his stepfather; that he suffered severe neglect and deprivation throughout his life; that he possessed learning disabilities, low intelligence, poor comprehension and retarded socialization skills which prevented him from achieving academically and from forming normal relationships; that he had a long history of alcohol and chemical dependency; long history of mental health problems; that he had encounters with the juvenile authorities; that he was severely intoxicated on the night of the crime; that he had no significant history of prior criminal activity; and that he was 21 years old at the time of the crime.

In support of this claim, Jenkins presented the testimony of several family members and friends which included his half brother, Michael Jenkins; two cousins, Tammy Pitts and Betty DeLavega; his grandmother, Doris Wagoner; and Sherry Seal, a friend. Jenkins also presented the testimony of a clinical psychologist, Dr. David Lisak. To rebut the testimony and claims made by these witnesses, the State relied upon cross-examination and the testimony of Dr. Karl Kirkland, a clinical psychologist. As to these claims of ineffective assistance of counsel for failing to introduce mitigating evidence, the Court finds as follows:

The Court initially finds that because Jenkins did not present any testimony from Stan Downey at the evidentiary hearing, he has not meet his burden of proof under Rule 32.3. The record shows that Mr. Downey was responsible for the penalty phase of the trial. Yet, Mr. Downey, who was not shown to be unavailable to testify, was not called by Jenkins as a witness to support his claim of ineffectiveness at the penalty phase. Instead, Jenkins attempted to elicit testimony from Mr. Scofield concerning Mr. Downey's actions. The Court is puzzled as to why Jenkins did not call the one lawyer asserted to be responsible for that portion of the trial against which most of his criticism is levied. While this was Jenkins's choice, the Court finds that this choice resulted in Jenkins failure to meet his burden of proof. The record is virtually silent as to what actions were or were not taken or what was or was not done by Mr. Downey at trial and why. It is possible that his actions could have been reasonable and strategic under the circumstances and, in large part, undertaken based upon what Jenkins told him. The Court, therefore, finds that Jenkins did not prove that Mr. Downey's representation was deficient or that he was prejudiced as a result of that representation.

The Court will, however, based upon the evidence presented at the hearing, attempt to address Jenkins's claim of ineffectiveness of counsel at the penalty phase. As previously stated in this order, Jenkins must show that counsel's representation was both deficient and that the deficient performance prejudiced the defense. The Court finds that Jenkins has not proven that, assuming counsel's deficiency, there was a reasonable probability that the sentencer, including the appellate court, to the extent it reweighs the evidence, would have concluded that a weighing of the aggravating and mitigating circumstances did not warrant death.

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The Court notes that for the reasons that will follow, the evidence presented at the hearing would not have affected the sentence this Court would have imposed on Jenkins. The aggravating circumstances clearly outweighed any mitigation caused by Jenkins's "abusive childhood", below average intelligence, lack of a criminal history, and his age. Jenkins kidnapped, robbed, and brutally murdered Tammy Hogeland. He then disposed of her nude body on the side of the interstate, leaving her to decompose beyond recognition. Death was the appropriate punishment in this case.

After listening to the evidence presented at the hearing and observing the demeanor of the witnesses, the Court finds that the witnesses were biased, that they grossly exaggerated their testimony, and that they were not credible for the following reasons:

The record reflects that, at the time of the trial, friends and family of Jenkins were contacted by a probation officer regarding the preparation of a pre-sentence report. Nothing in the report indicated that Jenkins was abused to the extent alleged at the evidentiary hearing. Additionally, although numerous records were introduced at the hearing, there were no medical records which would corroborate the level of abuse alleged by several of Jenkins's witnesses.

Jenkins's cousin, Tammy Lynn Pitts, was not a credible witness. Ms. Pitts testified that she lived with Jenkins and his family on a daily basis for the majority of her early life. (EH. 203) She claimed that Jenkins was beaten "daily" from the time he was an infant, to the time he left home around the age of thirteen. (EH. 186-189) Ms. Pitts stated that Jenkins was "pounded on" and that his stepfather would take whatever was in his hand, put all of his weight behind it, and hit Jenkins with "full force." (EH. 187) She related one alleged incident where Jenkins's stepfather, a man over six feet tall, hit Jenkins more than

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once with a full size shovel on the back. (EH. 209-210) Ms. Pitts described the incident as "normal." (EH. 212) According to the witness, Jenkins would be laid up in bed for weeks at a time due to the severity of the beatings. (EH. 210) Ms. Pitts even testified that Jenkins would receive additional beatings during the time he was laid up recovering from previous abuse. (EH. 210) However, Jenkins was apparently never taken to the hospital and there were no medical records reflecting injuries consistent with the alleged severity of the abuse alleged by Mrs. Pitts.

The Court also finds significant school records which noted that Jenkins suffered from a rash and gingivitis, but contained absolutely no indication that he was beaten on a regular basis. Ms. Pitts additionally testified concerning Jenkins's difficulty in controlling his bowels. (EH. 191, 213) She stated that, as a result of this problem, Jenkins would be forced by his parents to were "soiled" clothing to school "all the time." (EH. 191) Again, the Court finds it difficult to believe that school records would reflect the notice of a rash, but would be completely devoid of any indication that a child was regularly attending school in clothes soiled with feces. Ms. Pitts also testified that Jenkins was locked in his room 24 hours a day 7 days a week. (EH. 193) According to her, he was not even allowed to come out to eat dinner with the rest of the family. (EH. 194) This contradicted the testimony of Jenkins's brother who stated that Jenkins was sent to bed without dinner, "on occasions", because he was bad (EH. 113) If Ms. Pitts is to be believed, Jenkins eked a meager existence of scraps thrown to him after dinner by other members of the family. (EH. 194)

Ms. Pitts also testified that she called Child Protection Services on two occasions during her twenty plus years in the Jenkins household. (EH. 220, 224) She stated that the first time, CPS responded to the home but took no action. The second time, there was no

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response of any kind. (EH. 220, 224) The Court finds it to be unbelievable that Ms. Pitts would feel it necessary to call CPS on only two occasions when she claimed the abuse and maltreatment was a "daily" occurrence. It is also unbelievable that child protective services would take no action.

Finally, Ms. Pitts testified that she loved her cousin and felt it would be a tragedy if he were executed. (EH. 222) She stated that she felt guilty about Jenkins's childhood and that she believed she was helping him by testifying at the hearing. (EH. 222) Ms. Pitts displayed a strong bias in favor of Jenkins. During direct examination, Ms. Pitts appeared to be very emotional, often crying during her testimony. However, on cross-examination by the State, her demeanor changed dramatically. She became guarded and far less emotional. After hearing the testimony of Ms. Pitts, weighing the interests of the witness and observing the witnesses' demeanor, the Court finds the testimony to be incredible.

Not unlike the testimony of Tammy Lynn Pitts, the Court finds the testimony of Jenkins's half-brother, Michael, biased and not credible. Not only did his testimony conflict with that of other witnesses, it was also self-contradictory. The Court will not discuss the testimony in its entity, however, a few examples will make this point.

Michael Jenkins testified that the family moved ten or fifteen times during his youth because his father did not work very much. (EH. 107-108) This conflicted with Ms. Pitt's claim that the family moved maybe four times and that the stepfather was gainfully employed. (EH. 205, 218) Michael Jenkins stated that Jenkins would occasionally miss meals because he was sent to his room for "being bad." (EH. 113) Ms. Pitts stated that Jenkins was not allowed to eat with the family and would leap up at food thrown at him after dinner while locked in his room. (EH. 194) Additionally, contrary to Ms. Pitts testimony that

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Jenkins was locked in his room "twenty-four hours a day seven days a week," (EH. 193), Michael stated that Jenkins was locked in his room for "a couple of hours or so ... everytime he done something." (EH. 112)

As noted above, the testimony of Michael Jenkins was also self-contradictory. Describing the frequency of the alleged beatings, Michael initially stated "if it wasn't once a day, it would be every other day or every three days." (EH. 87) He then stated that Jenkins would get a whipping whenever he had a bowel movement in his pants and that this occurred "once a day." (EH. 90) Subsequent to that, Michael described the discipline imposed stating that Jenkins "would be sent to his room and a number of things happened," including an occasional beating. (EH. 93) The witnesses' testimony was in fact, filled with apparent confusion and contradictions. He originally testified that Jenkins was three or four years old at the time his stepfather went to prison for robbery. (EH. 128-132) However, he subsequently testified that Jenkins was conceived while his stepfather was in prison. (EH. 181) He also contradicted himself a number of times concerning whether Jenkins ever wrote to him requesting that he come to Alabama and testify during his capital murder trial. (EH. 125, 161-63) He finally stated conclusively that he received a letter mentioning that Jenkins might need him to testify at the trial. (EH. 161) Michael stated that he had no "curiosity or concern about what was going on." (EH. 163)

Finally, Michael testified that he believed that Jenkins was innocent and that he could not have committed the crime. (EH. 164) Michael himself had never committed an act of violence despite the fact that he was raised in an environment similar to that of Jenkins. (EH. 163-164) He also testified concerning the problems his other two siblings were experiencing in their adult lives. (EH. 169) The Court notes that all of the testimony

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indicated that these two individuals were never abused as children and were, in fact, babied and spoiled. They received this treatment despite the fact that Stephen Jenkins was not the biological father of either one of them. Any contention that a causal connection exists between the abuse allegedly suffered by Jenkins and the murder of Tammy Hogeland, is undercut by evidence within Jenkins's own family. After hearing the testimony of Michael Jenkins, weighing the interests of the witness and observing the witnesses demeanor, the court finds the testimony incredible and assigns it little weight.

Jenkins also presented the testimony of a friend, Sharon Seal. (EH. 46) Mrs. Seal stated that she came to know Jenkins through her husband, Lonnie Seal. (EH. 49) The trial record reveals that Lonnie Seal testified for Jenkins at the penalty phase of his trial as a character witness. (R. 1718) After reviewing the testimony of Mr. Seal, the Court finds that her testimony would have been cumulative to that of her husband. Furthermore, Mrs. Seal testified at the evidentiary hearing that her husband knew Jenkins better than she did. (EH. 64)

The Court also noted contradictions in Mrs. Seal's testimony. For example, she testified that Jenkins's trial lawyers never talked to her or contacted her about being a witness at the trial. (EH. 61) However, on cross-examination, Mrs. Seal stated that she did not attend the trial because "I was told by Mark's lawyers that we were not allowed in the courthouse because we might be potential witnesses." (EH. 64) She specifically stated that she was told this by Mr. Downey. (EH. 65) Because Mr. Downey did not testify at the hearing, the Court can only speculate as to why Mrs. Seal was not called to testify.

The witness in question also displayed a strong bias in favor of Jenkins. She stated that she believed that he was innocent, that he did not get a fair trial, and that it would

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be a tragedy if he were executed. (EH. 69-70) The Court would also point out that Mrs. Seal's testimony directly contradicted other theories of mitigation presented by counsel for Jenkins at the hearing. Her testimony related to the good character of Jenkins, his non-violent nature, his generous and caring attitude, his love for her children, and other qualities of a similar nature. Other evidence presented at the hearing, instead, dealt with Jenkins's abusive childhood, and culminated in Dr. David Lisak's testimony that abused children are at risk to commit violence. The evidence suggested on one hand that Jenkins was a wonderful person who would never hurt anyone. However, on the other hand, evidence was presented to support a theory that Jenkins's violent and chaotic background led him to murder Tammy Hogeland. Regarding the later theory, the Court finds it significant that the only documented act of violence committed by Jenkins was the murder of Tammy Hogeland. Based on all of the foregoing, the Court finds that Jenkins has proven neither deficient performance nor prejudice related to the failure to call Sharon Seal as a witness.

The inconsistencies in the different theories of mitigation presented through Sharon Seal's testimony is also true concerning the testimony of the two St. Clair County jailers who testified. (EH. 12-46) Both jailers testified that Jenkins was an absolute model prisoner who was always courteous and respectful. Again, the Court finds this to be inconsistent with the theory that the abuse Jenkins allegedly suffered as a child caused him to commit violence as an adult. Additionally, the Court notes that the behavior observed by the jailers occurred after the crime. The observation also took place during a time when Jenkins was confined alone to a prison cell, directly across from the guard desk. The Court finds nothing in the testimony of the jailers which mitigates Jenkins's crime.

The Court also finds that Betty DeLavega, Jenkins's second cousin, was not a credible witness and was biased. Ms. DeLavega had only seen Jenkins on two occasions in her life. Once when Jenkins and his family visited her in Indiana and once when she went to California to visit. Jenkins was very young when he came to Ms. DeLavega's home, and he was 11 or 12 when she visited in California. Ms. DeLavega testified that she stayed in the Jenkins home for five months with her husband and her four children.

Ms. DeLavega informed the Court that when Jenkins and his family visited her in Indiana, Jenkins was not beaten by his stepfather because she "wouldn't have stood for that." (EH. 239) However, Ms. DeLavega testified that Jenkins's stepfather was cruel to both Jenkins and his brother Michael, and specifically recounted an incident where she claimed that Jenkins's stepfather forced Jenkins to eat his own feces, in front of her and her family, out of his underwear with a spoon. Although claiming to be horrified at seeing this, Ms. DeLavega did nothing. She did not call the authorities and she and her four children continued to live in the Jenkins's home. Ms. DeLavega and Jenkins's brother, Michael, were the only two persons to recount that Jenkins was forced to eat his own feces with a spoon.

Ms. DeLavega also testified, demonstrating her bias, that she did not believe that Jenkins could hurt anybody and that he was innocent of the crime for which he was convicted. Ms. DeLavega testified that it would be a terrible thing for Jenkins to be executed. She also stated that she was asked to come and testify at the evidentiary hearing by Jenkins's grandmother, Doris Wagoner, "to get him off death row." (EH. 242)

The Court finds that Ms. DeLavega basically had no knowledge of any long term abuse Jenkins suffered because out she had only seen Jenkins on two very brief occasions in her life. At the time of her testimony, she had not seen Jenkins since he was 11 or 12 years

old. The Court finds it to be beyond belief that Ms. DeLavega could witness Jenkins being forced to eat his own feces with a spoon and do nothing. It is also beyond belief that she would remain in the home with her four children after witnessing such a horrifying event. After observing Ms. DeLavega and listening to her testimony, the Court finds her to be a biased and incredible witness, giving her testimony no weight.

The petitioner's grandmother, Doris Wagoner, was also a biased and incredible witness. (EH. 243) She testified that Jenkins was "slow" as an infant and could not sit up at the age of four months. (EH. 246) Mrs. Wagoner was not offered as an expert in early childhood development and this Court does not accept her as such. She testified that she never witnessed any physical abuse and offered nothing which would establish "that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695.

Most importantly, Mrs. Wagoner testified that she was not available to testify at the penalty phase of Jenkins's trial. The relevant portion of that testimony reads as follows:

Q. [Counsel for the State] Did you contact Mrs. Delavega in reference to testifying here today?

A. Yes.

Q. At the time Mark was on trial for his life, you didn't take that step and contact people who might be here and testify on his behalf?

A. No.
Q. Why is that?

A. I don't know why. I'm a very busy person--and still today even at my age. I don't know why. When the attorney started asking me for money, I didn't feel I could come down here and hire attorneys and this sort of thing.

***

Q. Correct me, then. Why did you not make an effort to come testify?

A. I may have been ill. There may have been a number of things. I don't remember why I didn't come down here. I would have to go and stay, which I could not do at that time.

Q. Why is that?

A. Like I said, I'm very busy. I had tenants and I have property. If I had left for a period of three weeks, I wouldn't have had much of a building when I got back.

Q. That is the difference in your being here today?

A. What is the difference?

Q. Yes, ma'am.

A. I have a good manager. I'm not needed. I'm here today with the intention of going straight back.

(EH. 259-269) Trial counsel can not be labeled ineffective for failure to present the testimony of a witness who, by her own admission, was unavailable and uninterested. Nothing in the testimony of Doris Wagoner mitigated Jenkins's crime.

The Court further finds that Jenkins's proffered expert, Dr. David Lisak, did not at all serve as an expert at the evidentiary hearing. His testimony did not assist the trier of fact in this proceeding. Despite Dr. Lisak's professional qualifications, his function at the Rule 32 hearing was simply to parrot what he said had been told to him by Jenkins's family and friends. He did so without applying any expert knowledge or opinions. His testimony, for the most part, was rank hearsay and unreliable. It consisted primarily of third party sources who by the nature of their relationship to Jenkins were inherently biased, most of these witnesses were not in court for the state to cross-examine and question their bias and credibility.

Dr. Lisak testified that he was told to accept as true the facts presented by the State at Jenkins's trial. Dr. Lisak also stated that his third party hearsay sources created the most objective source of assessing an individual. While the Court may agree that this is true concerning, for example, records from schools or mental health facilities, it does not agree with Dr. Lisak that this is the case concerning the family and friends of a death row inmate. Dr. Lisak also incredibly testified that third party sources do not tend to exaggerate, but instead tend to minimize any abuse. This was not the case with the family and friends of Jenkins.

Dr. Lisak also testified that Jenkins had been sexually abused by his grandfather while on a camping trip when Jenkins was four years old. Dr. Lisak stated that this was when Jenkins's bedwetting began. However, this story of abuse was reported to Dr. Lisak by Jenkins himself, and was corroborated by no one else. Dr. Lisak stated that he had no reason to doubt Jenkins's account of the abuse. This was so, he claimed, because when informed about this alleged incident, Jenkins's stepfather and aunt were not surprised. They claimed no surprise because Jenkins's grandfather had allegedly abused his two eldest daughters and because he was a violent alcoholic. The Court does not find that this was sufficient evidence to support the claim of sexual abuse. Moreover, Dr. Lisak discounted any possibility that Jenkins's bedwetting was the result of a medical problem on the sole fact that he was sexually abused on this one occasion.

The Court is also of the opinion that Dr. Lisak was a biased witness. His curriculum vitae revealed that he had presented numerous workshops to various groups that were opposed to the death penalty. He had not presented any similar workshops to any state agencies. Likewise, the five instances wherein Dr. Lisak had testified at trial, involved testifying for the defense in death penalty cases. In those cases, Dr. Lisak prepared social histories and presented similar testimony to that presented in this case. The Court finds it somewhat interesting that those defendants were either sentenced or resentenced to death or executed. Dr. Lisak was also very reluctant to answer questions posed by the State concerning his views on the death penalty. He stated that he had mixed feelings about the subject and had misgivings about the "equitability and the ways in which capital punishment can actually be applied." Dr. Lisak would not affirmatively answer whether Jenkins's crime was one which he believed was appropriate for capital punishment.

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Dr. Lisak also testified that Jenkins's parents used drugs on a daily basis, yet he did not question them about their drug abuse. He claimed that confronting them with accusations might cause them to "shut down." Likewise, he never questioned the alleged sources of most of the abuse about any specific instances claimed to have been perpetrated on Jenkins. Yet, at one point, Dr. Lisak referred to the most credible sources as Jenkins's parents. Because this testimony was hearsay and was not subject to cross-examination, the Court does not have the benefit of evaluating Jenkins's parents' credibility or the credibility of the other family members and friends that did not testify. Thus, because Dr. Lisak is reporting what these persons said and because he has accepted as true what he was told, Dr. Lisak is subject to the same credibility attacks as those witnesses would have been. He is subject to attack for believing and reporting to the Court that what he was told was the truth.

Although Dr. Lisak testified that he included in Jenkins's "social history" everything that was relevant, both positive and negative, nothing of a positive nature appeared in his version of Jenkins's social history. The Court finds this rather unbelievable in that if it is true, that family and friends minimize abuse, it would logically follow that someone would have had something positive to relate about Jenkins's life. That is not to say that this is further proof that everything in Jenkins's childhood was horrible, but rather that someone would have denied some of the unbelievable abuse alleged to have been perpetrated on Jenkins. The Court is apparently to believe that these accounts of abuse were minimized and that what actually happened to Jenkins was worse. The Court does not believe that to be the case.

Dr. Lisak was also not in possession of his notes from the interviews and, therefore, neither the Court nor the State had the benefit of examining the notes and cross-examining Dr. Lisak on information that he may have not included in his "social history." It

was Dr. Lisak's determination of what was relevant and useful instead of the trier of fact's determination. This reinforces the Court's finding that Dr. Lisak and his accounts of what family and friends told him were not credible.

Dr. Lisak also testified that he did not find family members accounts that Jenkins had whelps, bruises, and cuts all over his body almost continuously because of the beatings, to be an exaggeration. He also did not find it inconceivable that, if such were true, school officials would not have noticed the effects of the beatings, but would notice rashes and gingivitis. His explanation for this was that, according to Jenkins's stepfather, the beatings were inflicted on parts of Jenkins's body that were not visible. However, according to the other witnesses accounts, the beatings were clearly on all parts of his body.

One of the most incredible aspects of Dr. Lisak's testimony was his answer to a question posed by the State on re-cross examination. Dr. Lisak was asked whether he could rule out the possibility that Jenkins might have committed his crime for a reason unrelated to any abuse he might have suffered as a child and adolescent. Dr. Lisak ruled out such a possibility. He did so even though he had not considered Jenkins's mental state at the time of the crime or even inquired into the circumstances surrounding the crime itself. The Court finds that this response further supports the witness's lack of credibility.

The Court will lastly comment on Dr. Lisak's testimony concerning the cycle of violence. The cycle of violence generally refers to the connection between childhood abuse and the later perpetration of violence by persons who were abused as children. Dr. Kirkland, the psychological expert for the State, who's testimony will be discussed further in this order, correctly pointed out that under Dr. Lisak's theory of the cycle of violence, it would be hard to ever hold anyone responsible for doing anything if they had been abused.

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Dr. Kirkland stated, and the Court agrees, that it was more than a possibility that Jenkins committed the crime for some reason unrelated to any abuse he suffered.

In summary, Dr. Lisak was nothing more than a conduit through which to admit hearsay who was paid $5000. He did not evaluate Jenkins, he administered no psychological tests to him, and offered no expertise to assist the trier of fact. Dr. Lisak had no first hand knowledge of any of the facts to which he testified and most of those facts were already before the Court through the testimony of the lay witnesses. The Court finds that this evidence, in the form that it was presented, was not credible and discounts altogether the testimony of Dr. Lisak as an expert. While Jenkins may well have been abused as a child, Dr. Lisak's testimony does not show, that but for the failure to present his testimony to the jury, the result of the proceedings would have been different.

Testifying in rebuttal for the State was Dr. Karl Kirkland, a clinical psychologist who had participated in over 500 forensic evaluations, 322 of which were in criminal cases. Dr. Kirkland had testified 146 times as a forensic psychologist, 29 of those cases being capital murder cases. Of those 29 cases, Dr. Kirkland was retained by the defendant at least a dozen times. Dr. Kirkland evaluated Jenkins and administered a number of psychological tests. Dr. Kirkland found that Jenkins showed signs of severe depression, which in the Court's experience, is not unusual for a death row inmate. Dr. Kirkland also found that some of the test results produced an invalid profile in that Jenkins answered the questions in a way that tended to over-emphasize and exaggerate his symptoms. Jenkins scored in the range of borderline intellectual functioning, with an I.Q. of 76. Dr. Kirkland described Jenkins as a slow learner though not technically learning disabled. In his expert opinion, this had no effect

on Jenkins's ability to appreciate the criminality of his conduct. In fact, Dr. Kirkland stated that, in his opinion, Jenkins did appreciate the criminality of his conduct.

Dr. Kirkland, in contrast to Dr. Lisak, testified that ,while not denying that Jenkins was abused, his observation of the witnesses was that they inflated and exaggerated the degree of abuse. In his opinion, this was done possibly out of feelings of shame and guilt and in an attempt to help a loved one. The Court agrees. Dr. Kirkland found that Jenkins did not suffer from any mental disorder that would detract from his ability to appreciate the criminality of his conduct and he also did not think that Jenkins suffered from any mental disorder at the time of the murder.

The Court finds, as did Dr. Kirkland, that there was no causal connection between the abuse allegedly suffered by Jenkins and the brutal murder he committed. Absent some causal connection either making Jenkins less culpable or mitigating some circumstance of the crime, the allegedly mitigating evidence does not mitigate the crime at all. It is not the case here that Jenkins suffered abuse which resulted in a mental disorder that caused him to commit the murder. There was ten years between the end of the alleged abuse and the murder of Tammy Hogeland. This fact severely undercuts the weight of the evidence presented at the hearing. On this point, the Court finds the reasoning of a Federal District Court to be both sound and persuasive.

> Motley's argument is simple and wrong, [He argues that] [h]is circumstances were pitiful as a child; therefore, he is not responsible for his acts. Freedom necessarily implies responsibility; Motley abused his freedom. He must bear the

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> consequences the state of Texas has prescribed for this particular abuse, after he has been afforded every protection the procedure of a humane, reasonable people can offer.
>
> Child abuse is tragic for anyone, but its ability to break the causal connection between the free will of the defendant and the fate of his victim has never been suggested. If a defendant could argue that this experience as a youthful victim of abuse led him to react excessively to his perception of a threat, he could lend some support to an otherwise implausible assertion of self defense. These sorts of considerations were not present in this case.
>
> Motley argues that his experience as a victim of abuse in part justified his murdering an innocent passer-by...; this is not a constitutional issue. Motley's position is an insult to people everywhere who have overcome their injuries and deprivations to become successful contributing members of our community. Also, murders are committed by people who were not abused, contradicting the causal inference Motley wants the court to make.

Motley v. Collins, 18 F.3d 1223, 1228 (5th Cir.), cert. denied, 523 U.S. 960 (1994) (quoting from the findings of the District Court decision under review).

Regarding the statutory mitigating circumstances the record reveals that the jury was instructed on them at least three times. (R. 1716-17, 1747-48, 1759-60) At one point, the jury was specifically instructed as follows:

> The law in this State provides a list of some of the mitigating circumstances which you may consider. The list is not a complete list of mitigating circumstances you may consider. Now, I have already read to you, I have in here that I did, but I will read it to you again, but I have already read to you the mitigating circumstances that you might consider. There are seven of them. And if there are other mitigating circumstances that are not enumerated in the Code section, you have a right to consider that also in reaching your decision as to punishment. I

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> have read you all of the seven mitigating circumstances set out in the Code. And I have instructed you that you may consider all seven of these whether they exist or not. A mitigating circumstances considered by you should be based on the evidence you have heard. When the factual existence of an offered mitigating circumstances is in dispute, the State shall have the burden of disproving the facts that exist of that circumstance by a preponderance of the evidence. The burden of disproving it by a preponderance of the evidence means that you are to consider that the mitigating circumstance does exist unless the evidence as a whole it is more likely than not the mitigating circumstances does not exist. Therefore, if there is a factual dispute over the existence of a mitigating circumstances, then you should find and consider the mitigating circumstances does exist unless you find the evidence from the evidence that it is more likely than not that the mitigating circumstance did not exist.

(R. 1747-48) (emphasis added).

The Court additionally notes that the jury was instructed to consider the evidence offered during the guilt phase in making a sentencing recommendation. (R. 1717, 1742) The age of Jenkins was introduced into evidence at the guilt stage, as was testimony which indicated that Jenkins was intoxicated on the night of the murder. (R. 1148, 958-970, 1156, 1217) The State presented no evidence nor argument disputing the existence of Jenkins's age as a mitigating circumstance. Likewise, the State presented no evidence nor argument to indicate that Jenkins had any criminal history, much less a significant one. Therefore, the Court finds that Jenkins was not prejudiced by trial counsels failure to expressly argue the statutory mitigating circumstances in question. Also, the record reveals that Stan Downey examined the penalty phase witness who was presented, and argued on behalf of the defense

for a recommendation of life without parole. As noted previously, Jenkins did not call Mr. Downey as a witness at the evidentiary hearing. The Court is left to speculate as to why Mr. Downey took the actions he did. A decision not to argue voluntary intoxication as mitigation has been held to be the product of reasonable strategy. Because the petitioner bears the burden of proof, this Court will not speculate and presume deficient performance.

Finally, a great deal of information concerning Jenkins's background was contained in the pre-sentence report received by the trial court prior to sentencing. The information was supplied to the investigating officer by friends and family of Jenkins who resided in California. The information is similar to that which was presented at the evidentiary hearing although not nearly as extreme. The Court does not find it to be insignificant that family and friends, at the time of trial, did not relate the extreme levels of abuse which the Court was privy to at the Rule 32 hearing.

Upon receiving the information contained in the pre-sentence report, Doug Scofield prepared a "pre-sentence memorandum" for consideration by the trial court. (C. 119-131) Mr. Scofield testified that he felt he made the best arguments possible based on the information contained in the report. The Court finds the document to be well written and an excellent use of the information. The trial court, based upon all of the evidence, the presentence report, and the arguments of counsel, found the existence of the following statutory mitigating circumstances: (1) lack of a significant criminal history and; (2) the age of the defendant at the time of the crime. The trial court, additionally considered Jenkins's

abusive background and troubled youth to the extent it was contained in the pre-sentence report. Nevertheless, the aggravating circumstances were found to outweigh the mitigating circumstances and Jenkins was properly sentenced to death.

C. Ineffective Assistance Of Counsel On Appeal

Jenkins raised in claim (mm) of the amended petition that his counsel was ineffective on appeal. This claim is addressed and rejected below.

> **(mm) The claim that appellate counsel failed to provide effective assistance of counsel on appeal to the Alabama Court of Criminal Appeals and the Alabama Supreme Court**

Mr. Scofield testified at the evidentiary hearing that he continued to represent Jenkins on appeal. (EH. 403) Although he was the attorney of record, Mr. Scofield stated that he was assisted a great deal by an attorney with the Capital Resource Center, Hillary Hoffman. (EH. 403) The Court notes that the Capital Resource Center represents death row inmates exclusively and the majority of that representation occurs at the appellate level. Regarding the extent of Ms. Hoffman's involvement in the case, Mr. Scofield stated the following:

> I continued to be involved in the sense of Hillary would prepare things. I would review them for signatures and things like that. She did the majority of the work after that point. I reviewed court opinions. I reviewed her drafts and this, that and the other. Primarily, at that point, she became more involved in the actual appellate aspect of the case. I argued the case before the

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> Courts. In terms of the actual preparation, she would make drafts, send them to me and I would review them.

(EH. 404) The Court does not find it to be insignificant that the Capital Resource Center was, in essence, raising the issues on appeal and preparing the supporting argument. The past experience of an attorney is an important consideration in evaluating ineffective assistance of counsel claims. See State v. Whitley, 665 So.2d 998, 999 (Ala. Crim. App. 1995)(denying ineffective assistance of counsel claim while pointing out that "[d]efendant's attorney had extensive experience in the trial of criminal cases and specifically homicide cases.")

Finally, Jenkins offered no relevant evidence in support of this claim at the evidentiary hearing. Jenkins has the burden to prove by a preponderance of the evidence the facts necessary to show that he is entitled to relief. Rule 32.3, A.R.Crim.P. In order to do so successfully, in relation to an ineffective assistance of counsel claim, he must show both deficient performance and prejudice. In presenting no evidence, he has shown neither. This claim is dismissed.

CONCLUSION

As specifically stated in the beginning of this order, most of Jenkins's claims are precluded and do not entitle him to any relief. As to the remaining claims before the Court, Jenkins has failed to prove to the satisfaction of the Court that he is entitled to relief. Rule 32.3. A.R.Crim.P. Based upon the evidence and exhibits presented at the Rule 32 hearing, and the Court's observations and evaluations of the credibility and demeanor of the witnesses, the Court finds that Jenkins is not entitled to any relief on his post-conviction petition. Jenkins is not entitled to a perfect trial, only a fair trial under constitutional principles. The

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Court is convinced that Jenkins's conviction and sentence of death are the result of a fair trial wherein he received all constitutional privileges to which he was entitled, including effective representation of counsel. It is therefore

ORDERED, ADJUDGED, AND DECREED that Jenkins's Rule 32 petition is due to be and is hereby denied.

This the 31st ~~31th~~ day of December 1997.

William E. Hereford, Judge

FILED

DEC 31 1997

ST. CLAIR COUNTY

CLERK CIRCUIT COURT

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-12524-P

MARK ALLEN JENKINS,

Petitioner - Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

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

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE:WILSON, BRANCH, and TJOFLAT, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

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