

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JEFFERY DAY RIEBER,
Petitioner,

v.

JOHN Q. HAMM, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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MAY 2, 2025

CAPITAL CASE

QUESTIONS PRESENTED

1. Did trial counsel render ineffective assistance of counsel at the guilt phase by failing to pursue a theory that Mr. Rieber lacked the requisite intent for intentional homicide after being presented with evidence that Mr. Rieber was intoxicated and had no recollection of the offense?
2. Did trial counsel render ineffective assistance of counsel at the penalty phase by failing to develop and present corroborating mitigating evidence of Mr. Rieber's intoxication at the time of the offense?
3. Did Alabama's capital sentencing scheme, which permitted judicial override of the jury's sentencing verdict based on a judge's independent factfinding, violate Mr. Rieber's Sixth Amendment right to a trial by jury?

RELATED PROCEEDINGS

1. *State v. Rieber*, No. CC-90-2177FJ, (Ala. Cir. Ct. Madison Cnty.). Convicted April 10, 1992; sentenced June 26, 1992.
2. *Rieber v. State*, No. CR-91-1500, 663 So. 2d 985 (Ala. Crim. App. 1994). Opinion affirming judgment June 17, 1994; reh'g denied November 10, 1994.
3. *Ex parte Rieber*, No. 1940271, 663 So. 2d 999 (Ala. 1995). Judgment affirmed May 19, 1995; reh'g denied June 23, 1995.
4. *Rieber v. Alabama*, No. 95-6166 (U.S.). Petition for writ of certiorari denied November 27, 1995.
5. *Rieber v. Alabama*, No. CC-90-2177.60 (Ala. Cir. Ct. Madison Cnty.). Petition for postconviction relief pursuant to Ala. R. Crim. P. 32; evidentiary hearing held October 3-5, 2011; petition denied November 13, 2015.
6. *Rieber v. Alabama*, No. CR-15-0355 (Ala. Crim. App. Sept. 1, 2017). Opinion affirmed September 1, 2017; reh'g denied October 20, 2017.
7. *Ex parte Rieber*, No. 1170093 (Ala.). Petition for writ of certiorari denied February 2, 2018.
8. *Rieber v. Alabama*, No. 18-5103 (U.S.). Petition for writ of certiorari denied October 1, 2018.
9. *Rieber v. Hamm*, No. 5:18-cv-00337-ACA (N.D. Ala.). Habeas petition denied on August 7, 2023; motion to alter or amend the judgment denied October 31, 2023.
10. *Rieber v. Comm'r, Ala. Dep't of Corr.*, No. 23-13958, 2024 WL 4795311 (11th Cir. Nov. 14, 2024). Opinion affirmed November 14, 2025; panel reh'g denied January 6, 2025.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jeffery Day Rieber respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS AND ORDERS BELOW

The judgment of the United States District Court for the Northern District of Alabama denying Mr. Rieber's habeas petition is unreported. The district court's contemporaneously issued memorandum of opinion and order, *Rieber v. Hamm*, No. 5:18-cv-00337-ACA, 2023 WL 5020257 (N.D. Ala. Aug. 7, 2023) is attached as Appendix C. (Pet. App. 23a-108a.) The district court's order denying Mr. Rieber's motion to alter or amend the judgment is unreported and is attached as Appendix B. (Pet. App. 19a-22a.) The opinion of the United States Court of Appeals for the Eleventh Circuit affirming the denial of federal habeas relief is reported at *Rieber v. Commissioner, Alabama Department of Corrections*, No. 23-13958, 2024 WL 4795311 (11th Cir. Nov. 14, 2024), and attached as Appendix A. (Pet. App. 1a-18a.) The order of the Eleventh Circuit denying rehearing is unreported and attached as Appendix F. (Pet. App. 232a-233a.)

STATEMENT OF JURISDICTION

The Judgment of the Northern District of Alabama denying Mr. Rieber's petition for a writ of habeas corpus was entered on August 7, 2023. *Rieber v. Hamm*, No. 5:18-cv-00337-ACA, 2023 WL 5020257 (N.D. Ala. Aug. 7, 2023). The Eleventh Circuit Court of Appeals affirmed the District Court's denial of habeas relief on November 14, 2024, *Rieber v. Comm'r, Ala. Dep't of Corr.*, No. 23-13958, 2024 WL 4795311 (11th Cir. Nov. 14, 2024), and denied rehearing on January 6, 2025. *Rieber*

v. Comm’r, Ala. Dep’t of Corr., No. 23-13958 (11th Cir. Jan. 6, 2025). On February 14, 2025, Justice Thomas extended the time for filing this petition until May 6, 2025. *Rieber v. Hamm*, No. 24A785 (U.S. Feb. 14, 2025). The Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VI.

The Eighth Amendment to the United States Constitution provides in relevant part:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

I. Course of Proceedings Below

On April 10, 1992, Mr. Rieber was convicted of murder committed in the course of a robbery, a capital offense under Alabama law. (Doc. 16-78 at 41-42.)¹ The next day, following the penalty phase hearing to the jury, the jury recommended, by a vote of seven to five, that Mr. Rieber be sentenced to life imprisonment without parole. (Doc. 16-85 at 97-100.) On June 26, 1992, the Hon. Jeri Blankenship overrode the jury's recommendation, pursuant to former Ala. Code § 13A-5-47 (1992) (Pet. App. 243a.), and sentenced Mr. Rieber to death by electrocution. (Doc. 16-79 at 94.) Mr. Rieber moved for a new trial and resentencing, but his motion was denied on August 25, 1992. (Doc. 16-85 at 190.)

The Alabama Court of Criminal Appeals subsequently affirmed Mr. Rieber's conviction and death sentence, and it denied rehearing. *Rieber v. State*, 663 So. 2d 985 (Ala. Crim. App. 1994). The Alabama Supreme Court also affirmed, in *Ex parte Rieber*, 663 So. 2d 999 (Ala. 1995), and denied rehearing on June 23, 1995. Mr. Rieber timely filed a petition for a writ of certiorari to the United States Supreme Court, but the Court denied his petition on November 27, 1995.

On February 24, 1997, Mr. Rieber filed a pro se petition for post-conviction relief in Madison County Circuit Court, under Alabama Rule of Criminal Procedure 32, seeking to set aside his conviction and death sentence. Mr. Rieber filed an amended Rule 32 petition, with the assistance of counsel, on January 26, 2004.

¹ Citations are to the ECF document number as filed in the district court below. *Rieber v. Hamm*, No. 5:18-cv-00337-ACA (N.D. Ala.).

(Doc. 16-11 at 41-66.) In the Rule 32 petition, Mr. Rieber asserted ineffective assistance of counsel claims based on his trial counsels' deficient performance at both the guilt and penalty phases. He also raised a claim for the unconstitutionality of Alabama's judicial override statute, pursuant to which he was sentenced. (Doc. 16-11 at 52.)

With respect to the guilt phase, Mr. Rieber argued, among other things, that his trial counsel failed to conduct a minimally effective investigation of the facts, including Mr. Rieber's excessive drug use on the day of the offense (as well as his history of drug use). (Doc. 16-11 at 60, ¶ 62.) Mr. Rieber further argued that his counsel failed to conduct a minimally effective investigation into the law, specifically the legal standards and requirements for submission of lesser-included offenses. (*Id.*) Had counsel conducted such an investigation, counsel would have appreciated that Mr. Rieber could not have formed the intent required for the charges against him. (*Id.* ¶ 63.) And, had counsel conducted the most basic legal research, counsel would have presented to Mr. Rieber the option of asking for a jury instruction on the lesser included charge of manslaughter – an offense that did not require the mental state necessary for the capital murder charge on which Mr. Rieber was convicted. (*Id.*)

As to the penalty phase, Mr. Rieber argued that his trial counsel's failure to investigate his troubled past, extensive drug abuse background, as well as his drug abuse on the date in question, resulted in counsel's failure to present the mitigating circumstance of impairment due to drug use at sentencing. (Doc. 16-11 at 63, ¶ 76.)

The arguments in Mr. Rieber's post-conviction motion were presented to the trial court at an evidentiary hearing held on October 3-5, 2011, before the Hon. Laura Jo Hamilton (Judge Blankenship had passed away). The evidentiary hearing revealed just how prejudicial trial counsel's failures were as there was substantial evidence presented of Mr. Rieber's extensive drug use, which not only corroborated a voluntary intoxication defense, but also mitigated imposition of the death penalty.

Judge Hamilton retired following the Rule 32 hearing, and the case was reassigned to the Hon. Karen Hall. On November 13, 2015, Judge Hall denied Mr. Rieber's Rule 32 petition based on the 2011 hearing record. (Appendix E, Pet. App. 156a-231a.) The Alabama Court of Criminal Appeals affirmed the denial of Mr. Rieber's Rule 32 petition on September 1, 2017, and denied rehearing. *Rieber v. State*, No. CR-15-0355 (Ala. Crim. App. Aug. 31, 2017). (Appendix D, Pet. App. 109a-155a.) On February 2, 2018, the Alabama Supreme Court denied Mr. Rieber's petition for writ of certiorari. The U.S. Supreme Court subsequently denied Mr. Rieber's petition for a writ of certiorari.

The Alabama courts rejected evidence from the Rule 32 hearing of Mr. Rieber's drug use during the day of the crime, finding that it took place "at some time of the day of the offense" and that this "would not have proven that he was intoxicated at the time of the offense," at approximately 8:00 p.m. (Pet. App. 196a.) This finding is not only ambiguous, but also not accurate as the evidence presented clearly demonstrated that Mr. Rieber's drug use took place "at dusk," close in time to the robbery. (Doc. 16-83 at 65-67.)

Mr. Rieber filed a petition for a writ of habeas corpus in the Northern District of Alabama on March 2, 2018. (Doc. 1.) Mr. Rieber raised eleven claims in the petition, including the ineffective assistance of counsel and unconstitutional death penalty claims that are the subject of this petition. On August 7, 2023, the Northern District of Alabama issued a memorandum opinion and order dismissing Mr. Rieber's petition and declining to issue a certificate of appealability. (Pet. App. 23a-108a.)

The district court deferred to the Alabama Court of Criminal Appeal's (ACCA's) decision that trial counsel made a strategic decision to focus on a mistaken identity defense, as opposed to a voluntary intoxication defense, and the evidence presented at the Rule 32 hearing would not have entitled Mr. Rieber to a lesser-included offense manslaughter instruction based on voluntary intoxication. (Pet. App. 39a-44a.) The district court concluded, "[t]here is no dispute that trial counsel did not investigate the voluntary intoxication defense beyond reading [the State Psychologist's] report and briefly discussing Mr. Rieber's drug use with some of his family members" (Pet. App. 41a); yet, the district court determined the ACCA reasonably found that level of investigation to be reasonable. (Pet. App. 43a-44a.)

The district court also deferred to the ACCA's decision that at the penalty phase, counsel introduced as much mitigating evidence regarding Mr. Rieber's background as was available to him. (Pet. App. 48a.) The district court further concluded the evidence presented at the Rule 32 hearing corroborated the state doctor's report as to Mr. Rieber's history of drug use and his drug and alcohol use on

the day of the offense. (Pet. App. 50a.) Despite this evidence, the district court found the evidence did not corroborate Mr. Rieber's claim that he was intoxicated at the time of the crime. (*Id.*) The district court concluded that the mitigating evidence counsel failed to present was weak compared to the aggravating factors and, therefore, the ACCA reasonably determined that there was no prejudice to Mr. Rieber. (Pet. App. 52a-53a.)

On August 31, 2023, Mr. Rieber filed a motion to alter or amend the district court's judgment denying his petition and denying a certificate of appealability. (Doc. 21.) The district court denied his motion on October 31, 2023. (Pet. App. 19a-22a.) On November 22, 2023, Mr. Rieber filed a notice of appeal. (Doc. 27.) Mr. Rieber filed a motion for a certificate of appealability on January 16, 2024. (11th Cir. Doc. 15.)

On April 3, 2024, the Eleventh Circuit granted Mr. Rieber's motion for a certificate of appealability on two claims: (1) whether trial counsel rendered ineffective assistance at the guilt phase by not pursuing a theory that Mr. Rieber lacked the requisite intent for intentional homicide, and (2) whether trial counsel rendered ineffective assistance at the penalty phase by not presenting evidence of Mr. Rieber's intoxication at the time of the offense. (11th Cir. Doc. 18-1 at 2.)

The Eleventh Circuit affirmed the district court's denial of Mr. Rieber's habeas corpus petition on November 14, 2024. (Pet. App. 17a-18a.) On December 5, 2024, Mr. Rieber filed a petition for panel rehearing. (11th Cir. Doc. 38.) The petition for rehearing was denied on January 6, 2025. (Pet. App. 232a-233a.)

II. Statement of the Facts Relevant to the Issues Presented.

Mr. Rieber was arrested on October 10, 1990, in connection with a convenience store robbery and homicide that occurred the night of October 9, 1990. He was subsequently charged with murder committed in the course of a robbery, a capital offense. At the guilt phase of his trial, Mr. Rieber was represented by attorney Richard Kempaner.

Mr. Kempaner opted to pursue an alibi defense at trial, arguing that Mr. Rieber was at his job too late in the afternoon to have committed the crime. (Doc. 16-73 at 52-53.) But this defense was readily rebutted at trial by time records from Mr. Rieber's employer, which were available to the prosecution. (Doc. 16-77 at 45-46.)

But there was another defense available to Mr. Rieber that Mr. Kempaner should have investigated: lack of the requisite intent for intentional homicide. Before trial, Mr. Kempaner had successfully moved to have the state's psychologist, Dr. Kathy Rogers, examine Mr. Rieber. (Doc. 16-83 at 12; Doc. 16-85 at 43.) Mr. Rieber told Dr. Rogers that he completely blacked out from drug use—having consumed many different drugs and alcohol in the period just before the crime—and he had no recollection of the events of October 9, 1990. (Doc. 16-83 at 13; Doc. 16-86 at 130-132.) Specifically, Mr. Rieber reported consuming “six or seven beers,” “smok[ing] about six joints,” and “us[ing] three hits of ‘acid’” prior to the crime. (Doc. 16-86 at 135.)

Despite Dr. Rogers' awareness of Mr. Rieber's incentive to fabricate a blackout story, she nevertheless concluded that, in her medical judgment, Mr.

Rieber's reported lack of memory was more likely related to substance abuse than misrepresentation. (Doc. 16-83 at 13; Doc. 16-86 at 132-135.) Dr. Rogers' report provided Mr. Kempaner with an alternative to the alibi defense, allowing him to argue a lack of intent based on voluntary intoxication, which would mandate a manslaughter, not intentional homicide, conviction.

Mr. Kempaner read Dr. Rogers' report, including her conclusions, and inexplicably chose not to follow up with Mr. Rieber about the facts he reported to Dr. Rogers. (Doc. 16-83 at 13-14, 38-39.) In fact, Mr. Kempaner did nothing to investigate the voluntary intoxication defense and instead proceeded to trial on the doomed alibi defense. (*Id.*)

Had Mr. Kempaner spoken to Mr. Rieber about his intoxication on the night of the crime, Mr. Kempaner would have learned that Mr. Rieber attended a drug party immediately before the convenience store robbery, where Mr. Rieber was seen consuming drugs and alcohol by multiple witnesses.

At the Rule 32 evidentiary hearing over twenty years after the crime, numerous witnesses testified to Mr. Rieber's alcohol and drug use on the night of October 9, 1990:

- Mr. Rieber's friend, Jo Duffy, testified that Mr. Rieber regularly attended drug parties at her house, used marijuana daily, and used harder drugs like crystal meth, cocaine and acid, "as he could get it." (Doc. 16-83 at 64-65.) Ms. Duffy testified that Mr. Rieber attended a drug party at her house on the evening of October 9, 1990. (Doc. 16-83 at 67.)

- Ms. Duffy said that Mr. Rieber was there “around dark,” approximately “between 6:30, 7 ish.” (*Id.* at 67:16-21.) At that time, Ms. Duffy saw Mr. Rieber using drugs. (*Id.* at 67.) Ms. Duffy recalled that Mr. Rieber “maybe smok[ed] pot, [drank] a beer or something.” (*Id.*)
- Sonya Williamson also attended the drug party at Ms. Duffy’s house on October 9, 1990 and recalled Mr. Rieber snorting crystal meth, smoking pot, and drinking alcohol that evening at the party. (Doc. 16-83 at 73-75.)
- Derrell Dwayne Maroney was also with Mr. Rieber at Ms. Duffy’s house, where “everybody [] was high” on acid, which Mr. Maroney concluded that Mr. Rieber “obviously” did. (Doc. 16-83 at 96, 98, 100-102.)
- Dennis Howell, who had been living with Mr. Rieber at the time, testified that on October 9, 1990, “around 9,” he observed Mr. Rieber “sitting in a recliner and just constantly rocking back and forth...nonstop for 45 minutes [to] an hour.” (Doc. 16-83 at 87, 90, 95.) This was a behavior Mr. Howell had not seen Mr. Rieber do before. (*Id.* at 90.)

Further, Dr. Alex Stalcup, an unchallenged expert in the field of drug use and its effects, testified at the Rule 32 hearing that a person consuming the drugs Mr. Rieber consumed just before the convenience store crime very possibly could have a blackout or short circuit, and this would not be an unusual result from such drug consumption. (*Id.* at 148-151.) None of this evidence was ever presented at trial, or even considered by Mr. Kempaner, because Mr. Kempaner never did anything to investigate Mr. Rieber’s intoxication.

This same evidence, in addition to numerous other witnesses who testified to Mr. Rieber's troublesome family background and extensive period of increasingly severe drug use, (*see* 11th Cir. Doc. 26 at 17-19) was also never presented at sentencing due to the failure of Mr. Rieber's sentencing counsel, Dan Moran, who was appointed specifically to help "develop mitigating evidence" relevant to the penalty phase. (Doc. 16-85 at 46-48.)

During the penalty phase of the trial, Mr. Moran relied exclusively on the Rogers report regarding Mr. Rieber's drug use and offered nothing else. (Doc. 16-79 at 110-111.) Then, despite having clear notice that the state would attack the report at sentencing, (*see, e.g.*, Doc. 16-79 at 8-9), Mr. Moran did nothing to bolster Mr. Rieber's case against imposition of the death penalty between the penalty phase before the jury and the sentencing hearing before Judge Blankenship. (Doc. 16-33 at 6, 8, 10.) In fact, Mr. Moran's time sheets, including his worksheets for final submission, show that he meticulously noted his time, to the tenth of an hour, that his final submitted fee request was under the maximum amount allowed by the State at the time, and that he spent 0.0 hours between the date of the jury verdict and recommendation of life without parole and the date of the sentencing hearing before Judge Blankenship, despite the clear position of the State that the Rogers report was in need of corroboration. (*Id.*)

As a result, the trial court expressly rejected the Rogers report as it related to Alabama's statutory mitigating factors because of a lack of corroborating evidence of Mr. Rieber's intoxication. (Doc. 16-62 at 98.) As to Alabama Code § 13A-5-51(2)

(2015), that the capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance, the court concluded:

However, ***there is no evidence*** before the Court that the defendant was under the influence of drugs and alcohol at the time of the offense and, accordingly, the Court does not accept the view of the forensic examiner that this memory lapse, if it did in fact occur, occurred due to substance abuse.

Based on this report, the Court cannot conclude that the defendant was suffering from any mental disease or defect, or from the effect of any substance which affected his thought processes at the time of the commission of the offense.

(Doc. 16-62 at 98 (emphasis added).) As to Alabama Code § 13A-5-51(6) (2015), the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, the court concluded:

The ***only evidence*** offered to support such a finding is a conclusion that can be reached in the forensic report to the effect that the defendant was under the influence of drugs and alcohol at the time of the incident. This Court has determined that the evidence presented on this subject is not sufficient for this Court to find that this mitigating circumstance exists.

(Doc. 16-62 at 98 (emphasis added).) The trial court rejected both mitigating factors, overruled the jury's recommendation, and sentenced Mr. Rieber to death by electrocution. (Doc. 16-79 at 94.)

In the resentencing motion, Mr. Moran again cited the Rogers report to which Judge Blankenship asked Mr. Moran, point-blank, whether there was any evidence corroborating the report. Mr. Moran answered that there was nothing in the record to corroborate the report. (Doc. 16-79 at 109-111.) The statement was true as to the record that existed at the time, but as postconviction proceedings demonstrated,

there was a plethora of evidence corroborating the Rogers report that Mr. Moran had made no effort to find or develop.

Importantly, in overriding the jury recommendation of life imprisonment, Judge Blankenship made findings beyond those of the jury that led her to conclude two aggravating circumstances were established: (1) that the offense was committed while defendant was engaged in the commission of a robbery in the first degree or an attempt thereof; and (2) that the capital offense was especially heinous, atrocious and cruel compared to other capital offenses. (Doc. 16-79 at 91.) Specifically, Judge Blankenship found that Mr. Rieber stalked the victim, a finding which even the prosecutor in the case thought was questionable. (Doc. 16-79 at 11, 91.) In addition, Judge Blankenship received and relied on a pre-sentence investigation report (*id.* at 90) which the jury did not have, consistent with then-existent Alabama law. *See* Ala. Code § 13A-5-47(b) (1992) (Pet. App. 243a); *Ex parte Carroll*, 852 So. 2d 833, 836 (Ala. 2002) (“[T]he jury’s recommendation may be overridden based upon information known only to the trial court and not to the jury . . .”).

The only mitigating factor considered by Judge Blankenship was that Mr. Rieber had no significant history of prior criminal activity. (Doc. 16-79 at 92.) Due to the lack of corroborating evidence (evidence that surely existed but that Mr. Moran failed to develop and present), Judge Blankenship did not find the existence of mitigating circumstances related to Mr. Rieber’s mental or emotional state or his capacity to appreciate the criminality of his conduct or conform his conduct to the law. (*Id.* at 92-93.)

Despite the jury's recommendation, and based on the evidence she considered, Judge Blankenship concluded the aggravating circumstances outweighed the mitigating circumstances. (*Id.*) Her findings and conclusion were entirely inconsistent with the jury's recommendation. (Doc. 16-79 at 93-94.)

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT THIS PETITION TO REVIEW TRIAL COUNSEL'S INEFFECTIVE ASSISTANCE AT THE GUILT PHASE FOR INEXPLICABLY IGNORING A VOLUNTARY INTOXICATION DEFENSE AND LESSER-INCLUDED INSTRUCTION.

A. The Court Should Grant This Petition Because Counsel's Failure To Pursue The Viable Alternative Of A Voluntary Intoxication Defense Was Deficient Performance.

A criminal defendant is entitled to relief when his trial counsel's performance was deficient, and the deficient performance was prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Mr. Rieber has met both elements with respect to the performance of trial counsel Mr. Kempaner.

Counsel's performance is constitutionally deficient when it falls below "an objective standard of reasonableness" considering the "prevailing professional norms." *Strickland*, 466 U.S. at 687-88. Under *Wiggins v. Smith*, 539 U.S. 510, 511 (2003), a court shows deference to defense counsel's judgment as to which defenses to rely on at trial, but only if alternate strategies are fully pursued. *See Strickland*, 466 U.S. at 690-91 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.") In addition, "[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 571 U.S. 263, 274 (2014); *see also Lawhorn v. Allen*, 519 F.3d 1272, 1295-96 (11th Cir. 2008) (deficient performance found due to counsel's misunderstanding of Alabama law).

Mr. Kempaner's failure to fully investigate the voluntary intoxication defense—and resulting lesser included manslaughter charge—was objectively unreasonable. Mr. Kempaner had a readily available defense to rebut the scienter element of the intentional homicide charge, but he did nothing to pursue this line of defense other than obtaining the Rogers report, which he then ignored. Mr. Rieber told Dr. Rogers he had no recollection of the events of the evening because of heavy drug consumption in the period before the crime. (Doc. 16-83 at 13; Doc. 16-86 at 130-132.) Yet, Mr. Kempaner did nothing to follow up with Mr. Rieber about the facts reported to Dr. Rogers. (Doc. 16-83 at 13-14; Doc. 16-83 at 38-39.) Mr. Kempaner's decision to ignore that Mr. Rieber reportedly blacked out and had no recollection of the events of the evening due to intoxication was not reasonable, especially given that Mr. Kempaner knew an alibi defense would be easily rebutted.

Even 20 years after the crime, there was ample evidence presented at the Rule 32 hearing to corroborate the alternative defense that Mr. Rieber was intoxicated at the time of the crime. Numerous witnesses testified that they had seen Mr. Rieber smoking pot and drinking beer during a party the evening of the crime (Doc. 16-83 at 66-69); snorting crystal meth, smoking some pot, and drinking alcohol at the party (Doc. 16-83 at 73-75); and consuming LSD. (Doc. 16-83 at 96.) The testimony also showed that Mr. Rieber and his friends regularly got together and used crystal meth, LSD, cocaine marijuana and alcohol. (Doc. 16-83 at 64-66.) None of this evidence was ever investigated or presented because Mr. Kempaner never even asked Mr. Rieber about the facts relayed to Dr. Rogers.

In addition, Mr. Kempaner refused to undertake a basic review of Alabama law to confirm that a voluntary intoxication defense was not only available to Mr. Rieber, but much more likely to succeed than the doomed alibi defense. Mr. Kempaner admitted he did not pursue an instruction on a lesser included offense because he incorrectly believed that voluntary intoxication could not be the basis for a lesser included charge (Doc. 16-83 at 32-33), and he plainly did not research Alabama case law to clarify the matter. Contrary to Mr. Kempaner's belief, Alabama law at the time of the underlying trial was replete with cases requiring that a trial court present a manslaughter charge to the jury in a capital murder case where there is evidence (in many cases, weaker evidence than was available to Mr. Kempaner) that the defendant had consumed drugs or alcohol before the crime.

Under *Hinton v. Alabama*, Mr. Kempaner's ignorance and failure to conduct the most basic research is a "quintessential example of unreasonable performance." 571 U.S. at 274.²

B. The Court Should Grant This Petition Because The Eleventh Circuit Overlooked Evidence Of Intoxication In Concluding That Mr. Rieber Was Not Prejudiced.

Mr. Kempaner's deficient performance prejudiced Mr. Rieber. A defendant establishes prejudice by showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Here, the evidence Mr.

² The Eleventh Circuit's opinion is silent as to Mr. Kempaner's deficient performance, suggesting Mr. Rieber established Mr. Kempaner's performance was deficient. (Pet. App. 1a-18a.)

Kempaner failed to pursue supported a voluntary intoxication defense and a jury instruction on the lesser included manslaughter charge. But for Mr. Kempaner's deficient performance in failing to investigate and present the voluntary intoxication defense, there is a reasonable probability the jury would have found reasonable doubt as to Mr. Rieber's intent to commit murder, the mental state required to support a conviction.

In addition, but for Mr. Kempaner's ignorance of the law and failure to conduct basic research, the jury would have received an instruction on the lesser included offense of manslaughter. At the time of the trial in 1992, the maximum prison sentence for a manslaughter conviction was 20 years. Ala. Code § 13A-5-6(a)(2) (1994). (Pet. App. 238a.) It was not punishable by death. Mr. Kempaner's failure to request this appropriate instruction took a 20-year prison sentence (or less) off the table, leaving Mr. Rieber exposed to the death sentence which Judge Blankenship ultimately imposed. Even without the evidence Mr. Kempaner failed to pursue and present, the jury did not recommend the death penalty. Therefore, had Mr. Kempaner pursued the voluntary intoxication defense and lesser included instruction it is even more likely the jury would have found reasonable doubt as to Mr. Rieber's intent and adopted the lesser included manslaughter charge.

Despite this, the Eleventh Circuit affirmed denial of habeas relief on Mr. Rieber's guilt phase ineffective assistance of counsel claim because it concluded fair minded jurists could agree with the guilt-phase prejudice determination of the Alabama courts. *Rieber v. Comm'r, Ala. Dep't of Corr.*, No. 23-13958 (11th Cir. Nov.

14, 2024). (Pet. App. 1a-18a.) Specifically, the Eleventh Circuit concluded that “there was no testimony at the Rule 32 hearing about exactly when Mr. Rieber used drugs at the party or exactly what quantities of drugs he consumed.” (Pet. App. 11a.) The Eleventh Circuit determined that under the circumstances, Alabama law would not require a lesser included instruction on manslaughter. (Pet. App. 12a.) This determination overlooks evidence in the record and misapprehends the state court’s ruling.

First, the testimony of Ms. Duffy and Ms. Williamson refutes the Eleventh Circuit’s conclusion that there was no testimony at the Rule 32 hearing regarding time or quantity of Mr. Rieber’s drug use. At the Rule 32 hearing, Ms. Duffy testified that she saw Mr. Rieber consume drugs “around dark,” approximately “between 6:30, 7ish.” Ms. Williamson also testified that she witnessed Mr. Rieber snorting crystal meth, smoking pot, and drinking alcohol “that night.” Their testimony goes directly to timing and establishes that Mr. Rieber used drugs and consumed alcohol at night, in close proximity to the offense, and likely within an hour of the 8:00 p.m. convenience store robbery. As to quantity, Mr. Rieber reported to Dr. Rogers that he had consumed approximately “six or seven beers,” smoked “about six joints,” and used “three hits of ‘acid’” prior to the crime. (Doc. 16-86 at 135.) Ms. Duffy and Ms. Williamson’s observations of Mr. Rieber consuming drugs and alcohol that night corroborated Mr. Rieber’s own statements to Dr. Rogers.

Second, the Eleventh Circuit mistakenly concluded that, under the circumstances of this case, Alabama law does not require a lesser included

instruction. Alabama law is clear that “[w]hen there is evidence of intoxication and the crime charged requires a specific intent, an instruction on the effects of intoxication and how it relates to any lesser included offense should be given.” *Owen v. State*, 611 So. 2d 1126, 1128 (Ala. Crim. App. 1992). An instruction is warranted even if evidence of the degree of the defendant’s intoxication is conflicting, because whether the defendant’s level of intoxication rises to the degree necessary to reduce a charge from murder to manslaughter is a jury question. *Id.* See also *Fletcher v. State*, 621 So. 2d 1010, 1021 (Ala. Crim. App. 1993) (trial court’s determination that the appellant’s intoxication did not rise to the requisite level “invaded the exclusive province of the jury”) (citation omitted).

The only question for the trial court is whether there is “a rational basis to support an instruction that intoxication could negate the specific intent and lower the charge to manslaughter.” *Owen*, 611 So. 2d at 1128; see *Silvey v. State*, 485 So. 2d 790, 793 (Ala. Crim. App. 1986) (“No matter how strongly the facts may suggest that appellant was not so intoxicated at the time he committed the offense that he was incapable of forming the necessary specific intent, the jury should have been instructed on manslaughter as a lesser included offense since there was a ‘reasonable theory from the evidence which would support the position.’”) (citation omitted).

Indeed, Alabama law at the time of the underlying trial was replete with cases mandating a lesser-included instruction where there was some evidence the defendant had consumed drugs or alcohol before the crime. See, e.g., *Fletcher*, 621

So. 2d at 1021 (evidence the defendant smoked crack cocaine and was “high” on the evening of the crime); *Owen*, 611 So. 2d at 1127 (defendant drank four to eight beers); *Silvey*, 485 So. 2d at 790-91 (defendant “had been drinking all day” before the crime but did not appear intoxicated or drunk to law enforcement after arrest); *Bridges v. State*, 504 So. 2d 1223 (Ala. Crim. App. 1987) (evidence the defendant was drinking wine prior to the crime).

Here, the evidence that Mr. Kempaner should have pursued would have similarly required a lesser-included instruction. Ms. Duffy and Ms. Williamson observed Mr. Rieber ingest a variety of drugs and alcohol within one to two hours of the crime; Mr. Rieber himself reported drinking six to seven beers, smoking six joints, and taking three hits of acid in the period leading up to the crime; and Mr. Howell observed Mr. Rieber acting differently constantly rocking back and forth immediately following the convenience store robbery. Mr. Rieber had a right to have the jury assess the credibility and sufficiency of the evidence. Because there was evidence Mr. Rieber consumed a variety of drugs and alcohol immediately prior to the crime, the court would have been required to instruct the jury on intoxication.

Finally, the Eleventh Circuit improperly deferred to the Alabama Court of Criminal Appeals’ determination as a binding legal interpretation of state law. The Alabama Court of Criminal Appeals did not hold, nor could it have in light of the precedent cited above, that Alabama law did not support an intoxication defense. Rather, the Alabama court mischaracterized and misinterpreted the evidence of

intoxication at the time of the offense because it similarly ignored key evidence of the time and quantity of Mr. Rieber's drug and alcohol consumption.

Had Mr. Kempaner developed and presented the post-conviction evidence of Mr. Rieber's intoxication on the night of the convenience store robbery, the trial court would have been required to instruct the jury on the lesser-included offense of manslaughter.

II. THE COURT SHOULD GRANT THIS PETITION TO REVIEW TRIAL COUNSEL'S INEFFECTIVE ASSISTANCE AT THE PENALTY PHASE FOR FAILING TO DEVELOP AND PRESENT MITIGATING EVIDENCE OF MR. RIEBER'S INTOXICATION ON THE NIGHT OF THE OFFENSE.

A. The Court Should Grant This Petition Because The Failure To Investigate And Present Mitigating Evidence At Sentencing Is Deficient Performance.

Sentencing counsel Mr. Moran's performance was deficient for failing to pursue mitigating evidence related to Mr. Rieber's drug use.³ Under *Wiggins v. Smith*, a defense lawyer, in preparing the penalty phase of the case, is required to delve extensively into the client's background in an effort to obtain mitigating information. 539 U.S. at 524-25 (2003). This includes the requirement to interview family, friends, and other persons familiar with the defendant who might possess helpful information on sentencing. *Id.*

Mr. Moran's failure to develop and present mitigating evidence at the penalty phase constituted a clear violation of the United States Supreme Court's holding in

³ The Eleventh Circuit Court of Appeals also did not address deficient performance of Mr. Moran, suggesting Mr. Rieber established sentencing counsel was deficient for failing to pursue mitigating evidence related to drug use. (Pet. App. 1a-18a.)

Wiggins. Mr. Moran was appointed to assist Mr. Kempaner in developing and presenting mitigating evidence at the penalty phase. (Doc. 16-85 at 46-47.) He was obligated to investigate, develop, and present evidence in support of the Rogers report – all of which was available to him. He completely failed to do so.

Even after the jury's recommendation and despite being on notice that the State would attack the argument based on a lack of corroborating evidence, Mr. Moran's time records prove that he spent 0.0 hours on anything between the jury's recommendation on sentencing and the hearing before the court, almost two months later, despite having just heard the prosecution attack one of his mitigating factors. (Doc. 16-33 at 6, 8, 10.) He completely failed to investigate this potential line of mitigating evidence, even though he chose to present that argument to the jury and the judge as a mitigating factor.

B. The Court Should Grant This Petition Because The Eleventh Circuit Overlooked The Sentencing Record In Concluding That Counsel's Failure To Develop Mitigating Evidence Was Not Prejudicial.

The Eleventh Circuit wholly adopted the district court's conclusion that Mr. Rieber did not show the Alabama courts' determination as to prejudice was unreasonable. Its conclusion is contradicted by the sentencing record, which establishes the sentencing court would have reached a different outcome had the evidence of Mr. Rieber's drug use been developed and presented at sentencing.

At sentencing, the trial court expressly rejected the Rogers report as it related to the statutory mitigating factors because of a lack of corroborating evidence of Mr. Rieber's intoxication. The trial court rejected Alabama Code § 13A-

5-51(2) (2015), that the capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance, because it concluded there was “no evidence” corroborating Dr. Roger’s opinion that Mr. Rieber’s memory lapse was more likely due to substance abuse. (Doc. 16-62 at 98.) As to Alabama Code § 13A-5-51(6) (2015) (Pet. App. 245a), the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, the court again concluded that the only evidence relevant to that factor was the Rogers report and that evidence was “not sufficient” to support the mitigating circumstance. (Doc. 16-62 at 98.)

But as the Rule 32 hearing demonstrated, there was substantial evidence available that went directly to the mitigating factors rejected by the court for a lack of evidence. It was just never pursued.

The sentencing court’s record, as well as the record on Mr. Rieber’s resentencing motion, make clear that Mr. Moran’s failure to investigate and present mitigating evidence of Mr. Rieber’s drug use that corroborated the Rogers report made a difference in the outcome of Mr. Rieber’s sentence. The court explicitly noted the absence of such evidence in rejecting the statutory mitigating factors. Without the statutory mitigating factors, the only mitigating factor the judge found was Mr. Rieber’s lack of prior criminal activity. The judge concluded the aggravating circumstances outweighed this sole mitigating factor in overriding the jury’s recommendation of life without parole.

But for Mr. Moran's failure to develop and present mitigating evidence of Mr. Rieber's drug use, there is a reasonable probability the mitigating evidence would have outweighed the aggravating factors and, as a result, the judge would not have reversed the jury's determination and the death penalty would not have been imposed.

III. THE COURT SHOULD GRANT THIS PETITION TO REVIEW THE CONSTITUTIONALITY OF THE JUDICIAL OVERRIDE OF THE JURY'S SENTENCING RECOMMENDATION OF LIFE IMPRISONMENT WITHOUT PAROLE.

A. The Court Should Grant This Petition To Confirm That The Former Alabama Capital Sentencing Scheme, Pursuant To Which Mr. Rieber Was Sentenced To Death, Was Unconstitutional.

Alabama's death-penalty sentencing statute, Ala. Code § 13A-5-47 (1992), under which Mr. Rieber was sentenced, is unconstitutional under *Hurst v. Florida*, 577 U.S. 92 (2016) and *Ring v. Arizona*, 536 U.S. 584 (2002).

In *Ring*, this Court held that Arizona's capital sentencing scheme was unconstitutional because it permitted a judge to find the facts necessary to sentence a defendant to death. 536 U.S. at 589. Had the judge in *Ring* not engaged in any factfinding, Ring would have received a life sentence. *Hurst*, 577 U.S. at 97-98.

In *Hurst*, this Court held that Florida's capital sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance necessary to impose the death penalty, violated the Sixth Amendment right to a trial by jury because the court, not the jury, made the factual findings that support the sentence. 577 U.S. at 98-100. Like *Ring*, the judge in *Hurst*'s case increased the maximum punishment based on her own factfinding. *Id.* at 99. Without any judge-

made findings, the maximum punishment Hurst could have received was life in prison without parole. *Id.* This Court made clear that the Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. *Id.* at 94.

As in *Hurst* and *Ring*, the judge in Mr. Rieber's case engaged in independent factfinding to override the jury's recommended sentence of life imprisonment without the possibility of parole. Here, the jury recommended, by a vote of seven to five, that Mr. Rieber be sentenced to life imprisonment without the possibility of parole. (Doc. 16-85 at 97-100.) In reaching this verdict, the jury found that the aggravating circumstances, if any, did not outweigh the mitigating circumstances. (Doc. 16-79 at 40.) *See also* Ala. Code § 13A-5-46 (1982). (Pet. App. 241a-242a.)

Two months later, following the penalty phase hearing to the court, the Madison County Circuit Court Judge, Jeri Blankenship, overrode the jury's life recommendation and sentenced Mr. Rieber to death by electrocution. (Doc. 16-79 at 94.) Judge Blankenship found two aggravating circumstances established by the evidence: (1) that the offense was committed while the defendant was engaged in the commission of a robbery in the first degree or an attempt thereof; and (2) that the capital offense was especially heinous, atrocious and cruel compared to other capital offenses. (Doc. 16-79 at 91.) In reaching this conclusion, Judge Blankenship made factual findings beyond those of the jury. Specifically, Judge Blankenship found that Mr. Rieber stalked the victim. (Doc. 16-79 at 91.) Even the prosecutor in the case thought "[t]he word stalked may be a little bit too strong." (Doc. 16-79 at

11.) In addition, Judge Blankenship received and relied on a pre-sentence report, which the jury did not have. Considering this evidence, Judge Blankenship determined the aggravating factors outweighed the mitigating factors—a finding entirely inconsistent with the jury’s recommendation. (Doc. 16-79 at 93-94.)

As with *Ring*, and *Hurst*, had Judge Blankenship not been permitted to engage in this additional factfinding and reweighing of the aggravating and mitigating circumstances, Mr. Rieber would have received a life sentence pursuant to the jury’s recommendation. The process of judicial override permitted under Alabama’s prior sentencing scheme directly contradicts this Court’s mandate in *Hurst*. The jury, not the judge, must make all factual determinations that expose a defendant to a death sentence.

Following *Hurst*, Alabama’s appellate courts have held that Alabama’s former capital sentencing scheme does not violate the Sixth Amendment because under the prior law the jury is required to find *at least one* aggravating circumstance that would make the defendant eligible for a death sentence. *See Ex parte Bohannon*, 222 So. 3d 525, 532-33 (Ala. 2016) (Because the jury, not the judge, unanimously found the existence of an aggravating factor—the intentional causing of the death of two or more persons by one act or pursuant to one scheme or course of conduct—making Bohannon death-eligible, Bohannon’s Sixth Amendment rights were not violated.); *see Ex parte State*, 223 So. 3d 954, 963-64 (Ala. Crim. App. 2016) (holding Alabama’s capital sentencing scheme constitutional under *Hurst*).

Alabama's appellate courts do not distinguish between those aggravating circumstances automatically established by a guilty verdict and those that require an analysis of additional facts. For example, the aggravating circumstance in Ala. Code § 13A-5-49(4), that "[t]he capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit ... robbery" is automatically established by a guilty verdict of the capital offense of murder committed during the course of a robbery. Alabama's court of criminal appeals deemed this sufficient to satisfy *Ring* and *Hurst*, even though the jury's finding during the guilt phase is being used during the penalty phase. *See Ex parte Bohannon*, 222 So. 3d at 533.

The *Bohannon* court's reasoning is flawed and cannot be reconciled with *Ring*, which "specifically left open and did not decide the question of whether the aggravator used to impose a death sentence could be implicit in the jury's verdict." *Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172, 1198 (11th Cir. 2013). *See Ring*, 536 U.S. at 609 n. 7 ("We do not reach the State's assertion that any error was harmless because a pecuniary gain finding was implicit in the jury's guilty verdict.").

Here, the Judge's independent factfinding led her to find an additional aggravating circumstance which, in turn, led her to find the aggravating circumstances outweighed the mitigating circumstances (the opposite of the jury's determination). Like *Hurst* and *Ring*, Mr. Rieber's death sentence rests on facts found by the judge, not the jury, in violation of his Sixth Amendment rights.

Recognizing that Alabama’s capital sentencing scheme was virtually identical to the constitutionally defective, former Florida scheme, the Alabama legislature passed, and Governor Ivey signed into law on April 11, 2017, Senate Bill 16 (Act No. 2017-131), ending judicial override and giving the people of Alabama the final say on sentencing in capital cases by vesting juries with the sole authority on whether to impose the death penalty, or life imprisonment, in capital cases. (Pet. App. 247a-257a.) The new law amends Ala. Code §§ 13A-5-45, 13A-5-46, and 13A-5-47, the statutes under which Mr. Rieber was sentenced, to require at least ten of 12 jurors to vote in favor of the death penalty before such a sentence may be imposed. If less than ten jurors vote for death, the court must sentence the defendant to life without parole. In other words, the jury, not the judge, makes the final decision on life or death.

The Court should grant this petition to confirm that Alabama’s former capital sentencing scheme—like Arizona’s and Florida’s—was unconstitutional.

B. The Court Should Grant This Petition To Clarify Whether, And To What Extent, The Holding In *Hurst* Should Apply Retroactively To Collateral Review Of Judicial Override Cases In Alabama.

In the wake of this Court’s decision in *Hurst*, the Florida Supreme Court held that *Hurst* applies retroactively in some, but not all, collateral judicial override cases. In particular, the Florida Supreme Court held that *Hurst* applies to cases that became final after *Ring v. Arizona*, 536 U.S. 584 (2002), but not to cases decided before *Ring*:

Defendants who were sentenced to death under Florida’s former, unconstitutional capital sentencing scheme after *Ring* should not suffer due

to the United States Supreme Court’s fourteen-year delay in applying *Ring* to Florida. In other words, defendants who were sentenced to death based on a statute that was actually rendered unconstitutional by *Ring* should not be penalized for the United States Supreme Court’s delay in explicitly making this determination. Considerations of fairness and uniformity make it very ‘difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.’

Mosley v. State, 209 So. 3d 1248, 1283 (Fla. 2016) (citation omitted); *see Asay v.*

State, 210 So. 3d 1, 22 (Fla. 2016) (holding that *Hurst* did not apply retroactively where the death sentence had become final before *Ring*).

While this Court noted in *McKinney v. Arizona* that “*Ring* and *Hurst* do not apply retroactively on collateral review,” the Court in that case did not undertake an analysis of *Teague v. Lane*, 489 U.S. 288 (1989) as applied to *Hurst*. *See McKinney v. Arizona*, 589 U.S. 139, 145 (2020).

Hurst is the first time this Court expressly and unequivocally struck down judicial override statutes as violating the Sixth Amendment. A rule striking down judicial override and holding that the death penalty must be imposed by a jury, is a rule elaborating on fundamental constitutional rights and, hence, is a substantive rule. *See Teague v. Lane*, 489 U.S. 288, 311 (1989); *see also Montgomery v. Louisiana*, 577 U.S. 190, 198-99 (2016); *Welch v. United States*, 578 U.S. 120, 128-29 (2016). And this Court has held that such rules should apply retroactively to cases on collateral review. *Teague*, 489 U.S. 288.

Hurst is a “watershed” rule that courts should apply retroactively because it “implicate[s] the fundamental fairness of the trial” and “significantly improve[s] ... pre-existing fact-finding procedures....” *Teague*, 489 U.S. at 312 (citation omitted);

see *Montgomery*, 577 U.S. at 198-99; *Welch*, 578 U.S. at 128-29. A constitutional rule that is the difference between life and death is the definition of a “watershed” rule.

The Court should grant Mr. Rieber’s petition to decide whether, and to what extent, the holding in *Hurst* should apply retroactively to collateral attacks on judicial override cases in Alabama decided before *Hurst*.

C. The Court Should Grant This Petition To Decide Whether Sentencing Mr. Rieber To Death Was Arbitrary And Capricious, In Violation Of Mr. Rieber’s Eighth Amendment Rights.

The Eighth Amendment requires that there be a “meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.” *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring). Accordingly, this Court has barred “sentencing procedures that create[] a substantial risk that [a death sentence] would be inflicted in an arbitrary and capricious manner.” *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

In *Hurst*, where the jury recommended the death penalty by a seven to five vote, which was insufficient under Florida law to constitute a recommendation of death, Mr. Hurst is being re-sentenced. *Hurst*, 577 U.S. at 96-97. Mr. Rieber, on the other hand, was sentenced to death when the jury in his trial, by the same seven to five vote, affirmatively recommended life imprisonment rather than death. And despite that affirmative jury vote for life imprisonment, Mr. Rieber, unlike Mr. Hurst, continues to face a death sentence. That is arbitrary and capricious.

The “clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures” as well as state practice. *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (citation omitted). Today, no state

permits a judge to impose a death penalty after a jury vote for life imprisonment.

Alabama, in fact, was the last state to abolish judicial override. This constitutes not merely “national consensus,” see *Kennedy v. Louisiana*, 554 U.S. 407, 426 (2008), but unanimous agreement that a death sentence imposed by a judge contrary to a jury’s life verdict does not comport with evolving standards of decency and the Eighth Amendment’s prohibition on cruel and unusual punishment:

[O]ne of the most important functions any jury can perform in [deciding whether to impose a death sentence] is to maintain a link between contemporary community values and the penal system – a link without which the determination of punishment would hardly reflect ‘the evolving standards of decency that mark the progress of a maturing society.’

Witherspoon v. Illinois, 391 U.S. 510, 519 n. 15 (1968) (citation omitted). By abolishing judicial override, Alabama and other states have sought to strengthen that link and prevent a judge from interfering with the fundamental expression of those standards by the jury. In this case, the seven to five vote for life imprisonment was an expression of community values and, under the Eighth Amendment and this Court’s clear precedent, it should be respected.

The Court should grant this Petition to address these violations of Mr. Rieber’s Eighth Amendment rights.

CONCLUSION

The Court should grant Mr. Rieber's Petition.

Respectfully submitted this 2nd day of May 2025.

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[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 23-13958

Non-Argument Calendar

JEFFERY DAY RIEBER,

Petitioner-Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF
CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 5:18-cv-00337-ACA

Before JORDAN, JILL PRYOR, and GRANT, Circuit Judges.

PER CURIAM:

Jeffrey Rieber appeals the district court's denial of his 28 U.S.C. § 2254 habeas petition challenging his conviction and death sentence. First, he asserts that his trial counsel rendered ineffective assistance at the guilt phase by not pursuing a theory that he lacked the requisite *mens rea* for intentional homicide. Second, he contends that his trial counsel rendered ineffective assistance at the penalty phase by not presenting evidence of his intoxication at the time of the offense.

Following a review of the record, and with the benefit of oral argument, we affirm the district court's denial of habeas corpus relief. Mr. Rieber has not shown that the Alabama courts unreasonably concluded that he failed to show prejudice from his counsel's allegedly deficient performance.

I

The facts underlying Mr. Rieber's conviction are set out in *Rieber v. Alabama* (*Rieber I*), 663 So. 2d 985, 987–88 (Ala. Crim. App. 1994), and *Rieber v. Hamm* (*Rieber VI*), No. 5:18-CV-00337-ACA, 2023 WL 5020257, at *1–*4 (N.D. Ala. Aug. 7, 2023). We summarize them below in the light most favorable to the prosecution.

A

On the evening of October 9, 1990, just before 8:00 pm, Mr. Rieber entered a convenience store in Huntsville, Alabama. He

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shot and killed the cashier, Glenda Phillips Craig, in the course of a robbery.

Security footage showed Mr. Rieber approach the counter and shoot Ms. Craig. Ms. Craig fell behind the counter where she lay while Mr. Rieber emptied the cash register. Before he left, Mr. Rieber leaned over the counter and shot Ms. Craig a second time, this time in the head. A few minutes later, another customer entered the store and found Ms. Craig alive. Ms. Craig, however, died later at the hospital.

Against his counsel's advice, Mr. Rieber rejected a plea offer that would have taken the death penalty off the table and proceeded to trial. At trial, counsel presented a mistaken identity defense, in part because such a theory aligned with what Mr. Rieber told police upon arrest: that he had not been involved in Ms. Craig's murder.

The state presented evidence that Mr. Rieber had purchased a gun the week before and had been seen "patrolling the store" a few days prior. The other evidence relevant to this appeal was a psychiatric report by Dr. Kathy Rogers regarding Mr. Rieber's mental state at the time of the offense. Dr. Rogers found no evidence of any major psychiatric disorder but noted a significant self-reported history of drug and alcohol abuse. Mr. Rieber had said that he consumed drugs and alcohol prior to the murder, and Dr. Rogers concluded that "a reported lack of memory for that period would have been related to substance abuse or deliberate

misrepresentation of [Mr. Rieber’s] memory, although the former is more likely in my opinion.” D.E. 16–86 at 130–31.

The jury found Mr. Rieber guilty of murder during a first-degree robbery, a capital offense under Alabama law. By a vote of seven to five, the jury recommended that Mr. Rieber be sentenced to life imprisonment without parole, but the jury’s recommendation at that time was not binding upon the trial court. *See* Ala. Code § 13A-5-47(e) (1981). At sentencing, the trial court found two aggravating circumstances: (1) that the murder was committed during a first-degree robbery, and (2) that the offense was “especially heinous, atrocious, or cruel compared to other capital offenses.” *Rieber VI*, 2023 WL 5020257, at *3. *See also* D.E. 16–62 at 93–95. The trial court also found two mitigating circumstances: (1) that Mr. Rieber had no significant criminal history, and (2) that he had a good reputation and good character before the offense. *See* D.E. 16–62 at 96–99. After weighing the aggravating and mitigating circumstances, the trial court overrode the jury’s recommendation and imposed a sentence of death. *See* D.E. 16–62 at 100.

Mr. Rieber appealed his conviction and sentence, but the Alabama Court of Criminal Appeals affirmed. *See Rieber I*, 663 So. 2d at 998. The Alabama Supreme Court granted certiorari and also affirmed. *See Ex parte Rieber (Rieber II)*, 663 So. 2d 999, 1015 (Ala. 1995). The United States Supreme Court denied a petition for writ of certiorari. *See Rieber v. Alabama (Rieber III)*, 516 U.S. 995 (1995).

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B

Mr. Rieber then sought post-conviction relief. At the Rule 32 post-conviction evidentiary hearing, Mr. Rieber's counsel called fourteen witnesses, ten of whom testified as to Mr. Rieber's substance abuse history. *See Rieber VI*, 2023 WL 5020257, at *4. Two witnesses testified to seeing Mr. Rieber use drugs and alcohol at a party on the day of the murder but neither one said that he was high or intoxicated. *See id.*; Rule 32 Order, *Rieber v. State (Rieber IV)*, No. CC-90-2177.60, at 12–13 (Ala. Cir. Ct. Nov. 15, 2015).

Richard Kempaner, Mr. Rieber's trial counsel, testified at the Rule 32 hearing. He explained, in part, that he considered a voluntary intoxication defense but chose to proceed with the mistaken identity defense after discussing it with Mr. Rieber (who did not suggest any other defense to him). *See Rieber IV* at 9–11. Mr. Rieber did not testify at the hearing.

A psychiatrist, Dr. Alex Stalcup, also testified at the Rule 32 hearing on Mr. Rieber's behalf. As relevant here, he explained the effects that drug use might have had on Mr. Rieber the night of the murder. He believed that Mr. Rieber did not know what he was doing at the time of the murder. *See id.* at 15.

The Rule 32 court denied Mr. Rieber post-conviction relief. The Rule 32 court concluded in part that Mr. Rieber had not proven his ineffective assistance of counsel claims. *See Rieber IV* at 30–68. The Alabama Court of Criminal Appeals affirmed in a 47-page unpublished decision. *See Rieber v. State (Rieber V)*, No. CR-15-0355, 265 So. 3d 318 (Ala. Crim. App. 2017) (table).

The district court denied Mr. Rieber’s habeas corpus petition. *See Rieber VI*, 2023 WL 5020257, at *30. We granted a certificate of appealability on two claims:

1. Whether trial counsel rendered ineffective assistance at the guilt phase by not pursuing a theory that Mr. Rieber lacked the requisite intent for intentional homicide.
2. Whether trial counsel rendered ineffective assistance at the penalty phase by not presenting evidence of Mr. Rieber’s intoxication at the time of the offense.

We heard oral argument in August of 2024.

II

A district court’s denial of a habeas corpus petition under 28 U.S.C. § 2254 is subject to *de novo* review. *See Ward v. Hall*, 592 F.3d 1144, 1155 (11th Cir. 2010). Because Mr. Rieber filed his § 2254 petition after April 24, 1996, the Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”) governs. AEDPA “establishes a highly deferential standard for reviewing state court judgments.” *Parker v. Sec’y, Dep’t of Corr.*, 331 F.3d 764, 768 (11th Cir. 2003).

We may grant habeas relief under AEDPA if the state court’s decision (1) “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) “was based on an unreasonable determination of the facts in light of the evidence

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presented in the State court proceeding.” 28 U.S.C. § 2254(d). “Clearly established Federal law” consists of “holdings, as opposed to the dicta, of [the Supreme] Court’s decisions as of the time of the relevant state-court decision.” *Williams v. Taylor*, 529 U.S. 362, 412 (2000). A state court decision is “contrary to” federal law when it reaches “a conclusion opposite to that reached by [the Supreme] Court on a question of law or . . . the state court decide[d] a case differently than [the] Court . . . on a set of materially indistinguishable facts.” *Id.* at 412–13. An unreasonable application occurs when the state court correctly identified the “governing legal principle from [the Supreme] Court’s decisions but unreasonably applied[d] that principle to the facts of the prisoner’s case.” *Id.* at 413.

In sum, § 2254(d)(1) sets “a highly deferential standard that is intentionally difficult to meet.” *Meders v. Warden, Ga. Diagnostic Prison*, 911 F.3d 1335, 1348 (11th Cir. 2019). Showing that a state court was wrong is not enough; the petitioner must show that the state court’s ruling “was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement.” *Virginia v. LeBlanc*, 582 U.S. 91, 94 (2017).

We also presume that a state court’s factual findings are correct unless they are rebutted by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1034–35 (11th Cir. 2022) (en banc). Our review is limited to what the parties presented at the trial or at the state post-conviction proceedings. *See Shinn v. Ramirez*, 596 U.S. 366, 378 (2022).

III

To prevail on an ineffective assistance of counsel claim, Mr. Rieber must show that his counsel’s performance was deficient and that the deficient performance prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

An attorney’s performance is constitutionally deficient if it “fell below an objective standard of reasonableness and was outside the wide range of professionally competent assistance.” *Johnson v. Sec’y, Dep’t of Corr.*, 643 F.3d 907, 928 (11th Cir. 2011) (internal citations omitted). “The standard for counsel’s performance is ‘reasonableness under prevailing professional norms.’” *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000) (en banc) (citation omitted).

The prejudice prong requires a showing that that there was “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Reaves v. Sec’y, Fla. Dep’t of Corr.*, 872 F.3d 1137, 1148 (11th Cir. 2017) (internal citations omitted). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* “This does not require a showing that counsel’s actions ‘more likely than not altered the outcome,’ but the difference between *Strickland*’s prejudice standard and a more-probable-than-not standard is slight and matters ‘only in the rarest case.’ The likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 111–12 (2011) (citations omitted).

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A

Mr. Rieber argues that his counsel rendered ineffective assistance at the guilt phase by not pursuing a theory that he lacked the requisite intent for capital murder. He maintains that his counsel's failure to fully pursue the viable alternative of a voluntary intoxication defense was deficient performance which prejudiced him because evidence of his intoxication would have created a reasonable doubt as to the element of intent. And that, in turn, would have resulted in a conviction on the lesser included offense of manslaughter—a crime not punishable by death.

Specifically, Mr. Rieber argues that there was enough evidence of his intoxication (as presented at the Rule 32 hearing) that would have allowed the jury to find that he did not have the intent necessary for capital murder. He maintains that his counsel should have presented an intoxication/impairment defense instead of an alibi defense (which was not viable because he had clocked out of work before the murder). He contends that his counsel never asked him if he was intoxicated even though he had Dr. Rogers' report.

The state responds that the district court correctly concluded that the Alabama courts were not unreasonable in denying Mr. Rieber's claim of guilt-phase ineffective assistance for failing to pursue a manslaughter defense. The state notes that Mr. Rieber told police he was not at the convenience store and suggested he was not intoxicated to the point of being unaware of what he was doing. The state also points out that Mr. Rieber's counsel testified

that self-induced intoxication was not a “defense,” but could be used as a mitigating circumstance, and said that intoxication could negate intent.

The district court concluded, in part, that Mr. Rieber could not show prejudice from his counsel’s failure to pursue an intoxication/impairment defense through the testimony of witnesses who saw him using drugs and alcohol at a party the day of the murder. *See Rieber VI*, 2023 WL 5020257, at *8. Applying AEDPA deference to the Alabama courts’ prejudice ruling, we agree with the district court.

First, Dr. Rogers’ report—which noted no major psychiatric disorder but opined that reported memory loss could be due to substance abuse—was based on Mr. Rieber’s own statements. As noted, Mr. Rieber did not testify at the Rule 32 hearing.

Second, although there was plenty of evidence that Mr. Rieber generally used drugs and had a narcotics addition, only two witnesses at the Rule 32 hearing—Jo Duffy and Sonya Williams—testified that Mr. Rieber used drugs (meth and marijuana) and drank alcohol at a party the day of the murder. But neither of them provided a time frame for Mr. Rieber’s drug and alcohol use or the quantity of drugs consumed. Nor did they say that Mr. Rieber looked high or intoxicated. *See Rieber IV* at 12–13.

Third, Shauna Jenkins—Mr. Rieber’s sister—testified at the Rule 32 hearing that she could tell when her brother was high. She also explained that, when she saw him just after 9:00 pm the day of the murder—recall that the murder took place just before 8:00

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pm—he looked normal to her and did not appear to be high on drugs or alcohol. *See id.* at 6–7.

Fourth, the state presented evidence at trial that Mr. Rieber had done certain things which cast doubt on a claim of voluntary intoxication/impairment. He had purchased a gun a week before the murder. And he had had been “casing” the convenience store several days before the murder and on the day of the murder. *See Rieber VI*, 2023 WL 5020257, at *1.

We acknowledge Dr. Stalcup’s opinion at the Rule 32 hearing that Mr. Rieber did not know what he was doing on the night of the murder. But we are not conducting *de novo* review, and the Alabama Court of Criminal Appeals ruled that the evidence presented at the Rule 32 hearing—even if it had been presented at trial—would not have entitled Mr. Rieber to a jury instruction on the lesser-included offense of manslaughter. *See Rieber V* at 17 (“Furthermore, the evidence Rieber offered at the Rule 32 hearing in support of a voluntary-intoxication theory did not establish that he would have been entitled to a lesser-included-offense manslaughter instruction.”). As a general matter, federal courts conducting habeas review cannot second-guess a state court’s interpretation of state law. *See Estelle v. McGuire*, 502 U.S. 62, 67–68 (1997); *Reaves v. Sec’y, Fla. Dep’t of Corr.*, 717 F.3d 886, 903 (11th Cir. 2013); *Pietri v. Fla. Dep’t of Corr.*, 641 F.3d 1276, 1284 (11th Cir. 2011).

In any event, there was no testimony at the Rule 32 hearing about exactly when Mr. Rieber used drugs at the party or exactly what quantities of drugs he consumed. And there was also no

evidence that Mr. Rieber appeared high or intoxicated at around the time of the murder; to the contrary, the sister of Mr. Rieber testified that when she saw him after 9:00 pm the night of the murder, he seemed normal. Under the circumstances, Alabama law does not require the giving of an instruction on manslaughter. *See, e.g., Floyd v. State*, 289 So.3d 337, 417–18 (Ala. Crim. App. 2017) (“Similarly, here, we find no error on the part of the trial court in refusing to instruct the jury on voluntary intoxication and reckless manslaughter. There was evidence indicating that Floyd drank alcohol and shared with Roy James approximately seven grams of cocaine; however, that evidence indicated that Floyd’s consumption of alcohol and cocaine began around 11:00 a.m. on January 1, 2011, over 12 hours before the murder, and ended almost 5 hours before the murder, around 8:00 p.m. on January 1, 2011. There was no evidence presented as to how much alcohol Floyd drank, how much of the seven grams of cocaine Floyd ingested, what effects the alcohol and the cocaine had on Floyd, or how long those effects lasted. There was also evidence indicating that Floyd appeared intoxicated at around 8:00 p.m. on January 1, 2011, and that he used methamphetamine at that time. However, no evidence was presented as to how much methamphetamine Floyd ingested, what effects the methamphetamine had on him, or how long those effects lasted.”).

Under AEDPA deference, the question for us is whether fair-minded jurists could agree with the guilt-phase prejudice determination of the Alabama courts. *See Shinn v. Kayer*, 592 U.S. 111, 120–22 (2020). On this record, the answer to that question is yes. The

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determination by the Alabama courts that Mr. Rieber suffered no prejudice from his counsel's failure to pursue a voluntary intoxication/impairment defense was not unreasonable. *Cf. Knowles v. Mirzayance*, 556 U.S. 111, 127 (2009) ("To prevail on his ineffective-assistance claim, Mirzayance must show, therefore, that there is a 'reasonable probability' that he would have prevailed on his insanity defense had he pursued it.").

B

Mr. Rieber contends that his counsel rendered ineffective assistance at the penalty phase by not presenting mitigating evidence of his intoxication at the time of the offense. He argues that his counsel's failure to adequately investigate and present this type of mitigating evidence constituted deficient performance, and that he was prejudiced by that deficient performance because he would not have been sentenced to death had the evidence been presented.

In support of his claim, Mr. Rieber argues that at the penalty phase his counsel relied on Dr. Rogers' report but did not try to obtain corroborating evidence of his intoxication. He also asserts that—having chosen to put intoxication before the jury and the trial court—counsel had an obligation to corroborate that report. This is particularly so, he maintains, given that the trial court stated that there was no corroboration. He notes that counsel had two months after the guilty verdict to find mitigating evidence that corroborated Dr. Rogers' report and presented none.

The state responds that the district court correctly ruled that the Alabama courts were not unreasonable in rejecting this

ineffectiveness claim. In the state's view, the district court correctly concluded that the Alabama courts' decision on performance was not unreasonable. The state also argues that Mr. Rieber cannot show prejudice due to the trial court's findings about what he did, including buying a gun one week before the murder, casing the store, stalking the victim, and shooting her a second time in the head despite having already taken the money from the cash register.

We agree with the district court that under the standard set out in cases like *Kayer*, 592 U.S. at 120–22, Mr. Rieber has not shown that the Alabama courts' determination as to prejudice on the penalty-phase ineffectiveness claim was unreasonable:

This court need address only the prejudice prong of this claim. In this case, the state . . . courts found that Mr. Rieber failed to establish prejudice because the evidence he presented at the Rule 32 hearing would still not have convinced the sentencing court to impose a life sentence. Mr. Rieber contends that this conclusion was unreasonable because the evidence proved that he was in the habit of consuming hard drugs and that he consumed hard drugs on the day of the murder.

The evidence presented at the Rule 32 evidentiary hearing corroborates the part of Dr. Rogers' report reciting Mr. Rieber's history of drug use. The evidence also corroborates Mr. Rieber's claim that he consumed hard drugs and alcohol on the day of the murder. But it does not corroborate Mr. Rieber's

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claim that he was intoxicated at the time of the murder. The evidence that Mr. Rieber used drugs on the day of the murder was limited to evidence that Mr. Rieber attended a party where drugs were being used, one witness saw him snorting meth, smoking marijuana, and drinking alcohol at an unspecified time, and one witness *might* have seen him smoking marijuana and drinking around 6:30 or 7 P.M. Multiple witnesses testified that they had never seen Mr. Rieber black out from drug use. And Mr. Rieber's sister testified that she was familiar with how Mr. Rieber acted when he was high and that when she saw him about an hour after the murder, he did not appear to be intoxicated. It was not unreasonable for the state court to find as a fact that this evidence failed to establish that Mr. Rieber was intoxicated when he committed the murder.

Under *Wiggins* [*v. Smith*, 539 U.S. 510 (2003)]—a case that addressed the prejudice prong *de novo*—the question is whether, balanced against the aggravating evidence, the omitted mitigating evidence would have influenced the sentencer's assessment of the defendant's moral culpability. *See* 539 U.S. at 535. In that case, the only mitigating evidence presented to the jury was that the petitioner had no prior convictions and the aggravating evidence was weak. *Id.* at 537–38. The omitted mitigating evidence was that the petitioner was severely physically and sexually abused from an extremely young age. *Id.* at 516–17. Similar evidence was omitted in other cases in which

federal courts have found an unreasonable application of *Wiggins* based on a failure to investigate and present mitigating evidence. *See Williams v. Allen*, 542 F.3d 1326, 1342–43 (11th Cir. 2008) (finding prejudice based on mitigating evidence that as a child, the petitioner was repeatedly severely beaten with deadly weapons, deprived of food and clothing, and did not receive care relating to basic hygiene and medical needs).

By contrast, the mitigating evidence that trial counsel did not present to Mr. Rieber’s sentencing court is weak: it consisted of evidence that Mr. Rieber had a history of using hard drugs and alcohol and that he used some drugs and alcohol on the day he murdered Ms. Craig. Trial counsel did present evidence that Mr. Rieber had a reputation for good character and had no history of violence and that a jury had, by majority vote, recommended a life sentence.

But the aggravators were strong. The state court found that—in addition to committing the murder during a robbery—Mr. Rieber planned the crime in advance with the intent to kill Ms. Craig and killed her while she was defenseless, in pain, and posed no threat to him. Mr. Rieber does not challenge these findings. Moreover, some of the omitted evidence highlighted misconduct of which the sentencer was not aware, such as Mr. Rieber’s history of selling drugs and his involvement with a fourteen-year-old girl who soon began using drugs with him. . . .

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[S]ee *Evans v. Sec’y, Dep’t of Corr.*, 703 F.3d 1316, 1327 (11th Cir. 2013) (accepting as reasonable a state court’s rejection of a similar claim where the mitigating evidence “was a two-edged sword or would have opened the door to damaging evidence”) (quotation marks omitted); *Windom v. Sec’y, Dep’t of Corr.*, 578 F.3d 1227, 1251 (11th Cir. 2009) (“[A]ny potential benefit to be gained by presenting the relatively weak mitigating evidence in [the petitioner]’s case would have been severely undercut by rebuttal evidence of his own misconduct . . .”).

To find the state court[s’] determination on the prejudice prong unreasonable, the court would have to conclude that no reasonable jurist could have found a lack of prejudice. See *Brooks v. Comm’r, Ala. Dep’t of Corr.*, 719 F.3d 1292, 1300 (11th Cir. 2013). But a reasonable jurist could conclude that the omitted evidence would not have changed the sentencing court’s mind. Accordingly, the state courts’ findings on the prejudice prong were reasonable under *Strickland* and *Wiggins*, and Mr. Rieber is not entitled to habeas relief on this claim.

Rieber VI, 2023 WL 5020257, at *10–*11 (record citations and footnote omitted).

IV

The district court’s denial of Mr. Rieber’s habeas corpus petition is affirmed.

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AFFIRMED.

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

JEFFERY DAY RIEBER,**Petitioner,****v.****JOHN HAMM, Commissioner of the
Alabama Department of Corrections,****Defendant.**

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5:18-cv-00337-ACA

ORDER

Petitioner Jeffery Day Rieber filed a 28 U.S.C. § 2254 petition for writ of habeas corpus, challenging the effectiveness of his trial and appellate counsel, the state court's use of judicial override of the jury's recommendation, the constitutionality of Alabama's capital sentencing scheme and methods of execution, the State's limitation of the fee for court-appointed trial counsel, and alleged spoliation of exculpatory evidence. (Doc. 1). In August 2023 the court dismissed in part and denied in part Mr. Rieber's petition. (Docs. 19, 20). Mr. Rieber now moves, under Federal Rule of Civil Procedure 59(e), to alter or amend the part of the judgment denying the § 2254 petition and denying a certificate of appealability. (Doc. 21).

Rule 59(e) permits the court "to alter or amend a judgment" based only on "newly-discovered evidence or manifest errors of law or fact." *Arthur v. King*, 500

F.3d 1335, 1343 (11th Cir. 2007). “A Rule 59(e) motion cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment.” *Id.* (alterations accepted; quotation marks omitted).

Mr. Rieber does not submit any newly discovered evidence, but he contends that the court made manifest errors of law and fact in denying his petition and in denying him a certificate of appealability. (Doc. 21 at 5; *see also id.* at 12, 15, 17, 20–21, 24, 26, 28–29, 31; doc. 24 at 3, 15–17). For the most part, Mr. Rieber’s arguments are either reiterations of the arguments he has already made or arguments he could have made before the court entered its memorandum opinion and order. (*Compare* docs. 21, 24, *with* docs. 1, 17). The court has already addressed Mr. Rieber’s claims in detail and the court will not now repeat its analysis.

But one of Mr. Rieber’s arguments does warrant a brief discussion. Mr. Rieber contends that this court *sua sponte* applied the procedural bar to Claims Two and Five. (Doc. 21 at 20–21; doc. 24 at 8–9). The court disagrees. The State expressly argued that those claims were unexhausted and procedurally defaulted: Count Two because the Alabama Court of Criminal Appeals found the claim improperly preserved based on a failure to amend the state habeas petition to assert it, and Count Five because the Court of Criminal Appeals found the claim insufficiently pleaded under Alabama Rule of Appellate Procedure 28(a)(10). (Doc.

14 at 46–47, 57–58). The court determined that the State had mischaracterized its defense as one of exhaustion and procedural default when, in fact, it meant procedural bar. (Doc. 19 at 72, 75–76).

In recharacterizing the State’s defense, the court found persuasive the Eleventh Circuit’s unpublished opinion in *Kimbrough v. Sec’y, Fla. Dep’t of Corr.*, 809 F. App’x 684 (11th Cir. 2020). There, the State contended that the petitioner’s § 2254 petition failed on the merits because his successive state habeas petition did not comply with a state law for bringing successive petitions. *Id.* at 688, 691. The Eleventh Circuit held that, despite the State’s mischaracterization of the defense as a merits issue, it was in fact a procedural default defense that the State adequately preserved because “the state raised the argument that the postconviction court’s denial was based on a state procedural ground, even though it mislabeled the argument as merits-based.” *Id.* at 691. Although *Kimbrough* is not binding precedent, the court agrees with its analysis: the State raised the substance of its argument for why the court could not consider the merits of Mr. Rieber’s claim, even though it “mislabeled” those arguments as procedural default instead of procedural bar.

Because Mr. Rieber has not presented the court with any argument persuading the court that it manifestly erred by denying his § 2254 petition, the court **DENIES** the Rule 59(e) motion to alter or amend.

DONE and **ORDERED** this October 31, 2023.

A handwritten signature in black ink, appearing to read 'Annemarie', is positioned above a horizontal line.

ANNEMARIE CARNEY AXON
UNITED STATES DISTRICT JUDGE

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

JEFFERY DAY RIEBER,**Petitioner,****v.****JOHN HAMM, Commissioner of the
Alabama Department of Corrections,¹****Defendant.****5:18-cv-00337-ACA**

MEMORANDUM OPINION AND ORDER

In 1990, Petitioner Jeffery Day Rieber murdered Glenda Phillips Craig, a convenience store clerk, in the course of robbing the convenience store of \$506. An Alabama jury convicted Mr. Rieber of capital murder and recommended, by a seven to five vote, that the state court sentence him to life imprisonment without the possibility of parole. The state court overrode that recommendation and sentenced him to death. Mr. Rieber petitions for a writ of habeas corpus under 28 U.S.C. § 2254, asserting that his trial and appellate counsel were ineffective, the judicial override of the jury's recommendation invalidates his sentence, Alabama's capital sentencing scheme is unconstitutionally vague and arbitrary, Alabama's methods of

¹ When Mr. Rieber filed this petition, he named then-Commissioner of the Alabama Department of Corrections Jefferson Dunn. (Doc. 1 at 1). The Commissioner is now John Hamm. Under Federal Rule of Civil Procedure 25(d), the court substitutes Mr. Hamm for Mr. Dunn.

execution involve a substantial and unreasonable risk he will suffer unnecessary and prolonged pain, the State violated his constitutional rights by limiting the fee for court-appointed trial counsel, and the State permitted the spoliation of exculpatory evidence. (Doc. 1).

One of Mr. Rieber's claims—Claim Nine, a challenge to Alabama's method of execution—is not properly brought in a habeas petition, so the court **WILL DISMISS** that claim **WITHOUT PREJUDICE** to refiling under 42 U.S.C. § 1983. The rest of Mr. Rieber's claims are either meritless or procedurally defaulted, so the court **WILL DENY** his § 2254 petition and **WILL DENY** him a certificate of appealability. The court also **DENIES** his requests for discovery and an evidentiary hearing.

I. BACKGROUND

“In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct.” 28 U.S.C. § 2254(e)(1). The court therefore draws its description of the facts from the state courts' findings.

1. The Crime

Just before 8:00 P.M. on October 9, 1990, Mr. Rieber entered the convenience store where Ms. Craig worked. (Doc. 16-93 at 98); *see also Rieber v. State*, 663 So. 2d 985, 987 (Ala. Crim. App. 1994) (“*Rieber I*”). A surveillance camera captured him approaching the counter, where he withdrew a .22 caliber revolver and shot Ms. Craig, piercing her wrist and the back of her head. (Doc. 16-93 at 98). He took the contents of the cash register, which amounted to \$506, then leaned over the counter so that he could see Ms. Craig, shot her in the head a second time, and fled. (Doc. 16-93 at 98); *Rieber I*, 663 So. 2d at 988. Several minutes later, another customer entered the store. (Doc. 16-93 at 98–99). She found Ms. Craig, still alive but choking on her own blood. (*Id.*); *Ex parte Rieber*, 663 So. 2d 999, 1004 (Ala. 1995) (“*Rieber II*”). Ms. Craig died at the hospital soon after, widowing her husband and orphaning her two children from a previous marriage. (Doc. 16-93 at 99); *Rieber II*, 663 So. 2d at 1005; *Rieber I*, 663 So. 2d at 987.

At trial, the State presented evidence that, about a week before the murder, Mr. Rieber purchased a .22 caliber revolver. (Doc. 16-93 at 97). A few days before the murder, Tommy Erskine saw Mr. Rieber sitting in a car outside the convenience store. *Rieber I*, 663 So. 2d at 987. Mr. Erskine testified that when he spoke to Ms. Craig, she seemed “very nervous and afraid,” and he suggested that she call the

police. *Id.* After Mr. Erskine left, he became uneasy and went back to the store, where he saw Mr. Rieber drive by. *Id.*; (see also doc. 16-93 at 97). He went into the store and told Ms. Craig to call the police because Mr. Rieber “was patrolling the store.” *Rieber I*, 663 So. 2d at 987. In addition, Allen Wayne Gentle, who had gone to high school with Mr. Rieber, saw Mr. Rieber in the store about three hours before the murder. *Id.* Ms. Craig asked Mr. Gentle several questions, in response to which he identified Mr. Rieber and said, “I don’t think he would do nothing like that.” *Id.*

Shortly after the murder, Mr. Gentle identified Mr. Rieber on the surveillance video. *Rieber I*, 663 So. 2d at 987. Several hours after the murder, the police arrested Mr. Rieber and searched his house and car. *Id.* at 987–88. In Mr. Rieber’s room, they found clothing similar to the clothes worn by the gunman and \$292 in cash, and in his car, they found a .22 caliber revolver with two spent rounds. *Id.* at 988. During questioning, Mr. Rieber denied involvement in the murder. *Id.*

2. Trial Proceedings

A jury found Mr. Rieber guilty of murder during a first degree robbery, a capital offense. (Doc. 16-85 at 161); see Ala. Code § 13A-5-40(a)(2) (1987). Under the statute in effect at the time, a finding of guilt on a capital offense triggered a penalty hearing, after which the jury would issue a sentencing recommendation. Ala Code §§ 13A-5-43(d), 13A-5-45 (1981). At the penalty hearing, trial counsel

presented evidence that Mr. Rieber had a good reputation in the community. (Doc. 16-78 at 59–100). Trial counsel also submitted a psychiatric report about Mr. Rieber’s mental state at the time of the offense. (*Id.* at 100; Doc. 16-79 at 3; Doc. 16-86 at 128).

In the report, Dr. Kathy Rogers found no evidence of any major psychiatric disorder but noted a significant self-reported history of drug and alcohol abuse beginning at a young age. (Doc. 16-86 at 129–30). Dr. Rogers noted that Mr. Rieber was able to describe, “at length and in detail, his behavior leading up to” the offense, although he denied any memory of “a couple of hours during the actual offense.” (*Id.* at 130). Dr. Rogers opined that “a reported lack of memory for that period would have been related to substance abuse or deliberate misrepresentation of [Mr. Rieber’s] memory, although the former is more likely in my opinion.” (*Id.* at 131; *see also id.* at 133 (addendum to the original report)). In an addendum to the report, Dr. Rogers stated that Mr. Rieber had reported that, on the night of the murder, he drank six or seven beers, smoked six joints, and took three hits of acid. (*Id.* at 135). She further stated that Mr. Rieber had denied having blackouts when using acid, but had occasionally suffered blackouts from alcohol, and “the combination of substances and the possibility that the ‘acid’ which he used caused an idiosyncratic reaction, such that he experienced a blackout, is not untenable.” (*Id.* at 135).

Trial counsel argued to the jury that Mr. Rieber had a reputation in the community for being kind, gentle, helpful, trustworthy, and nonviolent; that he did not have any significant criminal history; and that the drugs he had consumed caused “an aberration completely different to anything that has ever occurred in this man’s life.” (Doc. 16-79 at 24–26). The jury recommended, seven to five, that the court impose a sentence of life imprisonment without parole. (Doc. 16-85 at 162).

But under the law in effect at the time, the jury’s recommendation was “not binding upon the court.” Ala. Code § 13A-5-47(e) (1981). Instead, the trial court was required to hold another hearing, where it considered the evidence presented at trial, during the penalty hearing, and in a pre-sentence investigation report, along with arguments by the parties about “the existence of aggravating and mitigating circumstances and the proper sentence to be imposed in the case.” *Id.* § 13A-5-47(c)–(d). In deciding the sentence, the trial court had to enter specific written findings about the factors and determine “whether the aggravating circumstances it [found] to exist outweigh[ed] the mitigating circumstances it [found] to exist.” *Id.* § 13A-5-47(d)–(e).

At the sentencing hearing before the court, trial counsel called Mr. Rieber’s mother, who testified about Mr. Rieber’s gentle nature and limited criminal history. (Doc. 16-79 at 54–60). The State argued that the commission of the murder in the

course of a first degree robbery was alone enough to warrant the death penalty, but that in addition the murder was especially heinous, atrocious, and cruel. (*Id.* at 71–72). In response, trial counsel argued that the murder was not especially heinous, atrocious, or cruel compared to other capital offenses; attempted to distinguish the cases the State had cited in support of that aggravating circumstance; and argued that Mr. Rieber had a limited criminal history, no history of violence, no memory of the offense because of his drug use, that he had shown improvement and helpfulness in prison, and that the court should weigh heavily the jury’s recommendation of a life sentence. (*Id.* at 73–86).

The state trial court found two aggravating circumstances: first, that Mr. Rieber committed the murder while engaged in the commission of a first degree robbery and second, that this offense was especially heinous, atrocious, or cruel compared to other capital offenses. (Doc. 16-62 at 93–95). The court based its factual finding about the first aggravating circumstance on the jury’s verdict. (*Id.* at 93). In support of the second aggravating circumstance, the court explained that Ms. Craig had been “completely defenseless and posed no threat” to Mr. Rieber; Mr. Rieber had “stalked the victim for several days before the murder,” causing her fear; Mr. Rieber planned the crime in advance; Mr. Rieber intended to kill Ms. Craig; Ms. Craig suffered pain; and the murder was “a conscienceless and pitiless killing performed for no reason

whatsoever . . . perpetrated under circumstances which caused fear and pain to the victim.” (*Id.* at 93–95).

The state trial court also found two mitigating circumstances: first, that Mr. Rieber had no significant criminal history and second, that Mr. Rieber had a good reputation and good character before the offense. (*Id.* at 96–99). The court expressly considered and rejected Dr. Rogers’ conclusion that Mr. Rieber’s reported memory lapse was due to substance abuse because “there is no evidence before the Court that the defendant was under the influence of drugs and alcohol at the time of the offense.” (*Id.* at 97–98). After weighing the aggravating and mitigating circumstances and the jury’s recommendation of a life sentence, the court overrode the jury’s recommendation and imposed a death sentence. (*Id.* at 100).

Mr. Rieber moved for a new trial on various grounds, including that his own attorney violated *Batson v. Kentucky*, 476 U.S. 79, 88 (1986) by using a peremptory strike for an Asian American juror because he believed Asian American jurors had “a tendency to be more law-and-order oriented and less apt to give a Defendant the benefit of the doubt.” (Doc. 16-85 at 184–85, 188; doc. 16-79 at 95, 99–102). At a hearing on the motion for a new trial, counsel challenged the court’s rejection of Dr. Rogers’ report. (Doc. 16-79 at 109–10). When the court asked whether any evidence supported the allegation that Mr. Rieber had consumed alcohol or drugs

before entering the store, counsel admitted the only evidence on that point was Dr. Rogers' report. (*Id.* at 110–11). The state trial court denied the motion for a new trial. (Doc. 16-85 at 190).

3. Direct Appeal

Mr. Rieber appealed his conviction and sentence and the Alabama Court of Criminal Appeals affirmed in a reasoned opinion. *Rieber I*, 663 So. 2d at 998. The Alabama Supreme Court granted certiorari and affirmed, also in a reasoned opinion. *Rieber II*, 663 So. 2d at 1015. The United States Supreme Court denied Mr. Rieber's petition for a writ of certiorari. *Rieber v. Alabama*, 516 U.S. 995 (1995).

4. Postconviction Proceedings

After the conclusion of his direct appeal, Mr. Rieber, proceeding *pro se*, filed in state court an Alabama Rule of Criminal Procedure 32 petition asserting various challenges to his conviction and sentence. (Doc. 16-6 at 19–55). He later filed a counseled amended Rule 32 petition. (Doc. 16-11 at 41–66). The state habeas trial court held a three-day evidentiary hearing on the amended Rule 32 petition. (Doc. 16-82 at 49–202; doc. 16-83; doc. 16-84 at 3–35).

Habeas counsel called fourteen witnesses, ten of whom testified about Mr. Rieber's history of substance abuse and one of whom testified that she was aware Mr. Rieber had sold drugs. (Doc. 16-31 at 38–47). One witness—Charity

Hubert—testified that she saw Mr. Rieber in a house where drugs were being used on the day of the murder. (*Id.* at 41). Ms. Hubert also testified that she entered a relationship with Mr. Rieber when she was fourteen and he was nineteen and that she had begun using hard drugs within a year of dating him. (*Id.*). Another witness testified that she had seen Mr. Rieber smoke marijuana and drink at a party on the day of the murder. (*Id.* at 45). Two other witnesses testified to seeing Mr. Rieber at the party but could not remember if they had seen him doing drugs. (*Id.* at 46–47).

One of Mr. Rieber’s trial counsel also testified at the Rule 32 evidentiary hearing.² (*See* doc. 16-31 at 42–44). Trial counsel testified that he believed Mr. Rieber would be convicted and he negotiated a plea agreement for a life sentence, but Mr. Rieber rejected the plea deal on his mother’s advice. (*Id.* at 42). Trial counsel stated that he had briefly considered a voluntary intoxication defense, but ultimately decided to proceed on a mistaken identity defense after consulting with Mr. Rieber, who never suggested any other strategy to him. (*Id.* at 43–44).

The state habeas trial court denied the amended Rule 32 petition in part as procedurally barred and in part on the merits. (Doc. 16-31 at 34–68; doc. 16-32 at 1–41). On appeal, the Alabama Court of Criminal Appeals affirmed the denial of the

² Mr. Rieber’s other trial attorney, who had worked on the penalty phase part of his trial, died before the state habeas evidentiary hearing. (Doc. 16-31 at 42 n.2).

Rule 32 petition. (Doc. 16-93 at 96–141). The Alabama Supreme Court denied a petition for writ of certiorari without an opinion. (Doc. 16-98 at 31).

Mr. Rieber then filed his § 2254 petition. (Doc. 1). He asserts the following claims:³

- (1) Trial counsel was ineffective for failing to “fully pursue” evidence of voluntary intoxication, which would have supported a jury instruction on the lesser included offense of manslaughter;
- (2) Trial counsel was ineffective for failing to research and present to the sentencing court caselaw that would have established the arbitrary and capricious nature of imposing a death sentence in this case;
- (3) Trial counsel was ineffective for failing to investigate and present to the sentencing court evidence corroborating Mr. Rieber’s extreme intoxication at the time of the murder;
- (4) Appellate counsel was ineffective for failing to challenge the sentencing court’s finding that Mr. Rieber had stalked the victim before murdering her;
- (5) Appellate counsel was ineffective for failing to raise six constitutional challenges to Alabama’s sentencing scheme;

³ Mr. Rieber’s § 2254 petition appears to raise an additional two claims: one that appellate counsel was ineffective for raising a frivolous issue on appeal (doc. 1 at 24), and one that Alabama’s capital sentencing scheme was unconstitutionally arbitrary because elected judges are likely to override a jury’s recommendation of life (*id.* at 36). In his reply brief, Mr. Rieber states that neither of these are freestanding claims; they are instead arguments in support of his claims about appellate counsel’s ineffectiveness and the statute’s constitutionality. (Doc. 17 at 14 (“Mr. Rieber did not make [a] claim [that appellate counsel were ineffective for raising a frivolous *Batson* issue]. . . . [He] has not argued . . . that by itself counsels’ raising the issue violated *Strickland*.”); *id.* at 19 (“The State also characterizes as a new claim Mr. Rieber’s argument that elected judges are more likely to override life-without-parole recommendations in favor of death. This is not a separate claim, though, but rather an argument . . . demonstrating that Alabama’s death penalty scheme is unmoored to any rational framework for consistent application.”) (citation omitted)). Given this concession, the court will not treat those two arguments as freestanding claims but will instead address them in the context of the claims in which they are asserted.

- (6) Under *Hurst v. Florida*, 136 S. Ct. 616 (2016), Alabama’s judicial override provision was unconstitutional, made his sentence arbitrary and capricious, and violated his right to equal protection;
- (7) Alabama’s statute setting out the factors that make a crime death-eligible is unconstitutionally vague;
- (8) Alabama’s death penalty statute is unconstitutionally arbitrary;
- (9) Alabama’s methods of execution involve a substantial and unreasonable risk that he will suffer unnecessary and prolonged pain;
- (10) Alabama’s then-applicable \$1,000 limit on the fees a court-appointed attorney may be paid in a death penalty case is unconstitutional; and
- (11) the State spoliated exculpatory evidence by keeping Mr. Rieber in custody after his arrest without appointing an attorney or conducting blood and urine tests.

(Doc. 1 at 4–44).

II. DISCUSSION

The State challenges each of Mr. Rieber’s claims, some of them on the merits and some of them as procedurally defaulted. (Doc. 14). The court will first discuss the claims that the State challenges on the merits before moving on to the claims challenged as procedurally defaulted.

1. Merits

Because Mr. Rieber filed his § 2254 petition after April 24, 1996, the Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”) governs this action. *Guzman v. Sec’y, Fla. Dep’t of Corr.*, 663 F.3d 1336, 1345 (11th Cir. 2011). Under AEDPA, where a state court has adjudicated a habeas claim on the merits, a federal

court may not grant relief except in highly limited circumstances. *See* 28 U.S.C. § 2254(d).

First, the court may grant habeas relief if the state court’s decision (1) “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1). “Clearly established federal law” means “the holdings, as opposed to the dicta, of [the United States Supreme] Court’s decisions as of the time of the relevant state-court decision.” *Williams v. Taylor*, 529 U.S. 362, 412 (2000). “Contrary to” federal law means the state court reached “a conclusion opposite to that reached by [the Supreme] Court on a question of law or . . . the state court decide[d] a case differently than [the] Court . . . on a set of materially indistinguishable facts.” *Id.* at 412–13. “Unreasonable application of” federal law means the state court correctly identified “the governing legal principle from [the Supreme] Court’s decisions but unreasonably applie[d] that principle to the facts of the prisoner’s case.” *Id.* at 413. Section 2254(d)(1) sets “a highly deferential standard that is intentionally difficult to meet.” *Meders v. Warden, Ga. Diagnostic Prison*, 911 F.3d 1335, 1348 (11th Cir. 2019). A petitioner cannot satisfy the standard merely by showing that the state court reached the wrong result; he must establish that the state court’s ruling “was so lacking in justification that there was an error

well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Virginia v. LeBlanc*, 582 U.S. 91, 94 (2017).

Alternatively, a federal court may grant habeas relief if the state court’s decision “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)(2). Again, the petitioner cannot satisfy § 2254(d)(2) by persuading the federal court that the state court’s factual finding was wrong. *See Wood v. Allen*, 558 U.S. 290, 301 (2010) (“[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.”). Instead, the petitioner must establish that the evidence is “too powerful to conclude anything but the petitioner’s factual claim” or that “the state court’s finding was clearly erroneous.” *Landers v. Warden, Att’y Gen. of Ala.*, 776 F.3d 1288, 1294 (11th Cir. 2015) (alteration and quotation marks omitted). Moreover, § 2254 requires the court to presume the correctness of any factual findings by the state court, with the petitioner bearing the burden of rebutting that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

But satisfying either § 2254(d)(1) and (d)(2) does not automatically entitle a petitioner to habeas relief. Instead, if a petitioner establishes that a state court’s decision is not entitled to deference under § 2254(d), the court reviews the claim *de*

novo. Madison v. Comm’r, Ala. Dep’t of Corr., 761 F.3d 1240, 1243–44 (11th Cir. 2014).

a. Claim One

Mr. Rieber asserts that trial counsel was ineffective for failing to “fully pursue” evidence of voluntary intoxication, which would have supported a jury instruction for the lesser included offense of manslaughter. (Doc. 1 at 4–11). He contends that despite the strong evidence of his guilt, trial counsel elected to present a meritless alibi defense. (*Id.* at 4–6). But, according to Mr. Rieber, once Dr. Rogers submitted her report indicating that he had consumed drugs and alcohol and did not remember the murder, trial counsel should have investigated the viability of a voluntary intoxication defense. (*Id.* at 6–11).

To prevail on a claim of ineffective assistance of trial counsel, a petitioner must establish that his counsel’s performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel’s performance is deficient only if it “fell below an objective standard of reasonableness and was outside the wide range of professionally competent assistance.” *Johnson v. Sec’y, DOC*, 643 F.3d 907, 928 (11th Cir. 2011) (quotation marks omitted). A petitioner can establish prejudice by showing “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.” *Reaves v. Sec’y, Fla. Dep’t of Corr.*, 872 F.3d 1137, 1148 (11th Cir. 2017) (quotation marks omitted).

At trial, defense counsel argued to the jury that the State’s evidence was insufficient to prove beyond a reasonable doubt that the convenience store video and witnesses showed Mr. Rieber committing the murder. (Doc. 16-73 at 48–52; doc. 16-77 at 81–96). He cross-examined the State’s witnesses about various aspects of the State’s evidence (doc. 16-74 at 16–18, 29–37, 48–63; doc. 16-76 at 17–23, 71–82, 87–90, 99–100), and called defense witnesses to cast doubt on the identification of Mr. Rieber as the man who had visited the convenience store several hours before the murder or the man who appeared in the surveillance video (doc. 16-77 at 9–12, 21–26, 31–37).

At the Rule 32 evidentiary hearing, Mr. Rieber called witnesses who testified about Mr. Rieber’s history of drug use as well as his drug use on the day of the murder. (Doc. 16-31 at 38–41, 45–48). Several of them also testified that, before trial, they briefly spoke with trial counsel about Mr. Rieber’s drug use. (*Id.* at 38–39; doc. 16-82 at 102–03, 124–25, 142–43). In addition, trial counsel testified about his investigation and strategy in defending Mr. Rieber. (Doc. 16-31 at 43–44; doc. 16-82 at 200–02; doc. 16-83 at 3–52).

Specifically, trial counsel testified that the State’s evidence was so strong that he was confident Mr. Rieber would be convicted, so he immediately negotiated a plea agreement that would have removed the death penalty from the case, but Mr. Rieber rejected the plea deal. (Doc. 16-83 at 9–10). Trial counsel then discussed a mistaken identity defense with Mr. Rieber, who seemed to understand the strategy, did not suggest any other defense, and never mentioned blacking out or being unable to remember what had happened at the convenience store. (*Id.* at 38–39, 44–45).

Trial counsel testified that he read Dr. Rogers’ report before trial. (Doc. 16-83 at 13). He knew that for crimes involving specific intent, “sometimes intoxication or dependency on drugs can be used to negate intent. But . . . I can’t say for sure.” (*Id.* at 32–33). He briefly considered a voluntary intoxication defense, but not for long because “it didn’t matter, because our position was he didn’t do it.” (*Id.* at 33; *see also id.* at 13–14 (explaining that Dr. Rogers’ statements about Mr. Rieber’s drug use did not change the trial strategy because “our position was it wasn’t him that did the shooting, so it didn’t make any difference what his mental state was. He was not the one who did the shooting.”)).

Mr. Rieber raised this ineffective assistance claim in his counseled Rule 32 petition. (Doc. 16-11 at 60 ¶¶ 62–63, 61 ¶¶ 70–71). After the state trial habeas court rejected this claim of ineffective assistance on the merits (doc. 16-32 at 5–8), the

Alabama Court of Criminal Appeals affirmed (doc. 16-93 at 109–12). The Court of Criminal Appeals concluded that trial counsel made a reasonable strategic decision to focus on the mistaken identity defense and that the evidence presented at the evidentiary hearing would not have entitled Mr. Rieber to a lesser-included-offense manslaughter instruction based on voluntary intoxication. (Doc. 16-93 at 107–12). Because the state court rejected this claim on the merits, this court must “use a ‘doubly deferential’ standard of review that gives both the state court and the defense attorney the benefit of the doubt.” *Burt v. Titlow*, 571 U.S. 12, 15 (2013).

Mr. Rieber cannot establish that the state court’s rejection of this ineffective assistance claim was contrary to, or an unreasonable application of, clearly established federal law. *See* 28 U.S.C. § 2254(d). With respect to the deficient performance prong, the Alabama Court of Criminal Appeals (and the state habeas trial court) found as a fact, based on the evidence presented at the evidentiary hearing, that trial counsel made a strategic decision to focus on the mistaken identity defense instead of the voluntary intoxication defense. (Doc. 16-93 at 112; *see* doc. 16-32 at 7–8). That factual finding is entitled to deference under § 2254(d)(2). *See Wood v. Allen*, 558 U.S. 290, 300–02 (2010). Mr. Rieber does not argue that this factual finding was unreasonable or that he could present clear and convincing evidence rebutting the presumption of correctness. (*See* doc. 1 at 4–10; doc. 17 at 5–

8); *see* 28 U.S.C. § 2254(d). The court is therefore bound by the state court’s finding that trial counsel made a strategic decision about which defense to pursue.

However, “[w]hether the state court reasonably determined that there was a strategic decision under § 2254(d)(2) is a different question from whether the strategic decision itself was a reasonable exercise of professional judgment under *Strickland* or whether the application of *Strickland* was reasonable under § 2254(d)(1).” *Wood*, 558 U.S. at 304. Mr. Rieber contends that the state courts unreasonably applied *Strickland* by finding trial counsel’s strategic decision to be a reasonable exercise of professional judgment. (Doc. 17 at 7–8).

There is no dispute that trial counsel did not investigate the voluntary intoxication defense beyond reading Dr. Rogers’ report and briefly discussing Mr. Rieber’s drug use with some of his family members. (Doc. 16-82 at 102–03, 124–25, 142–43; doc. 16-83 at 13–14). The question therefore is whether the Alabama Court of Criminal Appeals reasonably found that level of investigation to be reasonable. *See Wood*, 558 U.S. at 304

In *Strickland*, the Supreme Court wrote that “strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” 466 U.S. at 690–91. Indeed, “counsel need not always investigate before pursuing or not pursuing a

line of defense.” *Chandler v. United States*, 218 F.3d 1305, 1318 (11th Cir. 2000) (en banc). “[T]o be effective a lawyer is not required to pursue every path until it bears fruit or until all hope withers,” and “a decision to limit investigation is accorded a strong presumption of reasonableness.” *Williams v. Head*, 185 F.3d 1223, 1237 (11th Cir. 1999) (quotation marks and alteration omitted). Counsel’s duty is to “make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691. “This correct approach toward investigation reflects the reality that lawyers do not enjoy the benefit of endless time, energy or financial resources.” *Rogers v. Zant*, 13 F.3d 384, 387 (11th Cir. 1994).

The Alabama Court’s of Criminal Appeals’ decision was eminently reasonable in light of federal authority on counsel’s duty to investigate. The evidence presented at the Rule 32 evidentiary hearing establishes that trial counsel consulted with Mr. Rieber in deciding the defense to present at trial. (Doc. 16-83 at 44–45). The only indication that Mr. Rieber had blacked out was contained in Dr. Rogers’ report. (See doc. 16-79 at 110–11). Mr. Rieber never told his attorney that he had blacked out, nor did he suggest any defense other than mistaken identity. (*Id.* at 38–39, 44–45); see *Chandler*, 218 F.3d at 1318 (“Because the reasonableness of counsel’s acts (including what investigations are reasonable) depends critically upon information supplied by the petitioner or the petitioner’s own statements or actions,

evidence of a petitioner’s statements and acts in dealing with counsel is highly relevant to ineffective assistance claims.”) (alteration and quotation marks omitted). And a voluntary intoxication defense would have been inconsistent with the mistaken identity defense. (Doc. 16-83 at 13–14, 32–33); *see Chandler*, 218 F.3d at 1318 (“[C]ounsel’s reliance on particular lines of defense to the exclusion of others—whether or not he investigated those other defenses—is a matter of strategy and is not ineffective unless the petitioner can prove the chosen course, in itself, was unreasonable.”).

Moreover, the Alabama Court of Criminal Appeals held in this case that “the evidence Rieber offered at the Rule 32 hearing in support of a voluntary-intoxication theory did not establish that he would have been entitled to a lesser-included-offense manslaughter instruction.” (Doc. 16-93 at 112). This is a state court’s interpretation of state law, which is binding on this court. *See Pietri v. Sec’y, Fla. Dep’t of Corr.*, 641 F.3d 1276, 1284 (11th Cir. 2011). And an attorney does not perform deficiently by failing to present a meritless defense. *Lindsey v. Smith*, 820 F.2d 1137, 1152 (11th Cir. 1987) (“A habeas petitioner who proposes alternative trial strategy that would itself have proved futile has failed to demonstrate that the representation at trial fell below an objective standard of reasonableness.”). Accordingly, Mr. Rieber cannot establish that the state court unreasonably concluded that he failed to establish

deficient performance with respect to the investigation and presentation of a voluntary intoxication defense.

The same reasoning applies to any argument that counsel's performance prejudiced Mr. Rieber's defense. Even if trial counsel had investigated and presented to the jury all of the evidence Mr. Rieber presented during his Rule 32 evidentiary hearing, the state trial court would not have given the manslaughter instruction and there is no possibility the outcome of Mr. Rieber's trial would have changed. (Doc. 16-93 at 112); *Pietri*, 641 F.3d at 1284. Mr. Rieber therefore cannot establish that the state court's prejudice finding was contrary to, or an unreasonable application of, clearly established federal law.

b. Claim Three

Mr. Rieber contends that trial counsel was ineffective for failing to investigate and present to the sentencing court evidence corroborating his extreme intoxication at the time of the murder. (Doc. 1 at 14–18). He argues that because the State “fiercely attacked” Dr. Rogers' statements about Mr. Rieber's drug use during the penalty phase hearing before the jury, trial counsel should have known that he needed to present corroborating evidence to the trial court before the imposition of the sentence. (*Id.* at 14–17; doc. 17 at 8–11).

The standard for a claim of ineffective assistance of counsel at the sentencing phase of a capital trial is the same as at the guilt phase: the petitioner must establish both deficient performance and prejudice. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). With respect to the prejudice prong specifically, “where, as here, a petitioner challenges a death sentence, the question is whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Putman v. Head*, 268 F.3d 1223, 1248 (11th Cir. 2001) (quotation marks and alteration omitted). The court must assess the prejudice prong by “reweigh[ing] the evidence in aggravation against the totality of available mitigating evidence” and “presum[ing] a reasonable sentencer.” *Boyd v. Allen*, 592 F.3d 1274, 1295 (11th Cir. 2010).

During the penalty phase before the jury, trial counsel called seven witnesses who testified about Mr. Rieber’s “good character, his gentle nature, his lack of violence, and his willingness to help others.” (Doc. 16-32 at 27). Counsel also admitted Dr. Rogers’ report, which recited Mr. Rieber’s statements about his history of drug use and his inability to remember the crime. (*Id.* at 27–28). The jury ultimately recommended life imprisonment by a seven-to-five vote. (Doc. 16-85 at 162).

At the sentencing hearing before the judge, Mr. Rieber's mother testified that Mr. Rieber was a kind, gentle, and non-violent person who had helped take care of her and her home. (Doc. 16-79 at 54–60). The State asked the judge to override the jury's recommendation of life because the crime was especially heinous, atrocious, or cruel and the murder was committed in the course of a first degree robbery. (*Id.* at 60–72). Trial counsel argued that the evidence did not support the heinous, atrocious, or cruel aggravating circumstance and the cases on which the State had relied in support of that circumstance were distinguishable; that Mr. Rieber had no significant history of prior criminal activity and had a reputation for good character and helpfulness; that Dr. Roger's report showed Mr. Rieber was unable to appreciate the criminality of his conduct because of the drugs and alcohol he had consumed; and that the court should weigh heavily the jury's advisory verdict. (*Id.* at 73–86).

In the state trial court's sentencing order, the court described the facts of the crime and made factual findings about aggravating and mitigating circumstances. (Doc. 16-62 at 89–99). Among other things, the court described Dr. Rogers' report, and specifically Mr. Rieber's allegation to Dr. Rogers that he could not remember the murder, as well as Dr. Rogers' conclusion that the reason for the memory lapse was more likely substance abuse than deliberate misrepresentation. (Doc. 16-62 at 97). The state trial court rejected that conclusion because of the lack of evidence that

Mr. Rieber “was under the influence of drugs and alcohol at the time of the offense.” (*Id.* at 98). At the hearing on Mr. Rieber’s motion for a new trial, counsel conceded that Dr. Rogers’ report was the only evidence about Mr. Rieber’s substance abuse on the day of the murder or his history of substance abuse. (Doc. 16-79 at 111).

At the Rule 32 evidentiary hearing, Mr. Rieber called witnesses who testified about Mr. Rieber’s long history of drug use as well as people who saw him at a party using drugs the day of the murder, although none could testify about exactly what drugs he used at what time or how intoxicated he was. (Doc. 16-31 at 39–41, 45–47). Mr. Rieber’s sister testified that Mr. Rieber had sold acid in the past. (Doc. 16-82 at 104). And Charity Hubert testified that she began dating Mr. Rieber when she was fourteen and he was nineteen, after which she began doing cocaine, acid, and meth with him. (Doc. 16-31 at 41; *see* doc. 16-82 at 173–76, 189).

Mr. Rieber raised his ineffective assistance claim in his counseled Rule 32 petition. (Doc. 16-11 at 62–63 ¶ 76). The state habeas trial court rejected the claim on the grounds that the evidence presented at the evidentiary hearing would not have convinced the sentencing court to follow the jury’s recommendation, especially because it included evidence that was not mitigating, such as his history of selling drugs and providing drugs to a teenage girl with whom he was in a sexual relationship. (Doc. 16-32 at 30–31). Acknowledging that this claim was governed

by the United States Supreme Court’s decision in *Wiggins*, the Alabama Court of Criminal Appeals expressly adopted the state habeas trial court’s findings and added that trial counsel had “introduced as much mitigating evidence concerning Rieber’s background as was available to him.” (Doc. 16-93 at 114–17). Because that was a ruling on the merits, the court must afford § 2254(d) deference to the state courts’ factual findings and application of *Wiggins*.

In *Wiggins*, trial counsel’s investigation into the petitioner’s life history consisted of acquiring records about the petitioner’s placements in foster care and reading “a one-page account of [his] ‘personal history noting his ‘misery as a youth,’ quoting his description of his own background as ‘disgusting,’ and observing that he spent most of his life in foster care.” 539 U.S. at 523. Although “standard practice in Maryland in capital cases at the time of [his] trial included the preparation of a social history report,” counsel did no further investigation into the petitioner’s background. *Id.* at 524. Had counsel investigated, they would have found that the petitioner suffered severe physical and sexual abuse at the hands of his mother, multiple foster parents, foster siblings, and one employer, starting before he was six years old. *Id.* at 516–17. Instead of presenting any evidence about the petitioner’s traumatic childhood to the sentencer, trial counsel attempted to re-try his

responsibility for the murder and informed the jury only that the petitioner had no prior convictions. *Id.* at 515, 537.

The United States Supreme Court held that the state court's rejection of the petitioner's ineffective assistance claim was unreasonable. *Wiggins*, 539 U.S. at 527–38. The Court determined that the state court's decision on the deficient performance prong was based on an unreasonable factual finding about what evidence counsel had available and an unreasonable assumption that counsel decided not to investigate for strategic reasons. *Id.* at 523–29, 534. The Court, applying a *de novo* standard of review because the state courts had not reached the prejudice prong, then found that the petitioner had established prejudice because the mitigating evidence of childhood abuse was “powerful,” the mitigating evidence was not inconsistent with the sentencing strategy of challenging the petitioner's responsibility for the crime, the jury heard very little other mitigating evidence, and the State presented only weak aggravating evidence. *Id.* at 534–38.

This court need address only the prejudice prong of this claim. *See Boyd*, 592 F.3d at 1293 (“[A] court may decline to reach the performance prong of the ineffective assistance test if convinced that the prejudice prong cannot be satisfied.”). In this case, the state habeas courts found that Mr. Rieber failed to establish prejudice because the evidence he presented at the Rule 32 hearing would

still not have convinced the sentencing court to impose a life sentence. (Doc. 16-32 at 30–31; doc. 16-93 at 117). Mr. Rieber contends that this conclusion was unreasonable because the evidence proved that he was in the habit of consuming hard drugs and that he consumed hard drugs on the day of the murder. (Doc. 1 at 15–16; doc. 17 at 10).

The evidence presented at the Rule 32 evidentiary hearing corroborates the part of Dr. Rogers’ report reciting Mr. Rieber’s history of drug use. (*See* doc. 16-32 at 38–41, 45–47). The evidence also corroborates Mr. Rieber’s claim that he consumed hard drugs and alcohol on the day of the murder. (*See id.*). But it does not corroborate Mr. Rieber’s claim that he was intoxicated at the time of the murder. The evidence that Mr. Rieber used drugs on the day of the murder was limited to evidence that Mr. Rieber attended a party where drugs were being used, one witness saw him snorting meth, smoking marijuana, and drinking alcohol at an unspecified time, and one witness *might* have seen him smoking marijuana and drinking around 6:30 or 7 P.M. (*Id.* at 45–47; doc. 16-83 at 67–68, 74–75, 77, 96). Multiple witnesses testified that they had never seen Mr. Rieber black out from drug use. (Doc. 16-31 at 40, 46; doc. 16-82 at 172; doc. 16-83 at 70–71). And Mr. Rieber’s sister testified that she was familiar with how Mr. Rieber acted when he was high and that when she saw him about an hour after the murder, he did not appear to be intoxicated.

(Doc. 16-32 at 40; doc. 16-82 at 144–46). It was not unreasonable for the state court to find as a fact that this evidence failed to establish that Mr. Rieber was intoxicated when he committed the murder. *See Landers*, 776 F.3d at 1294 (explaining that a factual finding is unreasonable under § 2254(d)(2) if the evidence is “too powerful to conclude anything but the petitioner’s factual claim” or that “the state court’s finding was clearly erroneous”).

Under *Wiggins*—a case that addressed the prejudice prong *de novo*—the question is whether, balanced against the aggravating evidence, the omitted mitigating evidence would have influenced the sentencer’s assessment of the defendant’s moral culpability. *See* 539 U.S. at 535. In that case, the only mitigating evidence presented to the jury was that the petitioner had no prior convictions and the aggravating evidence was weak. *Id.* at 537–38. The omitted mitigating evidence was that the petitioner was severely physically and sexually abused from an extremely young age. *Id.* at 516–17. Similar evidence was omitted in other cases in which federal courts have found an unreasonable application of *Wiggins* based on a failure to investigate and present mitigating evidence. *See Williams v. Allen*, 542 F.3d 1326, 1342–43 (11th Cir. 2008) (finding prejudice based on mitigating evidence that as a child, the petitioner was repeatedly severely beaten with deadly

weapons, deprived of food and clothing, and did not receive care relating to basic hygiene and medical needs).

By contrast, the mitigating evidence that trial counsel did not present to Mr. Rieber’s sentencing court is weak: it consisted of evidence that Mr. Rieber had a history of using hard drugs and alcohol and that he used some drugs and alcohol on the day he murdered Ms. Craig. (Doc. 16-32 at 38–41, 45–47). Trial counsel did present evidence that Mr. Rieber had a reputation for good character and had no history of violence and that a jury had, by majority vote, recommended a life sentence. (Doc. 16-32 at 27; doc. 16-79 at 54–60).

But the aggravators were strong. The state court found that—in addition to committing the murder during a robbery—Mr. Rieber planned the crime in advance with the intent to kill Ms. Craig and killed her while she was defenseless, in pain, and posed no threat to him. (Doc. 16-62 at 94–95). Mr. Rieber does not challenge these findings.⁴ (*See generally* doc. 1). Moreover, some of the omitted evidence highlighted misconduct of which the sentencer was not aware, such as Mr. Rieber’s history of selling drugs and his involvement with a fourteen-year-old girl who soon

⁴ Mr. Rieber does challenge the sentencer’s findings that he “stalked” the victim for days before the murder. (*See* doc. 1 at 18–23). As discussed below, the state court’s “stalking” finding was not unreasonable. But for ease of analysis, the court will disregard that specific finding in its discussion of this claim.

began using drugs with him. (Doc. 16-31 at 29, 41; doc. 16-82 at 104, 106, 174–76, 189); *see Evans v. Sec’y, Dep’t of Corr.*, 703 F.3d 1316, 1327 (11th Cir. 2013) (accepting as reasonable a state court’s rejection of a similar claim where the mitigating evidence “was a two-edged sword or would have opened the door to damaging evidence”) (quotation marks omitted); *Windom v. Sec’y, Dep’t of Corr.*, 578 F.3d 1227, 1251 (11th Cir. 2009) (“[A]ny potential benefit to be gained by presenting the relatively weak mitigating evidence in [the petitioner]’s case would have been severely undercut by rebuttal evidence of his own misconduct . . .”).

To find the state court’s determination on the prejudice prong unreasonable, the court would have to conclude that no reasonable jurist could have found a lack of prejudice. *See Brooks v. Comm’r, Ala. Dep’t of Corr.*, 719 F.3d 1292, 1300 (11th Cir. 2013). But a reasonable jurist could conclude that the omitted evidence would not have changed the sentencing court’s mind. Accordingly, the state courts’ findings on the prejudice prong were reasonable under *Strickland* and *Wiggins*, and Mr. Rieber is not entitled to habeas relief on this claim.

c. Claim Four

Mr. Rieber asserts that appellate counsel was ineffective for failing to challenge the state trial court’s finding that he “stalked” the victim, which he contends was the “primary basis” for the trial court’s finding that the crime was

particularly heinous, atrocious, and cruel. (Doc. 1 at 18). He contends that the trial court's factual finding that he stalked Ms. Craig was unreasonable because the evidence presented at trial does not establish that he committed the crime of stalking as defined by Alabama law. (*Id.* at 19–20; doc. 17 at 12). And, he says, the Alabama Court of Criminal Appeals' rejection of this claim was an unreasonable application of *Strickland* because it imposed an irrebuttable presumption that counsel acted strategically in deciding not to challenge the finding. (Doc. 1 at 21–22; doc. 17 at 13).

“Claims of ineffective assistance of appellate counsel are governed by the same standards applied to trial counsel under *Strickland*.” *Brooks*, 719 F.3d at 1300. Mr. Rieber must therefore establish both that appellate counsel's performance was deficient and that the deficiency prejudiced him on appeal. *Id.* The prejudice inquiry requires the court “to consider the merits of the omitted claim” and whether “the neglected claim would have a reasonable probability of success on appeal.” *Id.* (quotation marks omitted).

The sentencing court found that the murder was especially heinous, atrocious, or cruel compared to other capital offenses. (Doc. 16-62 at 93). In doing so, the court found that Ms. Craig was defenseless and posed no threat to Mr. Rieber; that Mr. Rieber “stalked the victim for several days before the murder,” causing her

apprehension and fear; that Mr. Rieber planned the crime in advance; that Mr. Rieber intended to kill Ms. Craig; that Ms. Craig suffered before she died; and that Mr. Rieber had “no reason whatsoever” for the killing. (*Id.* at 93–95).

On appeal, appellate counsel challenged the denial of a motion to suppress evidence, the defense’s use of a peremptory challenge to strike an Asian American juror for racial reasons in violation of *Batson*, the lack of guidelines in deciding whether to override the jury’s advisory sentencing verdict, the sentencing court’s finding that the offense was especially heinous, atrocious, or cruel, the sentencing court’s findings about the lack of mitigating circumstances, and a penalty phase jury charge. (Doc. 16-1 at 10–11). With respect to the heinous, atrocious, or cruel aggravator, counsel argued that some of the factors the court considered were irrelevant and some were unsupported by the evidence. (*Id.* at 21–23). Counsel specifically argued that no evidence supported a finding that Mr. Rieber “stalked” Ms. Craig. (*Id.* at 21).

The Alabama Court of Criminal Appeals affirmed the conviction and death sentence in a reasoned opinion. *Rieber I*, 663 So. 2d at 998. Of relevance to this claim, the Court rejected the *Batson* argument on the ground that Mr. Rieber invited the error, *id.* at 990–92, and that the evidence “clearly support[ed]” the heinous, atrocious, or cruel aggravator, *id.* at 992–93. In his petition for writ of certiorari,

Mr. Rieber again challenged the heinous, atrocious, or cruel aggravator. (Doc. 16-2 at 33–35). Among other arguments against that aggravating factor, he contended that the stalking finding was based on hearsay. (*Id.* at 33 n.6). The Alabama Supreme Court, too, affirmed the conviction and death sentence. *Rieber II*, 663 So. 2d at 1015. The Supreme Court concluded that the evidence supported the sentencing court’s findings, and specifically agreed with the findings that Mr. Rieber “had ‘cased’ the store and had stalked Ms. Craig for several days before the murder,” that Ms. Craig was apprehensive and afraid of Mr. Rieber, that the murder was a brutal execution-style killing committed after she had been rendered helpless, and that she remained alive and in great pain for some time after the shooting. *Id.* at 1003–04.

In his amended Rule 32 petition, Mr. Rieber contended that appellate counsel was ineffective for failing to challenge the lack of evidence supporting the “stalking” finding. (Doc. 16-11 at 63 ¶ 79). At the Rule 32 evidentiary hearing, Mr. Rieber did not ask appellate counsel any questions about his reasons for failing to challenge the stalking finding. (*See* doc. 16-82 at 200–03; doc. 16-83 at 3–36, 48–50). Accordingly, the state habeas trial court found that Mr. Rieber had abandoned the ineffective assistance argument. (Doc. 16-32 at 36). In the alternative, the court determined that Mr. Rieber failed to prove the claim because he did not question

counsel about his reasons, and in any event, he failed to present any evidence or argument calling into question the support for the stalking finding. (*Id.* at 36–37).

On appeal, the Alabama Court of Criminal Appeals agreed with the state trial court’s conclusion that Mr. Rieber failed to prove the claim. (Doc. 16-93 at 123). The Court applied a presumption that counsel’s reason for not making an argument was strategic and concluded that Mr. Rieber had not rebutted that presumption because he did not question counsel about why he failed to challenge the stalking finding on appeal. (*Id.* at 123–24).

The Alabama Court of Criminal Appeals’ decision was a merits-based rejection of Mr. Rieber’s claim. (*See* doc. 16-93 at 123–24). Although the Court of Criminal Appeals discussed only deficiency, that court expressly concluded that Mr. Rieber failed to prove that trial counsel’s “performance was deficient or that his performance prejudiced [him].” (*Id.* at 124). The fact that the Court’s decision does not explain its rationale for the prejudice determination does not mean that it failed to address the prejudice prong on the merits. *See Reaves*, 872 F.3d at 1151 (“[T]he fact that a state court did not explain every step of its decision-making process does not mean that it did not adjudicate every prong of an ineffective assistance claim.”); *Wright v. Sec’y for Dep’t of Corr.*, 278 F.3d 1245, 1255 (11th Cir. 2002) (“Telling state courts when and how to write opinions to accompany their decisions is no way

to promote comity. Requiring state courts to put forward rationales for their decisions so that federal courts can examine their thinking smacks of a ‘grading papers’ approach that is outmoded in the post-AEDPA era.”). This court must afford § 2254(d) deference to the Alabama Court of Criminal Appeals’ rejection of this ineffective assistance claim on both prongs.⁵

The state court’s rejection of this claim was not an unreasonable application of clearly established federal law or based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d). The Alabama Court of Criminal Appeals determined that Mr. Rieber had not carried his burden of presenting evidence to rebut the presumption that counsel performed effectively. (Doc. 16-93 at 123–24). Mr. Rieber argues this was an unreasonable application of *Strickland* because no reasonable attorney could have made a strategic decision not to challenge the stalking finding, which was unsupported by any evidence. (Doc. 1 at 23; doc. 17 at 11). A necessary predicate for this argument is a finding that the stalking finding was, itself, unreasonable and unsupported. Mr. Rieber cannot prevail on either argument.

The court will begin with the predicate—the stalking finding. Because a state court made that finding, Mr. Rieber must establish that the sentencing court’s finding

⁵ Even if the court were to review the prejudice prong *de novo*, that prong would fail for the reasons explained below.

that he stalked Ms. Craig was unreasonable in light of the evidence before the Alabama Court of Criminal Appeals, *see* 28 U.S.C. § 2254(d)(2), and that clear and convincing evidence rebuts the presumption that the state court's finding was correct, *id.* § 2254(e)(1).

Mr. Rieber's only argument about the correctness of the sentencing court's stalking finding derives from the evidence presented during trial. Specifically, Tommy Erskine saw Mr. Rieber sitting in a car outside the convenience store several days before the murder, and later that same day saw Mr. Rieber drive by the store, prompting him to tell Ms. Craig to call the police because Mr. Rieber "was patrolling the store." *Rieber I*, 663 So. 2d at 987; (*see also* doc. 16-93 at 97). And Allen Wayne Gentle saw Mr. Rieber in the convenience store several hours before the murder, at which time Ms. Craig asked him several questions, in response to which he identified Mr. Rieber and said, "I don't think he would do nothing like that." *Rieber I*, 663 So. 2d at 987.

Mr. Rieber contends that there was evidence Mr. Erskine could not have seen Mr. Rieber's car in the weeks before the murder because the car Mr. Erskine saw had a Tennessee license plate while Mr. Rieber's car had an Alabama license plate. (Doc. 1 at 19). He further argues that Mr. Erskine never saw Mr. Rieber interact with Ms. Craig, and any evidence that Ms. Craig was fearful came from "hearsay

statements by Mr. Erskine inferring that the victim was afraid.” (*Id.* at 19–20). Finally, he asserts that the evidence presented does not rise to the level of stalking as defined by Alabama law. (*Id.* at 20). None of these arguments clearly and convincingly proves that the sentencing court erroneously found that Mr. Rieber stalked Ms. Craig before the murder.

For one thing, Mr. Erskine did not only identify Mr. Rieber’s car as the car he saw patrolling the store; he identified Mr. Rieber as the man inside the car and as the man he saw entering the store. (Doc. 16-76 at 96). And during cross-examination, trial counsel elicited testimony from Mr. Erskine that the car he saw had Tennessee plates, while Mr. Rieber’s car had Alabama plates. (*Id.* at 100). A reasonable factfinder could have considered that evidence and still found that Mr. Erskine saw Mr. Rieber patrolling the convenience store days before the murder. *See Landers*, 776 F.3d at 1294 (explaining that a factfinding is unreasonable if the evidence “is too powerful to conclude anything but the petitioner’s factual claim” or “the state court’s finding was clearly erroneous”). Nor does the license plate evidence clearly and convincingly rebut the presumption of correctness. *See* 28 U.S.C. § 2254(e)(1).

For another thing, this court cannot consider Mr. Rieber’s challenge to the court’s evidentiary ruling in allowing Mr. Erskine to testify about what he inferred from statements that Ms. Craig made to him. Even assuming that the state court erred

by allowing Mr. Erskine’s testimony about what he understood of Ms. Craig’s state of mind—which this court strongly doubts—“generally federal courts are not empowered to correct erroneous evidence rulings of state trial courts.” *Snowden v. Singletary*, 135 F.3d 732, 737 (11th Cir. 1998).

Finally, Mr. Rieber’s arguments about whether the evidence presented rose to the level of stalking as defined by Alabama law are unavailing. It is not clear that the sentencing court actually found that Mr. Rieber stalked Ms. Craig in the criminal sense of the word, as opposed to the colloquial sense of the word. (*See* doc. 16-62 at 93). What is clear is that the sentencing court relied heavily on evidence that Ms. Craig “was aware of his presence and was apprehensive and afraid of him.” (*Id.*); *see also Rieber II*, 663 So. 2d at 1003 (approving the sentencing court’s “stalking” finding and explaining that “fear experienced by the victim before death is a significant factor in determining the existence of the aggravating circumstance that the murder was especially heinous, atrocious, or cruel”). And in any event, even if the state courts had found that Mr. Rieber “stalked” Ms. Craig as defined by Alabama law, this court would be bound by their interpretation of Alabama law. *See Pietri*, 641 F.3d at 1284. Accordingly, Mr. Rieber cannot establish that the sentencing court’s “stalking” finding was unreasonable or incorrect. *See* 28 U.S.C. § 2254(d)(2), (e)(1).

Mr. Rieber also cannot prevail on the second part of his claim, which is that the Alabama Court of Criminal Appeals unreasonably applied an “irrebuttable presumption” that appellate counsel acted strategically when declining to raise this issue on appeal. (*See* doc. 1 at 21). As an initial matter, nothing about the Court of Criminal Appeals’ decision indicates that the presumption it applied was “irrebuttable.” Indeed, the court’s decision was premised on the fact that Mr. Rieber did *not* rebut the presumption of reasonableness. (*See* doc. 16-93 at 123). And the presumption of reasonableness arises from *Strickland* itself. *Strickland*, 466 U.S. at 690 (“[T]he 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.”).

But even if the Alabama Court of Criminal Appeals had unreasonably applied *Strickland* by applying an irrebuttable presumption that counsel acted strategically, *de novo* review of the deficient performance prong would not avail Mr. Rieber. Mr. Rieber appears to argue that because counsel exhibited poor judgment by asserting an entirely unrelated and frivolous *Batson* challenge—which the appeals court rejected as invited error—the court can find appellate counsel’s performance deficient in general. (*See* doc. 1 at 24; doc. 17 at 4–5; 14–15). But Mr. Rieber cites no caselaw supporting that position, and he does not address the fact that counsel

asserted various other claims, some of which had significant merit. *See, e.g., Rieber I*, 663 So. 2d at 987–90. Moreover, the record establishes that counsel, in fact, did challenge the stalking finding. (Doc. 16-1 at 21; doc. 16-2 at 33 n.6). Mr. Rieber cannot establish deficient performance.

Mr. Rieber also cannot overcome § 2254(d) deference on the performance prong. The Alabama Supreme Court found that the evidence supported a stalking finding. *Rieber II*, 663 So. 2d at 1003. Accordingly, Mr. Rieber cannot show a reasonable probability that challenging the stalking finding would have changed the outcome of the appeal. *See Brown v. United States*, 720 F.3d 1316, 1335 (11th Cir. 2013) (“It is . . . crystal clear that there can be no showing of actual prejudice from an appellate attorney’s failure to raise a meritless claim.”). Finally, even if a different or more fulsome argument about the propriety of the stalking finding could have been meritorious, Mr. Rieber has not addressed any of the five other factors that the sentencing and appeals courts found supported the heinous, atrocious, or cruel factor. (*See* doc. 1 at 18–23). He therefore cannot establish that the Alabama Court of Criminal Appeals’ rejection of this claim on the prejudice prong was unreasonable.

d. Claim Six

Mr. Rieber asserts that the Supreme Court’s decision in *Hurst* requires that the court vacate his death sentence for three reasons: the sentencing court’s override

of the jury’s advisory verdict violated Mr. Rieber’s Sixth Amendment right to a trial by jury, sentencing Mr. Rieber to death violates his Eighth Amendment right not be sentenced in an arbitrary and capricious manner, and Alabama’s 2017 amendment to its sentencing scheme results in a violation of Mr. Rieber’s Fourteenth Amendment right to equal protection. (Doc. 1 at 26–34). To understand Mr. Rieber’s claims, the court must set out in some detail the sentencing scheme Alabama used when Mr. Rieber was sentenced, as well as later developments in the legal landscape, and how Mr. Rieber’s state proceedings intersected with those developments.

Mr. Rieber was tried, convicted, and sentenced in 1992. (*See* doc. 16-62 at 88, 101). At that time (as now), Alabama’s capital sentencing statute provided that murder “during a robbery in the first degree” was a capital offense punishable by death. Ala. Code § 13A-5-40(a)(2) (1987); *see also id.* § 13A-5-39(1) (1981). If a jury found the defendant guilty of a capital offense, the trial court would set a sentence hearing so that the jury could issue an advisory verdict. *Id.* § 13A-5-45(a) (1981); *id.* § 13A-5-46(a) (1981). The jury was required to recommend life imprisonment if it found no statutorily defined aggravating circumstances or if it found that the statutorily defined aggravating circumstances did not outweigh any mitigating circumstances, and it had to recommend a death sentence if it found that

one or more statutorily defined aggravating circumstances existed and outweighed any mitigating circumstances. *Id.* § 13A-5-46(e) (1981).

One statutorily defined aggravating circumstance was that the defendant “was engaged . . . in the commission of . . . robbery”; another was that the crime was “especially heinous, atrocious, or cruel compared to other capital offenses.” *Id.* § 13A-5-49(4), (8) (1982). Because the jury’s verdict convicting Mr. Rieber established the aggravating circumstance that he committed the murder in the course of a robbery, Alabama’s capital sentencing statute required the jury to consider that aggravating circumstance “as proven beyond a reasonable doubt.” *Id.* § 13A-5-45(e) (1982). Accordingly, it had to have found at least one aggravating circumstance beyond a reasonable doubt, and its recommendation of life must have been because it found that the aggravating circumstances did not outweigh the mitigating circumstances. *See id.*

After the jury issued its advisory verdict, the trial court had to determine the sentence after considering the evidence presented at trial, during the penalty hearing, and in a pre-sentence investigation report, along with arguments by the parties about “the existence of aggravating and mitigating circumstances and the proper sentence to be imposed in the case.” Ala. Code § 13A-5-47(c)–(d) (1981). The sentencing court was required to consider, on its own, “whether the aggravating circumstances

it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court [had to] consider the recommendation of the jury contained in its advisory verdict,” but the advisory verdict was “not binding upon the court.” *Id.* § 13A-5-47(e) (1981). A court’s decision to disregard the jury’s advisory verdict and impose a different sentence is referred to as “judicial override.”

In Mr. Rieber’s direct appeal to the Alabama Court of Criminal Appeals—submitted in March 1993—he challenged the constitutionality of Alabama’s judicial override. (Doc. 16-1 at 17–29, 32). The Alabama Court of Criminal Appeals rejected that claim on the ground that judicial override was constitutional. *Rieber I*, 663 So. 2d at 992. Mr. Rieber again raised his constitutional challenges to the judicial override in his petition for certiorari to the Alabama Supreme Court, which he filed in December 1994. (Doc. 16-2 at 78–82, 102). While Mr. Rieber’s appeal to the Alabama Supreme Court was pending, the United States Supreme Court decided *Harris v. Alabama*, 513 U.S. 504, 512 (1995), holding that the Alabama statute was not unconstitutional because of its failure to specify the weight a sentencing judge must accord an advisory jury verdict. Based on *Harris* and other caselaw, the Alabama Supreme Court rejected Mr. Rieber’s challenge to the constitutionality of Alabama’s judicial override provision. *Rieber II*, 663 So. 2d at 1003.

At the time of Mr. Rieber’s trial and appeal, United States Supreme Court caselaw squarely held that the Constitution did not require a jury to make all findings underlying a sentencing decision. *Clemons v. Mississippi*, 494 U.S. 738, 745 (1990); *Walton v. Arizona*, 497 U.S. 639 (1990), overruled by *Ring v. Arizona*, 536 U.S. 584 (2002). Indeed, in *Walton*, the Supreme Court upheld the constitutionality of Arizona’s capital sentencing statute. 497 U.S. at 643. That statute provided that after a defendant had been convicted of first degree murder, the trial court had to hold a separate sentencing hearing, determine the existence of aggravating and mitigating circumstances, and determine whether to impose death or life imprisonment. *Id.* The *Walton* Court explained that aggravating circumstances were not elements of an offense that a jury must determine, but instead were “standards to guide the making of the choice between the alternative verdicts of death and life imprisonment.” *Id.* at 648 (quotation marks and alteration omitted).

In 2000, the United States Supreme Court held that, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The *Apprendi* Court highlighted that the rule it announced did not “render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital

crime, to find specific aggravating factors before imposing a sentence of death.” *Id.* at 496. The Court explained that “once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.” *Id.* at 497 (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 257 (1999) (Scalia, J., dissenting)).

Two years later, in *Ring v. Arizona*, 536 U.S. 584, 589 (2002), the United States Supreme Court held that “[c]apital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.” In that case, a jury found the defendant guilty of felony murder, an offense for which the maximum penalty was life imprisonment. *Id.* at 592. But Arizona’s capital sentencing scheme permitted the trial judge to impose a death sentence after conducting a separate sentencing hearing and finding the existence of aggravating and mitigating circumstances. *Id.* The trial judge sentenced the defendant to death based on evidence presented only to the court. *Id.* at 593–95. Relying on *Apprendi*, the United States Supreme Court held that Arizona’s capital sentencing scheme was unconstitutional because it allowed the sentencing judge to find the facts necessary to impose the death penalty, which otherwise would not have been available. *Id.* at 609.

In 2004, Mr. Rieber filed his amended Rule 32 petition, which challenged the constitutionality of Alabama’s jury override provision under the Fourteenth Amendment. (Doc. 16-11 at 52–53). The state habeas trial court, in a 2015 decision, found this claim procedurally barred because Mr. Rieber had already raised it on direct appeal. (Doc. 16-31 at 52–54).

While Mr. Rieber’s appeal of the denial of his Rule 32 petition was pending, the United States Supreme Court decided *Hurst v. Florida*, 577 U.S. 92 (2016). In that case, a jury found the defendant guilty of first degree murder, a capital felony. *Id.* at 95. Under Florida law, a conviction for first degree murder was limited to life imprisonment unless “an additional sentencing proceeding result[ed] in findings by the court that such person shall be punished by death.” *Id.* (quotation marks omitted). The sentencing proceeding involved an evidentiary hearing held before a jury, which would issue “an ‘advisory sentence’ of life or death without specifying the factual basis of its recommendation.” *Id.* at 95–96. The sentencing court would make factual findings about aggravating and mitigating circumstances and impose the sentence, giving the jury’s advisory verdict “great weight.” *Id.* at 96. The jury in *Hurst* recommended a death sentence and the judge sentenced the defendant to death. Relying on *Ring* and *Apprendi*, the United States Supreme Court found Florida’s capital sentencing scheme unconstitutional because it allowed “a sentencing judge

to find an aggravating circumstance, independent of a jury’s factfinding, that is necessary for imposition of the death penalty.” *Id.* at 102; *see also id.* at 98–99; *but see McKinney v. Arizona*, 140 S. Ct. 702, 707 (2020) (“Under *Ring* and *Hurst*, a jury must find the aggravating circumstance that makes the defendant death eligible. But importantly, in a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range.”).

On appeal of the denial of his Rule 32 petition, Mr. Rieber argued that *Hurst* mandated vacatur of his death sentence because the sentencing court overrode the jury’s advisory verdict based on the court’s own factual findings. (Doc. 16-91 at 84–89). The Alabama Court of Criminal Appeals denied this claim on the grounds that *Hurst* was not retroactively applicable to Mr. Rieber because the Supreme Court decided it after his conviction became final and, in any event, Alabama’s sentencing scheme did not violate *Hurst* because the jury made the finding permitting imposition of the death penalty. (Doc. 16-93 at 135–36).

In 2017, Alabama amended its capital sentencing scheme. 2017 Ala. Laws Act 2017-131 (S.B. 16). The amended statute provides that the trial court must impose the sentence decided by the jury. Ala. Code § 13A-5-47(a). The jury can

enter a death verdict only “on a vote of at least 10 jurors.” *Id.* § 13A-5-46(f). But the 2017 amendment “shall not apply retroactively to any defendant who has previously been convicted of capital murder and sentenced to death prior to April 11, 2017.” *Id.* § 13A-5-47.1.

In his § 2254 petition, Mr. Rieber makes the same three *Hurst* claims he made to the Alabama Court of Criminal Appeals during his state collateral proceeding: (1) his death sentence violates the Sixth Amendment because Alabama’s capital sentencing scheme permitted a judge to override a jury’s recommendation based on factual findings not made by the jury; (2) his death sentence violates the Eighth Amendment because it is arbitrary and capricious to impose the death penalty in light of evolving standards that resulted in abolition of judicial override, especially given statistical evidence that elected judges frequently override jury recommendations of life imprisonment when the victim is white; and (3) his death sentence violates equal protection because the 2017 amendment’s non-retroactivity provision means that an identically situated defendant sentenced after 2017 would get a different sentence than he did. (Doc. 1 at 26–34). The court will address each argument in turn.

i. Sixth Amendment

First, it was not unreasonable for the Alabama Court of Criminal Appeals to reject Mr. Rieber’s Sixth Amendment claim. *Hurst* and its predecessor *Ring* “do not apply retroactively on collateral review.” *McKinney*, 140 S. Ct. at 708. This is because *Ring*, on which *Hurst* was based, announced a “new procedural rule,” which under United States Supreme Court precedent applies prospectively and to cases still pending on direct review, but not to any cases already final on direct review. *Id.*; *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004).

Mr. Rieber’s conviction became final in 1995, when the United States Supreme Court denied certiorari in Mr. Rieber’s direct appeal. *See Beard v. Banks*, 542 U.S. 406, 408 (2004); *see also Rieber II*, 663 So. 2d at 1000; *Rieber v. Alabama*, 516 U.S. 995 (1995). That was years before the United States Supreme Court decided *Apprendi*, *Ring*, or *Hurst*. *Hurst*, 577 U.S. at 92 (2016); *Ring*, 536 U.S. at 589 (2002); *Apprendi*, 530 U.S. at 466 (2000). Accordingly, Mr. Rieber is not entitled to the benefit of the new procedural rule announced in any of those cases, *see McKinney*, 140 S. Ct. at 708, and the state habeas appellate court’s rejection of his *Hurst* claim was not an unreasonable application of clearly established federal law, *see* 28 U.S.C. § 2254(d)(2).

ii. Eighth Amendment

Mr. Rieber next argues that, under *Hurst*, his death sentence is arbitrary and capricious, in violation of the Eighth Amendment, because the *Hurst* petitioner received a life sentence despite the same seven to five split vote Mr. Rieber received, no States still permit a judicial override of a jury's life recommendation, and elected judges in Alabama frequently overrode life verdicts in cases involving white murder victims.⁶ (Doc. 1 at 30–32). Mr. Rieber made this argument to the Alabama Court of Criminal Appeals on appeal from the denial of his Rule 32 petition. (Doc. 16-91 at 89). The Alabama Court of Criminal Appeals, in denying this claim on the merits, did not explain its rationale. (*See* doc. 16-93 at 135–36 & n.12 (citing the part of Mr. Rieber's brief raising this argument); doc. 16-91 at 89); *see Reaves*, 872 F.3d at 1151; *Wright*, 278 F.3d at 1255.

The Alabama Court of Criminal Appeals' rejection of this claim was not based on an unreasonable application of clearly established federal law and, even under *de novo* review, this claim would fail. Although Mr. Rieber asserts this as a *Hurst* claim, the *Hurst* decision makes no holding about the Eighth Amendment; *Hurst* relates to

⁶ Mr. Rieber makes another arbitrariness challenge to his sentence in Claim Eight. (*See* Doc. 1 at 35–36). The court will address that claim separately.

the Sixth Amendment. *See* 577 U.S. at 102. The state court therefore could not have unreasonably applied *Hurst* to Mr. Rieber’s Eighth Amendment claim.

Mr. Rieber cites to *Furman v. Georgia*, 408 U.S. 238 (1972) and *Gregg v. Georgia*, 428 U.S. 153 (1976), in support of his Eighth Amendment claim. (Doc. 1 at 30). Those decisions “establish that a state capital sentencing system must: (1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant’s record, personal characteristics, and the circumstances of his crime.” *Kansas v. Marsh*, 548 U.S. 163, 173–74 (2006). Mr. Rieber argues that his sentence is arbitrary because the *Hurst* petitioner received a life sentence despite the same seven to five split jury verdict Mr. Rieber received. (Doc. 1 at 30–31). As an initial matter, nothing in the *Hurst* decision indicates that the *Hurst* petitioner was automatically entitled to a life sentence: the United States Supreme Court struck down Florida’s capital sentencing scheme and remanded for further proceedings, but did not, on its own, impose a life sentence. *See* 577 U.S. at 102–03. On remand from the *Hurst* decision, the Florida Supreme Court vacated the petitioner’s sentence and remanded for a new penalty phase proceeding. *Hurst v. State*, 202 So. 3d 40, 69 (Fla. 2016).

This distinction highlights why the state courts’ rejection of this arbitrariness claim was not unreasonable. Under the sentencing scheme applicable to Mr. Rieber, the jury’s advisory verdict was just one factor that the sentencer had to consider. Ala. Code § 13A-5-47(e) (1981). The other factors—the specifics of the murder, the defendant’s history and characteristics, and any other relevant circumstances, either aggravating or mitigating—necessarily differ from defendant to defendant. *See, e.g., id.* § 13A-5-49 (1981) (enumerating aggravating circumstances); *id.* § 13A-5-51 (1981) (enumerating mitigating circumstances); *id.* § 13A-5-52 (1981) (providing that the sentencer must consider any other mitigating circumstance offered by the defendant). Two juries splitting in the same proportion does not mean that a difference between the sentences imposed on the two defendants is arbitrary under *Furman* and *Gregg*. There is no indication in the record that the sentencer was unable to make a “reasoned, individualized sentencing determination based on [Mr. Rieber’s] record, personal characteristics, and the circumstances of his crime” in such a way that his sentence would violate *Furman* and *Gregg*. *See Marsh*, 548 U.S. at 173–74.

Mr. Rieber also argues that his sentence is arbitrary and capricious because no States still allow judicial override of a jury’s life recommendation. (Doc. 1 at 31–32). He does not explain how *Hurst*, or the post-*Hurst* legislative abolition of judicial

override, makes his sentence, imposed when judicial override was permissible, arbitrary and capricious. (*See id.*). Neither of the cases he cites establish that a death sentence is arbitrary and capricious when it was imposed, over a jury's life recommendation, before the national consensus changed. (*See id.*); *see Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the death penalty is an unconstitutionally disproportionate sentence to impose on an intellectually disabled defendant, as evidenced by a national legislative consensus prohibiting or disapproving the execution of such defendants); *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (holding that the categorical exclusion of all jurors who expressed qualms about capital punishment violates a defendant's Sixth and Fourteenth Amendment right to an impartial jury). Accordingly, Mr. Rieber has not established that the Alabama Court of Criminal Appeals' rejection of this claim was an unreasonable application of clearly established federal law.

Finally, Mr. Rieber argues that his death sentence was arbitrary and capricious because elected judges frequently override jury recommendations of life imprisonment in cases with white victims. (Doc. 1 at 31–32). Although he makes this argument in connection with his *Hurst* claim, he does not explain what it has to do with the *Hurst* decision. Moreover, the only caselaw Mr. Rieber provides in support of this argument is an opinion dissenting from the denial of a writ of

certiorari. (Doc. 1 at 32); *see Woodward v. Alabama*, 571 U.S. 1045 (2013) (Sotomayer, J., dissenting from the denial of a writ of certiorari). A dissenting opinion, much less an opinion dissenting from the denial of a writ of certiorari, cannot constitute “clearly established federal law,” which is strictly limited to “the holdings . . . of [the United States Supreme] Court’s decisions as of the time of the relevant state-court decision.” *Williams*, 529 U.S. at 412. Accordingly, Mr. Rieber has not established that the Alabama Court of Criminal Appeals’ rejection of this claim was contrary to or an unreasonable application of clearly established federal law. *See* 28 U.S.C. § 2254(d)(2).

iii. Fourteenth Amendment

Mr. Rieber’s final argument relating to *Hurst* is that his death sentence violates the Equal Protection Clause of the Fourteenth Amendment because Alabama’s 2017 repeal of the judicial override means that no person tried today who receives the same split jury verdict as him could receive the same sentence as him. (Doc. 1 at 33).

Mr. Rieber made this argument to the Alabama Court of Criminal Appeals in a letter brief during the pendency of his appeal of the denial of his Rule 32 petition (doc. 16-92 at 143), but the Alabama Court of Criminal Appeals did not address the argument and he did not reiterate it in his petition for certiorari to the Alabama

Supreme Court (*see* doc. 16-94 to 16-96; doc. 16-97 at 1–13). However, the State concedes exhaustion. (Doc. 14 at 59). Accordingly, the court will address this argument on the merits.

As the Eleventh Circuit has explained, “no U.S. Supreme Court decision holds that the failure of a state legislature to make revisions in a capital sentencing statute retroactively applicable to all of those who have been sentenced to death before the effective date of the new statute violates the Equal Protection Clause.” *Lambrix v. Sec’y, DOC*, 872 F.3d 1170, 1183 (11th Cir. 2017). And the Eleventh Circuit has held that the Supreme Court’s decision in *Dobbert v. Florida*, 432 U.S. 282 (1977) is inconsistent with any such claim. *Lambrix*, 872 F. 3d at 1183.

In *Dobbert*, the petitioner committed several murders. 432 U.S. at 288. Shortly after the murders, but before his trial, the Florida Supreme Court struck down Florida’s capital statute as unconstitutional, pursuant to the United States Supreme Court’s then-recent decision in *Furman v. Georgia*. *Id.* at 288, 301. The Florida Supreme Court commuted the sentences of all prisoners sentenced to death under the old statute. *Id.* at 301. But the petitioner was tried under the new statute. *Id.* The petitioner contended that, because he committed his crimes before the enactment of the new statute but was sentenced under the new statute, the imposition of the death penalty violated his right to equal protection. *Id.* The United States Supreme Court

rejected that claim, explaining that “petitioner is simply not similarly situated to those whose sentences were commuted. He was neither tried nor sentenced prior to *Furman*, as were they.” *Id.*

In *Lambrix*, the Eleventh Circuit explained that the reasoning in *Dobbert* applied to the petitioner’s equal protection claim challenging Florida’s non-retroactive change to its capital sentencing statute. 872 F.3d at 1183. Likewise, Mr. Rieber’s equal protection challenge to Alabama’s non-retroactive change to its capital sentencing statute must fail under *Dobbert* because he has not shown that he is similarly situated to any prisoners who have been sentenced under the new statute. *See* 432 U.S. at 301. Accordingly, Mr. Rieber has not shown entitlement to relief under the Equal Protection Clause of the Fourteenth Amendment.

e. Claim Eight

Mr. Rieber asserts that the capital sentencing scheme applicable to his trial was unconstitutionally arbitrary on two grounds: (1) because it did not “sufficiently narrow the decision maker’s discretion in deciding whether to impose the penalty of death”; and (2) permitting judicial override in States where judges are elected results in judges who are more likely to override a jury’s recommendation of life imprisonment. (Doc. 1 at 35–36). The constitutional basis for this claim is not entirely clear—he says that the statutory scheme violates his rights to due process

and equal protection but cites only a case decided under the Cruel and Unusual Punishment Clause of the Eighth Amendment, as applicable to the States via the Fourteenth Amendment. (*Id.* at 36).

In his amended Rule 32 petition, Mr. Rieber made these same arguments in support of due process and equal protection claims. (Doc. 16-11 at 52 ¶¶ 32–33, 52–53 ¶ 36). The state habeas trial court denied those claims on the merits because Mr. Rieber failed to adequately plead and prove them. (Doc. 16-31 at 51–52, 54–55). On appeal, Mr. Rieber argued that Alabama’s capital sentence scheme was arbitrary, in violation of the Eighth and Fourteenth Amendments, because it did not genuinely narrow the class of persons eligible for the death penalty. (Doc. 16-91 at 91–92). And in support of his *Hurst* Sixth Amendment claim—discussed in the preceding section—he argued that judicial elections inject arbitrariness into a court’s decision to override a jury’s advisory verdict. (*Id.* at 86–88). The Alabama Court of Criminal Appeals rejected both arguments on the merits. (Doc. 16-93 at 135 n.12 (acknowledging the effect-of-elections argument), 137–38 (rejecting the arbitrariness argument)).

The State concedes that Mr. Rieber exhausted the “standards of discretion” part of his claim but contends that he failed to exhaust the judicial-elections part of

his claim.⁷ (Doc. 14 at 81). Mr. Rieber replies that the judicial-elections issue is an argument in support of arbitrariness, not a freestanding claim. (Doc. 17 at 19). Ultimately, the court need not determine whether this is an argument, which Mr. Rieber is permitted to clarify on federal collateral review, or a substantive change, which he failed to exhaust. *See, e.g., Kelley v. Sec’y for Dep’t of Corr.*, 377 F.3d 1317, 1344 (11th Cir. 2004) (“[H]abeas petitioners are permitted to clarify the arguments presented to the state courts on federal collateral review provided that those arguments remain unchanged in substance.”). The court has discretion to deny—although not to grant—even unexhausted claims. *See* 28 U.S.C. § 2254(b)(2) (“An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.”). And for the reasons stated below, this claim is meritless, so the court exercises that discretion.

In support of this claim, Mr. Rieber cites only *Furman*, which held, without explanation, that three petitioners’ death sentences were cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments. (Doc. 1 at 36);

⁷ The State does not address whether Mr. Rieber’s shifting reliance on due process, equal protection, and cruel and unusual punishment changes the exhaustion analysis. Because the State does not argue exhaustion on that ground and because Mr. Rieber’s claim is meritless in any event, the court will also not address whether Mr. Rieber failed to exhaust the claim by changing its constitutional basis throughout his state collateral proceedings.

Furman, 408 U.S. at 239–40. Although five justices agreed that the sentences were unconstitutional, none agreed on the precise grounds, and each wrote a separate concurring opinion. *See Furman*, 408 U.S. at 239–371. A plurality of the Supreme Court later explained that the narrowest grounds were articulated by Justices Stewart and White, *Gregg*, 428 U.S. at 169 n.15, who wrote that the sentences were cruel and unusual because “the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed,” *Furman*, 408 U.S. at 309 (Stewart, J., concurring in the judgment), and because “the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not,” *id.* (White, J., concurring in the judgment). The Supreme Court has since explained that *Furman* and *Gregg* “establish that a state capital sentencing system must: (1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant’s record, personal characteristics, and the circumstances of his crime.” *Marsh*, 548 U.S. at 173–74.

Mr. Rieber argues that the capital sentencing scheme in effect at the time of his trial fails to satisfy that standard because the availability of judicial override incentivized elected judges to impose the death penalty and Mr. Rieber’s sentence

was more severe than other capital cases in which defendants who engaged in worse conduct received life sentences. (Doc. 1 at 35–36; doc. 17 at 18–19). Mr. Rieber’s claim fails, whether under § 2254(d) deference or *de novo* review.

The capital sentencing scheme under which Mr. Rieber was sentenced authorized a death sentence only for specifically enumerated homicide offenses, and therefore “rationally narrow[ed] the class of death-eligible defendants.” *Marsh*, 548 U.S. at 173–74; *see* Ala. Code § 13A-5-40(a) (1987) (listing fourteen specific types of murder that constitute capital offenses). Moreover, the sentencing scheme listed eight specific aggravating circumstances that the sentencer had to consider in determining whether to impose the death penalty, Ala. Code § 13A-5-49 (1982), as well as seven specifically listed mitigating factors, *id.* § 13A-5-50 (1981), and other mitigating circumstances in the form of “any aspect of a defendant’s character or record and any of the circumstances of the offense,” *id.* § 13A-5-52 (1981). By its very terms, the statute required a “reasoned, individualized sentencing determination based on a death-eligible defendant’s record, personal characteristics, and the circumstances of his crime.” *Marsh*, 548 U.S. at 173–74.

Mr. Rieber argues that his sentence was arbitrary based on the likelihood of judicial override in cases involving white victims. (Doc. 1 at 36). But as the United States Supreme Court explained in *Harris*, even accepting judicial override statistics

as “a true view of capital sentencing in Alabama, they say little about whether the scheme is constitutional. That question turns not solely on a numerical tabulation of actual death sentences as compared to a hypothetical alternative, but rather on whether the penalties imposed are the product of properly guided discretion and not of arbitrary whim.” 513 U.S. at 514.

Mr. Rieber’s argument that his sentence was arbitrary because other defendants in unrelated cases received life sentences is likewise unavailing. (Doc. 17 at 18–19). Under the statute, the weighing of aggravating and mitigating circumstances “shall not be defined to mean a mere tallying of aggravating and mitigating circumstances for the purpose of numerical comparison.” Ala. Code § 13A-5-48 (1981). The Supreme Court has explained that this provision, “which is no less than what the Constitution requires . . . reflects the fact that, in the subjective weighing process, the emphasis given to each decisional criterion must of necessity vary in order to account for the particular circumstances of each case.” *Harris*, 513 U.S. at 515. Mr. Rieber’s plucking of one factor from two cases, without discussion of any of the other aggravating or mitigating circumstances considered by the sentencers in each case, cannot establish that his sentence was imposed arbitrarily.

f. Claim Nine

Mr. Rieber asserts that his execution would be unconstitutional, in violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment, as incorporated by the Fourteenth Amendment, because the Alabama statute in effect when he filed his § 2254 petition provided for execution by either electrocution or lethal injection, either of which involve a risk that he will suffer unnecessary and prolonged pain, making the execution cruel and unusual. (Doc. 1 at 37–38). Since Mr. Rieber filed his § 2254 petition, the Supreme Court has held that a claim challenging a State’s method of execution is properly brought under 42 U.S.C. § 1983, not in a petition for writ of habeas corpus under 28 U.S.C. § 2254. *Nance v. Ward*, 142 S. Ct. 2214, 2219 (2022). The court therefore **DISMISSES** this claim **WITHOUT PREJUDICE** to refiling under § 1983.

g. Claim Ten

When Mr. Rieber was on trial in 1992, Alabama law capped appointed counsel’s compensation for “out-of-court work” at \$1,000, billed at \$20 per hour, plus “payment for all in-court work,” billed at \$40 per hour. Ala. Code § 15-12-21(d) (1984). In 1999, Alabama removed the cap on an appointed attorney’s total fee and increased the hourly rates. 1999 Ala. Laws Act 1999-427 (H.B. 53).

Mr. Rieber claims that Alabama, by imposing the \$1,000 cap, denied him due process, equal protection, and effective assistance of counsel because no effective attorney could do all the work required within the compensable hours. (Doc. 1 at 39–41). He contends that the State has not proved that his attorneys actually did all the tasks an attorney would need to do to effectively represent a capital defendant. (Doc. 17 at 21).

Mr. Rieber raised this claim in his amended Rule 32 petition. (Doc. 16-11 at 55–57). The state habeas trial court denied this claim on the merits because the fee cap was constitutional and because Mr. Rieber had not proved that his representation was affected by the cap. (Doc. 16-31 at 61–62). On appeal, the Alabama Court of Criminal Appeals affirmed, explaining that under Alabama Supreme Court precedent, the compensation cap was constitutional. (Doc. 16-93 at 140–41).

Although not entirely clear, Mr. Rieber’s claim appears to be that because the statute capped his counsel’s compensation, counsel was necessarily ineffective. But a claim of ineffective assistance of counsel requires the petitioner to establish both that his attorney was actually deficient and that the deficiency prejudiced his defense. *Strickland*, 466 U.S. at 687. Mr. Rieber contends that no attorney could have performed all the tasks required in a capital murder case, but he does not allege what tasks his attorneys failed to perform. Indeed, he attempts to shift the burden

onto the State, arguing that the State failed to prove that his attorneys performed each task. (Doc. 17 at 21). But the burden rests on him to “establish[] his right to federal habeas relief and of prov[e] all facts necessary to show a constitutional violation.” *Romine v. Head*, 253 F.3d 1349, 1357 (11th Cir. 2001); *see also* Rules Governing Section 2254 Cases, R. 2(c) (“The petition must . . . state the facts supporting each ground”); *McFarland v. Scott*, 512 U.S. 849, 856 (1994) (“Habeas corpus petitions must meet heightened pleading requirements, *see* [] Rule 2(c)”).

Mr. Rieber has not alleged facts that would, if true, establish that he received ineffective assistance based on the compensation cap. (*See* doc. 1 at 39–42). Nor has he identified any United States Supreme Court cases that would make the state court’s decision unreasonable or contrary to federal law. (*See id.*). Accordingly, he cannot establish that the state courts’ rejection of this claim was unreasonable.

h. Claim Eleven

Mr. Rieber asserts that the State spoliated evidence of his intoxication on the night of the murder because, despite him showing “clear signs of intoxication,” the State failed to test his blood and urine or to appoint counsel who could have ensured that the State tested his blood and urine. (Doc. 1 at 42–44; doc. 17 at 22). He asserts that the spoliation denied him due process and equal protection. (Doc. 1 at 44).

Mr. Rieber asserted this claim in his amended Rule 32 petition. (Doc. 16-11 at 57–58). At the Rule 32 evidentiary hearing, Mr. Rieber called Dr. Alex Stalcup, a physician who specialized in treatment of drug and alcohol addiction. (Doc. 16-31 at 48; doc. 16-83 at 134–36). Dr. Stalcup testified that in 1990, a test performed up to ten or twelve days after ingestion could have detected the presence of marijuana in a smoker’s urine. (Doc. 16-83 at 140). A test performed up to three days after ingestion could have detected LSD, meth, or cocaine. (*Id.* at 141). And a blood test performed up to twenty-four hours after ingestion could have detected alcohol. (*Id.*). After the state habeas trial court rejected this claim (doc. 16-31 at 58–59), the Alabama Court of Criminal Appeals affirmed, explaining that Mr. Rieber had not presented any evidence “indicating that the State permitted evidence to spoil.” (Doc. 16-93 at 141–42).

The Alabama Court of Criminal Appeals’ rejection of this claim on the merits was not unreasonable. That court based its rejection on a factual determination that Mr. Rieber had not proved the State permitted any evidence to spoil. (*Id.*). Mr. Rieber has not argued that this was an unreasonable determination in light of the evidence presented. (*See* doc. 1 at 42–44); *see* 28 U.S.C. § 2254(d)(2). Nor has he presented any evidence even attempting to rebut the state court’s factual finding. (*See* doc. 1 at 42–44); *see* 28 U.S.C. § 2254(e)(1). To the extent Mr. Rieber means

to rely on his argument, made in connection with his ineffective assistance claims, that the evidence presented at the Rule 32 evidentiary hearing proves he was extremely intoxicated on the night of the murder, that argument fails here as it did in those other claims. *See supra* at 15–22. Given that Mr. Rieber has not made any attempt to challenge the factual basis for the state court’s rejection of his claim, he cannot establish that he is entitled to habeas relief.

Even if he could establish that the State permitted evidence to spoil, Mr. Rieber has not established, under any standard of review, that the spoliation of evidence violated his due process or equal protection rights. Mr. Rieber bases his bad faith and equal protection claims on the United States Supreme Court’s decision in *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988), which held that “unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.” *Id.* at 58. But Mr. Rieber does not allege—either with specific factual support or in a conclusory manner—that the State acted in bad faith. (*See doc. 1* at 42–44). He has therefore failed to satisfy the requirements of a due process claim under *Youngblood*. And although he conclusorily asserts that the same facts support a violation of his equal protection rights (*see id.* at 44), *Youngblood* does not speak to equal protection and

Mr. Rieber has not pointed to any cases relating to equal protection in the context of a State's spoliation of evidence. He is therefore not entitled to relief on this claim.

2. Procedural Default

In addition to the claims that the State concedes were properly raised in Mr. Rieber's § 2254 petition, he also asserts some claims that the State challenges as procedurally defaulted. In federal habeas law, procedural default comes in two forms: (1) where the petitioner asserted the claim in state court but the state court rejected the claim based on a state procedural bar; and (2) where the petitioner failed to exhaust state remedies and a state procedural bar would now make exhaustion of the claim futile. *Bailey v. Nagle*, 172 F.3d 1299, 1302–03 (11th Cir. 1999). The State bears the burden of establishing a procedural default. *Gordon v. Nagle*, 2 F.3d 385, 388 n.4 (11th Cir. 1993).

The first type of procedural default arises from the requirement that a petitioner “must comply with all ‘independent and adequate’ state procedures.” *Mason*, 605 F.3d at 1119 (11th Cir. 2010) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 86–87 (1977)). If a state court rejects a petitioner's claim on independent and adequate state procedural grounds, the petitioner has procedurally defaulted the claim and the federal court may not consider the merits of the claim. *Ward v. Hall*, 592 F.3d 1144, 1156–57 (11th Cir. 2010). A procedural ground is independent and

adequate if the state court “clearly and expressly state[d] that it [was] relying on state procedural rules to resolve the federal claim without reaching the merits of that claim,” the state court’s decision was not “intertwined with an interpretation of federal law,” and the state procedural rule was not “applied in an arbitrary or unprecedented fashion.” *Judd v. Haley*, 250 F.3d 1308, 1313 (11th Cir. 2001).

The second type of procedural default arises from the requirement that a petitioner exhaust all challenges to his conviction and sentence in state court before seeking relief in federal court. *See* 28 U.S.C. § 2254(b)(1)(A); *Jimenez v. Fla. Dep’t of Corr.*, 481 F.3d 1337, 1342 (11th Cir. 2007). To exhaust a claim, the petitioner must “give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State’s established appellate review process” and “fairly present[ing] every issue raised in his federal petition to the [S]tate’s highest court, either on direct appeal or on collateral review.” *Mason v. Allen*, 605 F.3d 1114, 1119 (11th Cir. 2010) (quotation marks and citations omitted). Typically, a failure to exhaust results in the dismissal of the claim without prejudice so that the petitioner can return to state court and exhaust the claim properly. *Gore v. Crews*, 720 F.3d 811, 815 (11th Cir. 2013). However, if a petitioner failed to exhaust a claim and “it is clear from state law that any future attempts at exhaustion would be futile,”

then the petitioner will never be able to satisfy the exhaustion requirement and the claim is procedurally defaulted. *Bailey*, 172 F.3d at 1305.

A petitioner may overcome a procedural default only if he “can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *see also Lucas v. Sec’y, Dep’t of Corr.*, 682 F.3d 1342, 1353 (11th Cir. 2012). To establish cause and prejudice, a petitioner must prove that “some objective factor external to the defense impeded counsel’s efforts” to pursue the claim properly in state court, *Murray v. Carrier*, 477 U.S. 478, 488 (1986), and that the “the errors at trial actually and substantially disadvantaged his defense so that he was denied fundamental fairness,” *Ward v. Hall*, 592 F.3d 1144, 1157 (11th Cir. 2010). To establish a fundamental miscarriage of justice with respect to a defaulted claim attacking a death sentence, the petitioner must “prove that, but for the alleged constitutional error, no reasonable juror would have found him eligible for the death penalty under [Alabama] law.” *Raleigh v. Sec’y, Fla. Dep’t of Corr.*, 827 F.3d 938, 958 (11th Cir. 2016) (quotation marks and emphasis omitted). The petitioner bears the burden of establishing an exception to a procedural default. *Gordon*, 2 F.2d at 388 n.4.

a. Claim Two

Mr. Rieber asserts that trial counsel provided ineffective assistance at the sentencing stage by failing to research and present to the sentencing court Alabama cases in which a defendant who engaged in worse conduct received a life sentence. (Doc. 1 at 11–13). He argues that presenting those cases would have shown how imposition of the death penalty was arbitrary and capricious. (*Id.*).

Mr. Rieber did not assert this claim in his amended Rule 32 petition. (*See* doc. 16-11 at 62–53; doc. 16-6 at 19–55). At the Rule 32 evidentiary hearing, Mr. Rieber submitted to the state habeas trial court a memorandum about the cases he contended trial counsel should have presented to the sentencing court. (Doc. 16-82 at 72–73; *see also id.* at 58). The court overruled an objection from the State and admitted the memorandum. (*Id.* at 73). Then, after the evidentiary hearing, Mr. Rieber filed a brief in which he argued that trial counsel was ineffective for failing to present cases with worse facts. (Doc. 16-27 at 38, 45–46, 71–73). The state habeas trial court’s order denying Mr. Rieber’s amended Rule 32 petition expressly addressed only the claims made in his amended Rule 32 petition, and therefore did not address this particular ineffective assistance claim. (*See* Doc. 16-31 at 49, 22–33).

On appeal, Mr. Rieber challenged the state habeas trial court’s failure to address this claim. (Doc. 16-91 at 56). The Alabama Court of Criminal Appeals

concluded that, under Alabama law, he had not preserved the claim for review because he had not amended his Rule 32 petition to assert that claim. (Doc. 16-93 at 112–13). The Alabama Supreme Court denied Mr. Rieber a writ of certiorari without opinion. (Doc. 16-98 at 31). Because the Alabama Supreme Court’s denial of certiorari does not explain its rationale, the court must “look through” to the Alabama Court of Criminal Appeals’ opinion and presume that the Alabama Supreme Court adopted the same reasoning. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018).

The State contends that this claim is procedurally defaulted because Mr. Rieber did not raise it in his Rule 32 petition and the Alabama Court of Criminal Appeals found that Mr. Rieber had not properly preserved it. (Doc. 14 at 46). Although the State couches its procedural default defense as one of “exhaustion,” it argues about the state courts’ application of a state procedural bar. (*See id.*). The court will therefore address whether a procedural bar precludes federal review of this claim. *See, e.g., Kimbrough v. Sec’y, Fla. Dep’t of Corr.*, 809 F. App’x 684, 690–91 (11th Cir. 2020) (holding that the State adequately raised the procedural default defense despite the State’s mischaracterization of the defense as a merits issue).⁸

⁸ Although *Kimbrough* is an unpublished opinion, the court finds it persuasive. *See McNamara v. Gov’t Emps. Ins. Co.*, 30 F.4th 1055, 1060 (11th Cir. 2022).

Here, the Court of Criminal Appeals declined to address the merits of Mr. Rieber's claim because, under Alabama law, he did not properly preserve it by asserting the claim in his amended Rule 32 petition. (Doc. 16-93 at 112–13). The state court's statement that it was relying on a state procedural ground was clear and express. *See Judd*, 250 F.3d at 1313. It was also entirely independent of any interpretation of federal law. *Id.* Finally, the Court of Criminal Rules relied on longstanding precedent applying the same rule, so the application of the rule was not arbitrary or unprecedented. (*See* Doc. 16-93 at 113) (citing *Arrington v. State*, 716 So. 2d 237, 239 (Ala. Crim. App. 1997) (quoting *Cleveland v. State*, 570 So. 2d 855 (Ala. Crim. App. 1990); *Morrison v. State*, 551 So. 2d 435 (Ala. Crim. App. 1990))); *see also Boyd v. Comm'r, Ala. Dep't of Corr.*, 697 F.3d 1320, 1336–38 (11th Cir. 2012) (holding that Alabama's failure-to-preserve procedural bar is independent and adequate).

Mr. Rieber contends that because he presented this claim to the state habeas trial court and the state habeas trial court admitted his memorandum of cases, he did not need to amend his amended Rule 32 petition to formally assert the claim. (Doc. 1 at 13; Doc. 17 at 8–9). But “it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.” *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991). The Alabama Court of Criminal Appeals applied a state

law ground to bar consideration of the merits of the claim. Because that state law ground was “independent of the federal question and adequate to support the judgment,” this court cannot review the merits of the claim. *Walker v. Martin*, 562 U.S. 307, 315 (2011). Mr. Rieber makes no argument with respect to any exceptions to the procedural default rule. (See Doc. 1 at 13; Doc. 17 at 9). Accordingly, the court finds that Claim Two is procedurally defaulted based on the state courts’ application of an independent and adequate state procedural bar.

b. Claim Five

Mr. Rieber contends that appellate counsel were ineffective for failing to challenge Alabama’s capital sentencing scheme on six different constitutional grounds. (Doc. 1 at 25).

In his amended Rule 32 petition, Mr. Rieber argued that Alabama’s capital sentencing scheme was unconstitutional on various grounds. (Doc. 16-11 at 51–53). Later in the petition, he asserted in two sentences that appellate counsel “improperly failed to raise on appeal numerous issues identified in other claims in this amended petition that trial counsel either failed to identify or failed to adequately pursue during the trial and sentencing phases of this case” and the “failure to raise the issues on appeal constituted a failure to provide petitioner with appellate representation he

was entitled to under the Alabama and United States Constitutions to equal protection of the laws and due process of law.” (*Id.* at 64 ¶¶ 82–83).

The state habeas trial court denied this claim on the merits, stating that appellate counsel is presumed to exercise sound strategy in determining which claims to assert and that establishing prejudice requires the petitioner to show that the unpresented claim would have entitled him to relief. (Doc. 16-32 at 40–41). On appeal, Mr. Rieber argued that appellate counsel were ineffective based in part on the “arguments they abandoned,” which he asserted, without further explanation, he had set out “in his briefing in support of his Rule 32 petition.” (Doc. 16-91 at 73–74). The Alabama Court of Criminal Appeals agreed with the state habeas trial court, held that Alabama courts had repeatedly rejected challenges to the constitutionality of Alabama’s capital sentencing scheme, and noted that Mr. Rieber had not presented the court with sufficient argument under Alabama Rule of Appellate Procedure 28(a)(10), which requires an appellant to include in the appellate brief a statement of the issues, argument, and citations to authority and the record. (Doc. 16-93 at 125).

The State contends that this claim is unexhausted because Mr. Rieber’s poor briefing failed to “fairly present” the claim to the state courts. (Doc. 14 at 57–58). Although the State couches this argument as one of exhaustion, it is possible that the

State has again mischaracterized the procedural bar issue as one of exhaustion. The court will therefore address both types of procedural default.

With respect to exhaustion, the court finds that Mr. Rieber properly exhausted the claim. Although his Rule 32 petition was not well-briefed, the state habeas trial court understood the claim and ruled on its merits. (Doc. 16-31 at 40–41). It did so using the federal standard for ineffective assistance claims. (*Id.* at 63). The Alabama Court of Criminal Appeals did the same. (Doc. 16-93 at 114, 125).

The Eleventh Circuit has held that where the petitioner’s federal due process claim was not clearly pleaded but the state courts decided the claim based on federal constitutional law, the petitioner properly exhausted the claim. *Sandstrom v. Butterworth*, 738 F.2d 1200, 1206 (11th Cir. 1984). The Eleventh Circuit explained that this rule vindicates the exhaustion requirement because the state court “not only had the opportunity to pass upon petitioner’s claimed constitutional violation, it actually did so. . . . There is no better evidence of exhaustion than a state court’s actual consideration of the relevant constitutional issue.” *Id.* (citation and quotation marks omitted). The Eleventh Circuit has recently reiterated this holding, stating that “[e]ven though [the petitioner] didn’t develop his . . . claim as well as he could have, we conclude that the claim is exhausted because the state habeas court had an opportunity to address [the] claim in the first instance when it rejected the merits of

his . . . claim.” *Sealey v. Warden, Ga. Diagnostic Prison*, 954 F.3d 1338, 1365 n.15 (11th Cir. 2020) (quotation marks and one alteration omitted); *see also Holland v. Florida*, 775 F.3d 1294, 1316 (11th Cir. 2014) (“[T]he exhaustion requirement is satisfied if a claim is fairly presented to the state court that had an opportunity to apply controlling legal principles to the facts bearing upon it. The Florida Supreme Court had an opportunity to address [the petitioner’s] claims in the first instance when it rejected the merits of his *Strickland* claim.”) (citation and quotation marks omitted). Just as in those cases, Mr. Rieber presented his claim and the courts understood and addressed the merits of the claim. He therefore exhausted the claim.

The State may again be mischaracterizing its procedural default argument as one of exhaustion when in fact the issue is the Alabama Court of Criminal Appeals’ application of a state procedural bar: Rule 28(a)(10), which sets out the expectations for an appellate brief. (*See* Doc. 14 at 57). Immediately after rejecting the merits of Mr. Rieber’s claim, the Alabama Court of Criminal Appeals stated that because Mr. Rieber had not provided any factual support, legal authority, or argument about this claim, “he has failed to satisfy his duty to provide [the Court of Criminal Appeals] with a sufficient argument under Rule 28(a)(10).” (Doc. 16-93 at 125). The Eleventh Circuit has recently held that a petitioner’s failure to comply with Rule 28(a)(10) results in a procedural default. *Ferguson v. Comm’r, Ala. Dep’t of Corr.*,

69 F.4th 1243, 1259 (11th Cir. 2023). Accordingly, the court **WILL DENY** this claim as procedurally defaulted.

However, in the interest of completeness, the court will also address the merits of the claim. Mr. Rieber contends that appellate counsel were ineffective for failing to argue that (1) the Alabama capital sentencing statute was unconstitutionally vague, (2) the statute was unconstitutionally arbitrary, (3) the judicial override provision made the statute unconstitutional; (4) the effect of elected judges made the statute unconstitutional; (5) the statute “was unconstitutional as applied based on the stalking issue”; and (6) the methods of execution authorized were unconstitutional. (Doc. 1 at 25). He argues that because he is entitled to relief on each of these issues, counsel’s failure to raise these issues on appeal was ineffective. (*Id.*).

Because the Alabama Court of Criminal Appeals rejected Mr. Rieber’s claim based on a failure to establish prejudice (*see* doc. 16-93 at 125), the court will evaluate that decision using § 2254(d) deference. Of the six underlying constitutional arguments at issue in this ineffective assistance claim, the court has already discussed five (in Claims Six, Eight, and Nine) and explained that the state courts’ rejection of those underlying claims on the merits was not unreasonable. Accordingly, it was also not unreasonable to find that Mr. Rieber failed to establish prejudice based on counsel’s failure to raise those claims on appeal. *Brown*, 720 F.3d

at 1335 (“It is . . . crystal clear that there can be no showing of actual prejudice from an appellate attorney’s failure to raise a meritless claim.”).

The only underlying claim the court has not yet addressed is the vagueness challenge. This is because, as the court will discuss in the next section, Mr. Rieber procedurally defaulted the claim by failing to raise it at the appropriate stage in his state court proceedings. Nevertheless, the Alabama Court of Criminal Appeals also rejected this claim, in the alternative, on the merits. (*See* doc. 16-93 at 137). That rejection was not an unreasonable application of clearly established federal law.

A criminal statute is unconstitutionally vague if it does not define the offense “with sufficient definiteness that ordinary people can understand what conduct is prohibited and . . . in a manner that does not encourage arbitrary and discriminatory enforcement.” *Skilling v. United States*, 561 U.S. 358, 402–03 (2010) (quotation marks omitted). Mr. Rieber contends that the heinous, atrocious, or cruel aggravator is unconstitutionally vague because ordinary people would not understand what it means, it encourages arbitrary enforcement, and the state trial judge in fact found the aggravator “with little explanation and based, at least in part, on an erroneous finding.” (Doc. 1 at 35). The Alabama Court of Criminal Appeals explained that the heinous, atrocious, or cruel aggravator is not unconstitutionally vague. (Doc. 16-93 at 137). That was not an unreasonable application of clearly established federal law.

Mr. Rieber has offered no argument that would allow the court to find that it is an unreasonable application of clearly establish federal law to reject the contention that ordinary people would not understand the meaning of the phrase “especially heinous, atrocious, or cruel compared to other capital offenses.” (*See* doc. 1 at 34–35; doc. 17 at 17–18). The *Skilling* case, on which he relies, did not find any similar aggravating factor in a death penalty statute unconstitutionally vague—in fact, it found the criminal statute at issue constitutional. *See* 561 U.S. at 412–13. Moreover, the court has already rejected Mr. Rieber’s arbitrariness argument and his argument that the state sentencing court’s finding was based on an error. In short, Mr. Rieber has not carried his burden of establishing that the Alabama Court of Criminal Appeals’ rejection of this constitutional challenge to the statute was unreasonable. As a result, he cannot establish that the Alabama Court of Criminal Appeals’ prejudice finding was unreasonable.

Even if Mr. Rieber could establish that the state court’s prejudice finding was unreasonable, he would also have to establish deficient performance to prevail. The Alabama Court of Criminal Appeals’ decision rested entirely on the prejudice prong. (*See id.*). Accordingly, the court will evaluate the deficient performance prong *de novo*. *See Porter v. McCollum*, 558 U.S. 30, 39 (2009) (“Because the state court did

not decide whether [the petitioner]’s counsel was deficient, we review this element of [the] *Strickland* claim *de novo*.”).

“[A] criminal defendant’s appellate counsel is not required to raise all nonfrivolous issues on appeal.” *Payne v. United States*, 566 F.3d 1276, 1277 (11th Cir. 2009). “Experienced advocates since time beyond memory 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.” *Jones v. Barnes*, 463 U.S. 745, 751–52 (1983). “[G]ood advocacy requires winnowing out some arguments . . . to stress others.” *Dell v. United States*, 710 F.3d 1267, 1281 (11th Cir. 2013) (quotation marks omitted). To overcome the presumption of competent representation, the petitioner must “establish that no competent counsel would have taken the action that his counsel did take.” *Id.*

Even assuming that the six underlying constitutional challenges to Alabama’s sentencing statute had merit, appellate counsel asserted other claims that the state courts found strong. *See, e.g., Rieber I*, 663 So. 2d at 987–90 (discussing at length a Fourth Amendment suppression issue); *Rieber II*, 663 So. 2d at 1002–03 (discussing the same Fourth Amendment suppression issue); *id.* at 1005–07 (discussing the impact of improperly admitted victim impact evidence presented to the jury during the guilt phase and the propriety of victim impact evidence presented to the trial

judge during the judicial penalty phase proceeding). Mr. Rieber has not established that no competent attorney could have made the strategic decision to omit these six arguments and focus on the arguments actually asserted, in an effort to preserve the persuasive value and strength of those arguments. *See Strickland*, 466 U.S. at 690 (holding that courts “should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment”). Accordingly, he cannot establish deficient performance, and this claim must fail.

c. Claim Seven

Mr. Rieber asserts that Alabama’s capital sentencing scheme is unconstitutionally vague because it fails to adequately define the aggravating circumstances that can make a crime death-eligible.⁹ (Doc. 1 at 34–35).

Mr. Rieber asserted this claim for the first time in his amended Rule 32 petition. (Doc. 16-11 at 51). The state habeas trial court denied the claim as

⁹ This court has already addressed the merits of this claim in the preceding section, where Mr. Rieber argued that appellate counsel was ineffective for failing to raise this claim in his direct appeal. Although, as the court will address in this section, the underlying claim (that the statute is unconstitutionally vague) is procedurally defaulted, the ineffective assistance claim is properly before this court. And to address the ineffective assistance claim, the court had to take up the merits of the claim that appellate counsel omitted—this claim. That is why, although Mr. Rieber defaulted this constitutional challenge, the court has addressed the claim on the merits. Nevertheless, in the interest of the completeness and accuracy, the court also conducts the procedural default analysis for this claim.

procedurally barred under Alabama Rule of Criminal Procedure 32.2(a)(5) because he could have raised it in his direct appeal but he failed to do so. (Doc. 16-31 at 50–51). The Alabama Court of Criminal Appeals adopted the trial court’s ruling and added, in the alternative, that the claim was meritless. (Doc. 16-93 at 137).

The State contends that this claim is procedurally defaulted based on the state courts’ application of the state procedural ground. (Doc. 14 at 78–79). This court agrees. The Eleventh Circuit has “squarely held that claims barred under Rule 32.2(a)(3) and (a)(5) are procedurally defaulted from federal habeas review.” *Boyd v. Comm’r, Ala. Dep’t of Corr.*, 697 F.3d 1320, 1335 (11th Cir. 2012).

Mr. Rieber contends that trial and appellate counsel’s failure to challenge the vagueness of the statute should excuse the procedural default. (Doc. 17 at 18). In general, a petitioner must present a claim of ineffective assistance “to the state courts as an independent claim before it may be used to establish cause for a procedural default.” *Murray v. Carrier*, 477 U.S. 478, 489 (1986). Here, Mr. Rieber did not exhaust a claim that trial counsel was ineffective for failing to challenge the constitutionality of the statute. Accordingly, a claim of ineffective assistance of trial counsel for failing to challenge the constitutionality of the statute cannot suffice to establish cause and prejudice.

However, as discussed above, Mr. Rieber did exhaust his claim that *appellate* counsel was ineffective for failing to challenge the constitutionality of the statute. If that ineffective assistance claim were meritorious, it might serve as cause excusing the procedural default. But as discussed above, the claim is meritless. Accordingly, it cannot excuse the default of the substantive claim. *See Murray*, 477 U.S. 478, 492 (“Attorney error short of ineffective assistance of counsel does not constitute cause for a procedural default even when that default occurs on appeal rather than at trial.”).

The court notes Mr. Rieber’s conclusory statement that “[b]inding [him] to the missteps of his ineffective counsel would be a fundamental miscarriage of justice.” (Doc. 17 at 18). Although Mr. Rieber uses the phrase “miscarriage of justice,” this is the same cause and prejudice argument that the court has already rejected. It does not suffice to establish that prove that “no reasonable juror would have found him eligible for the death penalty under [Alabama] law,” which is the standard for establishing a miscarriage of justice that would excuse a procedural default. *Raleigh*, 827 F.3d at 958.

III. DISCOVERY AND EVIDENTIARY HEARING

Mr. Rieber requests an evidentiary hearing and permission to seek discovery. (Doc. 1 at 45). “A habeas petitioner, unlike the usual civil litigant in federal court, is

not entitled to discovery as a matter of ordinary course.” *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Instead, the court may authorize discovery if the party requesting discovery establishes good cause. Rules Governing Section 2254 Cases, R. 6(a)–(b); *Isaacs v. Head*, 300 F.3d 1232, 1248 (11th Cir. 2002). And a court is not required to hold an evidentiary hearing, but may do so in its discretion if “such a hearing could enable an applicant to prove the petition’s factual allegations, which, if true, would entitle the applicant to federal habeas relief.” *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). Because it is clear from the record that Mr. Rieber cannot prevail on his § 2254 petition, neither discovery nor an evidentiary hearing is unnecessary. The court therefore **DENIES** the requests for discovery and an evidentiary hearing.

IV. CONCLUSION

The court **DENIES** Mr. Rieber’s motions for discovery and an evidentiary hearing.

The court **WILL DISMISS** Mr. Rieber’s method-of-execution claim as improperly asserted in this § 2254 petition. The court **WILL DENY** the remainder of Mr. Rieber’s petition. When the court enters a final order adverse to the petitioner, the court must also either grant or deny a certificate of appealability. Rules Governing Section 2254 Cases, R. 11(a). This court may issue a certificate of appealability “only if the applicant has made a substantial showing of the denial of

a constitutional right.” 28 U.S.C. § 2253(c)(2). To make such a showing, a “petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong,” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or that “the issues presented were adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. at 336 (internal quotation marks omitted). Because reasonable jurists could not debate the merits of any of Mr. Rieber’s claims, the court **WILL DENY** a certificate of appealability.

The court will enter a separate final judgment consistent with this opinion.

DONE and **ORDERED** this August 7, 2023.



ANNEMARIE CARNEY AXON
UNITED STATES DISTRICT JUDGE

Court of Criminal Appeals

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

MARY BECKER WINDOM
Presiding Judge
SAMUEL HENRY WELCH
J. ELIZABETH KELLUM
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MEMORANDUM

CR-15-0355

Madison Circuit Court CC-90-2177.60

Jeffery Day Rieber v. State of Alabama

JOINER, Judge.

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

Statement of Facts and Procedural History

In 1992, Rieber was convicted of capital murder during a robbery, see § 13A-5-40(a)(2), Ala. Code 1975, for the 1990 killing of 25-year-old Glenda Phillips Craig and was ultimately sentenced to death. The circuit court, in its sentencing order, summarized the facts underlying Rieber's

conviction as follows:

"Glenda Phillips Craig was twenty-five years old at the time of her death. She was married, and the mother of two small girls ages five and seven. She was murdered October 9, 1990, while working as a convenience store clerk in Mobil-Mart #1 at the intersection of Bradford Lane and Winchester Road in Huntsville, Madison County, Alabama.

"Approximately seven to ten days before the murder, the defendant Jeffery Rieber purchased a twenty-two caliber revolver from a man named David Hill for thirty (\$30.00) dollars.

"There is testimony from at least two witnesses to the effect that the defendant had been in or about the store several times before the murder occurred.

"One of the witnesses, Mr. [Tommy] Erskine, was in the store a few days before the shooting, 'three to four days, maybe a little longer.' Although what the deceased stated to this witness was not admitted as evidence, it can certainly be inferred from his testimony that she was afraid and very nervous in the presence of the defendant, that he had driven up to the store on more than one occasion, and that the victim acted fearful in his presence. Mr. Erskine himself testified that he feared a robbery was about to take place at the hands of the defendant, and that he advised the victim to call the police. Just a few hours before her death, she inquired of the defendant's identity from a witness named Wayne Gentle, who knew the defendant and who identified the defendant for the victim.

"The evidence allows the Court to clearly conclude that the defendant, for at least three to four days, had stalked the victim, had targeted the store and her for his crime; that she was nervous, apprehensive, and afraid when he appeared. She had also inquired as to his identity from another witness and made some inquiry, the answer to which

from the victim was, 'I don't think he would do nothing like that.'

"The murder of Glenda Craig is on video tape, taken from a surveillance camera which had been installed as a security measure in the store. Mr. Gentle reviewed this tape and testified that the defendant appeared on the film at a time consistent when he himself was in the store to transact business and when the victim inquired of the defendant's identity. This was a few minutes after five o'clock P.M. on October 9, 1990.

"Just before eight o'clock P.M. on that same evening, the surveillance tape reflects that the defendant returned to the store. Mrs. Craig was alone in the store, standing behind the checkout counter to the defendant's left. The defendant passed outside the eye of the camera for a few moments and then returned to stand facing the victim across the counter. The defendant immediately withdrew the twenty-two caliber revolver from his clothing and fired a shot at Mrs. Craig. Her left arm went up in a defensive posture, and she fell to the floor behind the counter.

"The defendant proceeded to open the cash register at the counter, stuffing the contents into his pockets. The defendant then leaned over the counter in such a fashion that the victim was within his view. He extended his arm and shot Mrs. Craig a second time.

"He then fled the store. The expert testimony reflects that Mrs. Craig was shot at very close range, that the first bullet pierced her left wrist completely, and then lodged about one inch under her scalp in the back of her head. The second bullet entered her brain just behind her left ear, and according to the testimony, was the eventual cause of death.

"Glenda Craig remained alive for some minutes until a store patron found her and until her husband

came in to find her lying helpless, bleeding from the nose and mouth. She was transported to a hospital, where she underwent resuscitative effects and eventually died.

"The defendant was taken into custody at his home by law enforcement officials at 3:15 o'clock A.M. on October 10, 1990."

(C. 4404-07.)

On December 7, 1990, Rieber was indicted for capital murder during a robbery, see § 13A-5-40(a)(2), Ala. Code 1975.

Concerned that the evidence against Rieber was strong, Rieber's trial counsel, Richard Kempener, went to the district attorney to see if he could get him to "lift the death penalty off the table." According to Kempener, the district attorney agreed that Rieber could plead guilty in exchange for a sentence of life imprisonment without the possibility of parole. Kempener told Rieber about this plea deal, but Rieber decided not to take it.

Rieber's jury trial began on April 8, 1992, and on April 11, 1992, Rieber was convicted. The jury recommended, by a vote of 7 to 5, that Rieber be sentenced to life-imprisonment without the possibility of parole. The circuit court overrode the jury's recommendation and sentenced Rieber to death.¹

This Court affirmed Rieber's conviction and death sentence. See Rieber v. State, 663 So. 2d 985 (Ala. Crim. App. 1994). The Alabama Supreme Court later affirmed this Court's ruling. See Ex parte Rieber, 663 So. 2d 999, 1002 (Ala. 1995),

¹Effective April 11, 2017, §§ 13A-5-45, 13A-5-46, and 13A-5-47, Ala. Code 1975, were amended to prohibit a court from overriding a jury's sentencing verdict in a capital case. Section 13A-5-47 states: "This act shall apply to any defendant who is charged with capital murder after the effective date of this act and shall not apply retroactively to any defendant who has previously been convicted of capital murder and sentenced to death prior to the effective date of this act." Accordingly, those amendments do not apply here.

cert. denied, 516 U.S. 995, 116 S. Ct. 531 (1995).

On February 24, 1997, Rieber filed his first Rule 32 petition alleging (1) that he received ineffective assistance of counsel at both the guilt phase and penalty phase of his capital-murder trial; (2) that his appellate counsel failed to raise and properly argue numerous issues before this Court; (3) that he was illegally arrested in his home and subjected to a search, without a warrant and absent exigent circumstances in violation of his Fourth and Fourteenth Amendment rights; (4) that the State suppressed evidence favorable to the defense in violation of Brady v. Maryland, 373 U.S. 83 (1963); (5) that the trial court's failure to grant a change of venue prior to trial violated his rights to due process and a fair trial by an impartial jury; (6) that execution by electrocution in Alabama's electric chair constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution; (7) that the circuit court's override of the jury's life-imprisonment-without-parole recommendation violated his Eighth and Fourteenth Amendment rights; (8) that he was deprived of effective assistance of counsel by Alabama's "unreasonably low" compensation of appointed counsel in capital cases; (9) that the trial court's failure to grant him funds for expert assistance prior to trial violated his Fifth, Sixth, Eighth, and Fourteenth Amendment Rights and Alabama law; (10) that he was arrested without probable cause and in violation of the Fourth and Fourteenth Amendments; (11) that he was denied his Fifth, Sixth, Eighth, and Fourteenth Amendment rights by the circuit court's reinstatement of a juror who had been struck by the defense; (12) that the pool from which his grand and petit juries were selected "unconstitutionally excluded women, people of color and other cognizable groups in violation of the Fifth, Sixth, Eight, and Fourteenth Amendments and Alabama law" (C. 50); and (13) that the circuit judge committed reversible error by failing to recuse herself from his capital trial.

On March 29, 1997, the State filed its answer to Rieber's Rule 32 petition. Later, in February 1998, the State filed two motions for partial dismissal in which it argued that all of Rieber's claims should be dismissed except for his claims that he received ineffective assistance of counsel during the guilt phase and penalty phase of his capital trial.

In 1999, the Honorable Laura Jo Hamilton was appointed to the Madison County Circuit Court and was assigned Rieber's case.

On June 22, 2000, the circuit court granted the State's motion for partial dismissal after finding that all of Rieber's claims, except for his claims that he received ineffective assistance of counsel during the guilty phase and penalty phase of his capital trial, were procedurally barred.

After over a year of inactivity in the case, both the State and Rieber filed motions to set a status conference for September 20, 2001. For the next two years, the parties continued to file requests for additional status conferences.

On January 26, 2004, Rieber filed an amended Rule 32 petition in which he re-alleged some of his claims from his original Rule 32 petition but also alleged (1) that Alabama's death-penalty scheme was unconstitutionally vague and arbitrary as applied in this case; (2) that the jury's recommended sentence was impermissibly overruled because elected judges cannot override juries; (3) that Alabama presently permits a person who has been sentenced to death to opt between either the electric chair or death by lethal injection--an option that violates his right not to be subject to cruel and unusual punishment and his right to due process and equal protection under the law; (4) that Alabama's procedures limiting the fees for representation of an indigent charged with a capital offense to \$1,000.00, or to two attorneys, each with a \$1,000.00 cap, resulted in him being deprived of his rights to due process and equal protection under the Alabama and United States Constitutions;² and (5)

²At the time of Rieber's trial and direct appeal, §§ 15-12-21 and 15-12-22, Ala. Code 1975 limited an attorney's fee in a capital case involving an indigent defendant as follows: "The total fees to any one attorney in any one case, from the time of appointment through the trial of the case, including motions for new trial, shall not ... exceed \$1,000.00, except as follows: In cases where the original case involves a capital offense or charge which carries a possible sentence of life without parole, the limits shall be \$1,000.00 for out-of-court work, plus payment for all in-court work, said work to

that, by keeping him in custody for two weeks after his arrest without either appointing an attorney or conducting blood and urine examinations, Alabama permitted the spoilation of exculpatory evidence resulting in Rieber being deprived of his rights to due process and equal protection under the law.

On March 19, 2004, the State filed an answer to Rieber's amended petition and moved to dismiss it on the grounds that the allegations in his petition were either untimely, procedurally barred, failed to meet the specificity and pleading requirements of Rule 32.6(b), Ala. R. Crim. P., or failed to state a claim or establish that a material issue of fact or law existed as required by Rule 32.7(d), Ala. R. Crim. P.

On March 1, 2006, nearly two years after answering the amended petition, the State moved for a timely ruling. After four months of no response, the State filed a second motion for a timely ruling on July 19, 2006. In February 2007, the State filed a notice of intent to seek a writ of mandamus if the circuit court failed to either dismiss the amended petition or schedule an evidentiary hearing.

After the circuit court failed to take any action, the State filed a petition for a writ of mandamus on August 29, 2007, which this Court granted on October 18, 2007, and ordered the circuit court to take some action on Rieber's petition within a reasonable amount of time. On January 18, 2008, the circuit court denied the State's motion to dismiss Rieber's petition.

In 2008 and 2009, the parties continued to request status conferences. No action was taken, however, until October 2009, when a status conference was finally held.

In February 2011, the State moved the court to schedule an evidentiary hearing on the petition. Between October 3 and 5, 2011, an evidentiary hearing was held.

In November 2014, the case was reassigned to another

be billed at the aforementioned rates." § 15-12-21(d), Ala. Code 1975. This limit was removed in 1999.

circuit judge. On November 13, 2015--almost 19 years after Rieber filed his original Rule 32 petition--the circuit court denied Rieber's amended Rule 32 petition. Rieber appealed to this Court.

Standard of Review

"[Rieber] has the burden of pleading and proving his claims. As Rule 32.3, Ala. R. Crim. P., provides:

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

"'The standard of review this Court uses in evaluating the rulings made by the trial court [in a postconviction proceeding] is whether the trial court abused its discretion.' Hunt v. State, 940 So. 2d 1041, 1049 (Ala. Crim. App. 2005). However, 'when the facts are undisputed and an appellate court is presented with pure questions of law, [our] review in a Rule 32 proceeding is de novo.' Ex parte White, 792 So. 2d 1097, 1098 (Ala. 2001). '[W]e may affirm a circuit court's ruling on a postconviction petition if it is correct for any reason.' Smith v. State, [122] So. 3d [224], [227] (Ala. Crim. App. 2011).

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

"'The burden of pleading under Rule

32.3 and Rule 32.6(b) is a heavy one. Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b). The full factual basis for the claim must be included in the petition itself. If, assuming every factual allegation in a Rule 32 petition to be true, a court cannot determine whether the petitioner is entitled to relief, the petitioner has not satisfied the burden of pleading under Rule 32.3 and Rule 32.6(b). See Bracknell v. State, 883 So. 2d 724 (Ala. Crim. App. 2003).'

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

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

"Boyd v. State, 913 So. 2d 1113, 1125 (Ala. Crim. App. 2003). '[T]he procedural bars of Rule 32[.2, Ala. R. Crim. P.,] apply with equal force to all cases, including those in which the death penalty has been imposed.' Burgess v. State, 962 So. 2d 272, 277 (Ala. Crim. App. 2005).

"Some of [Rieber's] claims were also dismissed based on his failure to comply with Rule 32.7(d),

Ala. R. Crim. P. In discussing the application of this rule we have stated:

"[A] circuit court may, in some circumstances, summarily dismiss a postconviction petition based on the merits of the claims raised therein. Rule 32.7(d), Ala. R. Crim. P., provides:

"If the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings, the court may either dismiss the petition or grant leave to file an amended petition. Leave to amend shall be freely granted. Otherwise, the court shall direct that the proceedings continue and set a date for hearing."

"Where a simple reading of the petition for post-conviction relief shows that, assuming every allegation of the petition to be true, it is obviously without merit or is precluded, the circuit court [may] summarily dismiss that petition.'" Bishop v. State, 608 So. 2d 345, 347-48 (Ala. 1992) (emphasis added) (quoting Bishop v. State, 592 So. 2d 664, 667 (Ala. Crim. App. 1991) (Bowen, J., dissenting)). See also Hodges v. State, [Ms. CR-04-1226, March 23, 2007] ___ So. 3d ___, ___ (Ala. Crim. App. 2007) (a postconviction claim is 'due to be summarily dismissed [when] it is meritless on its face')[, rev'd on other grounds, ___ So. 3d ___ (Ala. 2011)].'

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

Washington v. State, 95 So. 3d 26, 38-39 (Ala. Crim. App. 2012). Rieber's remaining claims were denied by the circuit court after he was afforded the opportunity to prove those claims at an evidentiary hearing. See Rule 32.9(a), Ala. R. Crim. P.

When the circuit court conducts an evidentiary hearing, "[t]he burden of proof in a Rule 32 proceeding rests solely with the petitioner, not the State." Davis v. State, 9 So. 3d 514, 519 (Ala. Crim. App. 2006), rev'd on other grounds, 9 So. 3d 537 (Ala. 2007). "[I]n a Rule 32, Ala. R. Crim. P., proceeding, the burden of proof is upon the petitioner seeking post-conviction relief to establish his grounds for relief by a preponderance of the evidence." Wilson v. State, 644 So. 2d 1326, 1328 (Ala. Crim. App. 1994). Rule 32.3, Ala. R. Crim. P., specifically provides that "[t]he petitioner shall have the burden of ... proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief." "[W]hen the facts are undisputed and an appellate court is presented with pure questions of law, that court's review in a Rule 32 proceeding is de novo." Ex parte White, 792 So. 2d 1097, 1098 (Ala. 2001). "However, where there are disputed facts in a postconviction proceeding and the circuit court resolves those disputed facts, '[t]he standard of review on appeal ... is whether the trial judge abused his discretion when he denied the petition.'" Boyd v. State, 913 So. 2d 1113, 1122 (Ala. Crim. App. 2003) (quoting Elliott v. State, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992)).

Finally, "[a]llthough on direct appeal we reviewed [Rieber's] capital-murder conviction for plain error, the plain-error standard of review does not apply when an appellate court is reviewing the denial of a postconviction petition attacking a death sentence." James v. State, 61 So. 3d 357, 362 (Ala. Crim. App. 2010) (citing Ex parte Dobyne, 805 So. 2d 763 (Ala. 2001)). With these principles in mind, we review the claims raised by Rieber on appeal.

Discussion

First, Rieber argues that his trial counsel was ineffective during both the guilt phase and penalty phase of his capital-murder trial. Generally, "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." Strickland v. Washington, 466 U.S. 668, 689 (1984). In Marshall v. State, 182 So. 3d 573 (Ala. Crim. App. 2014), this Court stated:

"To prevail on a claim of ineffective assistance of counsel, the petitioner must show (1) that counsel's performance was deficient and (2) that the petitioner was prejudiced by the deficient performance. See Strickland, [supra].

"Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable

³Because Rieber relies on the same principles of law to support his arguments in both Sections I and II of his brief, we will address both of those arguments here.

professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.'

"Strickland, 466 U.S. at 689.

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

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

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

Yeomans v. State, 195 So. 3d 1018, 1025-26 (Ala. Crim. App. 2013). Additionally, "'[w]hen courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger.'" Ray v. State, 80 So. 3d 965, 977 n.2 (Ala. Crim. App. 2011) (quoting Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000)).

Rieber was represented at trial by Richard Kempner. Kempner later obtained the assistance of Daniel Moran during the penalty phase of Rieber's trial. Both men also represented Rieber on direct appeal. Only Kempner testified at Rieber's postconviction evidentiary hearing.

A. Guilt-Phase Ineffective-Assistance Claim

Rieber argues that his trial counsel, Richard Kempner, was ineffective during the guilt phase of his capital murder trial for failing to pursue the defense that he was voluntarily intoxicated and that he had "blacked out" at the time of the murder. (Rieber's brief, pp. 29-39.) Rieber also argues that Kempner should have followed up on a report created by Dr. Kathy Rogers, from the Taylor Hardin Secure Medical Facility, because this report, Rieber says, indicated that he "had no recollection of the events of the evening because of heavy drug consumption in the period before the robbery/shooting." (Rieber's brief, p. 31.) According to Rieber, this finding provided reasonable doubt as to his intent to kill Craig and, thus, could have been used as a basis for requesting a jury instruction on the lesser-included offense of manslaughter. (Rieber's brief, p. 37.)

During the evidentiary hearing on Rieber's petition, Kempner was questioned about his defense strategy. Kempner testified that, after Rieber rejected the plea deal offered to him, the strategy he chose to pursue for Rieber's defense was

mistaken identity and that he hired a private investigator to locate witnesses who could place Rieber at a different location at the time of the offense. (Ev. R. 304, 329.)⁴ When explicitly asked why he did not pursue an intoxication defense during Rieber's trial, Kempener stated that he did not do so because Rieber never brought it up. (Ev. R. 328-29.) Additionally, when asked why he did not rely more heavily on Dr. Rogers' report, Kempener gave the following response:

"MR. KEMPENER: I discussed it with co-counsel and we both agreed that at the time it didn't make any difference, our position was it wasn't him that did the shooting, so it didn't make any difference what his mental state was. He was not the one that did the shooting."

(Ev. R. 303-04.)

Generally, "trial counsel's decisions regarding what theory of the case to pursue represent the epitome of trial strategy." Clark v. State, 196 So. 3d 285, 306 (Ala. Crim. App. 2015) (internal quotations and citation omitted). "What defense to carry to the jury, what witnesses to call, and what method of presentation to use is [something] ... that we will seldom, if ever, second guess." Id. Importantly,

"the mere existence of a potential alternative defense theory is not enough to establish ineffective assistance based on counsel's failure to present that theory." Hunt v. State, 940 So. 2d 1041, 1067 (Ala. Crim. App. 2005), quoting Rosario-Dominquez v. United States, 353 F. Supp. 2d 500, 513 (S.D.N.Y. 2005). 'Hindsight does not elevate unsuccessful trial tactics into ineffective assistance of counsel.' People v. Eisemann, 248 A.D.2d 484, 484, 670 N.Y.S.2d 39, 40-41 (1998)."

Davis v. State, 44 So. 3d 1118, 1132 (Ala. Crim. App. 2009). "The fact that [a] defense strategy was ultimately unsuccessful with the jury does not render counsel's

⁴References to the transcript of the evidentiary hearing will be cited as "Ev. R."

performance deficient.'" Bush v. State, 92 So. 3d 121, 160-61 (Ala. Crim. App. 2009) (internal quotations and citations omitted).

According to Rieber, because Kemapner was aware of Dr. Rogers' report and the "reasonable doubt" that, he says, it contained concerning his level of intoxication on the night of the offense, he should have pursued an intoxication defense and should have requested a jury instruction on manslaughter. The circuit court disagreed with Rieber's argument, however, and found as follows:

"Mr. Kempener explained at the evidentiary hearing that he did not request a jury instruction on manslaughter because the defense strategy was mistaken identity. Mr. Kempener also testified that he discussed the guilt phase with Rieber, that Rieber understood the strategy, and that Rieber never suggested presenting another defense, such as intoxication. Rieber did not testify at the evidentiary hearing, so there is no evidence before this Court refuting Mr. Kempener's testimony."

(C. 2873-74.)

The circuit court also concluded that even if Kempener had requested a manslaughter instruction, Rieber would not have been entitled to it. (C. 2874.) In its order denying Rieber's amended Rule 32 petition, the circuit court acknowledged that while Rieber presented witnesses who gave testimony concerning his history of drug and alcohol abuse,⁵ such testimony would not necessarily have been admissible during the guilt phase of his trial because evidence that Rieber had been using drugs at some time during the day of the offense would not necessarily have proven that he was intoxicated at the time of the offense. (C. 2872 (citing Windsor v. State, 683 So. 2d 1027 (Ala. Crim. App. 1994)).) Specifically, the circuit court found that "[e]vidence that someone was a habitual drug user is not evidence that that

⁵All seven of those fact witnesses testified that none of them had ever seen Rieber become violent or "black out" while under the influence of drugs or alcohol.

person was intoxicated at the time of the murder." (C. 2871-72 (quoting Whitehead v. State, 777 So. 2d 781, 833 (Ala. Crim. App. 1999)).) Based on these findings, the circuit court denied this claim on the ground that, under Rule 32.3, Ala. R. Crim. P., Rieber failed to prove that Kempener was ineffective during the guilt phase of his capital murder trial.

Rieber has not demonstrated that the circuit court erred in denying this claim. Here, Kempener's decision not to pursue an intoxication defense was a reasonable strategic decision under the circumstances. From the time of his arrest within hours of the offense, Rieber denied any involvement in the crime. Thus, a theory of voluntary intoxication would have been inconsistent with Rieber's own statements. Furthermore, the evidence Rieber offered at the Rule 32 hearing in support of a voluntary-intoxication theory did not establish that he would have been entitled to a lesser-included-offense manslaughter instruction. See Ex parte McWhorter, 781 So. 2d 330, 342-43 (Ala. 2000) (holding that because there was no substantial evidence indicating that at the time of the crime defendant was intoxicated to such a degree that the intoxication amounted to insanity, as required to negate specific intent element of murder and reduce the charge to manslaughter, the trial court's giving a voluntary-intoxication charge at guilt phase of capital murder prosecution was neither prejudicial nor necessary). Therefore, Rieber is not entitled to relief on this claim.

B. Penalty-Phase Ineffective-Assistance Claims

1.

Next, Rieber argues that attorney Daniel Moran, who was retained to assist with the penalty phase of Rieber's capital trial, was expected to bring the circuit court's attention to other capital cases with "worse" facts in which the defendant was sentenced to life without parole rather than death and that he failed to fulfill this obligation. (Rieber's brief, p. 25.) According to Rieber, this was an "essential component of defense work ... to assure that the imposition of the death penalty [was] not arbitrary or capricious" and, because Moran failed to do this, he rendered ineffective assistance during the penalty phase of Rieber's capital-murder trial. Id.

This specific claim was not presented to the circuit court in either the original or amended versions of Rieber's Rule 32 petition below; therefore, it has not been properly preserved for our review. "The general rules of preservation apply to Rule 32 proceedings." Boyd v. State, 913 So. 2d 1113, 1123 (Ala. Crim. App. 2003). A Rule 32 petitioner cannot raise on appeal a postconviction claim that was not included in his or her petition or amendments. See Arrington v. State, 716 So. 2d 237, 239 (Ala. Crim. App. 1997) ("An appellant cannot raise an issue on appeal from the denial of a Rule 32 petition which was not raised in the Rule 32 petition."). Because this claim was not properly preserved for review, it will not be considered by this Court.

2.⁶

Rieber also contends that Moran's assistance was ineffective for two additional reasons. First, he argues that Moran was ineffective for failing to find evidence between the penalty phase and the sentencing phase to corroborate Dr. Kathy Rogers's evaluation report. (Rieber's brief, pp. 43-46.) According to Rieber, after Moran placed Dr. Rogers's report into evidence at the sentencing hearing, Rieber says that Moran should have taken more time to search for and obtain evidence to corroborate the findings in Dr. Rogers's report. (Rieber's brief, p. 44.) Second, Rieber argues that Moran's assistance was ineffective because he failed to present evidence of Rieber's drug-laced and unstable background during the penalty phase of his capital-murder trial. (Rieber's brief, p. 46.) Relying on the United States Supreme Court's decision, Wiggins v. Smith, 539 U.S. 510 (2003), Rieber specifically argues that Moran was required to "explore [his] background fully and bring to the attention of the sentencing body--in Alabama's case both the jury and the court--any mitigating evidence that could outweigh a determination that aggravating factors were present." Id. According to Rieber, had Moran done so, "he would have been able to prove through numerous witnesses ... that Mr. Rieber's life was laced with drug use starting at an early age, and that his home life was

⁶Because Rieber's arguments in Sections II.B. and II.C. of his appellate brief rely on the same principles of law, both arguments are addressed here.

volatile and colossally unstable." (Rieber's brief, pp. 46-47.) For the reasons provided herein, Rieber's argument is without merit.

When reviewing claims of ineffective assistance of counsel during the penalty phase of a capital trial, this Court applies the following legal standard:

"'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).'"

Davis v. State, 44 So. 3d 1118, 1137 (Ala. Crim. App. 2009) (internal citations omitted). In Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003), the United States Supreme Court in reviewing a claim of ineffective assistance of counsel at the penalty phase of a capital trial, stated:

"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. In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence."

539 U.S. at 534, 123 S. Ct. 2527.

Additionally, this Court has previously recognized that:

"'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.'"

Waldrop v. State, 987 So. 2d 1186, 1195 (Ala. Crim. App. 2007) (internal citation omitted). This Court has also previously recognized that:

"'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.'" 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)."

Davis v. State, 44 So. 3d 1118, 1137-38 (Ala. Crim. App. 2009) (citation omitted).

In the present case, Rieber contends that Moran provided ineffective assistance during the sentencing phase of his capital-murder trial because he failed to provide evidence corroborating the findings located in Dr. Rogers's report. (Rieber's brief, pp. 43-46.) He also contends that Moran failed to provide effective assistance because he failed to present evidence of Rieber's drug-laced and unstable background during the sentencing phase. (Rieber's brief, p. 46.) The circuit court disagreed with Rieber's argument and made the following findings on this claim:

"Mr. Moran called seven witnesses to testify in mitigation at the penalty phase of Rieber's trial. These witnesses included a former employer, former neighbors, friends, and Rieber's sister, Shauna Mr. Moran's focus was to [elicit] testimony in order to humanize Rieber to the jurors in hope[s] of securing a favorable sentencing recommendation. Mr. Moran elicited testimony from these witnesses focusing on Rieber's good character, his gentle nature, his lack of violence, and his willingness to help others. For example, Rieber's sister, Shauna, told the jury that, since Rieber's arrest for capital murder, he had had a religious conversion, was helping other inmates learn to read, and had joined Alcoholics anonymous.

"In addition to the witness testimony, Mr. Moran submitted a pretrial mental evaluation and report prepared by Dr. Kathy Rogers from Taylor-Hardin Secured Mental Facility into evidence for the juror's consideration Dr. [Rogers] stated in her report that '[Rieber] reported a very significant history of abuse, dating back to when he was very young, about age 9.' (C.R. 207.) Dr. [Rogers's] report also stated that Rieber had informed her that on the day of the murder 'he had been drinking alcoholic beverages prior to the alleged offense, and had also smoked marijuana and used three hits of "acid".' (C.R. 213.) Referring to Dr. [Rogers's] report, Mr. Moran argued in his penalty phase closing that Rieber did not remember what happened because of the drugs he had taken the day of the murder. (R. 1003.) The jury voted seven to five that Rieber be sentenced to life in prison without the possibility of parole.

"The testimony presented by Rieber at the evidentiary hearing from his siblings, friends, and acquaintances, and Dr. Stalcup focused on Rieber's history of drug abuse. Much of this same evidence was presented to the jury by way of Dr. [Rogers's] report and does not support Rieber's assertion that Mr. Moran's performance was deficient.

"

"The fact that Mr. Moran did not present evidence about Rieber's history of drug abuse during the penalty phase in the manner that Rieber believes he should have does not establish that Mr. Moran was ineffective."

(C. 2894-96.) Based on these findings, the circuit court denied Rieber's claim pursuant to Rule 32.3, Ala. R. Crim. P., on the basis that he failed to prove that Moran's performance was deficient and prejudiced his case. (C. 2896.) We agree with the circuit court's findings on this claim.

The record indicates that Moran introduced as much mitigating evidence concerning Rieber's background as was available to him. Rieber has failed to point to specific examples in the record demonstrating that the evidence and testimony above rendered Moran's assistance deficient and ultimately prejudiced him during the penalty phase of his capital murder trial. As such, Rieber is not entitled to relief on this claim. Thus, the circuit court properly denied this claim.

3.

Finally, although not a model of clarity, Rieber appears to argue that both Kempener and Moran were ineffective for arguing that Rieber was entitled to a new trial⁷ solely on the basis that Kempener had improperly struck a juror based on his Taiwanese nationality. (Rieber's brief, pp. 51-52.) Specifically, he argues that their motion should have been based on evidence corroborating Dr. Rogers's report and not on a claim that "went nowhere." Id.

⁷Although Rieber contends that Kempener and Moran were ineffective for raising this ground in a "motion for reconsideration," the portions of the record to which he cites contain both his original and amended motion for a new trial. Both of these motions recite the grounds discussed in this section of Rieber's brief. Thus, we refer only to the motion for a new trial.

This specific claim was not presented to the circuit court in Rieber's amended Rule 32 petition below; therefore, it has not been properly preserved for our review. Once again, "the general rules of preservation apply to Rule 32 proceedings." Boyd v. State, 913 So. 2d 1113, 1123 (Ala. Crim. App. 2003). A Rule 32 petitioner cannot raise on appeal a postconviction claim that was not included in his or her petition or amendments. See Arrington v. State, 716 So. 2d 237, 239 (Ala. Crim. App. 1997) ("An appellant cannot raise an issue on appeal from the denial of a Rule 32 petition which was not raised in the Rule 32 petition."). Because this claim was not properly preserved for review, it will not be considered by this Court.

II.

Next, Rieber argues that both Kempener and Moran were ineffective on direct appeal because they "chose to press a plainly meritless position, instead of developing readily-available arguments and facts that, if presented, would have resulted in reversal and a lesser sentence." (Rieber's brief, p. 52.) According to Rieber, his appellate counsel's argument that the exclusion of a specific juror prior to the commencement of his capital murder trial "constituted racial discrimination by the State, rendering [Rieber's] trial unconstitutional" is a "preposterous" argument. Id. Rieber also contends that there were several other arguments that could have and should have been made on direct appeal that, he says, would have caused the Alabama Court of Criminal Appeals or the Alabama Supreme Court to reverse his conviction or sentence. (Rieber's brief, p. 54.) We disagree.

"The standards for determining whether appellate counsel was ineffective are the same as those for determining whether trial counsel was ineffective." Jones v. State, 816 So. 2d 1067, 1071 (Ala. Crim. App. 2000), overruled on other grounds by Brown v. State, 903 So. 2d 159 (Ala. Crim. App. 2004). As this Court explained in Thomas v. State, 766 So. 2d 860 (Ala. Crim. App. 1998):

"As to claims of ineffective appellate counsel, an appellant has a clear right to effective assistance of counsel on first appeal. Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985).

However, appellate counsel has no constitutional obligation to raise every nonfrivolous issue. Jones v. Barnes, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983). The United States Supreme Court has recognized that '[e]xperienced advocates since time beyond memory 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.' Jones v. Barnes, 463 U.S. at 751-52, 103 S. Ct. 3308. Such a winnowing process 'far from being evidence of incompetence, is the hallmark of effective advocacy.' Smith v. Murray, 477 U.S. 527, 536, 106 S. Ct. 2661, 91 L. Ed. 2d 434 (1986). Appellate counsel is presumed to exercise sound strategy in the selection of issues most likely to afford relief on appeal. Pruett v. Thompson, 996 F.2d 1560, 1568 (4th Cir. 1993), cert. denied, 510 U.S. 984, 114 S.Ct. 487, 126 L. Ed. 2d 437 (1993). One claiming ineffective appellate counsel must show prejudice, i.e., the reasonable probability that, but for counsel's errors, the petitioner would have prevailed on appeal. Miller v. Keeney, 882 F.2d 1428, 1434 and n. 9 (9th Cir. 1989)."

766 So. 2d at 876. Generally, "[a]ppellate counsel is presumed to exercise sound strategy in the selection of issues most likely to afford relief on appeal. One claiming ineffective appellate counsel must show prejudice, i.e., the reasonable probability that, but for counsel's errors, the petitioner would have prevailed on appeal." Whitson v. State, 109 So. 3d 665, 672 (Ala. Crim. App. 2012). With these principles in mind, we will first address the merits of Rieber's argument that Kempener and Moran were ineffective for raising a Batson⁸ challenge on appeal. We will then address the merits of Rieber's argument that Kempener and Moran were ineffective for failing to raise six claims that he later raised in his amended Rule 32 petition.

A.

⁸Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

First, Rieber claims that his appellate counsel were ineffective for raising a "preposterous" Batson challenge instead of arguing other claims on direct appeal. (Rieber's brief, pp. 52-54.)

As an initial matter, the record shows that Kempener, Rieber's lead counsel, tried to inject error into the record by striking a venire member of Asian heritage from the jury on the basis of race. (R. 324.) When questioned about this decision during the evidentiary hearing, Kempener explained that he did this because

"the law at that time was that if you struck a person because of racial reasons, that was reversible error and it wasn't something against the defendant, it was something--it was against the potential juror.

"So the potential juror's right to be on a jury [was] violated by me, and I thought that would get the case reversed. And that's why I did that."

(R. 324.) On direct appeal, this Court found this argument to be without merit and stated as follows:

"This court has recognized that the logic of Batson applies to the striking of Asian-American jurors. Wilsher v. State, 611 So. 2d 1175 (Ala. Crim. App. 1992). Defense counsel in this case admitted that he struck the Asian-American juror for racial reasons. The juror in question was clearly a member of a racially cognizable group and was struck for racial reasons. While the striking of this juror may have been improper and may have violated this juror's right to serve, we cannot hold that it was 'plain error' because we fail to see how the striking of this juror affected the substantial right of this appellant. The appellant has not shown us nor can we see how the appellant was prejudiced by his defense counsel's striking this particular venire member. Defense counsel struck this juror because he believed this juror would be more in favor of the prosecution and it was in his client's best interest to strike this juror. Further, not

only is there no 'plain error' in this situation, but also any error that may have occurred by defense counsel's actions in striking the Asian-American juror was invited error.

"....

"'A defendant cannot by his own voluntary conduct invite error and then seek to profit thereby. Boutwell v. State, 279 Ala. 176, 183 So. 2d 774 (1966); Aldridge v. State, 278 Ala. 470, 179 So. 2d 51 (1965); Buford v. State, 214 Ala. 457, 108 So. 74 (1926); Barber v. State, 151 Ala. 56, 43 So. 808 (1907). "It would be a sad commentary upon the vitality of the judicial process if an accused could render it improper by his own choice." Aldridge, 278 Ala. at 474, 179 So. 2d at 54; Jackson v. State, 38 Ala. App. 114, 116, 78 So. 2d 665, cert. denied, 262 Ala. 702, 78 So. 2d 667 (1955). This is not a situation where a defendant merely remained silent and permitted error to occur. Turner v. State, 54 Ala. App. 467, 309 So. 2d 503 (1975).'

"Rowe v. State, 625 So. 2d 1210, 1213 (Ala. Crim. App. 1993). See also Dixon v. State, 481 So. 2d 434 (Ala. Crim. App. 1985); Murrell v. State, 377 So. 2d 1102 (Ala. Crim. App. 1979), writ. denied, 377 So. 2d 1108 (1977).

"Batson and its progeny 'permit any party in any case to challenge the opposing party's use of peremptory challenges in a racially discriminatory manner.' Williams v. State, 634 So. 2d 1034 (Ala. Crim. App. 1993) (Bowen, P.J., dissenting). Thus, as a general rule, a party may object only to the

opposing party's use of its peremptory strikes and not to its own. However, in this case, defense counsel could have alerted the trial court that he struck a juror for racial purposes before the swearing of the jury and the trial court could have fashioned some type of remedy for defense counsel's action, such as placing the removed juror back on the jury panel. However, by waiting until after the trial to object, defense counsel has taken inconsistent positions. Defense counsel obviously felt that it was advantageous to strike this juror. Defense counsel is now arguing that the trial court should protect the juror's right to serve and that the appellant was somehow harmed by being denied this particular juror's service. Defense counsel argues that because he struck this juror for racial reasons, his client should be granted a new trial. We fail to see how this would remedy the injustice suffered by the juror who was excluded from jury service."

Rieber v. State, 663 So. 2d 985, 991-92 (Ala. Crim. App. 1994), aff'd, 663 So. 2d 999 (Ala. 1995).

In his amended Rule 32 petition, Rieber argued that his counsel were ineffective for raising this issue as the first ground for appeal. (C. 661.) The circuit court denied Rieber's claim for the following reason:

"Rieber presented no evidence demonstrating what issues Mr. Kempener and Mr. Moran could have raised on direct appeal that would have caused the Alabama Court of Criminal Appeals or the Alabama Supreme Court to reverse his conviction or sentence. This Court finds that Rieber failed to prove that Mr. Kempener's and Mr. Moran's performance on direct appeal was deficient and caused him to be prejudiced. Rule 32.3, Ala. R. Crim. P."

(C. 2901.) After reviewing the record on appeal, we find that Rieber's claim is without merit for the reasons stated by the trial court. The circuit court did not err in denying it.

B.

Next, according to Rieber, instead of raising a Batson challenge, Kempener and Moran should have argued that the circuit court erred in its analysis of the aggravating and mitigating circumstances. (Rieber's brief, pp. 54-58.) Specifically, Rieber contends that the circuit court's finding that Rieber stalked his victim served as a basis for the court's application of the "heinous, atrocious, or cruel" aggravating circumstance standard and constituted reversible error. Id. In its order, the circuit court found, in relevant part, that Rieber failed to prove this claim because he failed to question his appellate counsel about this claim at his Rule 32 evidentiary hearing. (C. 2902.) We agree.

Rieber's appellate counsel, Richard Kempener, testified at Rieber's evidentiary hearing. Rieber, however, never questioned Kempener about why he did not raise the stalking issue on direct appeal. (R. 290-342.) This Court has previously reasoned:

"'It is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim.' Broadnax v. State, 130 So. 3d 1232, 1255 (Ala. Crim. App. 2013). '[T]o overcome the strong presumption of effectiveness, a Rule 32 petitioner must, at his evidentiary hearing, question ... counsel regarding his or her actions or reasoning.' Stallworth v. State, 171 So. 3d 53, 92 (Ala. Crim. App. 2014). 'When a record is silent as to the reasons for an attorney's actions we must presume that counsel's conduct was reasonable.' Hooks v. State, 21 So. 3d 772, 793 (Ala. Crim. App. 2008). '"If the record is silent as to the reasoning behind counsel's actions, the presumption of effectiveness is sufficient to deny relief on [an] ineffective assistance of counsel claim.'" Davis v. State, 9 So. 3d 539, 546 (Ala. Crim. App. 2008) (quoting Howard v. State, 239 S.W.3d 359, 367 (Tex. Crim. App. 2007))."

Clark v. State, 196 So. 3d 285, 312 (Ala. Crim. App. 2015).

In the present case, because Rieber failed to question Kempener about why he chose not to raise the stalking issue on

direct appeal, the record is silent as to whether Kepmaner's decision not to make that argument was strategic. For this reason, Rieber failed to satisfy his burden of proving that Kempener's performance was deficient or that his performance prejudiced Rieber pursuant to Rule 32.3, Ala. R. Crim. P. Thus, the circuit court properly denied this claim.

C.

Rieber argues that Kempener and Moran were ineffective for failing to argue on appeal that the circuit court did not treat the jury's recommendation of life imprisonment without the possibility of parole as a mitigating circumstance. (Rieber's brief, pp. 58-59.) Relying on the Alabama Supreme Court's decision in Ex parte Carroll, 852 So. 2d 833, 835 (Ala. 2002), Rieber argues that the circuit court was required to treat the jury's recommendation as a mitigating circumstance and its failure to do so mandates that his death sentence be set aside. (Rieber's brief, p. 59.) Even though Carroll was decided more than 10 years after Rieber was convicted and sentenced, Rieber appears to argue that the Alabama Supreme Court's holding in that case should apply retroactively to his case.

In denying Rieber's claim, the circuit court found that the Alabama Supreme Court's decision in Ex parte Carroll, supra, requiring a sentencing court to consider a jury's life without parole recommendation as a mitigating circumstance did not apply to Rieber's case. (C. 2904.) Specifically, the circuit court found that this decision was not issued until 10 years after Rieber was convicted and sentenced and that its holding could not be applied retroactively. Id. We agree.

This Court has previously stated that, in Carroll, the Alabama Supreme Court never gave any indication that its decision was to be "applied retroactively to all cases, even those cases that were final" when Carroll was announced. See Ferguson v. State, 13 So. 3d 418, 429 (Ala. Crim. App. 2008). Furthermore, we note that, on direct appeal, both this Court and the Alabama Supreme Court found that Rieber's conviction and sentence were proper and that, even after independently weighing the aggravating and mitigating circumstances, both courts still concluded that Rieber's death sentence was appropriate. See Ex parte Rieber, 663 So. 2d 999, 1015 (Ala.

1995) (holding that the "guilty verdict and the sentence are supported by the record"); Rieber v. State, 663 So. 2d 985, 998 (Ala. Crim. App. 1994) (holding that "[o]ur review of the record leads us to conclude that the trial court's findings [concerning the aggravating and mitigating circumstances] are supported by the record").

For these reasons, we agree with the circuit court's conclusion that Rieber failed to prove that Kempener's and Moran's performance in representing him on direct appeal was deficient and caused him prejudice. Rule 32.3, Ala. R. Crim. P. Thus, the circuit court properly denied this claim.

D.

Finally, Rieber argues that his appellate counsel were ineffective for failing to raise on direct appeal the first six claims in his amended Rule 32 petition. (Rieber's brief, pp. 60.) Noting that "appellate counsel is presumed to exercise sound strategy in the selection of issues most likely to afford relief on appeal,"⁹ the circuit court denied Rieber's claim on the basis that he had failed to prove that he was prejudiced by Kempener's and Moran's failure to raise these six issues on appeal. (C. 2906-07.) We agree with the circuit court's findings here.

In his brief on appeal, Rieber provides no factual support or legal authority for this claim, nor has he presented any analysis on this issue. Thus, he has failed to satisfy his duty to provide this Court with a sufficient argument under Rule 28(a)(10), Ala. R. App. P. Furthermore, we note that claims 1 through 6 from Rieber's amended Rule 32 petition challenge the constitutionality of Alabama's death-penalty scheme, which Alabama courts have addressed and repeatedly rejected. See, e.g., Largin v. State, [Ms. CR-09-0439, Dec. 18, 2015] ____ So. 3d ____, ____ (Ala. Crim. App. 2015). Thus, under these circumstances, the circuit court properly denied Rieber's claim.

III.

⁹Thomas v. State, 766 So. 2d 860, 876 (Ala. Crim. App. 1998).

Next, Rieber contends that the circuit court erred by limiting or excluding certain pieces of evidence that Rieber sought to have admitted during the October 2011 evidentiary hearing on his Rule 32 petition. (Rieber's brief, p. 61.) We will address each of these claims individually below.

A.

First, Rieber argues that the circuit court erred by ruling that evidence that he attended drug parties both on a regular basis and on the night of the murder was "admissible only on the question of penalty and not on the question of whether Mr. Rieber was guilty of an offense requiring intent." (Rieber's brief, p. 61-62.) Specifically, Rieber argues that this ruling was "wrong and violated the Alabama Rules of Evidence" because, according to Rieber, this evidence was admissible under Rule 404(b), Ala. R. Evid., as proof of a "general plan among Mr. Rieber and his friends to meet ... [and] consume whatever drugs were available." (Rieber's brief, p. 62.) This argument is without merit.

This Court has previously held that the circuit court "at a Rule 32 hearing has the authority to ensure presentation of testimony and evidence relevant to the petitioner's claims and to the State's defenses" and the court is under no obligation to allow testimony or evidence that is irrelevant or cumulative. McGahee v. State, 885 So. 2d 191, 229 (Ala. Crim. App. 2003). Rieber's defense theory during the guilt phase of his capital-murder trial was that someone other than him killed Craig on October 9, 1990; his defense theory was not that he committed the offense while he was intoxicated that night. Under these circumstances, evidence that he was intoxicated would have been irrelevant to the guilt phase because it would have been inconsistent with his defense theory.

Moreover, even if Rieber had presented an intoxication defense during the guilt phase of his trial, this evidence still would have been inadmissible under Rule 404(b), Ala. R. Evid., for the reasons given by Rieber in his brief. During the evidentiary hearing on his Rule 32 petition, Rieber presented several fact witnesses to testify about his habitual

drug use and his drug use on the day of the murder.¹⁰ Before Rieber presented his first witness, however, the State objected and reminded the circuit court that evidence of prior or habitual drug use is not admissible as guilt-phase evidence to prove intoxication or diminished capacity at the time of a capital crime. (Ev. R. 182.) The circuit court agreed with the State's argument and chose to limit all testimony concerning drug use prior to the day of the murder to the penalty phase. (Ev. R. 184, 197-198.) Rieber now contends, however, that this limitation was incorrect because, he says, evidence that he attended drug parties on a regular basis and on the night of the murder are admissible under Rule 404(b), Ala. R. Evid., as proof of a general plan between himself and others to attend drug parties that night. (Rieber's brief, p. 62.) We disagree.

Under Alabama law, evidence of any offense other than that specifically charged is prima facie inadmissible. Allen v. State, 380 So. 2d 313 (Ala. Crim. App. 1979). Alabama law, however, provides for the admissibility of evidence of collateral crimes or acts as a part of the prosecution's case-in-chief if the defendant's collateral misconduct is relevant to show his guilt other than by suggesting that he is more likely to be guilty because of his past misdeeds. See Nicks v. State, 521 So. 2d 1018, 1025 (Ala. Crim. App. 1987), aff'd, 521 So. 2d 1035 (Ala. 1988) (emphasis added). Rule 404(b), Ala. R. Evid., provides, in pertinent part:

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case

¹⁰These fact witnesses were: Teresa Hill (Ev. R. 184-98), Warren "Lenny" Rieber (Ev. R. 198-216), Shauna Jenkins (Ev. R. 218-37), John Walls (Ev. R. 237-53), Beth Piraino (Ev. R. 253-63), Charity Hubert (Ev. R. 263-90), Tim Hubert (Ev. R. 342-51), Jo Duffy (Ev. R. 351-61), Sonya Williamson (Ev. R. 361-69), Melissa Smallwood (Ev. R. 369-75), Dennis Howell (Ev. R. 375-85), and Dwayne Maroney (Ev. R. 385-87.).

shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial."

Rule 404(b), Ala. R. Evid. (emphasis added).¹¹

"[T]he common plan, scheme, or design exception is 'essentially coextensive with the identity exception,' and 'applies only when identity is actually at issue.'" Lewis v. State, 889 So. 2d 623, 661 (Ala. Crim. App. 2003) (quoting Ex parte Darby, 516 So. 2d 786, 789 (Ala. 1987), and Campbell v. State, 718 So. 2d 123, 128-29 (Ala. Crim. App. 1997)). Concerning the identity exception to the general exclusionary rule, this Court has stated:

"Collateral-act evidence is admissible to prove identity only when the identity of the person who committed the charged offense is in issue and the charged offense is committed in a novel or peculiar manner. 1 Charles W. Gamble, McElroy's Alabama

¹¹Although Rule 404(b), Ala. R. Evid., did not become effective until January 1, 1996--more than four years after Rieber was convicted--admitting evidence of specific conduct for a limited purpose is consistent with preexisting Alabama law in both criminal and civil cases. See, e.g., Sessions Co. v. Turner, 493 So. 2d 1387 (Ala. 1986) (other misrepresentations held admissible to prove prerequisite knowledge in fraud case); Averette v. State, 469 So. 2d 1371 (Ala. Crim. App. 1985) (evidence admissible in criminal case to prove knowledge); Ex parte Cofer, 440 So. 2d 1121 (Ala. 1983) (dealing with intent as a purpose for admitting evidence of the accused's collateral crimes); Nicks v. State, 521 So. 2d 1018 (Ala. Crim. App. 1987) (evidence of other crimes admissible to prove plan, design, or scheme), aff'd, 521 So.2d 1035 (Ala.), cert. denied, 487 U.S. 1241 (1988); Ford v. State, 514 So. 2d 1057 (Ala. Crim. App. 1987) (dealing with motive as a permissible purpose for admitting evidence of the accused's collateral crimes), cert. denied, 514 So. 2d 1060 (Ala. 1987); Ex parte Arthur, 472 So. 2d 665 (Ala. 1985) (containing an instructive discussion of the identity purpose).

Evidence § 69.01(8) (5th ed. 1996); Ex parte Arthur, 472 So. 2d 665 (Ala. 1985); Johnson v. State, 820 So. 2d 842, 861 (Ala. Crim. App. 2000); Tyson v. State, 784 So. 2d 328, 344 (Ala. Crim. App.), aff'd, 784 So. 2d 357 (Ala. 2000). 'Under the identity exception to the general exclusionary rule prohibiting the admission of other or collateral crimes as substantive evidence of the guilt of the accused, the prior crime is not relevant to prove identity unless both that and the now-charged crime are "signature crimes" having the accused's mark and the peculiarly distinctive modus operandi so that they may be said to be the work of the same person.' Bighames v. State, 440 So. 2d 1231, 1233 (Ala. Crim. App. 1983). '[E]vidence of a prior crime is admissible only when the circumstances surrounding the prior crime and those surrounding the presently charged crime "exhibit such a great degree of similarity that anyone viewing the two offenses would naturally assume them to have been committed by the same person."' Ex parte Arthur, 472 So. 2d at 668 (quoting Brewer v. State, 440 So. 2d 1155, 1161 (Ala. Crim. App. 1983)). See also Mason v. State, 259 Ala. 438, 66 So. 2d 557 (1953); and Govan v. State, 40 Ala. App. 482, 115 So. 2d 667 (1959) (recognizing that the identity exception is applicable only where both the prior crime and the charged offense were committed in the same special or peculiar manner). 'When extrinsic offense evidence is introduced to prove identity, the likeness of the offenses is the crucial consideration.'"

Petric v. State, 157 So. 3d 176, 192 (Ala. Crim. App. 2013) (internal quotation and citation omitted). In light of the principles quoted above concerning the "common plan" exception to Rule 404(b), Ala. R. Evid., Rieber's argument here is clearly without merit.

As noted above, in the present case, the defense's theory at trial was that someone other than Rieber killed Craig on October 9, 1990. Because identity of the person who committed the charged offense was at issue, the State, not the defense, could have presented collateral-bad-acts evidence to prove

that Rieber was the culprit. For example, if there was evidence in this case showing that Rieber had previously robbed convenience stores and killed the clerks in the same way in which he robbed and murdered Craig, that evidence could have been introduced by the State and admitted under Rule 404(b), Ala. R. Evid., as evidence of a common plan or scheme. This, however, is not true in the case before us. For the foregoing reasons, Rieber's argument here is without merit and he is not entitled to relief on this claim.

B.

Rieber next argues that the circuit court erred by limiting Dr. Alex Stalcup's evidentiary hearing testimony to issues relating to the penalty phase. (Rieber's brief, pp. 64-67.) Specifically, he argues that Dr. Stalcup's testimony was critical to show the effects of severe drug and alcohol use on a person's behavior and that this testimony would have shown that he did not have the intent to kill Craig. Id. This argument is without merit.

Once again, the circuit court "at a Rule 32 hearing has the authority to ensure presentation of testimony and evidence relevant to the petitioner's claims and to the State's defenses" and the court is under no obligation to allow testimony or evidence that is irrelevant or cumulative. McGahee v. State, 885 So. 2d 191, 229 (Ala. Crim. App. 2003). Rule 704, Ala. R. Evid., governs the admissibility of expert testimony in Alabama. This rule states, in pertinent part: "Testimony in the form of an opinion or inference otherwise admissible is to be excluded if it embraces an ultimate issue to be decided by the trier of fact." Rule 704, Ala. R. Evid. This Court has repeatedly held that a circuit court does not commit reversible error by prohibiting a mental-health expert from testifying during the guilt phase of a capital-murder trial to show that the defendant did not have the ability to form intent and has reasoned that this testimony would invade the province of the jury. See, e.g., Wiggins v. State, 193 So. 3d 765, 800-03 (Ala. Crim. App. 2014); Gobble v. State, 104 So. 3d 920, 967-69 (Ala. Crim. App. 2010); Wilkerson v. State, 686 So. 2d 1266, 1278-79 (Ala. Crim. App. 1996); McCowan v. State, 412 So. 2d 847, 849 (Ala. Crim. App. 1982).

In Wilkerson v. State, 686 So. 2d 1266 (Ala. Crim. App.

1996), this Court stated:

"The appellant contends that the trial court erred by not allowing him to question his expert witness, Dr. Alan Blotcky, a clinical psychologist who performed a court-ordered evaluation of the appellant, as to whether the appellant had the ability to form the requisite intent to commit murder. During an offer of proof in the trial court, the appellant's counsel explained that Dr. Blotcky would testify that the appellant had a diminished capacity to form the requisite intent to commit murder because of the combined effect of intoxication at the time of the crime, borderline intellectual function, and mental disease or defect (i.e., passive-aggressive personality). 'It has been held traditionally in this country that an expert witness cannot give his opinion upon an ultimate issue in the case.' Charles W. Gamble, McElroy's Alabama Evidence § 127.01(5) (d) (4th ed. 1991). More specifically, '[a] witness, be he expert or lay, cannot give his opinion when such constitutes a legal conclusion or the application of a legal definition.' Gamble, supra, at § 128.07.

"The appellant refers us to our opinion in Bailey v. State, 574 So. 2d 1001, 1003 (Ala. Cr. App. 1990), where we stated: '[T]he modern trend is in the direction of permitting experts to give their opinions upon ultimate issues, of which the final determination rests with the jury.' The modern trend culminated in the adoption of Rule 704 of the Federal Rules of Evidence, which abandoned the ultimate issue rule. C. Gamble, supra, at § 127.01(5) (d). However, subsection (b) of Rule 704 contains the following important limitation:

"'No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense

thereto.'

"Stated differently,

"Rule 704(b) does not prohibit an expert witness from stating his opinion and reviewing facts from which a jury could determine whether a defendant had the requisite criminal intent. ... Rather, the rule prohibits an expert witness from testifying that a defendant did or did not possess the requisite mental intent at the time of the crime.'

"United States v. Orr, 68 F.3d 1247, 1252 (10th Cir. 1995), cert. denied, 516 U.S. 1064, 116 S. Ct. 747, 133 L. Ed. 2d 695 (1996). See also United States v. Frisbee, 623 F. Supp. 1217, 1222-223 (N.D. Cal. 1985) ('the defendant's experts will not be allowed to state an opinion or inference as to whether the defendant did or did not form a specific intent to kill.... No testimony directly or indirectly opining on the issue of specific intent will be allowed'). Thus, even the more permissive federal rule does not allow an expert witness to state an opinion as to the ultimate issue of whether a defendant had the requisite mental state to commit murder. Here, it is clear from the record that the appellant sought only to elicit Dr. Blotcky's opinion on the issue of specific intent. Therefore, even under the modern trend, the appellant's argument that Dr. Blotcky should have been allowed to testify concerning the appellant's intent fails."

686 So. 2d at 1278-79.

Dr. Stalcup was Rieber's expert witness concerning the effects of drugs and alcohol on mental states. (Ev. R. 427.) He offered his opinion on the long-term effect of Rieber's drug and alcohol use on his brain and mental processes. (Ev. R. 433-41.) He opined specifically on the effects of the drugs that Rieber allegedly took on the night of the murder. Id. Dr. Stalcup testified that he did not believe that Rieber was "aware of what he was doing" during the murder and thought he

experienced "an LSD short circuit as opposed to a classic alcohol black out." (Ev. R. 441.)

Even though Dr. Stalcup was able to provide testimony concerning the long-term effect of Rieber's drug and alcohol use on his brain and mental processes, it was proper for the circuit court to determine that he was not allowed to testify whether Rieber "did or did not possess the requisite mental intent at the time of the crime." Wilkerson, 686 So. 2d at 1278-79. Based on our holding in Wilkerson, quoted above, and the record in this case, the circuit court did not commit reversible error in prohibiting Rieber from presenting the expert testimony of Dr. Stalcup as to issues relating to the guilt phase of his trial. Thus, Rieber is not entitled to relief on this issue.

C.

Rieber also contends that the circuit court erred by excluding as inadmissible hearsay law student Mary Sowinski's social-history report covering Rieber's background and the amount of time it took her to compile it. (Rieber's brief, pp. 67-69.) According to Rieber, this ruling was erroneous because the report was not being offered for the truth of the matter asserted but was instead being offered to "prove the kind of evidence that was accessible to Mr. Moran had he made the effort required of counsel in a death penalty case to conduct what amounts, essentially, to a social history of his client." (Rieber's brief, p. 68.)

Rieber's claim here fails to satisfy the requirements of Rule 28(a)(10), Ala. R. App. P. This rule requires that an argument contain "the contentions of the appellant/petitioner with respect to the issues presented, and the reasons therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on." Rule 28(a)(10), Ala. R. App. P. "When an appellant fails to cite any authority for an argument on a particular issue, this Court may affirm the judgment as to that issue, for it is neither this Court's duty nor its function to perform an appellant's legal research." City of Birmingham v. Business Realty Inv. Co., 722 So. 2d 747, 752 (Ala. 1998).

In his brief on appeal, Rieber provides no legal

authority for this claim, nor has he presented any analysis on this issue. Thus, he has failed to satisfy his duty to provide this Court with a sufficient argument under Rule 28(a)(10), Ala. R. App. P.

D.

Finally, Rieber argues that the circuit court erred by prohibiting Kempener from testifying about Moran's statement that he felt he was being underpaid for his work on Rieber's case on the basis that such testimony was inadmissible hearsay. (Rieber's brief, pp. 69-70.) According to Rieber, Moran's statement is admissible under the "present emotional, physical, or mental condition" exception to Alabama's rule against hearsay. (Rieber's brief, p. 70.)

As noted, the Alabama Rules of Evidence apply to Rule 32 proceedings. See Hunt v. State, 940 So. 2d 1041, 1051 (Ala. Crim. App. 2005). Under Rule 801(c), Ala. R. Evid., hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay evidence is inadmissible unless expressly allowed by statute or rule. Rule 802, Ala. R. Evid. Rule 803, Ala. R. Evid., provides a list of statements that are considered exceptions to the general rule against the admissibility of hearsay. One such exception is found in subparagraph (3) of this rule which provides, in pertinent part, that:

"A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will."

Rule 803(3), Ala. R. Evid. According to Rieber, this exception applies to Moran's statements about his compensation for representing Rieber during his capital murder trial. We disagree.

During the evidentiary hearing, Kempener was asked

whether Moran had "a feeling about fees that he was receiving." (Ev. R. 317.) Rieber's counsel contended, as he does here, that Kempener's recollection of Moran's statement was admissible under Rule 803, Ala. R. Evid., as a statement of Moran's present mental condition. (Ev. R. 318.) The State objected on hearsay grounds and stated that such testimony "doesn't go to show [Moran's] mental state, it just goes to show you he didn't think he was being compensated enough." Id. The circuit court disagreed with Rieber's counsel's argument and sustained the objection.

Regardless of whether the statement--i.e., Moran's alleged dissatisfaction with the fees cap--fits within the Rule 803(3), Ala. R. Evid., exception discussed above, Rieber has not demonstrated that this is reversible error. Thus, Rieber is not entitled to relief on this claim.

IV.

Rieber argues that the United States Supreme Court's decision in Hurst v. Florida, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016), requires that his death sentence be set aside. (Rieber's brief, p. 71.)¹² In Hurst, the defendant was convicted for first-degree murder and sentenced to death, but the United States Supreme Court vacated the death sentence after finding that Florida's capital-sentencing-scheme violated the defendant's Sixth Amendment right to a jury trial. Id. at 622. According to Rieber, because Alabama's death-penalty scheme is almost identical to the scheme used in Florida and because his jury recommended life without parole, his death sentence is due to be set aside. (Rieber's brief, pp. 71-76.)

This Court has previously stated in State v. Billups, [Ms. CR-15-0619, June 17, 2016] ____ So. 3d ____ (Ala. Crim.

¹²Rieber also appears to argue that there is a link between the imposition of the death penalty and the proximity of judicial elections. (Rieber's brief, pp. 73-75.) Specifically, he contends that the "watershed nature" of the Hurst decision is "particularly compelling in Alabama where the evidence has shown that judicial elections, as much as anything else, influence override decisions." Id.

App. 2016), that Alabama's capital-sentencing scheme does not violate Hurst. Specifically, this Court held that Alabama's capital-sentencing scheme, unlike the scheme held unconstitutional in Hurst, allows the jury, not the trial court, to make the critical finding necessary for imposition of the death penalty, and is, thus, constitutional and does not violate the United States Supreme Court's decision in Hurst. ____ So. 3d at ____ (quoting Hurst, ____ U.S. at ____, 136 S. Ct. at 624).

Critical to Rieber's claim, in Billups we held that the United States Supreme Court in "Hurst did nothing more than apply its previous holdings in Apprendi [v. New Jersey, 530 U.S. 466 (2000),] and Ring [v. Arizona, 536 U.S. 584 (2002),] to Florida's capital-sentencing scheme. The Court did not announce a new rule of constitutional law, nor did it expand its holdings in Apprendi and Ring." ____ So. 3d at _____. See also Ex parte Bohannon, [Ms. 1150640, Sept. 30, 2016] ____ So. 3d ____ (Ala. 2016) ("The United States Supreme Court's holding in Hurst was based on an application, not an expansion, of Apprendi and Ring"). Apprendi and Ring were decided after Rieber's conviction became final, and those decisions do not apply retroactively to Rieber. Boyd v. State, 913 So. 2d 1113, 1146 (Ala. Crim. App. 2003) ("[T]his court has held that Apprendi claims are not applied retroactively to postconviction proceedings. Sanders v. State, 815 So. 2d 590, 592 (Ala. Crim. App. 2001). Our retroactivity analysis of Apprendi applies equally to Ring. Accordingly, Ring claims are not applied retroactively to postconviction proceedings."). Likewise, Hurst, which merely applied Apprendi and Ring, does not apply retroactively to Rieber. Thus, Rieber is not entitled to relief on this claim.

V.

Rieber argues that he is entitled to relief on the merits of claims 1, 2, 5, and 6, in his amended Rule 32 petition. (Rieber's brief, p. 76.) Initially, we note that all four of these claims challenge the constitutionality of Alabama's death-penalty scheme on various grounds. (Rieber's brief, pp. 76-81.) Although we have already discussed that Alabama's death-penalty scheme has been repeatedly upheld as constitutional, see Section IV, supra, we will briefly address claims 1, 2, 5, and 6 of Rieber's amended Rule 32 petition.

A.

With regard to the first claim in his amended Rule 32 petition, Rieber argues that Alabama's death-penalty scheme is unconstitutional because it is unconstitutionally vague. (Rieber's brief, p. 76.) As best we can discern, Rieber appears to challenge the circuit court's labeling of his offense as being "heinous, atrocious, or cruel" and argues that, under Alabama's death-penalty statute, "there is a clear lack of notice as to the kind of conduct that would warrant the imposition of the death-penalty, [thereby] rendering the statute void for vagueness." (Rieber's brief, p. 77.) The circuit court found that this claim was procedurally barred by Rules 32.2(a)(3) and (a)(5), Ala. R. Crim. P., because Rieber could have been raised it at trial or on direct appeal but failed to do so. (C. 2848-49.) After reviewing the record and Rieber's amended petition, we agree with the circuit court's determination here. Moreover, this Court has repeatedly held that this aggravating circumstance is not unconstitutionally vague. See Whatley v. State, 146 So. 3d 437, 499 (Ala. Crim. App. 2010).¹³ Therefore, Rieber is not entitled to any relief on this claim.

B.

With regard to the second claim in his amended Rule 32 petition, Rieber argues that Alabama's capital offense statutes--§§ 13A-5-40 and 13A-5-49, Ala. Code 1975--are unconstitutional on their face and as applied because they lead to arbitrary sentencing. (Rieber's brief, pp. 78-79.)

¹³See also Minor v. State, 914 So. 2d 372, 437 (Ala. Crim. App. 2004), cert. denied, Minor v. Alabama, 548 U.S. 925, 126 S. Ct. 2977, 165 L. Ed.2d 987 (2006); Duke v. State, 889 So. 2d 1 (Ala. Crim. App. 2002); Ingram v. State, 779 So. 2d 1225 (Ala. Crim. App. 1999), aff'd, 779 So. 2d 1283 (Ala. 2000); Freeman v. State, 776 So. 2d 160 (Ala. Crim. App. 1999), aff'd, 776 So. 2d 203 (Ala. 2000); Bui v. State, 551 So. 2d 1094 (Ala. Crim. App. 1988), aff'd, 551 So. 2d 1125 (Ala. 1989), judgment vacated on other grounds, 499 U.S. 971, 111 S. Ct. 1613, 113 L. Ed. 2d 712 (1991); and Hallford v. State, 548 So. 2d 526 (Ala. Crim. App. 1988), aff'd, 548 So. 2d 547 (Ala. 1989).

Relying on the United States Supreme Court's decision in Lowenfield v. Phelps, 484 U.S. 231 (1988), Rieber specifically argues that, "there is simply no way one can define the class of persons eligible for the death penalty" in Alabama and, as such, his death sentence is due to be set aside. Id. In denying Rieber's claim, the circuit court found that he had failed to meet his burden for "pleading and proving by a preponderance of the evidence the facts necessary to entitle" him to relief pursuant to Rule 32.3, Ala. R. Crim. P. (C. 2849-50.) After reviewing the record and Rieber's amended petition, we agree with the circuit court.

The Alabama Supreme Court has repeatedly held that Alabama's capital-offense statutes include a sentencing scheme that is not arbitrary. See Ex parte Hays, 518 So. 2d 768, 774 (Ala. 1986); Daniels v. State, 534 So. 2d 628, 642-45 (Ala. Crim. App. 1985), aff'd, 534 So. 2d 656 (Ala. 1986), cert. denied, 479 U.S. 1040, 107 S. Ct. 898, 93 L. Ed. 2d 850 (1987). Therefore, Rieber is not entitled to relief on this claim.

C.¹⁴

With regard to the fifth claim in Rieber's amended Rule 32 petition, as best we can discern, Rieber appears to argue that the imposition of the death penalty in his case violated his Eighth Amendment rights because the circuit judge in his case made findings beyond those of the jury. (Rieber's brief, p. 72.) Specifically, Rieber argues that the circuit judge received and relied on information that the jury did not have and made findings that were "utterly inconsistent" with the jury's recommendation. Id.

The circuit court denied this claim on the basis that Rieber failed to prove that the allegations were not procedurally barred from postconviction review, see Rule 32.3, Ala. R. Crim. P., and because he could have, but failed to, raise this claim on direct appeal, see Rule 32.2(a)(3) and (5), Ala. R. Crim. P. (C. 2853-54.) Based on our review of the record, we agree with the circuit court.

¹⁴Although this claim is briefly discussed in Section V of Rieber's brief (p. 72), we address this argument here.

D.

Finally, with regard to the sixth claim in his amended Rule 32 petition, Rieber argues that Alabama's death-penalty scheme is cruel and unusual and violates the Eighth Amendment of the United States Constitution. (Rieber's brief, pp. 79-81.) Specifically, Rieber argues that Alabama's use of lethal injection to put inmates to death does not "pass constitutional muster." Id. For the reasons provided herein, the circuit court properly summarily dismissed this claim.

The circuit court summarily dismissed this claim prior to the 2011 evidentiary hearing on Rieber's petition because it found that the claim was insufficiently pleaded pursuant to Rule 32.6(b), Ala. R. Crim. P., since Rieber merely provided a "bare allegation that a constitutional right has been violated." (C. 2856.) We agree with the circuit court's dismissal of this claim.

Moreover, even if Rieber had provided more than a "bare allegation" that Alabama's use of lethal injection violated his Eighth Amendment rights, his claim would still be without merit. This Court has previously held that "'lethal injection does not constitute per se cruel and unusual punishment.'" Townes v. State, [Ms. CR-10-1892, Dec. 18, 2015] ____ So. 3d ____, ____ (Ala. Crim. App. 2015) (quoting McNabb v. State, 991 So. 2d 313 (Ala. Crim. App. 2007)). In fact, both the Supreme Court of the United States and the Alabama Supreme Court have held that lethal injection does not constitute cruel and unusual punishment. See Baze v. Rees, 553 U.S. 35, 54-56, 128 S. Ct. 1520 (2008) (holding that lethal injection does not violate the Eighth Amendment); Ex parte Belisle, 11 So. 3d 323, 339 (Ala. 2008) (holding that lethal injection is not unconstitutional); see also Glossip v. Gross, ____ U.S. ____, 135 S. Ct. 2726, 2732-46, 192 L. Ed. 2d 761 (2015). Therefore, Rieber is not entitled to relief on this claim.

For the foregoing reasons, Rieber is not entitled to relief on the first, second, fifth, and sixth claims found in his amended Rule 32 petition, and the circuit court properly denied these claims.

VI.

Next, Rieber challenges the constitutionality of the \$1,000 limit on compensation in a death-penalty case.¹⁵ (Rieber's brief, p. 81.) Specifically, he argues that "Alabama's \$1,000 cap on compensation to counsel for capital defendants violated his due process and equal protection rights." Id. Rieber's claim here fails.

His claim is meritless under Alabama caselaw. This Court has been faced with this exact argument before and, in such cases, has previously held:

"These limitations on compensation have withstood repeated challenges that they ... deprive indigent capital defendants of the effective assistance of counsel, and deny equal protection in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the Alabama Constitution, and Alabama state law. See Ex parte Smith, 698 So. 2d 219 (Ala.), cert. denied, 522 U.S. 957, 118 S. Ct. 385, 139 L. Ed. 2d 300 (1997); May v. State, 672 So. 2d 1310 (Ala. 1995); Ex parte Grayson, 479 So. 2d 76 (Ala.), cert. denied, 474 U.S. 865, 106 S. Ct. 189, 88 L. Ed. 2d 157 (1985); Sparks v. Parker, 368 So. 2d 528 (Ala.), appeal dismissed, 444 U.S. 803, 100 S.Ct. 22, 62 L. Ed. 2d 16 (1979); Stewart v. State, 730 So. 2d 1203, 1212 (Ala. Crim. App. 1997), aff'd, 730 So. 2d 1246 (Ala. 1999); Boyd v. State, 715 So. 2d 825 (Ala. Crim. App. 1997), aff'd, 715 So. 2d 852 (Ala.), cert. denied, 525 U.S. 968, 119 S. Ct. 416, 142 L.Ed. 2d 338 (1998); Slaton v. State, 680 So. 2d 879 (Ala. Crim. App. 1995), aff'd, 680 So. 2d 909 (Ala. 1996), cert. denied, 519 U.S. 1079, 117 S. Ct. 742, 136 L. Ed. 2d 680 (1997); Barbour v. State, 673 So. 2d 461 (Ala. Crim. App. 1994), aff'd, 673 So. 2d 473 (Ala. 1995), cert. denied, 518 U.S. 1020, 116 S. Ct. 2556, 135 L. Ed. 2d 1074 (1996); Johnson v. State, 620 So. 2d 679 (Ala. Crim. App. 1992), rev'd on other grounds, 620 So. 2d 709 (Ala.), cert. denied, 510 U.S. 905, 114 S. Ct. 285, 126 L. Ed. 2d 235 (1993); Smith v. State, 581 So. 2d 497 (Ala.

¹⁵See footnote 1, supra.

Crim. App. 1990), rev'd on other grounds, 581 So. 2d 531 (Ala. 1991). Because this court is bound by the decisions of the Alabama Supreme Court, we are not in a position to reverse that court's approval of the current compensation system.

"'The decisions of the Supreme Court shall govern the holdings and decisions of the courts of appeals, and the decisions and proceedings of such courts of appeals shall be subject to the general superintendence and control of the Supreme Court as provided by Constitutional Amendment No. 328.'

"§ 12-3-16, Ala. Code 1975. See also Barbour, supra."

Samra v. State, 771 So. 2d 1108, 1112 (Ala. Crim. App. 1999). For these reasons, Rieber's claim is without merit and, thus, he is not entitled to relief on this issue.

VII.

Finally, Rieber argues that his "constitutional rights to due process and equal protection were violated because the State knowingly permitted the spoilation of exculpatory evidence." (Rieber's brief, p. 88.) According to Rieber, because the State failed to appoint counsel for him until two weeks after his arrest, it was "far too late for drug testing to reveal that [he] was under the influence of mind-altering drugs at the time of his arrest." Id. As a result, Rieber says, the circuit court and the jury were unable to consider "irrefutable evidence of [Rieber's] diminished capacity" that would have resulted in either a conviction of a "viable lesser-included offense" or a sentence of life imprisonment without the possibility of parole. (Rieber's brief, pp. 89-90.)

The circuit court found that Rieber failed to prove facts demonstrating that the State permitted evidence to spoil. (C. 2857.) After reviewing the record and Rieber's amended Rule 32 petition, there does not appear to be any evidence presented by Rieber indicating that the State permitted evidence to

spoil. Therefore, the circuit court properly denied Rieber's claim here.

Accordingly, the judgment of the circuit court is affirmed.

AFFIRMED.

Windom, P.J., and Welch and Burke, JJ., concur. Kellum, J., concurs in the result.

JEFFREY DAY RIEBER,)
)
 Petitioner,)
)
 v.) Case No: CC-90-2177.60
)
 STATE OF ALABAMA,)
)
 Respondent.)

This case was assigned to this court on the 13th day of November 2014. After careful consideration of the allegations in Rieber's Amended Rule 32 Petition (amended petition), the responses in the State's Answer and Motion to Dismiss (State's answer), the testimony, exhibits, and arguments presented at the October 3-5, 2011 evidentiary hearing, the parties post-hearing pleadings, the appellate courts' opinions on direct appeal, the trial record, the final arguments of the parties presented on August 5, 2015, and the Petitioner's Memorandum of Law Regarding the

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Inapplicability of Broadnax v. State, this Court finds as follows¹:

FACTS OF THE CRIME

This Court adopts the trial court's summary of the facts of the crime in its sentencing order as follows:

Glenda Phillips Craig was twenty-five years old at the time of her death. She was married, and the mother of two small girls ages five and seven. She was murdered October 9, 1990, while working as a convenience store clerk in Mobil-Mart #1 at the intersection of Bradford Lane and Winchester Road in Huntsville, Madison County, Alabama.

Approximately seven to ten days before the murder, the defendant Jeffery Rieber purchased a twenty-two caliber revolver from a man named David Hill for thirty (\$30.00) dollars.

There was testimony from at least two witnesses to the effect that the defendant had been in or about the store several times before the murder occurred.

One of the witnesses, Mr. Erskine, was in the store a few days before the shooting, "three to four days, maybe a little longer." Although what the deceased stated to this witness was not admitted as evidence, it can certainly be inferred from his testimony that she was afraid and very nervous in the presence of the defendant; that he had driven up to the store on more than one occasion and

¹"C.R." refers to the clerk's record on direct appeal; "R." refers to the trial record; "A.P." refers to Rieber's amended Rule 32 petition; "H.R." refers to the evidentiary hearing record.

that the victim acted fearful in his presence. Mr. Erskine himself testified that he feared a robbery was about to take place at the hands of the defendant, and that he advised the victim to call the police. Just a few hours before her death, she inquired of the defendant's identity from a witness named Wayne Gentle who knew the defendant and who identified the defendant for the victim.

The evidence allows the Court to clearly conclude that the defendant, for at least three to four days, had stalked the victim, had targeted the store and her for his crime; that she was nervous, apprehensive and afraid when he appeared. She had also inquired as to his identity from another witness and made some inquiry the answer to which from the witness was "I don't think he would do nothing like that."

The murder of Glenda Craig is on video tape, taken from a surveillance camera which had been installed as a security measure in the store. Mr. Gentle reviewed this tape and testified that the defendant appeared on the film at a time consistent when he himself was in the store to transact business and when the victim inquired of the defendant's identity. This was a few minutes after five o'clock P.M. on October 9, 1990.

Just before eight o'clock P.M. on that same evening, the surveillance tape reflects that the defendant returned to the store. Mrs. Craig was alone in the store standing behind the checkout counter to the defendant's left. The defendant passed outside facing the victim across the counter. The defendant immediately withdrew the twenty-two revolver from his clothing and fired a shot at Mrs. Craig. Her left arm went up in a defensive posture and she fell to the floor behind the counter.

The defendant proceeded to open the cash register at the counter, stuffing the contents into his pockets. The defendant then leaned over the counter in such a fashion that the victim was within his view. He extended his arm and shot Mrs. Craig a second time.

He then fled the store. The expert testimony reflects that Mrs. Craig was shot at very close range, that the first bullet pierced her left wrist completely and then lodged about one inch under her scalp in the back of her head. The second bullet entered her brain just behind her left ear, and according to the testimony, was the eventual cause of death.

Glenda Craig remained alive for some minutes until a store patron found her and until her husband came in to find her lying helpless, bleeding from the nose and mouth. She was transported to a hospital where she underwent resuscitative efforts and eventually died.

The defendant was taken into custody at his home by law enforcement officials at 3:15 A.M. on October 10, 1990.

(C.R. 82-85)

Rieber's conviction and death sentence were affirmed on direct appeal. Rieber v. State, 663 So.2d 985 (Ala. Crim. App. 1994), affirmed, Ex parte Rieber, 663 So.2d 999 (Ala. 1995).

FACTS FROM THE EVIDENTIARY HEARING

An evidentiary hearing was held on October 3-5, 2011, at which Rieber presented 15 witnesses and offered certain exhibits. Below is a brief summary of the witness testimony.

Teresa Hill

Teresa Hill is Rieber's older sister. Ms. Hill testified that Rieber first smoked marijuana when he was nine years old. Ms. Hill also said she and her siblings witnessed instances of domestic violence between their parents. In the years before the murder, she also witnessed Rieber consume drugs other than marijuana, including crystal meth and LSD. Ms. Hill said when Rieber was discharged from the Navy he used various drugs on a daily basis.

On cross-examination Ms. Hill indicated that Rieber sold LSD between 1986 and 1989. She also said she spoke to Rieber's trial counsel about Rieber's drug use prior to trial.

Warren "Lenny" Rieber

Rieber next called his brother, Warren "Lenny" Rieber, to testify. Mr. Rieber's testimony concerning his brother's drug usage was consistent with Ms. Hill's

testimony. He also said he witnessed his brother using cocaine when Rieber was in his mid-teens. Mr. Rieber saw his brother using drugs at people's houses, including the homes of Jo Duffy and Bill Young. Mr. Rieber said that while he and his siblings lived in Alabama with their father, their mother would send marijuana to them through the mail. Mr. Rieber roomed with his brother for a time and he related an incident where the utilities were turned off because Rieber used the money that Mr. Rieber had given him to pay the bills for drugs.

Shauna Jenkins

Rieber next called his sister, Shauna Jenkins. Ms. Jenkins testified about domestic violence between her parents as well as Rieber's drug use. Ms. Jenkins testified that in the summer of 1988 Rieber's drug use increased following the suicide of Rieber's friend, David Jones. Ms. Jenkins said that she, her mother, her sister, and her brother Lenny, spoke to trial counsel prior to trial.

On cross-examination, Ms. Jenkins indicated she could tell when Rieber was high. She reaffirmed her

penalty phase testimony that she saw Rieber just after 9 p.m. on the night of the incident, that he looked normal to her, and that he did not appear to be high on drugs or alcohol.

John Walls

Rieber next called John Walls, a friend from high school. Mr. Walls testified about his observations of Rieber using drugs and alcohol. Mr. Walls indicated he was not contacted by Rieber's trial counsel.

Beth Piraino

Beth Piraino testified that she lived with the Rieber family for a period of time in 1984. Ms. Piraino recalled Rieber joining the Navy in 1985 and being discharged in 1986. Ms. Piraino testified that while living with the Riebers she smoked marijuana with Rieber and his mother. Ms. Piraino indicated she was not contacted by trial counsel.

On cross-examination, Ms. Piraino indicated she did not see Rieber much after he entered the Navy. She also indicated she had never seen him black out due to using drugs.

Charity Hubert

Charity Hubert testified that she met Rieber when she was 13 or 14 years old. Ms. Hubert's father was in a domestic relationship with Rieber's sister, Shauna. Ms. Hubert and Rieber began a boyfriend/girlfriend relationship when she was 14 years old and he was 19 years old. Ms. Hubert testified she smoked marijuana with Rieber and by the time she was 16 or 17 she was using the same hard drugs as Rieber. After their relationship ended, Ms. Hubert saw Rieber at house parties where drugs were used. Ms. Hubert testified she saw Rieber at Bill Young's house on the day of the murder and that drugs were being used. Ms. Hubert said the police showed up at Mr. Young's house and that people left. She said that Rieber left before the police arrived. Ms. Hubert indicated she was not contacted by trial counsel.

On cross-examination, Ms. Hubert indicated the police arrived at Young's house during daylight hours. She also said she began doing hard drugs, including cocaine and LSD, with Rieber when she was 14 or 15 years old. She also indicated she never recalled Rieber blacking out due to drug use.

Richard Kempaner

Rieber next called Mr. Richard Kempaner, his lead defense counsel.² Mr. Kempaner was admitted to practice law in 1961 and his practice focused on criminal defense. At the time he was appointed to represent Rieber in October 1990, there was a \$1000 cap on compensation for attorneys appointed to represent capital defendants. Mr. Kempaner testified he took Rieber's case for publicity and to help generate business. Mr. Kempaner maintained a case file throughout Rieber's trial and direct appeal and gave it to Rieber's collateral counsel in 1997 or 1998. Mr. Kempaner testified that after he had received and reviewed discovery from the district attorney, he believed Rieber would be convicted. Mr. Kempaner negotiated a plea agreement with the assistant district attorney to take death off the table, but Rieber's mother would not allow him to plead guilty to capital murder. Mr. Kempaner tried to convince her it was a mistake, but was unsuccessful.

² At the time of the evidentiary hearing, Mr. Kempaner's co-counsel, Mr. Daniel Moran, was deceased.

Mr. Kempaner testified that part of his trial strategy was to put error in the record in order to get the conviction reversed. Mr. Kempaner also said the guilt phase defense strategy was mistaken identity. Mr. Kempaner said Mr. Moran was responsible for the penalty phase. Mr. Kempaner had known Mr. Moran for about 20 years and had regular contact with him during their representation of Rieber. Mr. Kempaner knew that Mr. Moran had certain health problems, but those problems did not affect him. Mr. Kempaner said that, other than needing a walker to get around, Mr. Moran appeared to be "in fine shape" during his representation of Rieber. He also said Mr. Moran never complained about not feeling well and there was never an occasion during Mr. Moran's representation of Rieber that Mr. Kempaner believed Mr. Moran was drinking. Mr. Kempaner testified he briefly considered an intoxication defense.

Mr. Kempaner testified he struck an Oriental juror thinking that would put error in the record and would get the conviction reversed. Mr. Kempaner indicated

that he was aware that voluntary intoxication could be used to negate intent in capital murder cases.

On cross-examination, Mr. Kempaner indicated he spent more time preparing for Rieber's trial than was reflected in his fee declaration sheet. He also said taking Rieber's case for publicity did not affect his representation. Mr. Kempaner hired Glen Brooks, a private investigator, to find witnesses to testify for the defense. Mr. Brooks had previously worked for Mr. Kempaner and he felt that Mr. Brooks was an excellent investigator. Mr. Kempaner had represented 15 to 18 capital defendants before being appointed to represent Rieber.

Mr. Kempaner testified that he discussed the mistaken identity defense strategy with Rieber, that Rieber understood the strategy, and that Rieber did not suggest any other strategy to him. Mr. Kempaner believed the State had a strong case against Rieber and his strategy was to keep evidence from being admitted and to try and show Rieber did not murder the victim. A majority of Mr. Kempaner's practice from 1961 until he was appointed to defend Rieber was criminal defense.

Tim Hubert

Tim Hubert testified he lived with Rieber's sister, Shauna, and was acquainted with Rieber from 1986 until 1990. Mr. Hubert said he had seen Rieber smoke marijuana as well as crystal meth two or three times.

Jo Duffy

Jo Duffy testified she met Rieber while in the eighth grade and that they were good friends. Ms. Duffy and Rieber partied a lot together, including at her house. Ms. Duffy said between 1987 and 1990 she saw Rieber use marijuana, crystal meth, LSD, and cocaine. Ms. Duffy often had gatherings at her house and that almost every time Rieber would show up at least once. Ms. Duffy testified there was a gathering at her house on October 9, 1990, and that Rieber was there "at one point" around dark or at dusk. Ms. Duffy recalled that on that occasion Rieber was smoking marijuana and drinking, but could not recall if he used other drugs. Ms. Duffy indicated she was not contacted by trial counsel.

On cross-examination, Ms. Duffy indicated she had never seen Rieber black out while using drugs or seen him get violent.

Sonya Williams

Sonya Williams testified she knew Rieber from high school. Ms. Williams testified she had seen Rieber on the day of the murder at Ms. Duffy's house snorting meth and smoking pot. Ms. Williams indicated on cross she could not recall when Rieber arrived or left Ms. Duffy's house.

Melissa Smallwood

Melissa Smallwood testified that she hung out with Rieber when she was a teenager. Ms. Smallwood testified she had seen Rieber smoke marijuana and seen him on LSD and crystal meth. Ms. Smallwood recalled seeing Rieber driving his mother's car on the day of the murder and him honking at her. Ms. Smallwood said it was daylight when she saw Rieber.

Dennis Howell

Dennis Howell testified he knew Rieber through his sister Shauna. Mr. Howell had seen Rieber smoke marijuana. At the time of the murder, Mr. Howell was

living at Rieber's house while his trailer was being set up. He recalled seeing Rieber come and go a lot on the night of the murder. Mr. Howell recalled at one point seeing Rieber rocking in a recliner chair for 45 minutes to an hour. He indicated he had never see Rieber act like that before. Mr. Howell testified that, on the night of the offense, he was taken to the police station, shown the surveillance videotape from the crime scene, and recognized Rieber on the tape. Mr. Howell remembered being contacted by someone prior to trial on Rieber's behalf, but he could not recall who contacted him or the substance of any conversation.

Dwayne Maroney

Dwayne Maroney testified he saw Rieber at Jeff Goodrich's house on October 9, 1990, and that "everyone" there was doing LSD. Mr. Maroney indicated on cross-examination that Rieber was at Goodrich's house when he arrived and left and that it was daylight. Mr. Maroney had never seen Rieber black out due to using drugs.

Dr. Alex Stalcup

Rieber's final witness was psychiatrist Dr. Alex Stalcup. Dr. Stalcup specializes in treating drug and alcohol addiction. He lives in Oakland, CA and works at the New Leaf Treatment Center in LaFayette, CA.

Dr. Stalcup testified that tests were available at the time of Rieber's arrest in 1990 to determine what drugs were in an individual's system. He also testified about how long certain substances would stay in a person's system. Dr. Stalcup testified about how early exposure to drugs could affect a person's brain development. Dr. Stalcup said that Rieber was probably an addict by age 11 or 12. He opined about the effects Rieber's drug use may have had on him the night of the murders. Dr. Stalcup also stated that he believed that Rieber did not know what he was doing at the time of the offense.

On cross-examination, Dr. Stalcup indicated he was retained by Rieber's collateral counsel in May 2011. He also indicated he had never testified in an Alabama court before Rieber's case.

FINAL ARGUMENTS

On August 5, 2015, this Court, via telephone, heard final arguments from the attorneys representing Rieber and the State.

I. SUBSTANTIVE ALLEGATIONS IN RIEBER'S AMENDED RULE 32 PETITION.

"Rule 32 is not a substitute for a direct appeal.'" Brown v. State, 903 So.2d 159, 162 (Ala. Crim. App. 2004)(citation omitted). "[T]he procedural bars of Rule 32 apply with equal force to all cases, including those in which the death penalty has been imposed.'" State v. Tarver, 629 So.2d 14, 19 (Ala. Crim. App. 1993)." Boyd v. State, 746 So.2d 364, 374 (Ala. Crim. App. 1999). The Alabama Court of Criminal Appeals has held that "Rule 32 makes no provision for different treatment of death penalty cases." Thompson v. State, 615 So.2d 129, 131 (Ala. Crim. App. 1992).

The State pleaded in its answer and motion to dismiss that a number of allegations in Rieber's amended Rule 32 petition were procedurally barred from post-conviction review. Rieber, therefore, had the burden of proving, by a preponderance of the evidence, that these allegations were not procedurally barred.

Rule 32.3, Ala.R.Crim.P. See Ex parte Beckworth, 2013 WL 3336983, *4 (Ala. July 3, 2013).

A. **Allegation That Alabama's Death Penalty Scheme Is Unconstitutional Because It Is Vague.**

In part II.B(1), paragraphs 30-31 on page 10, of Rieber's amended Rule 32 petition, he claimed that the statutory aggravating circumstances enumerated in Section 13A-5-49 of the Code of Alabama (1975), were unconstitutionally vague. The State, relying on Rules 32.2(a)(3) and (a)(5), Ala.R.Crim.P, pleaded in its answer that this claim was procedurally barred from post-conviction review.

A post-conviction claim attacking the validity of a State statute is a constitutional claim, not a jurisdictional claim and, therefore, is subject to the procedural bars in Rule 32.2(a), Ala.R.Crim.P. See Sumlin v. State, 710 So.2d 941, 942 (Ala. Crim. App. 1998)(holding that "although [Sumlin] couches his argument [that the trial court lacked subject matter jurisdiction] in jurisdictional terms, this is actually a nonjurisdictional claim that is procedurally barred because it could have been, but was not, raised at trial or on appeal.").

This Court finds Rieber failed to prove that this claim was not procedurally barred from post-conviction review. Rules 32.3, Ala.R.Crim.P. Therefore, this Court finds that Rieber failed to prove he is entitled to relief on this claim.

B. **Allegation That Alabama's Death Penalty Scheme Is Unconstitutional Because It Is Arbitrary On Its Face And As Applied To Rieber's Case.**

This allegation is in part II.B(2), paragraphs 32-33 on pages 10-11 of Rieber's amended Rule 32 petition. The State, relying on Rules 32.2(a)(3) and (a)(5), Ala.R.Crim.P., pleaded in its answer that this claim was procedurally barred from post-conviction review.

A post-conviction claim attacking the validity of a State statute is a constitutional claim, not a jurisdictional claim and, therefore, is subject to the procedural bars in Rule 32.2(a), Ala.R.Crim.P. See Sumlin v. State, 710 So.2d 941, 942 (Ala. Crim. App. 1998).

This Court finds Rieber failed to prove his claim that Alabama's death penalty statute is unconstitutional arbitrary on its face and as applied to his case was not procedurally barred from post-

conviction review. Rule 32.3, Ala.R.Crim.P. Therefore, this Court finds that Rieber failed to prove he is entitled to relief on this claim.

C. Allegation That Alabama's Death Penalty Scheme Is Unconstitutional Due To Its Provision For Judicial Override.

This allegation is in part II.B(3), paragraphs 34-35 on page 11, of Rieber's amended Rule 32 petition. In his post-hearing memorandum, Rieber relies on Ex parte Carroll, 852 So.2d 833 (Ala. 2002), to support this allegation. The Alabama Supreme Court held in Carroll that in capital murder cases a jury's sentencing recommendation of life imprisonment without parole should be treated by the sentencing court as a mitigating factor. The State, relying on Rules 32.2(a)(3) and (a)(4), Ala.R.Crim.P., pleaded in its answer that this claim was procedurally barred from post-conviction review.

The Alabama Supreme Court's holding in Ex parte Carroll was not issued until seven years after Rieber's direct appeal became final. Rieber argued that Carroll should be applied retroactively to his case by pointing out it was applied in the 1977 murder case reviewed by

the Alabama Supreme Court in Ex part Tomlin, 909 So.2d 283 (Ala. 2003). Tomlin was a direct appeal of the defendant's fourth conviction for capital murder that was committed in 1977. Tomlin's most recent conviction for capital murder and death sentence occurred in 1999, and was affirmed by the Alabama Court of Criminal Appeals on May 31, 2002. See Tomlin v. State, 909 So.2d 213 (Ala. Crim. App. 2002). The Supreme Court's opinion in Carroll was issued on July 26, 2002. The Alabama Court of Criminal Appeals denied Tomlin's request for a rehearing on November 22, 2002. Because Tomlin's direct appeal to the Alabama Supreme Court of his fourth conviction for the 1977 murder occurred after the Supreme Court had issued Carroll, that case was applicable to his case in his most recent direct appeal. The Alabama Court of Criminal Appeals' has observed that "[i]n neither Carroll nor Tomlin did the Alabama Supreme Court give any indication that those decisions were to be applied retroactively to all cases, even those cases that were final when the decisions in Carroll and Tomlin were announced."

Ferguson v. State, 13 So.3d 418, 429 (Ala. Crim. App. 2008).

This allegation could have been but was not raised at trial or in Rieber's motion for new trial. Additionally, this allegation was raised and addressed on direct appeal. See Rieber v. State, 663 So.2d at 992, aff'd, Ex parte Rieber, 663 So.2d at 1003.

This Court finds Rieber failed to prove his claim that Alabama's death penalty scheme is unconstitutional due to its provision for judicial override was not procedurally barred from post-conviction review. Rule 32.3, Ala.R.Crim.P. Therefore, this Court finds that Rieber failed to prove he is entitled to relief on this claim.

D. **Allegation That Alabama's Death Penalty Scheme Is Unconstitutional Because Circuit Judges Are Elected By Popular Vote.**

In part II.B(4), paragraph 36 on pages 11-12, of Rieber's amended Rule 32 petition he alleged that all the circuit judges in Alabama that have ever sentenced a capital defendant to death have done so in order to get re-elected. The State, relying on Rules 32.2(a)(3) and (a)(5), Ala.R.Crim.P., pleaded in its answer that

this claim was procedurally barred from post-conviction review.

A post-conviction claim attacking the process by which circuit judges are selected in Alabama is not a jurisdictional claim and, therefore, is subject to the procedural bars in Rule 32.2(a), Ala.R.Crim.P. See Sumlin v. State, 710 So.2d 941, 942 (Ala. Crim. App. 1998).

This Court finds Rieber failed to prove his claim regarding circuit judges in Alabama being elected was not procedurally barred from post-conviction review. Rule 32.3, Ala.R.Crim.P. Therefore, this Court finds that Rieber failed to prove he is entitled to relief on this claim.

E. Allegations That Alabama's Death Penalty Is Unconstitutional As Applied To Rieber's Case.

These allegations are in part II.B(5), paragraphs 37-40 on pages 12-13, of Rieber's amended Rule 32 petition.

Rieber alleged in paragraph 37 that the trial court erred by failing to consider the jury's life without parole recommendation as a mitigating circumstance. The State, relying on Rules 32.2(a)(2)

and (a)(5), Ala.R.Crim.P., pleaded in its answer that this claim was procedurally barred from post-conviction review.

This allegation was raised by trial counsel in their motion for a new trial and was addressed by the trial court. (C.R. 104, 108). Additionally, this allegation could have been but was not raised on direct appeal.

This Court finds that Rieber failed to prove that this allegation was not procedurally barred from post-conviction review. Rule 32.3, Ala.R.Crim.P. Therefore, this Court finds that Rieber failed to prove he is entitled to relief on this claim.

Rieber alleged in paragraph 39 that the trial court erred in finding that the aggravating circumstance of heinous, atrocious, or cruel was applicable in his case. The State, relying on Rules 32.2(a)(2) and (a)(4), Ala.R.Crim.P., pleaded in its answer that this claim was procedurally barred from post-conviction review.

This allegation was raised by Rieber's trial counsel at the hearing on his motion for new trial and

addressed by the trial court. (R. 1082; C.R. 108). This allegation was also raised and addressed on direct appeal. See Rieber v. State, 663 So.2d at 992-993; Ex parte Rieber, 663 So.2d at 1003.

This Court finds that Rieber failed to prove that this allegation was not procedurally barred from post-conviction review. Rule 32.3, Ala.R.Crim.P. Therefore, this Court finds that Rieber failed to prove he is entitled to relief on this claim.

F. Allegation That Allegations In Parts II.B(1)-(5), Singly And Collectively, Violated Rieber's Rights Under The Alabama And United States Constitutions.

This allegation is in part II.B(5), paragraph 40 on page 13, of Rieber's amended Rule 32 petition.

Having found that Rieber failed to prove that the allegations in parts II.B(1)-II.B(5) of his amended Rule 32 petition are not procedurally barred from post-conviction review, this Court finds that there is no cumulative effect to consider. See Ex parte Woods, 789 So.2d 941, 942 n. 1 (Ala. 2001) (holding that "multiple nonerrors obviously don't require reversal."). Therefore, this Court finds that Rieber failed to prove

he is entitled to relief on this claim. Rule 32.3, Ala.R.Crim.P.

G. Allegation That Alabama's Method Of Execution Is Unconstitutional.

This allegation is in part II.B(6), paragraphs 41-44 on pages 13-14, of Rieber's amended Rule 32 petition.

Part II.B(6) of Rieber's amended Rule 32 petition was summarily dismissed at the evidentiary hearing prior to the taking of testimony. (H.R. 12)

H. Allegation That The State Permitted Alleged Exculpatory Evidence To Spoil.

In part II.B(8), paragraphs 50-54 on pages 16-17, of Rieber's amended Rule 32 petition he alleged that his rights to due process and equal protection were violated because the State did not test his blood and urine for mind-impairing substances immediately after he was arrested. Rieber argued this evidence would have caused the trial court to sentence him to life imprisonment without parole and would have provided evidence for the jury to convict him of a lesser-included offence. The State, relying on Rules 32.2(a)(3) and (a)(5), Ala.R.Crim.P., pleaded in its

answer that this claim was procedurally barred from post-conviction review.

At the evidentiary hearing Rieber elicited testimony from Dr. Stalcup that there were tests available in 1990 which could determine what drugs an individual had ingested. However, this Court finds Rieber failed to prove that his claim the State permitted evidence to spoil was not procedurally barred from post-conviction review. Rules 32.3, Ala.R.Crim.P. Therefore, this Court finds that Rieber failed to prove he is entitled to relief on this claim.

I. **Allegations That The State Violated Brady v. Maryland, 373 U.S. 83 (1963).**

These allegations are in part II.B(10), paragraphs 84-86 on pages 23-24, of Rieber's amended Rule 32 petition.

Rieber withdrew these allegations at the evidentiary hearing. (H.R. 333). Therefore, this Court will not address them.

J. **Allegation That Rieber Was Denied A Fair Trial When The Trial Court Reinstated A Juror Struck By His Trial Counsel.**

This allegation is in part II.B(11), paragraphs 87-89 on page 24, of Rieber's amended Rule 32 petition.

Rieber contends that the trial court's reinstatement of a juror his trial counsel had struck violated his right to a fair trial and his Sixth Amendment right to assistance of counsel. The State, relying on Rules 32.2(a)(2) and (a)(4), Ala.R.Crim.P., pleaded in its answer that this claim was procedurally barred from post-conviction review.

This allegation was raised in Rieber's motion for new trial and addressed by the trial court in a written order. (C.R. 102, 108) Additionally, this allegation was raised and addressed on direct appeal. See Rieber v. State, 663 So.2d at 990-991.

This Court finds that Rieber failed to prove that this allegation was not procedurally barred from post-conviction review. Rule 32.3, Ala.R.Crim.P. Therefore, this Court finds that Rieber failed to prove he is entitled to relief on this claim.

K. Allegation That The Pool From Which Rieber's Grand Jury And Petit Jury Were Selected Unconstitutionally Excluded Women, Blacks, And Other Cognizable Groups.

This allegation is in part II.B(12), paragraph 90 on page 24, of Rieber's amended petition. Rieber asserted that "[u]pon information and belief, the

percentage of blacks and women on the venires was significantly less than the percentage that those groups composed of the total population of Madison County." (A.P. p. 24) The State, relying on Rules 32.2(a)(3) and (a)(5), Ala.R.Crim.P., pleaded in its answer that this claim was procedurally barred from post-conviction review.

This Court finds Rieber failed to prove that this allegation was not procedurally barred from post-conviction review. Rule 32.3, Ala.R.Crim.P. Therefore, this Court finds that Rieber failed to prove he is entitled to relief on this claim.

II. ALLEGATION THAT RIEBER'S TRIAL COUNSEL WERE INEFFECTIVE DUE TO INADEQUATE COMPENSATION.

This allegation is in part II.B(7), paragraphs 45-49 on pages 14-16, of Rieber's amended Rule 32 petition. Rieber alleged that "[c]onstitutionally effective representation of a person charged with a capital murder offense requires vastly more hours than [were] compensated for by the Alabama provisions in effect at the time between the offense and [Rieber's] trial and sentence." (A.P. p. 15)

In Samra v. State, 771 So.2d 1108, 1112 (Ala. Crim. App. 1999), the Alabama Court of Criminal Appeals rejected this precise argument, observing that:

These limitations on compensation have withstood repeated challenges that they violate the separation of powers doctrine, constitute a taking without just compensation, deprive indigent capital defendants of the effective assistance of counsel, and deny equal protection in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the Alabama Constitution, and Alabama state law. See Ex parte Smith, 698 So.2d 219 (Ala.), cert. denied, 522 U.S. 957, 118 S.Ct. 385, 139 L.Ed.2d 300 (1997) [...]. Because this court is bound by the decisions of the Alabama Supreme Court, we are not in a position to reverse that court's approval of the current compensation system.

(Some internal citations omitted)

Further, Rieber failed to elicit any testimony from Mr. Kempaner proving his representation was adversely affected in any way due to the limits on compensation in effect at the time.

This Court finds that Rieber failed to prove Mr. Kempaner and Mr. Moran were ineffective due to inadequate compensation. Rule 32.3, Ala.R.Crim.P.

**III. ALLEGATIONS RIEBER RECEIVED INEFFECTIVE ASSISTANCE
FROM HIS TRIAL COUNSEL DURING THE GUILT PHASE OF
TRIAL.**

These allegations are in part II.B(9)(a), paragraphs 55-74 on pages 17-21, of Rieber's amended Rule 32 petition. As stated above, Rieber was represented at trial and on direct appeal by Mr. Richard Kempner and Mr. Daniel Moran.

"[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." Strickland v. Washington, 466 U.S. 668, 689 (1984). In order to show that Mr. Kempaner and Mr. Moran were ineffective, Rieber had the burden of proving by a preponderance of the evidence that (1) Mr. Kempaner's and Mr. Moran's performance was deficient and (2) their deficient performance caused Rieber to be prejudiced. See Id. at 687. Rieber had the burden of proving that "counsel's errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." Id.; see also

Harrington v. Richter, 562 U.S. 86, 112 (2011) (holding that in assessing prejudice under Strickland, "[t]he likelihood of a different result must be substantial, not just conceivable.").

A. Allegation That Rieber's Trial Counsel Were Ineffective For Allegedly Conceding The Application Of The Death Penalty In Their Guilt Phase Opening Statement.

This allegation is in paragraph 55 on pages 17-18 of Rieber's amended Rule 32 petition.

Rieber did not question Mr. Kempaner concerning his guilt phase opening statement. Therefore, this Court finds that Rieber abandoned this allegation of ineffective assistance of counsel. See Clark v. State, 2015 WL 1122521, *21 (Ala. Crim. App. March 13, 2015) ("'[A] petitioner is deemed to have abandoned a claim if he fails to present any evidence to support the claim at the evidentiary hearing.'" (citation omitted)).

In the alternative, because Rieber presented no evidence to support this ineffectiveness claim, this Court finds that Rieber failed to prove Mr. Kempner's guilt phase opening statement was deficient and caused Rieber to be prejudiced. See State v. Gissendanner,

2015 WL 6443194, *7 (Ala. Crim. App. 2015) (holding that "[w]hen the record contains no direct evidence of counsel's reasons for the challenged conduct, we 'will assume that counsel had a strategy if any reasonably sound strategic motivation can be imagined.'") (citation omitted); see also Broadnax v. State, 130 So.3d 1232, 1255 (Ala. Crim. App. 2013) ("It is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions, or inactions, of counsel that occurred outside the record.").

Moreover, before the prosecutor and Mr. Kempaner delivered their guilt phase opening statements, the trial court instructed the jury that "[t]hese opening statements the attorneys make to you are not testimony, and they are not evidence in this case, and they are not to be taken by you as such. They simply will be statements of what they think the evidence will show or what they feel the evidence will show." (R. 410). The trial court repeated these instructions to the jury

before the prosecutor and Mr. Kempaner delivered their guilt phase closing arguments. (R. 826)

"Jurors are presumed to follow the trial court's instructions." Evans v. State, 794 So.2d 415, 439 (Ala. Crim. App. 2000). Rieber presented no evidence at the evidentiary hearing proving any member of his jury did not follow the trial court's explicit instructions. This Court finds that Rieber failed to prove he is entitled to any relief on this claim. Rule 32.3, Ala.R.Crim.P.

B. Allegation That Rieber's Trial Counsel Were Ineffective For Failing To Move To Dismiss The Charges Against Him Because The Prosecution Allowed Evidence To Spoil.

This allegation is in paragraph 56 on page 18 of Rieber's amended Rule 32 petition. Rieber alleged his trial counsel should have moved to dismiss the capital murder charges against him because his blood and urine were not tested for drugs during the 14-day lapse between his arrest and the appointment of counsel. Rieber contended that his trial counsel's failure "resulted in a verdict of guilty on a capital offense that would otherwise not have happened." (A.P. at p. 18).

Mr. Kempaner testified the defense strategy during the guilt phase of trial was mistaken identity. In Rieber's statement to police he said, on more than one occasion, that he did not commit the robbery/murder for which he was arrested. (R. 38, 39, and 41). Rieber also told police, on more than one occasion, that he had never been in the convenience store where the robbery/murder occurred. (R. 39). Detective James Parker testified at the hearing to suppress Rieber's statement that at the time he took Rieber's statement Rieber did not appear to be under the influence of drugs or alcohol and that Rieber specifically told Parker that he was not intoxicated. (R. 37, 43). Further, Rieber's sister testified during the penalty phase of trial that she saw Rieber after 9 p.m. the night of the murder and that he "seemed normal" and did not appear high on drugs or alcohol. (R. 977)

Trial counsel had no basis to move to dismiss the charges against Rieber based on the reasonable defense strategy they pursued during the guilt phase of trial. Rieber's defense was mistaken identity, so the issue of whether he had consumed drugs and alcohol prior to the

offense would have been irrelevant. See Magwood v. State, 689 So.2d 959, 981 (Ala. Crim. App. 1996) (holding that "[c]ounsel cannot be held ineffective for failing to make a challenge that has no basis in fact or law.").

This Court finds that Rieber failed to prove this allegation of ineffective assistance of counsel. Rule 32.3, Ala.R.Crim.P.

C. **Allegation That Rieber's Trial Counsel Were Ineffective For Failing To Object To Gruesome Photographs.**

This allegation is in paragraph 57 on page 18 of Rieber's amended Rule 32 petition.

"[T]he rule [is] that decisions to object or not are customarily trial strategy questions." King v. State, 518 So.2d 191, 196 (Ala. Crim. App. 1987). Further, Rieber did not question Mr. Kempaner concerning why he and Mr. Moran did not object to the photographs that were admitted at trial. Rieber also did not present any arguments at the evidentiary hearing concerning this claim. Therefore, this Court finds that Rieber abandoned this allegation of ineffective assistance. See Clark v. State, 2015 WL

1122521, *21 (Ala. Crim. App. March 13, 2015) ("'[A] petitioner is deemed to have abandoned a claim if he fails to present any evidence to support the claim at the evidentiary hearing.'") (citation omitted).

In the alternative, because he presented no evidence to support this ineffectiveness claim, this Court finds that Rieber failed to prove his trial counsel's performance was deficient and caused him to be prejudiced. See State v. Gissendanner, 2015 WL 6443194, *7 (Ala. Crim. App. 2015) (holding that "'[w]hen the record contains no direct evidence of counsel's reasons for the challenged conduct, we 'will assume that counsel had a strategy if any reasonably sound strategic motivation can be imagined.'") (citation omitted); see also Broadnax v. State, 130 So.3d 1232, 1255 (Ala. Crim. App. 2013) ("It is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions, or inactions, of counsel that occurred outside the record.").

D. Allegation That Rieber's Trial Counsel Were Ineffective For Failing To Object To Victim Impact Testimony Elicited During The Guilt Phase Of Trial.

This allegation is in paragraphs 57-61 on pages 18-19 of Rieber's amended Rule 32 petition.

"[T]he rule [is] that decisions to object or not are customarily trial strategy questions." King v. State, 518 So.2d 191, 196 (Ala. Crim. App. 1987). Further, Rieber did not question Mr. Kempaner about why he chose not to object to testimony from the victim's husband during the guilt phase. Therefore, this Court finds that Rieber abandoned this allegation of ineffective assistance. See Clark v. State, 2015 WL 1122521, *21 (Ala. Crim. App. March 13, 2015) ("'[A] petitioner is deemed to have abandoned a claim if he fails to present any evidence to support the claim at the evidentiary hearing.'") (citation omitted).

In the alternative, because he presented no evidence to support this ineffectiveness claim, this Court finds that Rieber failed to prove his trial counsel's failure to object amounted to deficient performance and caused him to be prejudiced. See State v. Gissendanner, 2015 WL 6443194, *7 (Ala. Crim. App.

2015) (holding that "[w]hen the record contains no direct evidence of counsel's reasons for the challenged conduct, we "will assume that counsel had a strategy if any reasonably sound strategic motivation can be imagined.""") (citation omitted); see also Broadnax v. State, 130 So.3d 1232, 1255 (Ala. Crim. App. 2013) ("It is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions, or inactions, of counsel that occurred outside the record.").

Moreover, Rieber raised the substantive issue underlying this allegation of ineffective assistance of counsel on direct appeal. In rejecting Rieber's argument, the Alabama Supreme Court held that, although certain victim impact testimony elicited during the guilt phase of trial should not have been admitted, "the aforementioned portions of [the victim's husband's] testimony, although they should not have been permitted, did not operate to deny Rieber a fair trial." Ex parte Rieber, 663 So.2d at 1006.

Rieber presented no evidence or argument at the evidentiary hearing calling the Supreme Court's holding into question. Therefore, this Court finds that Rieber failed to prove his trial counsel were ineffective for not objecting to victim impact testimony being presented during the guilt phase of trial.

E. Allegation That Rieber's Trial Counsel Were Ineffective For Failing To Fully Investigate Rieber's Past And The Events Of The Day Of The Murder.

This allegation is in paragraphs 62-63 on page 19 of Rieber's amended Rule 32 petition. Rieber alleged that "[h]ad trial counsel conducted a full inquiry into [his] past and the events of the day of the homicide[,] ... trial counsel would have appreciated [that he] could not have formed the intent required for the charges against him." (A.P. p. 19). The crux of Rieber's assertion is that his trial counsel were ineffective because they did not present an intoxication defense during the guilt phase of trial.

"'[T]he mere existence of a potential alternative defense theory is not enough to establish ineffective assistance based on counsel's failure to present that theory.'" Hunt v. State, 940 So.2d 1041, 1067 (Ala.

Crim. App. 2005). Further, in Crosslin v. State, 446 So.2d 675, 682 (Ala. Crim. App. 1983), the Alabama Court of Criminal Appeals held that:

"... Partial intoxication will not avail to disprove the specific intent; the intoxication must be of such character and extent as to render the accused incapable of discriminating between right and wrong - stupefaction of the reasoning faculty."

"However, it is equally clear that the degree of intoxication exhibited by the accused, such as to reduce murder to manslaughter, even where the evidence is in sharp conflict, is for the jury to decide."

See also Ex parte McWhorter, 781 So.2d 330, 342-343 (Ala. 2000) (holding that "[the] standard is that 'the intoxication necessary to negate specific intent and, thus, reduce the charge, must amount to insanity.'" (citation omitted)).

The witnesses presented by Rieber at the evidentiary hearing testified about his history of drug and alcohol abuse. Such testimony, however, would not have been admissible during the guilt phase of Rieber's trial because "[e]vidence that someone was a habitual drug user is not evidence that that person was intoxicated at the time of the murder." Whitehead v.

State, 777 So.2d 781, 833 (Ala. Crim. App. 1999). Likewise, Dr. Stalcup's opinion that Rieber did not know what he was doing at the time of the offense would not have been admissible during the guilt phase of trial. See Hammond v. State, 776 So.2d 884, 887 (Ala. Crim. App. 1998) (holding that "where there is evidence of intoxication, the extent to which the accused is intoxicated is a question to be decided by the jury.").

Charity Hubert, Jo Duffy, Sonya Williams, and Dwayne Moroney testified that they saw Rieber using drugs during the day of the murder. The evidence presented at trial proved that the murder occurred at approximately 8:00 p.m. This Court takes judicial notice that night had long fallen by 8:00 p.m. on October 9, 1990, in Huntsville, Alabama. Evidence that Rieber had been using drugs at some time during the day of the offense would not have proven that he was intoxicated at the time of the offense. See Windsor v. State, 683 So.2d 1027 (Ala. Crim. App. 1994) ("Evidence that someone was drinking an alcoholic beverage is not evidence that that person was intoxicated."). Furthermore, in his statement to police Rieber denied

committing the offense or ever being at the convenience store where the offense was committed.

This Court finds that Rieber failed to prove Mr. Kempaner and Mr. Moran were ineffective for not investigating and presenting an intoxication defense at the guilt phase of trial. Rule 32.3, Ala.R.Crim.P.

In paragraph 63, and again in paragraphs 70-71 of his amended Rule 32 petition, Rieber contends that if his trial counsel had conducted a full investigation, "[trial counsel] would have discussed with [Rieber] the option of asking for a jury instruction on the lesser included charge of manslaughter." (A.P. p. 19)

Mr. Kempaner explained at the evidentiary hearing that he did not request a jury instruction on manslaughter because the defense strategy was mistaken identity. Mr. Kempaner also testified that he discussed the guilt phase strategy with Rieber, that Rieber understood the strategy, and that Rieber never suggested presenting another defense, such as intoxication. Rieber did not testify at the evidentiary hearing, so there is no evidence before this Court refuting Mr. Kempaner's testimony. Even if trial

counsel had requested a manslaughter instruction, Rieber would not have been entitled it. See Ex parte Julius, 455 So.2d 984, 987 (Ala. 1984) (holding that "Julius' reliance solely upon the defense of alibi resulted in his failure to produce any evidence warranting a charge on the lesser included offense of manslaughter in the first degree.").

This Court finds that Rieber failed to prove Mr. Kempaner and Mr. Moran were ineffective for not requesting a jury instruction on manslaughter. Rule 32.3, Ala.R.Crim.P.

F. Allegations That Rieber's Trial Counsel Were Ineffective For Failing Object To Prosecutorial Misconduct During The State's Guilt Phase Closing Argument.

These allegations are in paragraphs 64-68 on pages 19-20 of Rieber's amended Rule 32 petition.

"[T]he rule [is] that decisions to object or not are customarily trial strategy questions." King v. State, 518 So.2d 191, 196 (Ala. Crim. App. 1987). Further, Rieber did not question Mr. Kempaner concerning why he chose not to object during the prosecutor's guilt phase closing argument. Therefore, this Court finds that Rieber has abandoned this

allegation of ineffective assistance. See Clark v. State, 2015 WL 1122521, *21 (Ala. Crim. App. March 13, 2015) ("[A] petitioner is deemed to have abandoned a claim if he fails to present any evidence to support the claim at the evidentiary hearing.") (citation omitted).

In the alternative, because he presented no evidence to support this ineffectiveness claim, this Court finds that Rieber failed to prove his trial counsel's failure to object constituted ineffective assistance of counsel. See State v. Gissendanner, 2015 WL 6443194, *7 (Ala. Crim. App. 2015) (holding that "[w]hen the record contains no direct evidence of counsel's reasons for the challenged conduct, we 'will assume that counsel had a strategy if any reasonably sound strategic motivation can be imagined.'" (citation omitted); see also Broadnax v. State, 130 So.3d 1232, 1255 (Ala. Crim. App. 2013) ("It is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions,

or inactions, of counsel that occurred outside the record.").

Moreover, Rieber raised the substantive issues regarding the statements identified in paragraphs 66 and 67 of his amended Rule 32 petition on direct appeal. In denying Rieber relief, the Alabama Supreme Court held that "we cannot reasonably conclude that the prosecutor's comments in this particular case, when considered in the context of the entire trial, were so prejudicial as to call into question the correctness of the verdict." Ex parte Rieber, 663 So.2d at 1014.

Rieber presented no evidence or argument at the evidentiary hearing calling the Supreme Court's holding into question. Therefore, this Court finds that Rieber failed to prove his trial counsel were ineffective for not objecting to the prosecutor's guilt phase closing argument.

G. Allegations That Rieber's Trial Counsel Were Ineffective For Failing To Object To Prosecutorial Misconduct During The State's Guilt Phase Closing Arguments.

In paragraph 69 of Rieber's amended Rule 32 petition, he alleged that "the prosecution in this case vouched for its witnesses, expressed its personal

opinions about the case, misstated the evidence, and otherwise argued inappropriately." (A.P. at p. 20)

"[T]he rule [is] that decisions to object or not are customarily trial strategy questions." King v. State, 518 So.2d 191, 196 (Ala. Crim. App. 1987). Further, Rieber did not question Mr. Kempaner concerning why he chose not to object during the prosecutor's guilt phase closing argument. Therefore, this Court finds that Rieber abandoned this allegation of ineffective assistance. See Clark v. State, 2015 WL 1122521, *21 (Ala. Crim. App. March 13, 2015) ("'[A] petitioner is deemed to have abandoned a claim if he fails to present any evidence to support the claim at the evidentiary hearing.'" (citation omitted)).

In the alternative, because he presented no evidence to support this ineffectiveness claim, this Court finds that Rieber failed to prove his trial counsel's failure to object constituted ineffective assistance of counsel. See State v. Gissendanner, 2015 WL 6443194, *7 (Ala. Crim. App. 2015) (holding that "[w]hen the record contains no direct evidence of counsel's reasons for the challenged conduct, we 'will

assume that counsel had a strategy if any reasonably sound strategic motivation can be imagined.""") (citation omitted); see also Broadnax v. State, 130 So.3d 1232, 1255 (Ala. Crim. App. 2013) ("It is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions, or inactions, of counsel that occurred outside the record.").

Moreover, Rieber raised the substantive issue underlying this allegation of ineffective assistance on direct appeal, arguing that "several comments made by the prosecutor during his closing argument in the guilt phase of the trial constitute reversible error." Ex parte Rieber, 663 So.2d at 1012. The Alabama Supreme Court rejected Rieber's argument, holding that "[a]fter carefully reviewing the prosecutor's closing argument, we conclude that the comments complained of either were within the scope of permissible argument, or, if they were outside that scope, did not undermine the fundamental fairness of the trial." Id.

Rieber presented no evidence or argument at the evidentiary hearing calling the Supreme Court's holding into question. Therefore, this Court finds that Rieber failed to prove his trial counsel were ineffective for not objecting during the prosecutor's guilt phase closing argument.

H. Allegation That Rieber's Trial Counsel Were Ineffective For Failing To Request Funds For Experts.

In paragraph 72 on page 21 of his amended Rule 32 petition, Rieber alleged that "[t]rial counsel failed to seek funds for expert witnesses, such as potential witnesses referred to in subparagraphs 47(c) and 47(f) above." (A.P. p. 21)

In paragraph 47(c) of his amended Rule 32 petition, Rieber alleged that a ballistics examination "would either provide conclusive evidence of innocence" or overridden "any reluctance [by Rieber] to accept the State's [plea bargain] offer." (A.P. p. 15)

Rieber did not testify at the evidentiary hearing, did not present testimony from a ballistics examiner, nor did he question Mr. Kempaner about why he and Mr. Moran chose not to retain a ballistics examiner.

Rieber presented no evidence at the evidentiary hearing proving that favorable testimony from a ballistics expert was available. He also presented no evidence proving that, even if such testimony was available, it would have persuaded him to take the State's plea offer. Therefore, this Court finds that Rieber abandoned this allegation of ineffective assistance of counsel. See Clark v. State, 2015 WL 1122521, *21 (Ala. Crim. App. March 13, 2015)("[A] petitioner is deemed to have abandoned a claim if he fails to present any evidence to support the claim at the evidentiary hearing.") (citation omitted).

In the alternative, because he presented no evidence to support this ineffectiveness claim, this Court finds that Rieber failed to prove his trial counsel because they did not retain a ballistics expert. See State v. Gissendanner, 2015 WL 6443194, *7 (Ala. Crim. App. 2015) (holding that "[w]hen the record contains no direct evidence of counsel's reasons for the challenged conduct, we 'will assume that counsel had a strategy if any reasonably sound strategic motivation can be imagined.'"") (citation omitted); see

also Broadnax v. State, 130 So.3d 1232, 1255 (Ala. Crim. App. 2013) ("It is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions, or inactions, of counsel that occurred outside the record.").

In paragraph 47(f), Rieber contends that his trial counsel were ineffective from not "[o]btaining an expert to testify as to the effect [Rieber's] background and drug use would have on a person." (A.P. at p. 15)

Even if Rieber's trial counsel had considered presenting an intoxication defense during the guilt phase, testimony from an expert would not have been admissible. In Wilkerson v. State, 686 So.2d 1266, 1279 (Ala. Crim. App. 1996), the Alabama Court of Criminal Appeals held that "[w]e are aware of no case holding that a witness can testify as to whether the defendant has the ability to form the requisite intent to commit the charged offense." The Court of Criminal Appeals has also held that "[t]he question of whether a

defendant had the specific intent to commit a murder may be gleaned from the circumstances surrounding the offense and therefore constitutes a matter best suited to a jury's determination." Brown v. State, 982 So.2d 565, 597 (Ala. Crim. App. 2006). Since testimony from an expert regarding Rieber's background and drug use would not have been admissible during the guilt phase of trial, his trial counsel were not ineffective. See Daniel v. State, 86 So.3d 405, 438 (Ala. Crim. App. 2011)(holding that "[c]ounsel is not ineffective for failing to present inadmissible evidence.").

This Court finds that Rieber failed to prove he is entitled to any relief on this claim. Rule 32.3, Ala.R.Crim.P.

I. Allegations That Rieber's Trial Counsel Were Ineffective for Failing to Object to Improper Jury Instructions And The Jury Venires.

In paragraph 73 of his amended Rule 32 petition, Rieber alleged that "[t]rial counsel failed to object to improper jury instructions, such as the reasonable doubt and intent instructions, and failed to challenge the jury venires." (A.P. p. 21)

"[T]he rule [is] that decisions to object or not are customarily trial strategy questions." King v. State, 518 So.2d 191, 196 (Ala. Crim. App. 1987). Further, Rieber did not question Mr. Kempaner concerning why he chose not to object to the trial court's guilt phase jury instructions or the makeup of the jury venires. Therefore, this Court finds that Rieber abandoned these allegations of ineffective assistance. See Clark v. State, 2015 WL 1122521, *21 (Ala. Crim. App. March 13, 2015) ("[A] petitioner is deemed to have abandoned a claim if he fails to present any evidence to support the claim at the evidentiary hearing.") (citation omitted).

In the alternative, because he presented no evidence to support these ineffectiveness claims, this Court finds that Rieber failed to prove his trial counsel's failure to object constituted ineffective assistance. See State v. Gissendanner, 2015 WL 6443194, *7 (Ala. Crim. App. 2015) (holding that "[w]hen the record contains no direct evidence of counsel's reasons for the challenged conduct, we 'will assume that counsel had a strategy if any reasonably

sound strategic motivation can be imagined.""") (citation omitted); see also Broadnax v. State, 130 So.3d 1232, 1255 (Ala. Crim. App. 2013) ("It is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions, or inactions, of counsel that occurred outside the record.").

Moreover, the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed Rieber's conviction and sentence after reviewing the record for plain error, which would have included reviewing the trial court's guilt phase jury instructions. Rieber v. State, 663 So.2d at 998; Ex parte Rieber, 663 So.2d at 1015. Rieber presented no evidence or argument at the evidentiary hearing calling the Court of Criminal Appeals' or the Supreme Court's holdings into question. Therefore, this Court finds that Rieber failed to prove his trial counsel were ineffective for not objecting.

J. **Allegation That, Taken as a Whole, Rieber's Allegations of Ineffective Assistance of Counsel During the Guilt Phase Entitle Him To Relief.**

This allegation is in paragraph 74 on page 21 of Rieber's amended petition.

"Alabama does not recognize a 'cumulative effect' analysis for ineffective-assistance-of-counsel claims." Carruth v. State, 165 So.3d 627, 651 (Ala. Crim. App. 2014). Additionally, Rieber failed to prove that his trial counsels' preparation for and representation at the guilt phase of trial was deficient and caused him to be prejudiced as required by Strickland. Therefore, even if this Court were to consider any cumulative effect of Rieber's allegations of ineffective assistance against his trial counsel, this Court finds that Rieber would not be entitled to any relief. See Calhoun v. State, 932 So.2d 923, 974 (Ala. Crim. App. 2005) (holding that "'[b]ecause we find no error in the specific instances alleged by the appellant, we find no cumulative error.'") (citation omitted).

K. **Allegation That Mr. Kempner Was Ineffective During Plea Negotiations Because He Did Not Show Rieber The Surveillance Video Tape.**

In his post-hearing memorandum, as well as during final arguments, Rieber alleged that Mr. Kempner was ineffective during plea negotiations because he did not

show Rieber the surveillance video tape from the Mobile Mart store. Rieber contends that if Mr. Kempner had shown him the surveillance video he would have accepted the State's plea offer of life without the possibility of parole in exchange for pleading guilty to capital murder.

As the State pointed out during final arguments, this claim of ineffective assistance of counsel was not pleaded in Rieber's amended Rule 32 petition nor was it raised during the evidentiary hearing. As such, the State had no opportunity to defend against it. Because Rieber did not raise this claim until after the October 2011 evidentiary hearing, it is not properly before this Court. See Ex parte Jenkins, 972 So.2d 159, 164 (Ala. 2005) (holding that a circuit court's refusal to allow an amendment would 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.").

Moreover, even if this claim was properly before this Court, Rieber failed to prove he would be entitled

to any relief. Mr. Kempner testified that he did not show Rieber the surveillance video tape prior to informing him about the State's plea offer. (H.R. 167) However, Rieber failed to ask Mr. Kempner why he did not show Rieber the video tape prior to discussing the State's plea offer with him. There is no evidence before this Court explaining Mr. Kempner's reasons for not showing Rieber the video tape. See Martin v. State, 62 So.3d 1050, 1068 (Ala. Crim. App. 2010) ("[I]t is well settled that an ambiguous or silent record will not overcome the strong and continuing presumption that counsel's conduct was appropriate and reasonable."). Further, Rieber did not testify at the evidentiary hearing. Therefore, there is no evidence before this Court proving, or even suggesting, that Rieber would have accepted the State's plea offer if he had seen the video tape. See Van Pelt v. State, 2015 WL 4876548, *13 (Ala. Crim. App. Aug. 14, 2015) ("Van Pelt's claim that trial counsel failed to communicate with him regarding a plea offer by the State fails to state a claim because Van Pelt does not allege that he would have accepted the offer.").

This Court finds that Rieber failed to prove trial counsel's performance during plea negotiations was deficient and caused him to be prejudiced. Rule 32.3, Ala.R.Crim.P.

IV. ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE OF TRIAL AND AT THE JUDICIAL SENTENCING BEFORE THE TRIAL COURT.

These allegations are in part II.B(9)(b), paragraphs 75-77 on pages 21-22 of Rieber's amended Rule 32 petition.

A. Allegation That Rieber's Trial Counsel Were Ineffective for Conceding the Heinous Nature of the Offense.

This allegation is in paragraph 75 on page 21 of Rieber's amended petition. To support this allegation Rieber referred to Mr. Kempaner's guilt phase opening statement.

Rieber did not question Mr. Kempaner about his guilt phase opening statement. Therefore, this Court finds that Rieber abandoned this allegation of ineffective assistance of counsel. See Clark v. State, 2015 WL 1122521, *21 (Ala. Crim. App. March 13, 2015)("[A] petitioner is deemed to have abandoned a claim if he fails to present any evidence to support

the claim at the evidentiary hearing.'") (citation omitted).

In the alternative, because Rieber presented no evidence to support this ineffectiveness claim, this Court finds that Rieber failed to prove that Mr. Kempaner's comments during his guilt phase opening statement prejudiced Rieber at the penalty phase. See State v. Gissendanner, 2014 WL 7236991, *7 (Ala. Crim. App. Dec. 19, 2014) (holding that "[w]hen the record contains no direct evidence of counsel's reasons for the challenged conduct, we "will assume that counsel had a strategy if any reasonably sound strategic motivation can be imagined.'") (citation omitted); see also Broadnax v. State, 130 So.3d 1232, 1255 (Ala. Crim. App. 2013) ("It is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions, or inactions, of counsel that occurred outside the record.").

Moreover, Rieber's guilt phase defense was mistaken identity. As such, Mr. Kempaner acknowledging

the nature of the offense to the jury during his guilt phase opening statement was reasonable. See Walls v. Buss, 658 F.3d 1274, 1279 (11th Cir. 2011) ("Openness in a jury trial is a move that can pay off. We have previously recognized the reasonableness of being forthcoming with the jury."). Additionally, the trial court instructed the jury before the beginning of Rieber's trial and before the parties delivered their guilt phase closing arguments that the prosecutor's and trial counsel's arguments were not evidence and should not be considered as such. (R. 410, 826) Rieber presented no evidence at the evidentiary hearing proving that the jurors did not follow the trial court's explicit instructions. See Evans v. State, 794 So.2d 415, 439 (Ala. Crim. App. 2000) (holding that "[j]urors are presumed to follow the trial court's instructions").

This Court finds that Rieber failed to prove he is entitled to any relief on this claim. Rule 32.3, Ala.R.Crim.P.

B. Allegations That Rieber's Trial Counsel Were Ineffective During Penalty Phase Before The Jury And At The Judicial Sentencing Before The Trial Court.

In paragraph 76, pages 21-22 of Rieber's amended Rule 32 petition, he alleged his trial counsel were ineffective before the jury and at the judicial sentencing for not presenting evidence about his troubled past, his history of drug use, and his drug use on the day his murdered the victim.

1. Allegation that Rieber's trial counsel were ineffective during the penalty phase before the jury.

Mr. Kempaner testified that Mr. Moran was responsible for preparing for the penalty phase of trial. In paragraphs 17-20 on pages four and five of Rieber's amended Rule 32 petition, he alleged that Mr. Moran was ineffective because he: 1) had been suspended from practicing law in 1989; 2) was in poor physical health; and 3) took numerous prescription medications as a result of his poor health.

Mr. Kempaner testified that, other than being overweight and needing the assistance of a walker, Mr. Moran's health issues did not affect his performance in representing Rieber. Mr. Kempaner said that Mr. Moran appeared to be "in fine shape" during his representation of Rieber and that he never complained

about not feeling well. Mr. Kempaner testified he had seen Mr. Moran's vehicle parked at a local bar but that there was no occasion during Mr. Moran's representation that he believed Mr. Moran was drinking. Further, letters from Mr. Moran's treating physician indicated that his health improved during his representation of Rieber. Finally, this Court finds that the fact that Moran had been disciplined by the Alabama State Bar Association on an unrelated matter prior to representing Rieber is not relevant in determining whether his performance in Rieber's case was deficient and caused Rieber to be prejudiced. See Adkins v. State, 930 So.2d 524, 549 (Ala. Crim. App. 2001)(holding that "[t]he fact that [Adkins' defense counsel] have been disciplined by the Alabama State Bar on unrelated matters has no bearing on their performance in Adkins' trial").

This Court finds that Rieber failed to prove Mr. Moran's performance was deficient in any way due to his health. Rule 32.3, Ala.R.Crim.P.

Rieber also alleged Mr. Moran was ineffective during the penalty phase for not presenting witnesses

to testify about Rieber's background and history of drug abuse.

Mr. Moran called seven witnesses to testify in mitigation at the penalty phase of Rieber's trial. These witnesses included a former employer, former neighbors, friends, and Rieber's sister, Shauna. (R. 937-978) Mr. Moran's focus was to elicit testimony in order to humanize Rieber to the jurors in hope of securing a favorable sentencing recommendation. Mr. Moran elicited testimony from these witnesses focusing on Rieber's good character, his gentle nature, his lack of violence, and his willingness to help others. For example, Rieber's sister, Shauna, told the jury that, since Rieber's arrest for capital murder, he had had a religious conversion, was helping other inmates learn to read, and had joined Alcoholics Anonymous. (R. 974-975)

In addition to witness testimony, Mr. Moran submitted a pretrial mental evaluation and report prepared by Dr. Kathy Ronan from Taylor Hardin Secured Medical Facility into evidence for the juror's consideration. (R. 978-980) Dr. Ronan stated in her

report that "[Rieber] reported a very significant history of abuse, dating back to when he was very young, about age 9." (C.R. 207) Dr. Ronan's report also stated that Rieber had informed her that on the day of the murder "he had been drinking alcoholic beverages prior to the alleged offense, and had also smoked marijuana and used three hits of 'acid'." (C.R. 213) Referring to Dr. Ronan's report, Mr. Moran argued in his penalty phase closing that Rieber did not remember what happened because of the drugs he had taken the day of the murder. (R. 1003) The jury voted seven to five that Rieber be sentenced to life in prison without the possibility of parole.

The testimony presented by Rieber at the evidentiary hearing from his siblings, friends and acquaintances, and Dr. Stalcup focused on Rieber's history of drug abuse. Much of this same evidence was presented to the jury by way of Dr. Ronan's report and does not support Rieber's assertion that Mr. Moran's performance was deficient. See Boyd v. State, 913 So.2d 1113, 1139 (Ala. Crim. App. 2003) ("Unpresented cumulative testimony does not establish that counsel

was ineffective."). Further, some of the testimony elicited from witnesses would not have benefited Rieber. Rieber's sister, Teresa Hill, testified that Rieber sold LSD between 1986 and 1989. Charity Hubert testified that she and Rieber began a relationship when she was 13 or 14 years old and Rieber was 19 years old. Ms. Hubert also testified that she smoked marijuana with Rieber that she eventually began using the same hard drugs as Rieber by the time she was 16 years old.

In Dunaway v. State, 2009 WL 4980320, *17 (Ala. Crim. App. Dec. 18, 2009), rev'd on other ground, Ex part Dunaway, 2014 WL 1508697 (Ala. April 18, 2014), the Alabama Court of Criminal Appeals held:

"Strickland cautions that 'there are countless ways to provide effective assistance in a given case' and that 'even the best criminal defense attorneys would not defend the particular client the same way.' 466 U.S. at 689, 104 S.Ct. 2052. Among the 'virtually unchallengeable' tactical decisions left to the judgment of trial counsel are determinations regarding the defense strategy adopted at trial."

(citations omitted) The fact that Mr. Moran did not present evidence about Rieber's history of drug abuse during the penalty phase in the manner that Rieber

believes he should have does not establish that Mr. Moran was ineffective.

This Court finds that Rieber failed to prove Mr. Moran's penalty phase investigation and presentation was deficient and caused Rieber to be prejudiced. Rule 32.3, Ala.R.Crim.P.

2. Allegation that Rieber's trial counsel were ineffective at the sentencing hearing before the trial court.

Rieber also alleged his trial counsel were ineffective for not presenting mitigation evidence at the judicial sentencing hearing.

The trial court's sentencing order demonstrates that that court considered evidence of Rieber's history of substance abuse in mitigation. (C.R. 89-91) The trial court concluded that Rieber was not under the influence of drugs and/or alcohol nor was he suffering from any mental disease or defect at the time of the offense. (C.R. 91) This Court finds there is no reasonable probability that if the witness testimony concerning Rieber history of drug and alcohol abuse presented at the evidentiary hearing had been presented at the judicial sentencing it would have persuaded the

trial court to follow the jury's recommendation. Also, as noted above, evidence that Rieber sold drugs and was in a sexual relationship with and providing illegal drugs to a teenage girl would not have been mitigating.

This Court finds that Rieber failed to prove Mr. Moran's performance at the sentencing hearing before the trial court was deficient and caused Rieber to be prejudiced. Rule 32.3, Ala.R.Crim.P.

C. Allegation That Rieber's Trial Counsel Were Ineffective During Penalty Phase Before the Jury For Failing To Object To Improper Jury Instructions.

In paragraph 77 of Rieber's amended Rule 32 petition, he contends that:

Trial counsel failed to object to improper jury instructions, such as an instruction informing the jury that its vote was merely an advisory verdict and an instruction suggesting that a finding of aggravating circumstances need not be unanimous, and failed to object to the court's refusal to instruct the jury that residual doubt could be a mitigating circumstance.

(A.P. p. 22)

Rieber did not question Mr. Kempaner concerning why he chose not to object to the trial court's penalty phase jury instructions. Therefore, this Court finds that Rieber abandoned this allegation of ineffective

assistance. See Clark v. State, 2015 WL 1122521, *21 (Ala. Crim. App. March 13, 2015) ("[A] petitioner is deemed to have abandoned a claim if he fails to present any evidence to support the claim at the evidentiary hearing.") (citation omitted).

In the alternative, because he presented no evidence to support this ineffectiveness claim, this Court finds that Rieber failed to prove his trial counsel's performance was deficient and caused him to be prejudiced. See State v. Gissendanner, 2015 WL 6443194, *7 (Ala. Crim. App. 2015) (holding that "[w]hen the record contains no direct evidence of counsel's reasons for the challenged conduct, we 'will assume that counsel had a strategy if any reasonably sound strategic motivation can be imagined.'" (citation omitted); see also Broadnax v. State, 130 So.3d 1232, 1255 (Ala. Crim. App. 2013) ("It is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions,

or inactions, of counsel that occurred outside the record.").

Moreover, on direct appeal the Alabama Court of Criminal Appeals specifically held that "[a]ny error that may have occurred [in the trial court's penalty phase jury instructions] is harmless because the jury recommended life imprisonment without parole." Rieber v. State, 663 So.2d at 993. The Court of Criminal Appeals then went on to address all the substantive allegations listed in paragraph 77 and found that Rieber was not entitled to any relief. See Rieber v. State, 663 So.2d at 994-995. Rieber presented no evidence or argument at the evidentiary hearing that would call the Court of Criminal Appeals' holding into question.

This Court finds that Rieber failed to prove his trial counsel were ineffective for not objecting to the trial court's penalty phase jury instructions. Rule 32.3, Ala.R.Crim.P.

V. ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

These allegations are in Part II.B(9)(c), paragraphs 78-83 on pages 22-23 of Rieber's amended

Rule 32 petition. Mr. Kempaner and Mr. Moran represented Rieber on direct appeal.

A. Allegation That Rieber's Appellate Counsel Were Ineffective On Direct Appeal.

In paragraph 78 of Rieber's amended Rule 32 petition, he alleges that:

At the trial, trial counsel had excluded a juror of Asian ancestry on the ground that jurors of Asian ancestry tended to vote in favor of the prosecution. On appeal, trial counsel's first ground for appeal was that the exclusion of that juror rendered petition's trial unconstitutional, since it constituted impermissible racial discrimination by the State.

(A.P. p. 22)

In Whitson v. State, 109 So.3d 665, 672 (Ala. Crim. App. 2012), the Alabama Court of Criminal Appeals held:

"Appellate counsel is presumed to exercise sound strategy in the selection of issues most likely to afford relief on appeal. One claiming ineffective appellate counsel must show prejudice, i.e., the reasonable probability that, but for counsel's errors, the petitioner would have prevailed on appeal."

(citations omitted)

Mr. Kempaner testified that part of his trial strategy was to inject error into the record so the

case would be reversed if Rieber were convicted. On direct appeal, Mr. Kempaner and Mr. Moran argued that Rieber's conviction should be reversed because "his attorney struck an Asian-American from the jury venire for racial reasons." Rieber v. State, 663 So.2d at 990. In rejecting this claim, the Alabama Court of Criminal Appeals held that "[Rieber] has not shown us nor can we see how [he] was prejudiced by his defense counsel's striking this particular veniremember." Id. at 991.

Rieber presented no evidence demonstrating what issues Mr. Kempaner and Mr. Moran could have raised on direct appeal that would have caused the Alabama Court of Criminal Appeals or the Alabama Supreme Court to reverse his conviction or sentence. This Court finds that Rieber failed to prove that Mr. Kempaner's and Mr. Moran's performance on direct appeal was deficient and caused him to be prejudiced. Rule 32.3, Ala.R.Crim.P.

B. Allegation That Rieber's Appellate Counsel Were Ineffective For Failing To Argue That The Trial Court Erred In Finding That Rieber Had Stalked The Victim Before The Murder.

This allegation is in paragraph 79, page 22 of Rieber's amended Rule 32 petition.

Rieber did not question Mr. Kempaner concerning why he chose not to raise this issue on direct appeal. Therefore, this Court finds that Rieber abandoned this allegation of ineffective assistance. See Clark v. State, 2015 WL 1122521, *21 (Ala. Crim. App. March 13, 2015) ("[A] petitioner is deemed to have abandoned a claim if he fails to present any evidence to support the claim at the evidentiary hearing.") (citation omitted).

In the alternative, because he presented no evidence to support this ineffectiveness claim, this Court finds that Rieber failed to prove his trial counsel's guilt phase opening statement was deficient and caused him to be prejudiced. See State v. Gissendanner, 2015 WL 6443194, *7 (Ala. Crim. App. 2015) (holding that "[w]hen the record contains no direct evidence of counsel's reasons for the challenged conduct, we 'will assume that counsel had a strategy if any reasonably sound strategic motivation can be imagined.'") (citation omitted); see also Broadnax v. State, 130 So.3d 1232, 1255 (Ala. Crim. App. 2013) ("It is extremely difficult, if not impossible, to prove a

claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions, or inactions, of counsel that occurred outside the record.").

Moreover, in reviewing the Alabama Court of Criminal Appeals's holding that the trial court correctly found that the capital murder was especially heinous, atrocious, or cruel, the Alabama Supreme Court specifically found that:

Suffice it to say that the evidence supports those findings. The evidence indicates that Rieber had "cased" the store and had stalked [the victim] for several days before the murder. Testimony and the videotape from the surveillance camera at the store clearly indicated that [the victim] was aware of Rieber's presence and was apprehensive and afraid of him. As the Court of Criminal Appeals pointed out, evidence as to the fear experienced by the victim before death is a significant factor in determining the existence of the aggravating circumstance that the murder was especially heinous, atrocious, or cruel.

Ex parte Rieber, 663 So.2d at 1003 (footnote omitted).

Rieber presented no evidence or argument that would call the Supreme Court's finding into question.

This Court finds that Rieber failed to prove that Mr. Kempaner's and Mr. Moran's performance on direct appeal was deficient and caused him to be prejudiced. Rule 32.3, Ala.R.Crim.P.

C. **Allegation That Rieber's Appellate Counsel Were Ineffective For Failing To Argue That The Trial Court Did Not Give The Jury's Sentencing Recommendation Its Proper Weight.**

This allegation is in paragraphs 80-81, pages 22-23 of Rieber's amended Rule 32 petition.

As stated above, the Alabama Supreme Court's decision in Ex parte Carroll requiring a sentencing court to consider a jury's life without parole recommendation as a mitigating circumstance was not issued until long after Rieber's conviction and sentence were affirmed on direct appeal. Therefore, Mr. Kempaner and Mr. Moran were not ineffective for failing to raise this issue on direct appeal. See Inmin v. State, 654 So.2d 86, 88 (Ala. Crim. App. 1994) (holding that "[c]ounsel cannot be held ineffective for failing to predict the future course of the law."). Further, for the reasons stated in part I.C of this order, Rieber reliance on Ex parte Tomlin, 909 So.2d 283 (Ala. 2003) is entirely misplaced.

Moreover, on direct appeal, both the Alabama Court of Criminal Appeals and the Alabama Supreme Court held that Rieber's conviction and sentence were proper. Rieber v. State, 663 So.2d at 998 (holding that "[o]ur review of the record leads us to conclude that the trial court's findings [concerning the aggravating and mitigating circumstances] are supported by the record."); Ex parte Rieber, 663 So.2d at 1015 (holding that "the guilty verdict and the sentence are supported by the record."). Further, both the Alabama Court of Criminal Appeals and the Alabama Supreme Court independently weighed the aggravating and mitigating circumstances and concluded that Rieber's death sentence was appropriate. Rieber v. State, 663 So.2d at 998, aff'd, Ex parte Rieber, 663 So.2d at 1015.

This Court finds that Rieber failed to prove that Mr. Kempaner's and Mr. Moran's performance on direct appeal was deficient and caused him to be prejudiced. Rule 32.3, Ala.R.Crim.P.

D. Allegation That Rieber's Appellate Counsel
Were Ineffective For Failing To Raise Or
Adequately Pursue Issues On Direct Appeal.

In paragraph 82 of his amended Rule 32 petition, Rieber contends that "[c]ounsel improperly failed to raise on appeal numerous issues identified in other claims in this amended petition that trial counsel either failed to identify or failed to adequately pursue during the trial and sentencing phases of this case." (A.P. p. 23)

"Appellate counsel is presumed to exercise sound strategy in the selection of issues most likely to afford relief on appeal." Thomas v. State, 766 So.2d 860, 876 (Ala. Crim. App. 1998), overruled on other grounds, Ex parte Taylor, 10 So.3d 1075 (Ala. 2005). In Payne v. State, 791 So.2d 383, 399 (Ala. Crim. App. 1999), the Alabama Court of Criminal Appeals held that "[a petitioner's] claims of ineffective assistance of appellate counsel depends on whether [the petitioner] proves that appellate counsel failed to present on direct appeal a claim that would have entitled him to relief."

This Court finds that Rieber failed to prove that Mr. Kempaner's and Mr. Moran's performance on direct appeal was deficient and caused him to be prejudiced. Rule 32.3, Ala.R.Crim.P.

CONCLUSION

After careful review of all relevant and applicable law, and for the reasons stated above, Rieber's request for relief from his conviction and sentence is hereby DENIED.

Rieber shall have 42 days from the entry of this Order in which to appeal this Court's ruling.

DONE this the 13th day of November, 2015.



CIRCUIT COURT JUDGE
23rd JUDICIAL CIRCUIT

cc: Frank Tuerkheimer, Counsel for Petitioner
James Friedman, Counsel for Petitioner
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In the
United States Court of Appeals
For the Eleventh Circuit

No. 23-13958

JEFFERY DAY RIEBER,

Petitioner-Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF
CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 5:18-cv-00337-ACA

Before JORDAN, JILL PRYOR, and GRANT, Circuit Judges.

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Order of the Court

23-13958

PER CURIAM:

The Petition for Panel Rehearing filed by Jeffery Day Rieber
is DENIED.

United States Constitution

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in

aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Directing a presentence investigation is probably an inherent discretionary right of the court without the necessity of an enabling statute. Williams v. New York, 337 U.S. 241 (1949) (due process clause does not prevent judge's getting additional out-of-court information to assist him in sentencing). Circuit courts already have statutory authority to require an investigation when considering probation. Section 15-22-51. The proposal would make an investigation, if requested, mandatory in felony cases and discretionary in misdemeanor and violation cases.

Cross Reference:

Investigation for probation, § 15-22-51.

Code Commissioner's note. — For this section being modified by new Rule 26.3, Alabama Rules of Criminal Procedure, effective January 1, 1991, see the committee comments to new Rule 26.3 in Volume 23A, Code of Alabama.

Cross references. — As to sentence and punishment generally, see § 15-18-1 et seq. As to investigation for probation, see § 15-22-51. As to presentence reports, see Rule 26.3, Alabama Rules of Criminal Procedure.

Editor's note. — Most of the cases annotated below were decided prior to promulgation of the new Alabama Rules of Criminal Procedure, effective January 1, 1991.

Failure to make written motion for presentence report. — The trial judge properly denied defendant's request for presentence report, where he failed to make a written motion for a presentence report, as required by this section and former Rule 3(a)(2), A.R.C.P. Temp. Thus, his oral request was insufficient. *James v. State*, 500 So. 2d 474 (Ala. Crim. App. 1986).

The trial judge may have access to the presentence report prior to trial; neither this section nor former Rule 3, A.R.C.P. Temp., state that the presentence report must be conducted after the trial. Although the presentence report was available to the trial judge prior to trial, the defendant was not prejudiced by this fact, since the evidence showed the trial judge did not actually read the presentence report until after the trial. *Howington v. State*, 568 So. 2d 351 (Ala. Crim. App. 1990), aff'd, 627 So. 2d 1074 (Ala. Crim. App. 1993).

Defendant was not prejudiced by denial of presentence report since he admitted to three prior felony convictions, and thus the trial court had no discretion in imposing sentence. *James v. State*, 500 So. 2d 474 (Ala. Crim. App. 1986).

There is nothing in the language of this section which states that trial judge must declare on the record that he has considered the presentence report received by one of the parties. *Young v. State*, 472 So. 2d 1139 (Ala. Crim. App. 1985).

Consideration of presentence investiga-

tion report proper before death sentence. — In making the determination of sentence, the trial judge must take into consideration the presentence investigation report and any evidence submitted in connection with it, in addition to the evidence presented at trial and during the sentence hearing. *Kuenzel v. State*, 577 So. 2d 474 (Ala. Crim. App. 1990), aff'd, 577 So. 2d 531 (Ala.), cert. denied, — U.S. —, 112 S. Ct. 242, 116 L. Ed. 2d 197 (1991).

Lack of written report held not prejudicial error. — Although it would have been better if the trial judge had complied with the oral request of defendant's counsel to have required a written report of a presentence investigation of the defendant before he was sentenced, the trial court did not commit error prejudicial to defendant in failing to do so, where there was no reason to believe that the trial court would modify its judgment of sentence if this case were remanded to the trial court for another judgment of sentence. *Arington v. State*, 513 So. 2d 40 (Ala. Crim. App. 1987).

Where defendant failed to make a written motion for a presentence report, the provisions of this section have not been violated and the court cannot be held in error. *Young v. State*, 598 So. 2d 1050 (Ala. Crim. App. 1992).

Hearsay information in presentence report not prejudicial. — Appellant's argument, that her sentence was excessive because it was tainted by some "highly prejudicial hearsay" information contained in the presentence report, was without merit. *Dumas v. State*, 611 So. 2d 426 (Ala. Crim. App. 1992).

Cited in *Corbin v. State*, 412 So. 2d 299 (Ala. Crim. App. 1982); *Dutton v. State*, 434 So. 2d 853 (Ala. Crim. App. 1983); *Traylor v. State*, 439 So. 2d 178 (Ala. Crim. App. 1983); *Smith v. State*, 443 So. 2d 1347 (Ala. Crim. App. 1983).

Collateral references. — 21 Am. Jur. 2d, Criminal Law, § 527.

Court's right, in imposing sentence, to hear evidence of, or to consider, other offenses committed by defendant. 96 ALR2d 768.

Defendant's right to disclosure of presentence reports. 40 ALR3d 681.

Court's presentence inquiry as to, or consid-

eration of, accused's intention to appeal, as error. 64 ALR3d 1226.

Consideration of accused's juvenile court

§ 13A-5-6. Sentences of imprisonment for felonies.

(a) Sentences for felonies shall be for a definite term of imprisonment, which imprisonment includes hard labor, within the following limitations:

(1) For a Class A felony, for life or not more than 99 years or less than 10 years.

(2) For a Class B felony, not more than 20 years or less than 2 years.

(3) For a Class C felony, not more than 10 years or less than 1 year and 1 day.

(4) For a Class A felony in which a firearm or deadly weapon was used or attempted to be used in the commission of the felony, not less than 10 years.

(5) For a Class B or C felony in which a firearm or deadly weapon was used or attempted to be used in the commission of the felony, not less than 10 years.

(b) The actual time of release within the limitations established by subsection (a) of this section shall be determined under procedures established elsewhere by law. (Acts 1977, No. 607, p. 812, § 1225, Acts 1981, No. 81-840, p. 1505.)

Cross references. — See Commentary following § 13A-5-39 et seq., and § 13A-6-2. As to sentence and imprisonment or life imprisonment without parole for murder or other offenses committed under aggravated circumstances, see § 13A-5-39 et seq., and § 15-18-1 et seq. As to pardons and paroles, see § 15-22-20 et seq.

I. General Consideration.

II. Constitutionality.

III. Enhancement.

A. In General.

B. Deadly Weapon.

IV. Sentence Modification.

V. Appeal.

I. GENERAL CONSIDERATION.

Section 13A-12-250 works in concert with § 13A-12-211 and this section, and effectively imposes only a single punishment for a single offense. Clearly, the interaction of these sections does not constitute a new jeopardy. *Hardy v. State*, 576 So. 2d 685 (Ala. Crim. App. 1991).

Defendant not denied trial by jury where jury not allowed to determine application of subdivisions (a)(4) and (a)(5). — Defendant was not denied his constitutional right to a trial by jury on grounds that the jury was not allowed to determine the application of subdivisions (a)(4) and (a)(5) of this section, as the use or attempted use of a firearm in the commission of the felony is not an element of the crime, but has bearing on the duration of

the confinement, a question which has traditionally been committed to the discretion of the sentencing court. *Guest v. State*, 507 So. 2d 546 (Ala. Crim. App. 1986), aff'd, 507 So. 2d 551 (Ala. 1987).

Joining Class B and Class C felonies under this section is reasonable and is founded on a rational basis and is not violative of the equal protection clause. *Rocker v. State*, 443 So. 2d 1316 (Ala. Crim. App. 1983).

In fixing punishment, it is reasonable for the legislature to take into account that the danger to the victim is the same when the criminal uses a firearm, whether the felony be Class B or Class C; and on this basis to join them for punishment. *Rocker v. State*, 443 So. 2d 1316 (Ala. Crim. App. 1983).

Certain Class C felonies constitute great

[1992 Code of Ala. § 13A-5-45](#)

1992 Alabama Code Archive

MICHIE'S ALABAMA CODE > TITLE 13A. CRIMINAL CODE > CHAPTER 5. PUNISHMENTS AND SENTENCES > ARTICLE 2. DEATH PENALTY AND LIFE IMPRISONMENT WITHOUT PAROLE

§ 13A-5-45. Sentence hearing -- Delay; statements and arguments; admissibility of evidence; burden of proof; mitigating and aggravating circumstances

- (a) Upon conviction of a defendant for a capital offense, the trial court shall conduct a separate sentence hearing to determine whether the defendant shall be sentenced to life imprisonment without parole or to death. The sentence hearing shall be conducted as soon as practicable after the defendant is convicted. Provided, however, if the sentence hearing is to be conducted before the trial judge without a jury or before the trial judge and a jury other than the trial jury, as provided elsewhere in this article, the trial court with the consent of both parties may delay the sentence hearing until it has received the pre-sentence investigation report specified in section 13A-5-47(b). Otherwise, the sentence hearing shall not be delayed pending receipt of the pre-sentence investigation report.
- (b) The state and the defendant shall be allowed to make opening statements and closing arguments at the sentence hearing. The order of those statements and arguments and the order of presentation of the evidence shall be the same as at trial.
- (c) At the sentence hearing evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to the aggravating and mitigating circumstances referred to in sections 13A-5-49, 13A-5-51 and 13A-5-52. Evidence presented at the trial of the case may be considered insofar as it is relevant to the aggravating and mitigating circumstances without the necessity of re-introducing that evidence at the sentence hearing, unless the sentence hearing is conducted before a jury other than the one before which the defendant was tried.
- (d) Any evidence which has probative value and is relevant to sentence shall be received at the sentence hearing regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the state of Alabama.
- (e) At the sentence hearing the state shall have the burden of proving beyond a reasonable doubt the existence of any aggravating circumstances. Provided, however, any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing.
- (f) Unless at least one aggravating circumstance as defined in section 13A-5-49 exists, the sentence shall be life imprisonment without parole.

§ 13A-5-45. Sentence hearing -- Delay; statements and arguments; admissibility of evidence; burden of proof; mitigating and aggravating circumstances

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

History

Acts 1981, No. 81-178, p. 203, § 7.

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death penalty statute does not violate the Constitution by conferring upon the trial judge the right to commute a sentence of death. *Beck v. State*, 365 So. 2d 985 (Ala. Crim. App.), *aff'd*, 365 So. 2d 1006 (Ala. 1978), *rev'd* on other grounds, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed. 2d 392, on remand, 396 So. 2d 645 (Ala. 1980).

Court not restricted to statutory mitigating factors. — The sentencing court considered evidence as to any matter that the court deemed relevant to sentence, and was not restricted to those mitigating factors statutorily defined. *Kyzer v. State*, 399 So. 2d 317 (Ala. Crim. App. 1979), *rev'd* on other grounds, 399 So. 2d 330 (Ala. 1981).

But the only aggravating circumstances which may be considered under the capital felony statute relating to a defendant's prior criminal history are set out in the statute. *Keller v. State*, 380 So. 2d 926 (Ala. Crim. App. 1979), *cert. denied*, 380 So. 2d 938 (Ala. 1980).

Remand for new hearing where improper aggravating circumstances found. — Where trial court found one or more

proper aggravating circumstances, but likewise based sentence on one or more improper aggravating circumstances, remandment to trial court for new sentencing hearing should be mandated by appellate court finding aggravating circumstances improper. *Bufford v. State*, 382 So. 2d 1162 (Ala. Crim. App.), *cert. denied*, 382 So. 2d 1175 (Ala. 1980).

Crime charged in indictment cannot be used as both criminal charge and circumstances aggravating that charge. *Keller v. State*, 380 So. 2d 926 (Ala. Crim. App. 1979), *cert. denied*, 380 So. 2d 938 (Ala. 1980).

Options in sentencing. — In any case in which the jury finds the defendant guilty and imposes the death sentence, the trial court is required to hold a presentence hearing to determine whether to sentence the defendant to death or to life imprisonment without parole; these are the only options for the sentencing authority. *Evans v. Britton*, 472 F. Supp. 707 (S.D. Ala. 1979), *rev'd* on other grounds, 628 F.2d 400 (5th Cir. 1980).

§ 13A-5-46. Same — Conducted before jury unless waived; trial jury to sit for unless impossible or impracticable; separation of jury; instructions to jury; advisory verdicts; vote required; mistrial; waiver of right to advisory verdict.

(a) Unless both parties with the consent of the court waive the right to have the sentence hearing conducted before a jury as provided in section 13A-5-44(c), it shall be conducted before a jury which shall return an advisory verdict as provided by subsection (e) of this section. If both parties with the consent of the court waive the right to have the hearing conducted before a jury, the trial judge shall proceed to determine sentence without an advisory verdict from a jury. Otherwise, the hearing shall be conducted before a jury as provided in the remaining subsections of this section.

(b) If the defendant was tried and convicted by a jury, the sentence hearing shall be conducted before that same jury unless it is impossible or impracticable to do so. If it is impossible or impracticable for the trial jury to sit at the sentence hearing, or if the case on appeal is remanded for a new sentence hearing before a jury, a new jury shall be impanelled to sit at the sentence hearing. The selection of that jury shall be according to the laws and rules governing the selection of a jury for the trial of a capital case.

(c) The separation of the jury during the pendency of the sentence hearing, and if the sentence hearing is before the same jury which convicted the defendant, the separation of the jury during the time between the guilty verdict and the beginning of the sentence hearing, shall be governed by the law and court rules applicable to the separation of the jury during the trial of a capital case.

(d) After hearing the evidence and the arguments of both parties at the sentence hearing, the jury shall be instructed on its function and on the

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relevant law by the trial judge. The jury shall then retire to deliberate concerning the advisory verdict it is to return.

(e) After deliberation, the jury shall return an advisory verdict as follows:

(1) If the jury determines that no aggravating circumstances as defined in section 13A-5-49 exist, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole;

(2) If the jury determines that one or more aggravating circumstances as defined in section 13A-5-49 exist but do not outweigh the mitigating circumstances, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole;

(3) If the jury determines that one or more aggravating circumstances as defined in section 13A-5-49 exist and that they outweigh the mitigating circumstances, if any, it shall return an advisory verdict recommending to the trial court that the penalty be death.

(f) The decision of the jury to return an advisory verdict recommending a sentence of life imprisonment without parole must be based on a vote of a majority of the jurors. The decision of the jury to recommend a sentence of death must be based on a vote of at least ten jurors. The verdict of the jury must be in writing and must specify the vote.

(g) If the jury is unable to reach an advisory verdict recommending a sentence, or for other manifest necessity, the trial court may declare a mistrial of the sentence hearing. Such a mistrial shall not affect the conviction. After such a mistrial or mistrials another sentence hearing shall be conducted before another jury, selected according to the laws and rules governing the selection of a jury for the trial of a capital case. Provided, however, that, subject to the provisions of section 13A-5-44(c), after one or more mistrials both parties with the consent of the court may waive the right to have an advisory verdict from a jury, in which event the issue of sentence shall be submitted to the trial court without a recommendation from a jury. (Acts 1981, No. 81-178, § 8.)

Editor's note. — In light of the similarity of the provisions, decisions under former § 13A-5-33 are included in the annotations for this section.

Sentencing hearing should not serve function of hearing on petition for writ of error coram nobis. Once having litigated this issue before the same judge who conducted the sentencing hearing, and a determination having been made that the allegations were without merit, the defendant had no right to relitigate the same issue and argue contentions which had already been determined to be without factual support. *Hubbard v. State*, 382 So. 2d 577 (Ala. Crim. App. 1979), *aff'd*, 382 So. 2d 597 (Ala. 1980), *rev'd on remand*, 405 So. 2d 695 (Ala. 1981).

Jury verdict not binding on trial court. — The requirement that the jury fix the punishment at death if it finds the defendant guilty of a capital offense is in no way binding on the

trial court as the final sentencing authority. *Beck v. State*, 396 So. 2d 645 (Ala. 1980).

Act not mandatory where judge empowered to alter jury verdict. — Before a death penalty can be imposed in Alabama, the trial judge is compelled to hold a separate hearing and make written findings of one or more of the aggravating circumstances set forth in the act. If the trial judge fails to find one or more aggravating circumstances, supported by the evidence, he is empowered to alter the verdict of the jury and sentence the defendant to life imprisonment without parole. Since the verdict of the jury is not binding on the trial court the act cannot under any construction be classed as mandatory. *Williamson v. State*, 370 So. 2d 1054 (Ala. Crim. App. 1978), *aff'd*, 370 So. 2d 1066 (Ala. 1979), *rev'd on remand*, 405 So. 2d 698 (Ala. Crim. App. 1981).

But crime charged in indictment cannot be used as both criminal charge and cir-

[1992 Code of Ala. § 13A-5-47](#)

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MICHIE'S ALABAMA CODE > TITLE 13A. CRIMINAL CODE > CHAPTER 5. PUNISHMENTS AND SENTENCES > ARTICLE 2. DEATH PENALTY AND LIFE IMPRISONMENT WITHOUT PAROLE

§ 13A-5-47. Determination of sentence by court; pre-sentence investigation report; presentation of arguments on aggravating and mitigating circumstances; court to enter written findings; court not bound by sentence recommended by jury

- (a) After the sentence hearing has been conducted, and after the jury has returned an advisory verdict, or after such a verdict has been waived as provided in section 13A-5-46(a) or section 13A-5-46(g), the trial court shall proceed to determine the sentence.
- (b) Before making the sentence determination, the trial court shall order and receive a written pre-sentence investigation report. The report shall contain the information prescribed by law or court rule for felony cases generally and any additional information specified by the trial court. No part of the report shall be kept confidential, and the parties shall have the right to respond to it and to present evidence to the court about any part of the report which is the subject of factual dispute. The report and any evidence submitted in connection with it shall be made part of the record in the case.
- (c) Before imposing sentence the trial court shall permit the parties to present arguments concerning the existence of aggravating and mitigating circumstances and the proper sentence to be imposed in the case. The order of the arguments shall be the same as at the trial of a case.
- (d) Based upon the evidence presented at trial, the evidence presented during the sentence hearing, and the pre-sentence investigation report and any evidence submitted in connection with it, the trial court shall enter specific written findings concerning the existence or nonexistence of each aggravating circumstance enumerated in section 13A-5-49, each mitigating circumstance enumerated in section 13A-5-51, and any additional mitigating circumstances offered pursuant to section 13A-5-52. The trial court shall also enter written findings of facts summarizing the crime and the defendant's participation in it.
- (e) In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict, unless such a verdict has been waived pursuant to section 13A-5-46(a) or 13A-5-46(g). While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.

History

Acts 1981, No. 81-178, p. 203, § 9.

§ 13A-5-47. Determination of sentence by court; pre-sentence investigation report; presentation of arguments on aggravating and mitigating circumstances; court

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532 U.S. 1055, 149 L.Ed.2d 1030. Sentencing And Punishment $\Rightarrow$ 1660

Robbery could form an element of capital murder and also an aggravating circumstance. *McWhorter v. State*, 781 So.2d 257 (Ala.Crim.App.1999), rehearing denied, affirmed 781 So.2d 330, certiorari denied 121 S.Ct. 1612, 532 U.S. 976, 149 L.Ed.2d 476. Sentencing And Punishment $\Rightarrow$ 1660

Use of defendant's conviction for robbery both as an element of capital murder and as an aggravating circumstance did not improperly punish him twice for same act. *Smith v. State*, 756 So.2d 892 (Ala.Crim.App.1997), opinion after remand, rehearing denied, affirmed 756 So.2d 957, certiorari denied 121 S.Ct. 82, 531 U.S. 830, 148 L.Ed.2d 44. Sentencing And Punishment $\Rightarrow$ 1660

Use of robbery as element of capital murder and as aggravating circumstance did not implicate Double Jeopardy. *Roberts v. State*, 735 So.2d 1244 (Ala.Crim.App.1997), opinion after remand, rehearing denied. Double Jeopardy $\Rightarrow$ 30

Robbery may be counted as both element of capital offense and aggravating circumstance. *Windsor v. State*, 683 So.2d 1027 (Ala.Crim.App.1994), rehearing denied, affirmed 683 So.2d 1042, 70 A.L.R.5th 785, certiorari denied 117 S.Ct. 1438, 520 U.S. 1171, 137 L.Ed.2d 545. Sentencing And Punishment $\Rightarrow$ 1660

5. Kidnapping

Capital murder defendant was not subjected to double jeopardy when kidnapping, which was an element of offense for which he was convicted, was also considered as an aggravating circumstance. *Hagood v. State*, 777 So.2d 162 (Ala.Crim.App.1998), rehearing denied, affirmed in part, reversed in part and remanded 777 So.2d 214, on remand 777 So.2d 221, opinion after remand. Double Jeopardy $\Rightarrow$ 30

Double counting of kidnapping as element of capital murder and as aggravating circumstance was both constitutionally and statutorily permissible. *Boyd v. State*, 715 So.2d 825 (Ala.Crim.App.1997), rehearing denied, affirmed 715 So.2d 852, certiorari denied 119 S.Ct. 416, 525 U.S. 968, 142 L.Ed.2d 338, dismissal of post-conviction relief affirmed 913 So.2d 1113. Sentencing And Punishment $\Rightarrow$ 1660

6. Killing held heinous, atrocious, or cruel

Where one of the victims was 74 years old and had severe arthritis and watched helplessly as defendant killed her daughter, then turned on her, killing her in much the same fashion was enough to support a finding that

the killing was especially heinous, atrocious, or cruel. *Ex parte Ford*, 515 So.2d 48 (Ala.1987), certiorari denied 108 S.Ct. 1061, 484 U.S. 1079, 98 L.Ed.2d 1023, denial of post-conviction relief affirmed 630 So.2d 111, certiorari granted, affirmed 630 So.2d 113, modified on denial of rehearing, rehearing denied, certiorari denied 114 S.Ct. 1664, 511 U.S. 1078, 125 L.Ed.2d 380, rehearing denied 114 S.Ct. 2774, 512 U.S. 1248, 129 L.Ed.2d 887, stay granted.

7. Convictions used as aggravating circumstances

Trial conviction for murder made capital because it was committed during a first-degree robbery complied with requirement under *Ring* that a jury, and not the trial judge, determine the existence of aggravating circumstance necessary for imposition of death penalty. *Ex parte Hodges*, 856 So.2d 936 (Ala.2003), certiorari denied 124 S.Ct. 465, 540 U.S. 986, 157 L.Ed.2d 379, denial of post-conviction relief remanded 147 So.3d 916, opinion after remand, reversed 147 So.3d 973, on remand 147 So.3d 977. Jury $\Rightarrow$ 34(9)

That convictions for capital murder committed during course of rape and capital murder committed during course of robbery contained necessary elements of rape and robbery did not preclude consideration of rape and robbery as aggravating circumstances for purposes of capital sentencing. *Turner v. State*, 924 So.2d 737 (Ala.Crim.App.2002), opinion after remand, rehearing denied, certiorari denied, certiorari denied 126 S.Ct. 1653, 547 U.S. 1056, 154 L.Ed.2d 399. Sentencing And Punishment $\Rightarrow$ 1660

Use of defendant's convictions for burglary and kidnapping both as elements of capital murder and as aggravating circumstances did not violate his double jeopardy rights under Fifth Amendment. *Stewart v. State*, 730 So.2d 1203 (Ala.Crim.App.1996), opinion after remand, rehearing denied, affirmed 730 So.2d 1246, certiorari denied 120 S.Ct. 119, 528 U.S. 846, 145 L.Ed.2d 101. Double Jeopardy $\Rightarrow$ 30

Fact that capital murder defendant had previously been convicted of first-degree assault, and that killing was committed while defendant was a robbery accomplice were aggravating factors supporting imposition of death penalty. *Guthrie v. State*, 689 So.2d 948 (Ala.Crim.App.1996), rehearing denied, affirmed 689 So.2d 961, certiorari denied 118 S.Ct. 135, 522 U.S. 848, 139 L.Ed.2d 84. Sentencing And Punishment $\Rightarrow$ 1681; Sentencing And Punishment $\Rightarrow$ 1705

Aggravating circumstances were properly weighed by trial court against mitigating circumstances, and full consideration was given

to statutory and nonstatutory mitigating circumstances, in reaching determination that aggravating circumstances outweighed mitigating circumstances and sentencing defendant to death, such that court's sentencing order was not constitutionally deficient. *Williams v. State*, 710 So.2d 1276 (Ala.Crim.App.1996), rehearing overruled, affirmed 710 So.2d 1350, certiorari denied, certiorari denied 118 S.Ct. 2325, 524 U.S. 929, 141 L.Ed.2d 699. Sentencing And Punishment $\Rightarrow$ 1785(3)

9. Instructions

Trial court did not adequately instruct jury as to burdens of proof with respect to death penalty aggravating and mitigating circumstances, where court never mentioned any burden, either the word "burden" or the concept of a burden, and court's only mention of "reasonable doubt" was its attempt in its opening instructions to explain operation of statute allowing jury to find as an aggravating circumstance the aggravation component of capital offense for which defendant has been convicted. *Thomas v. State*, 824 So.2d 1 (Ala.Crim.App.1999), opinion after remand, rehearing denied. Sentencing And Punishment $\Rightarrow$ 1780(3)

10. Functions of jury

Death sentence imposed by trial court, after jury convicted defendant on two counts of capital murder for murdering store clerk during the course of a robbery and a burglary and defendant waived jury's participation in the sentencing hearing, did not violate requirement of *Apprendi* and *Ring* that any fact that increased a sentence above the statutory maximum had to be presented to a jury, as the jury's conviction on two counts of capital murder determined the existence of the aggravating circumstance necessary for the imposition of the death penalty, and the determination in the trial court's sentencing hearing that the aggravating circumstances outweighed the mitigating circumstances, was not a finding of fact or an element of the offenses. *Belisle v. State*,

11 So.3d 256 (Ala.Crim.App.2007), rehearing denied, affirmed 11 So.3d 323, certiorari denied 129 S.Ct. 2865, 557 U.S. 939, 174 L.Ed.2d 582.

Trial court's imposition of death penalty, overriding jury's recommendation of life imprisonment without parole, did not violate capital murder defendant's right to trial by jury, where findings reflected in the jury's verdict established the existence of aggravating circumstances necessary for imposition of the death penalty. *Harris v. State*, 2 So.3d 880 (Ala.Crim.App.2007), rehearing denied, certiorari denied, certiorari denied 129 S.Ct. 1039, 555 U.S. 1155, 173 L.Ed.2d 472. Jury $\Rightarrow$ 34(9); Sentencing And Punishment $\Rightarrow$ 1784(3)

The requirement of *Ring v. Arizona* that jury, and not trial court, determine existence of aggravating circumstance necessary for imposition of death penalty was satisfied, where defendant was convicted by jury, at guilt phase, of one count of murder during first-degree robbery; committing capital offense while engaged in commission of robbery was statutory aggravating circumstance at penalty phase; only one aggravating circumstance was needed to impose death penalty, and trial court's subsequent determination of additional aggravating circumstance that the murders were especially heinous, atrocious, or cruel had application only in weighing mitigating and aggravating circumstances, a process that was not an element of the offense. *McGowan v. State*, 990 So.2d 931 (Ala.Crim.App.2003), appeal after remand, rehearing denied, certiorari denied, certiorari denied 129 S.Ct. 136, 555 U.S. 861, 172 L.Ed.2d 104. Jury $\Rightarrow$ 34(9)

Cited in *Bush v. State*, 431 So.2d 555 (Ala.Crim.App.1982); *Heath v. State*, 458 So.2d 898 (Ala.Crim.App.1983); *Johnson v. State*, 521 So.2d 1006 (Ala.Crim.App.1986); *Halford v. State*, 548 So.2d 526 (Ala.Crim.App.1988); *McMillian v. State*, 594 So.2d 1253 (Ala.Crim.App.1991).

§ 13A-5-51. Mitigating circumstances — Generally.

Mitigating circumstances shall include, but not be limited to, the following:

- (1) The defendant has no significant history of prior criminal activity;
- (2) The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;
- (3) The victim was a participant in the defendant's conduct or consented to it;
- (4) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and

(7) The age of the defendant at the time of the crime. (Acts 1981, No. 81-178, p. 203, § 13.)

LIBRARY REFERENCES

American Digest System:
Sentencing and Punishment ⇨ 1669, 1675, 1677, 1708 to 1714.

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20 ALR 5th 177, Propriety of Imposing Capital Punishment on Mentally Retarded Individuals.

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Criminal Offenses and Defenses in Alabama § D10, Death Penalty.

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I. GENERAL CONSIDERATION

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1. Construction and application

Residual doubt as to the defendant's guilt is not a statutory mitigating circumstance. *Petric v. State*, 157 So.3d 176 (Ala.Crim.App. 2013), petition for certiorari filed 135 S.Ct. 711, 190 L.Ed.2d 446. Sentencing and Punishment ⇨ 1685

The capital defendant generally must be allowed to introduce any relevant mitigating evidence regarding his character or record and any of the circumstances of the offense, and consideration of such evidence is a constitutionally indispensable part of the process of inflicting the penalty of death. *Haney v. State*, 603 So.2d 368 (Ala.Crim.App.1991), affirmed 603 So.2d 412, certiorari denied 113 S.Ct. 1297, 507 U.S. 925, 122 L.Ed.2d 687. Sentencing And Punishment ⇨ 1759; Sentencing And Punishment ⇨ 1760

Had the Legislature intended that convictions for nonviolent crimes not be considered in determining whether there has been "no significant history of prior criminal activity" for purposes of determining the existence of mitigating circumstances, it would have specifically so stated in the statutes. *Williams v. State*, 601 So.2d 1062 (Ala.Crim.App.1991), certiorari granted, affirmed 662 So.2d 929, rehearing denied, certiorari denied 113 S.Ct. 417, 506 U.S. 957, 121 L.Ed.2d 340, denial of post-conviction relief affirmed.

2. All mitigating circumstances considered

While all evidence submitted as mitigation is required to be considered, whether the evidence is actually found to be mitigating is in the discretion of the sentencing authority in a capital murder case. *Perguson v. State*, 814 So.2d 925 (Ala.Crim.App.2000), rehearing denied, affirmed 814 So.2d 970, certiorari denied 122 S.Ct. 1208, 535 U.S. 907, 152 L.Ed.2d 145, dismissal of post-conviction relief affirmed 13 So.3d 418. Sentencing And Punishment ⇨ 1653

The sentencing authority in Alabama, the trial judge, has unlimited discretion to consider any perceived mitigating circumstances, and he can assign appropriate weight to particular mitigating circumstances. The United States Constitution does not require that specific weights be assigned to different aggravating and mitigating circumstances. *Ex parte Clisby*, 456 So.2d 105 (Ala.1984), certiorari denied 105 S.Ct. 1372, 470 U.S. 1009, 84 L.Ed.2d 391, grant of habeas corpus reversed 907 F.2d 1047, rehearing granted and vacated 920 F.2d 720, on rehearing 960 F.2d 925, denial of post-conviction relief affirmed 663 So.2d 1038, rehearing denied, denial of habeas corpus affirmed 52 F.3d 905, certiorari denied 115 S.Ct. 1818, 514 U.S. 1093, 131 L.Ed.2d 741.

Subject only to the loose evidentiary requirement of relevance, capital defendants have a right to offer any evidence they choose on character or record or circumstances of the offense. Further, a death penalty scheme must allow the sentencing authority to consider and give independent weight to mitigating factors in addition to those listed in the death penalty statute. While a sentencing authority may consider only those aggravating circumstances listed in the relevant statute, it may consider any mitigating factors that it wishes. *Clisby v. State*, 456 So.2d 99 (Ala.Crim.App. 1983).

The constitution requires that the sentencer in capital cases must be permitted to consider

the discretion of the sentencing authority in a capital murder case. *Perguson v. State*, 814 So.2d 925 (Ala.Crim.App.2000), rehearing denied, affirmed 814 So.2d 970, certiorari denied 122 S.Ct. 1208, 535 U.S. 907, 152 L.Ed.2d 145, dismissal of post-conviction relief affirmed 13 So.3d 418. Sentencing And Punishment ⇨ 1653

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The trial judge is free to consider each case individually and determine whether a particular aggravating circumstance outweighs the mitigating circumstances or vice versa. The determination of whether the aggravating circumstances outweigh the mitigating circumstances is not a numerical one, but instead involves the gravity of the aggravation as compared to the mitigation. *Ex parte Clisby*, 456 So.2d 105 (Ala.1984), certiorari denied 105 S.Ct. 1372, 470 U.S. 1009, 84 L.Ed.2d 391, grant of habeas corpus reversed 907 F.2d 1047, rehearing granted and vacated 920 F.2d 720, on rehearing 960 F.2d 925, denial of post-conviction relief affirmed 663 So.2d 1038, rehearing denied, denial of habeas corpus affirmed 52 F.3d 905, certiorari denied 115 S.Ct. 1818, 514 U.S. 1093, 131 L.Ed.2d 741.

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The constitution requires that the sentencer in capital cases must be permitted to consider

1 SB16
2 178947-3
3 By Senator Brewbaker
4 RFD: Judiciary
5 First Read: 07-FEB-17
6 PFD: 12/19/2016

SB16

ENROLLED, An Act,

To amend Sections 13A-5-45, 13A-5-46, and 13A-5-47, Code of Alabama 1975, relating to capital cases and to the determination of the sentence by courts; to prohibit a court from overriding a jury verdict.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. Sections 13A-5-45, 13A-5-46, 13A-5-47, Code of Alabama 1975, are amended to read as follows:

"§13A-5-45.

"(a) Upon conviction of a defendant for a capital offense, the trial court shall conduct a separate sentence hearing to determine whether the defendant shall be sentenced to life imprisonment without parole or to death. The sentence hearing shall be conducted as soon as practicable after the defendant is convicted. Provided, however, if the sentence hearing is to be conducted before the trial judge without a jury or before the trial judge and a jury other than the trial jury, as provided elsewhere in this article, the trial court with the consent of both parties may delay the sentence hearing until it has received the pre-sentence investigation report specified in Section 13A-5-47(b). Otherwise, the

1 sentence hearing shall not be delayed pending receipt of the
2 pre-sentence investigation report.

3 "(b) The state and the defendant shall be allowed to
4 make opening statements and closing arguments at the sentence
5 hearing. The order of those statements and arguments and the
6 order of presentation of the evidence shall be the same as at
7 trial.

8 "(c) At the sentence hearing evidence may be
9 presented as to any matter that the court deems relevant to
10 sentence and shall include any matters relating to the
11 aggravating and mitigating circumstances referred to in
12 Sections 13A-5-49, 13A-5-51, and 13A-5-52. Evidence presented
13 at the trial of the case may be considered insofar as it is
14 relevant to the aggravating and mitigating circumstances
15 without the necessity of re-introducing that evidence at the
16 sentence hearing, unless the sentence hearing is conducted
17 before ~~a jury other than the one before which the defendant~~
18 ~~was tried~~ a trial judge other than the one before whom the
19 defendant was tried or a jury other than the trial jury before
20 which the defendant was tried.

21 "(d) Any evidence which has probative value and is
22 relevant to sentence shall be received at the sentence hearing
23 regardless of its admissibility under the exclusionary rules
24 of evidence, provided that the defendant is accorded a fair
25 opportunity to rebut any hearsay statements. This subsection

1 shall not be construed to authorize the introduction of any
2 evidence secured in violation of the Constitution of the
3 United States or the State of Alabama.

4 "(e) At the sentence hearing the state shall have
5 the burden of proving beyond a reasonable doubt the existence
6 of any aggravating circumstances. Provided, however, any
7 aggravating circumstance which the verdict convicting the
8 defendant establishes was proven beyond a reasonable doubt at
9 trial shall be considered as proven beyond a reasonable doubt
10 for purposes of the sentence hearing.

11 "(f) Unless at least one aggravating circumstance as
12 defined in Section 13A-5-49 exists, the sentence shall be life
13 imprisonment without parole.

14 "(g) The defendant shall be allowed to offer any
15 mitigating circumstance defined in Sections 13A-5-51 and
16 13A-5-52. When the factual existence of an offered mitigating
17 circumstance is in dispute, the defendant shall have the
18 burden of interjecting the issue, but once it is interjected
19 the state shall have the burden of disproving the factual
20 existence of that circumstance by a preponderance of the
21 evidence.

22 "§13A-5-46.

23 "(a) Unless both parties with the consent of the
24 court waive the right to have the sentence hearing conducted
25 before a jury as provided in Section 13A-5-44(c), it shall be

1 conducted before a jury which shall return ~~an advisory~~ a
2 verdict as provided by subsection (e) of this section. If both
3 parties with the consent of the court waive the right to have
4 the hearing conducted before a jury, the trial judge shall
5 proceed to determine sentence without ~~an advisory~~ a verdict
6 from a jury. Otherwise, the hearing shall be conducted before
7 a jury as provided in the remaining subsections of this
8 section.

9 "(b) If the defendant was tried and convicted by a
10 jury, the sentence hearing shall be conducted before that same
11 jury unless it is impossible or impracticable to do so. If it
12 is impossible or impracticable for the trial jury to sit at
13 the sentence hearing, or if the case on appeal is remanded for
14 a new sentence hearing before a jury, a new jury shall be
15 impanelled to sit at the sentence hearing. The selection of
16 that jury shall be according to the laws and rules governing
17 the selection of a jury for the trial of a capital case.

18 "(c) The separation of the jury during the pendency
19 of the sentence hearing, and if the sentence hearing is before
20 the same jury which convicted the defendant, the separation of
21 the jury during the time between the guilty verdict and the
22 beginning of the sentence hearing, shall be governed by the
23 law and court rules applicable to the separation of the jury
24 during the trial of a capital case.

1 "(d) After hearing the evidence and the arguments of
2 both parties at the sentence hearing, the jury shall be
3 instructed on its function and on the relevant law by the
4 trial judge. The jury shall then retire to deliberate
5 concerning the ~~advisory~~ verdict it is to return.

6 "(e) After deliberation, the jury shall return ~~an~~
7 ~~advisory~~ a verdict as follows:

8 "(1) If the jury determines that no aggravating
9 circumstances as defined in Section 13A-5-49 exist, it shall
10 return ~~an advisory verdict recommending to the trial court~~
11 ~~that the penalty be~~ a verdict of life imprisonment without
12 parole;

13 "(2) If the jury determines that one or more
14 aggravating circumstances as defined in Section 13A-5-49 exist
15 but do not outweigh the mitigating circumstances, it shall
16 return ~~an advisory verdict recommending to the trial court~~
17 ~~that the penalty be~~ a verdict of life imprisonment without
18 parole;

19 "(3) If the jury determines that one or more
20 aggravating circumstances as defined in Section 13A-5-49 exist
21 and that they outweigh the mitigating circumstances, if any,
22 it shall return ~~an advisory verdict recommending to the trial~~
23 ~~court that the penalty be~~ a verdict of death.

24 "(f) The decision of the jury to return ~~an advisory~~
25 a verdict recommending a sentence of life imprisonment without

1 parole must be based on a vote of a majority of the jurors.
2 The decision of the jury to recommend a sentence of death must
3 be based on a vote of at least 10 jurors. The verdict of the
4 jury must be in writing and must specify the vote.

5 "(g) If the jury is unable to reach ~~an advisory~~ a
6 verdict recommending a sentence, or for other manifest
7 necessity, the trial court may declare a mistrial of the
8 sentence hearing. Such a mistrial shall not affect the
9 conviction. After such a mistrial or mistrials another
10 sentence hearing shall be conducted before another jury,
11 selected according to the laws and rules governing the
12 selection of a jury for the trial of a capital case. Provided,
13 however, that, subject to the provisions of Section
14 13A-5-44(c), after one or more mistrials both parties with the
15 consent of the court may waive the right to have ~~an advisory~~ a
16 verdict from a jury, in which event the issue of sentence
17 shall be submitted to the trial court without a recommendation
18 from a jury.

19 "§13A-5-47.

20 "(a) After the sentence hearing has been conducted,
21 and after the jury has returned ~~an advisory~~ a verdict, or
22 after such a verdict has been waived as provided in Section
23 13A-5-46(a) or Section 13A-5-46(g), the trial court shall
24 ~~proceed to determine the~~ impose sentence. Where the jury has
25 returned a verdict of death, the court shall sentence the

1 defendant to death. Where a sentence of death is not returned
2 by the jury, the court shall sentence the defendant to life
3 imprisonment without parole. This code section shall not
4 affect a trial court's power to sentence in accordance with a
5 guilty plea.

6 ~~"(b) Before making the sentence determination, the~~
7 ~~trial court shall order and receive a written pre-sentence~~
8 ~~investigation report. The report shall contain the information~~
9 ~~prescribed by law or court rule for felony cases generally and~~
10 ~~any additional information specified by the trial court. No~~
11 ~~part of the report shall be kept confidential, and the parties~~
12 ~~shall have the right to respond to it and to present evidence~~
13 ~~to the court about any part of the report which is the subject~~
14 ~~of factual dispute. The report and any evidence submitted in~~
15 ~~connection with it shall be made part of the record in the~~
16 ~~case.~~

17 ~~"(c) Before~~ (b) Where the sentencing jury is waived
18 pursuant to Section 13A-5-44 and before imposing sentence the
19 trial court shall permit the parties to present arguments
20 concerning the existence of aggravating and mitigating
21 circumstances and the proper sentence to be imposed in the
22 case. The order of the arguments shall be the same as at the
23 trial of a case. The trial court, based upon evidence
24 presented at trial and the evidence presented during the
25 sentence hearing and any evidence submitted in connection with

1 it, shall enter specific written findings concerning the
2 existence or nonexistence of each aggravating circumstance
3 enumerated in Section 13A-5-49, each mitigating circumstance
4 enumerated in Section 13A-5-51, and any additional mitigating
5 circumstances offered pursuant to Section 13A-5-52. The trial
6 court shall also enter written findings of facts summarizing
7 the crime and the defendant's participation in it. In deciding
8 upon the sentence, the trial court shall determine whether the
9 aggravating circumstances it finds to exist outweigh the
10 mitigating circumstances it finds to exist.

11 ~~"(d) Based upon the evidence presented at trial, the~~
12 ~~evidence presented during the sentence hearing, and the~~
13 ~~pre-sentence investigation report and any evidence submitted~~
14 ~~in connection with it, the trial court shall enter specific~~
15 ~~written findings concerning the existence or nonexistence of~~
16 ~~each aggravating circumstance enumerated in Section 13A-5-49,~~
17 ~~each mitigating circumstance enumerated in Section 13A-5-51,~~
18 ~~and any additional mitigating circumstances offered pursuant~~
19 ~~to Section 13A-5-52. The trial court shall also enter written~~
20 ~~findings of facts summarizing the crime and the defendant's~~
21 ~~participation in it.~~

22 ~~"(e) In deciding upon the sentence, the trial court~~
23 ~~shall determine whether the aggravating circumstances it finds~~
24 ~~to exist outweigh the mitigating circumstances it finds to~~
25 ~~exist, and in doing so the trial court shall consider the~~

1 ~~recommendation of the jury contained in its advisory verdict,~~
2 ~~unless such a verdict has been waived pursuant to Section~~
3 ~~13A-5-46(a) or 13A-5-46(g). While the jury's recommendation~~
4 ~~concerning sentence shall be given consideration, it is not~~
5 ~~binding upon the court."~~

6 Section 2. This act shall apply to any defendant who
7 is charged with capital murder after the effective date of
8 this act and shall not apply retroactively to any defendant
9 who has previously been convicted of capital murder and
10 sentenced to death prior to the effective date of this act.

11 Section 3. This act shall become effective
12 immediately following its passage and approval by the
13 Governor, or its otherwise becoming law.

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President and Presiding Officer of the Senate

Speaker of the House of Representatives

SB16
Senate 23-FEB-17
I hereby certify that the within Act originated in and passed
the Senate, as amended.

Patrick Harris,
Secretary.

House of Representatives
Passed: 04-APR-17

By: Senator Brewbaker

Select Year: 2015 ▼ Go

The 2015 Florida Statutes

[Title XLVII](#)
CRIMINAL PROCEDURE AND CORRECTIONS

[Chapter 921](#)
SENTENCE

[View Entire Chapter](#)

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) **SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.**—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. [775.082](#). The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death.

(2) **ADVISORY SENTENCE BY THE JURY.**—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

- (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
 - (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
 - (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.
- (3) **FINDINGS IN SUPPORT OF SENTENCE OF DEATH.**—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

- (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
- (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. [775.082](#).

(4) **REVIEW OF JUDGMENT AND SENTENCE.**—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida and disposition rendered within 2 years after the filing of a

notice of appeal. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) **AGGRAVATING CIRCUMSTANCES.**—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.

(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

(l) The victim of the capital felony was a person less than 12 years of age.

(m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

(n) The capital felony was committed by a criminal gang member, as defined in s. [874.03](#).

(o) The capital felony was committed by a person designated as a sexual predator pursuant to s. [775.21](#) or a person previously designated as a sexual predator who had the sexual predator designation removed.

(p) The capital felony was committed by a person subject to an injunction issued pursuant to s. [741.30](#) or s. [784.046](#), or a foreign protection order accorded full faith and credit pursuant to s. [741.315](#), and was committed against the petitioner who obtained the injunction or protection order or any spouse, child, sibling, or parent of the petitioner.

(6) **MITIGATING CIRCUMSTANCES.**—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

(h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

(7) **VICTIM IMPACT EVIDENCE.**—Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim’s uniqueness as an individual human being and the resultant loss to the community’s members by the victim’s death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

(8) **APPLICABILITY.**—This section does not apply to a person convicted or adjudicated guilty of a capital drug trafficking felony under s. [893.135](#).

History.—s. 237a, ch. 19554, 1939; CGL 1940 Supp. 8663(246); s. 119, ch. 70-339; s. 1, ch. 72-72; s. 9, ch. 72-724; s. 1, ch. 74-379; s. 248, ch. 77-104; s. 1, ch. 77-174; s. 1, ch. 79-353; s. 177, ch. 83-216; s. 1, ch. 87-368; s. 10, ch. 88-381; s. 3, ch. 90-112; s. 1, ch. 91-270; s. 1, ch. 92-81; s. 1, ch. 95-159; s. 5, ch. 96-290; s. 1, ch. 96-302; s. 7, ch. 2005-28; s. 2, ch. 2005-64; s. 27, ch. 2008-238; s. 25, ch. 2010-117; s. 1, ch. 2010-120.

Note.—Former s. 919.23.