REL: 09/05/2014

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2013-2014

CR-08-0405

Jerry Devane Bryant

v.

State of Alabama

Appeal from Houston Circuit Court
(CC-97-403.60)

On Return to Second Remand

KELLUM, Judge.

Jerry Devane Bryant was convicted in 1998 of the murder of Donald Hollis made capital because it was committed during the course of a kidnapping, see § 13A-5-40(a)(1), Ala. Code 1975, and was sentenced to death. This Court affirmed

Bryant's conviction and sentence on appeal. See Bryant v. State, 951 So. 2d 702 (Ala. Crim. App. 1999) ("Bryant I"). The Alabama Supreme Court also affirmed Bryant's conviction, but it reversed his death sentence and remanded the case for a new penalty-phase trial. See Ex parte Bryant, 951 So. 2d 724 (Ala. 2002) ("Bryant II"), on remand, Bryant v. State, 951 So. 2d 732 (Ala. Crim. App. 2003). After a second penalty-phase trial, Bryant was again sentenced to death, and this Court affirmed his sentence. See Bryant v. State, 951 So. 2d 732, 737 (Ala. Crim. App. 2003) (opinion on return to remand) ("Bryant III"). The Alabama Supreme Court denied certiorari review, and this Court issued a certificate of judgment on September 29, 2006.

Bryant timely filed a Rule 32, Ala. R. Crim. P., petition for postconviction relief on September 26, 2007, raising numerous claims, including several claims of ineffective assistance of counsel. He filed an amended petition on March 21, 2008 (hereinafter "first amended petition"), in which he reasserted the claims raised in his original petition and raised additional claims as well. Bryant also filed a discovery motion, which the circuit court denied. After the

State filed an answer and motion to dismiss the first amended petition and Bryant filed a reply to the State's answer and motion to dismiss, the circuit court summarily dismissed Bryant's first amended petition by written order on October 27, 2008.

On appeal, this Court held that the circuit court had properly summarily dismissed the majority of the claims in Bryant's first amended petition; however, we remanded this case for the circuit court to allow Bryant an opportunity to present evidence to prove the following claims of ineffective assistance of counsel, which we held were sufficiently pleaded and facially meritorious: (1) that trial counsel at his first trial were ineffective for not properly investigating and retaining a blood-spatter expert and a DNA expert; (2) that trial counsel at his first trial were ineffective for not properly investigating and presenting evidence to support a motion to suppress the first statement he made to police; and (3) that trial counsel at his first trial and trial counsel at his second penalty-phase trial were ineffective for failing to adequately impeach Ricky Vickers's testimony and that trial counsel at his second penalty-phase trial were ineffective for

failing to adequately challenge Vickers's unavailability. See Bryant v. State, [Ms. CR-08-0405, February 4, 2011] ___ So. 3d ___ (Ala. Crim. App. 2011) ("Bryant IV"). We also ordered the circuit court to reconsider its denial of Bryant's discovery request as it related to the above-listed claims.

After the case was remanded, Bryant filed two additional requests for discovery, both of which were denied by the circuit court. Bryant then filed a second amended Rule 32 petition, in which he added additional facts and arguments to several of the claims from his first amended petition, including those claims for which this Court had remanded this case as well as some of the claims that this Court had held had already been properly dismissed. The circuit court issued an order on December 28, 2011, striking the second amended petition. On March 1, 2012, the circuit court conducted an evidentiary hearing on the claims of ineffective assistance of counsel listed above, and on October 23, 2012, after the parties had filed post-hearing briefs, the circuit court issued an order denying those claims. We permitted the parties to file briefs on return to remand and heard oral argument on the issues.

On return to remand, this Court remanded this case a second time for the circuit court to reconsider the claim in Bryant's first amended petition that his trial counsel at his second penalty-phase trial were ineffective for failing to adequately impeach Ricky Vickers's testimony and to issue specific findings of fact regarding that claim. The circuit court complied with this Court's instructions and submitted its return to second remand on May 29, 2014. We permitted the parties to file additional briefs on return to second remand.

The facts of the crime are fully set out in our opinions in Bryant I and Bryant IV and need not be repeated here.

Standard of Review

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

Wilkerson v. State, 70 So. 3d 442, 451 (Ala. Crim. App. 2011).

"[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). Also, "where a trial court does not receive evidence ore tenus, but instead makes its judgment based on the pleadings, exhibits, and briefs, ... it is the duty of the appellate court to judge the evidence de novo." Ex parte Horn, 718 So. 2d 694, 705 (Ala. 1998). Likewise, when a trial court makes its judgment "based on the cold trial record," the appellate court must review the evidence de novo. Ex parte Hinton, [Ms. 1110129, November 9, 2012] ___ So. 3d ___, ___ (Ala. 2012).

"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)). "When conflicting evidence is presented ... a presumption of correctness is applied to the court's factual determinations." State v. Hamlet, 913 So. 2d

493, 497 (Ala. Crim. App. 2005). This is true "whether the dispute is based entirely upon oral testimony or upon a combination of oral testimony and documentary evidence." Parker Towing Co. v. Triangle Aggregates, Inc., [Ms. 1100510, December 13, 2013] ___ So. 3d ___, ___ (Ala. 2013) (citations omitted). "The credibility of witnesses is for the trier of fact, whose finding is conclusive on appeal. This Court cannot pass judgment on the truthfulness or falsity of testimony or on the credibility of witnesses." Hope v. State, 521 So. 2d 1383, 1387 (Ala. Crim. App. 1988). Indeed, it is well settled that, in order to be entitled to relief, a postconviction "petitioner must convince the trial judge of the truth of his allegation and the judge must 'believe' the testimony." Summers v. State, 366 So. 2d 336, 343 (Ala. Crim. App. 1978). See also Seibert v. State, 343 So. 2d 788, 790 (Ala. 1977).

I.

We first reconsider one of the claims from Bryant's first amended petition that this Court previously held was properly summarily dismissed -- the claim that the State violated Brady v. Maryland, 373 U.S. 83 (1963), by not turning over to the

defense for DNA testing two used condoms found at the scene of Hollis's murder. In Bryant IV, relying on Payne v. State, 791 So. 2d 383, 397 (Ala. Crim. App. 1999), this Court held, in part, that Bryant had failed to plead sufficient facts in his petition indicating that the two used condoms constituted newly discovered material facts under Rule 32.1(e), Ala. R. Crim. P., and that, therefore, summary dismissal of this claim was proper. After our opinion in Bryant IV was released, the Alabama Supreme Court issued its decision in Ex parte Beckworth, [Ms. 1091780, July 3, 2013] ___ So. 3d ___ (Ala. 2013), in which that Court held that a Brady claim may be raised under Rule 32.1(a), Ala. R. Crim. P., in which case the petitioner would not be required to meet the requirements for establishing newly discovered material facts under Rule 32.1(e).

A review of Bryant's first amended petition indicates that he raised his Brady claim under Rule 32.1(a), not under Rule 32.1(e); therefore, our analysis of Bryant's Brady claim under the premise that the claim asserted the existence of newly discovered material facts was in error based on the Alabama Supreme Court's recent holding in Ex parte Beckworth.

However, after again reviewing the claim, we find that our ultimate conclusion that the claim was precluded by Rules 32.2(a)(3) and (a)(5) was nonetheless correct.[1]

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

Freeman v. State, 722 So. 2d 806, 810 (Ala. Crim. App. 1998). However, "'the rule of Brady applies only in situations which

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[1]As the Alabama Supreme Court noted in Ex parte Beckworth:

> "The fact that the elements of a claim of 'newly discovered material facts' as contemplated by Rule 32.1(e) ... need not be pleaded in order to avoid summary dismissal for failure to state a claim based on Rule 32.1(a) ... does not mean that the preclusive bars of Rule 32.2(a)(3) and (a)(5) might not be applicable."

___ So. 3d at ___.

involve "discovery after trial of information which had been known to the prosecution but unknown to the defense."'" Bates v. State, 549 So. 2d 601, 609 (Ala. Crim. App. 1989) (quoting Gardner v. State, 530 So. 2d 250, 256 (Ala. Crim. App. 1987), quoting in turn United States v. Agurs, 427 U.S. 97, 103 (1976)) (some emphasis added).

Although Bryant did not have to allege in his petition sufficient facts indicating that the two used condoms constituted newly discovered material facts under Rule 32.1(e), he did have to allege in his petition sufficient facts indicating that the two used condoms were unknown to the defense and were discovered only after his trial, two necessary requirements to establish a Brady violation. Not only did Bryant fail to plead such facts, he admitted in his first amended petition that the existence of the two used condoms was, in fact, known by the defense at the time of trial.[2] As we stated in Bryant IV, Bryant

[2]Indeed, trial counsel's failure to have the condoms tested for DNA formed the basis of one of Bryant's ineffective-assistance-of-counsel claims for which we remanded this case for further proceedings. See Part III.A. of this opinion.

> "admitted in his [first] amended petition that his counsel at his first trial was, in fact, aware of the existence of the two used condoms -- he stated in his [first] amended petition that his counsel requested discovery of the condoms. Counsel could not very well request discovery of evidence of which counsel was unaware. ... Contrary to Bryant's apparent belief, 'not turn[ing] over' evidence is not the equivalent of suppressing evidence for purposes of Brady."

___ So. 3d at ___. Based on Bryant's admission in his first amended petition that his counsel were aware of the two used condoms at the time of trial, and that counsel even requested discovery of those condoms, it is clear that Bryant's Brady claim was precluded by Rules 32.2(a)(3) and (a)(5) because it could have been, but was not, raised and addressed at trial and on appeal. Therefore, we again conclude that summary dismissal of this claim in Bryant's first amended petition was proper.

II.

Bryant contends on return to remand that the circuit court denied him "an adequate opportunity to present evidence to support the remanded claims." (Bryant's brief on return to remand ("RTR brief"), p. 15.) He makes two arguments in this regard; we address each in turn.

A.

Bryant argues that the circuit court erred in striking his second amended petition filed after remand. Relying on Ex parte Apicella, 87 So. 3d 1150 (Ala. 2011), Bryant argues that when the Court of Criminal Appeals "reverses and remands the case for an evidentiary hearing, there is no jurisdictional bar to amending the Rule 32 petition." (Bryant's RTR brief, p. 30.) He further argues that preventing him from amending his petition to add new factual allegations to support his claims "is contrary to Rule 32's liberal amendment policy." (Bryant's RTR brief, p. 31.) Finally, he argues that, by refusing to allow him to amend his petition, the circuit court "took an overly narrow view" of his claims that "failed to comply with [this Court's] mandate according to its true intent and meaning." (Bryant's RTR brief, pp. 31-33.) We disagree.

Bryant's reliance on Ex parte Apicella is misplaced. After being convicted of capital murder and sentenced to death, Andrew Anthony Apicella filed a Rule 32, Ala. R. Crim. P., petition for postconviction relief, followed by an amended petition and a second amended petition. The circuit court

summarily dismissed the second amended petition. On appeal, this Court reversed the circuit court's summary dismissal of the second amended petition and remanded the case for the circuit court to conduct an evidentiary hearing on one of the claims in Apicella's second amended petition. See Apicella v. State, 945 So. 2d 485 (Ala. Crim. App. 2006) ("Apicella I"). On remand, Apicella attempted to file a third amended petition, but the circuit court struck that petition. The circuit court then denied Apicella's second amended petition, and Apicella appealed. On appeal, this Court affirmed, by unpublished memorandum, the circuit court's judgment, holding, in part, that the striking of Apicella's third amended petition on the ground that the third amended petition had been filed after the circuit court's judgment, i.e., after the circuit court had summarily dismissed Apicella's second amended petition, was appropriate. See Apicella v. State (No. CR-06-1059), 77 So. 3d 624 (Ala. Crim. App. 2010) (table) ("Apicella II"). The Alabama Supreme Court reversed this Court's judgment, holding:

> "In December 2004, the trial court did enter a judgment summarily dismissing Apicella's second amended Rule 32 petition. However, in Apicella [I], the Court of Criminal Appeals 'reverse[d] the trial

> court's summary dismissal of Apicella's petition ... and ... remand[ed] the cause for further proceedings.' 945 So. 2d at 491. 'Reversal of a judgment and remanding of the cause restores both the State and the defendant to the condition in which they stood before the judgment was pronounced.' Knight v. State, 356 So. 2d 765, 767 (Ala. Crim. App. 1978). See also City of Hampton v. Iowa Civil Rights Comm'n, 554 N.W.2d 532, 535 (Iowa 1996) ('Unless the remand limits the issues to be considered, the case should be reviewed in its entirety.')."

Ex parte Apicella, 87 So. 3d at 1154. Because this Court's reversal of the circuit court's judgment summarily dismissing the second amended petition had the effect of setting aside that judgment, there was no judgment in effect at the time Apicella filed his third amended petition. Therefore, the Supreme Court concluded, the circuit court erred in striking the third amended petition on the ground that it had been filed after entry of judgment.

In this case, however, unlike Ex parte Apicella, this Court did not reverse the circuit court's judgment summarily dismissing Bryant's first amended petition. Rather, this Court only remanded the case for further proceedings. By remanding the case, instead of reversing and remanding, this Court, contrary to Bryant's belief, left intact the circuit court's October 27, 2008, summary dismissal of his first

amended petition. Bryant's argument in his reply brief on return to remand that there is no "meaningful distinction" between remanding a case and reversing and remanding a case (Bryant's reply brief on return to remand ("RTR reply brief"), p. 11), is clearly meritless because it is that very distinction that formed the basis for the Alabama Supreme Court's opinion in Ex parte Apicella. See Ex parte Apicella, 87 So. 2d at 1154 (noting that although this Court had stated in Apicella II that this Court had erred in reversing the judgment in Apicella I instead of simply remanding with directions, the judgment in Apicella I was nonetheless "unambiguous, and its effect cannot be ignored"). Therefore, because this Court's remand in this case did not set aside the circuit court's October 27, 2008, summary dismissal of Bryant's first amended petition, Bryant's second amended petition was clearly untimely, having been filed after entry of judgment, and was properly stricken by the circuit court. See Rule 32.7(b), Ala. R. Crim. P. ("Amendments to pleadings may be permitted at any stage of the proceedings prior to the entry of judgment." (emphasis added)).

Moreover, the striking of Bryant's second amended petition was not contrary to "Rule 32's liberal amendment policy," as Bryant contends, because although amendments to Rule 32 petitions are to be freely granted, that general rule applies only to amendments timely filed before judgment is entered. Because Bryant's second amended petition was untimely filed after entry of judgment, the circuit court properly refused to consider it.

Finally, we have thoroughly reviewed the record on return to remand and it is clear to us that the circuit court did not, as Bryant contends, take "an overly narrow view" of his claims contrary to the "true intent and meaning" of this Court's opinion in Bryant IV. Rather, as the circuit court noted in its order on remand: Bryant "has attempted to amend his Rule 32 petition and otherwise boot strap a multitude of other claims of ineffective assistance of counsel onto those three narrow issues" that "[t]his Court was assigned to review" on remand. (Record on Return to Remand ("RTR"), C. 1338.) On remand in the circuit court, Bryant argued, incorrectly, that the claims for which we remanded this case were much broader than they actually were, and he attempted to

change the factual basis for those claims in his second amended petition, at the evidentiary hearing, and again in his post-hearing brief. However, as the circuit court correctly determined, this Court remanded this case for further proceedings on three very narrow and specific claims of ineffective assistance of counsel[3] and to reconsider its denial of Bryant's discovery request as it related to those specific claims.

As this Court noted in Bryant IV:

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

[3]Indeed, had the claims not been so narrow and specific, this Court would have found them to be insufficiently pleaded as we did with the majority of the claims in Bryant's first amended petition.

___ So. 3d at ___ (quoting Boyd v. State, 913 So. 2d 1113, 1125 (Ala. Crim. App. 2003)). In Bryant IV, we found that Bryant had pleaded sufficient facts that, if true, would entitle him to relief on the three claims of ineffective assistance of counsel set out previously. Thus, we remanded this case to give Bryant an opportunity to present evidence to prove the specific facts he had alleged in his first amended petition in support of those three claims of ineffective assistance of counsel. This Court's remand order did not permit Bryant to allege new and additional facts to support those three claims, or to raise new or different claims and, indeed, the circuit court had no authority to go beyond this Court's remand order and to consider additional factual allegations or new claims of ineffective assistance of counsel because "any act by a trial court beyond the scope of an appellate court's remand order is void for lack of jurisdiction." Anderson v. State, 796 So. 2d 1151, 1156 (Ala. Crim. App. 2000) (opinion on return to remand).

For these reasons, we conclude that the circuit court properly struck Bryant's second amended petition. Moreover, we point out that because Bryant's second amended petition was

properly struck by the circuit court, for purposes of this opinion, we do not consider any of the additional factual allegations or new claims raised in the second amended petition; we consider only those factual allegations supporting the three claims of ineffective assistance of counsel for which we remanded this case that were included in Bryant's first amended petition. Nor do we consider or address any of Bryant's arguments in his brief on return to remand that are based on the additional factual allegations or claims that Bryant untimely raised for the first time in his second amended petition, at the evidentiary hearing, or in his post-hearing brief. Because those additional factual allegations and claims were not properly before the circuit court for review on remand, they are likewise not properly before this Court on return to remand.

B.

Bryant also argues that the circuit court erred in denying his discovery requests on remand. He argues that the circuit court's denial of his requests prevented him from "fully presenting" his claims to the circuit court and "severely undermined" his ability to prove his claims of

ineffective assistance of counsel.[4] (Bryant's RTR brief, p. 25.)

As noted above, in remanding this case, this Court instructed the circuit court to reconsider its denial of Bryant's discovery motion as it related to the three specific claims of ineffective assistance for which this Court remanded the case for further proceedings. After we remanded this case, Bryant filed an amended discovery motion, requesting discovery of a laundry list of items. The State filed a response to the motion, in which it indicated that it did not object to Bryant's being provided with the Houston County District Attorney's file, with the exception of any work product; to Bryant's viewing any of the physical evidence that

[4]Bryant's argument in this regard is somewhat disingenuous given that he also argues on return to remand that he did, in fact, prove all of his claims of ineffective assistance of counsel so as to entitle him to postconviction relief. As the Pennsylvania Supreme Court noted in a similar situation: "Given Appellant's strenuous argument that he has proven his right to collateral relief, we find his current claim, that the order denying discovery significantly hampered his ability to conduct a reasonable investigation and to prepare for the [postconviction] hearing, to be somewhat disjointed. It cannot be that one has proven his/her claim; yet also be true that the inability to obtain discovery on that precise claim resulted in a denial of one's right to prove that claim." Commonwealth v. Abu-Jamal, 553 Pa. 485, 511 n.14, 720 A.2d 79, 91 n.14 (1998).

had been introduced at his trial as long as the evidence remained in the possession of the circuit clerk and was not tested or altered in any way; and to Bryant's being provided with a tape recording of his January 30, 1997, statement to police. The State argued, however, that Bryant had failed to establish good cause for discovery of the remaining items Bryant had requested. The circuit court conducted a hearing on the amended discovery motion on April 13, 2011, at which the parties presented argument. Following the hearing, the circuit court issued an order denying the majority of Bryant's requested discovery on the ground that Bryant had failed to show good cause. The court, however, ordered that the State provide a copy of all materials contained in the district attorney's files that had been provided to trial counsel before Bryant's trial.

After receiving the materials from the district attorney's file, Bryant filed a supplemental motion for discovery in which Bryant requested discovery of even more items than he did in his amended discovery motion. Bryant attached to his supplemental motion a 7-page spreadsheet

listing 53 categories of evidence[5] that he wanted as part of discovery. For each category, Bryant listed the volume and page number of the trial record where the evidence was introduced or referred to, the claim to which Bryant alleged the evidence was relevant, and a short explanation of why Bryant believed the evidence was necessary to prove his claims. In its response to the supplemental motion, the State argued that the spreadsheet effectively listed "every single document or piece of physical evidence that was ever mentioned or referenced during trial relating to the investigation of the crime." (RTR, C. 758.) On August 30, 2011, the circuit court issued an order denying the supplemental discovery motion. However, on December 19, 2011, the circuit court issued an order granting Bryant access "to the entire court file in this matter for the purposes of copying and photographing items therein" as well as access "to examine and copy all paper records, photographs, trial exhibits and videotapes." (RTR, C. 939.) The court specifically stated in

[5]Some categories included multiple items of evidence, such as "items collected from location of body," which included 17 different items of evidence. (RTR, C. 740.) Other categories included only one item of evidence.

the order that Bryant could "touch any items in the court file as is reasonably necessary" but that he could not "manipulate, test, or remove from the Houston County Clerk's Office any items in the court file without receiving prior written agreement from the State." (RTR, C. 939.)

Although on remand Bryant requested discovery of, essentially, every document and every piece of physical evidence related to Hollis's murder, in his brief on return to remand Bryant mentions only a few items that he believes he should have received in discovery. It is well settled that this Court "will not review issues not listed and argued in brief." Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995). "'[A]llegations ... not expressly argued on ... appeal ... are deemed by us to be abandoned.'" Burks v. State, 600 So. 2d 374, 380 (Ala. Crim. App. 1991) (quoting United States v. Burroughs, 650 F.2d 595, 598 (5th Cir. 1981)). By mentioning only a few items in his brief on return to remand, Bryant has abandoned any argument regarding the remaining evidence of which he requested discovery in the circuit court, and we address the propriety of the circuit court's denial of Bryant's requested discovery only as to those items of

evidence specifically argued by Bryant in his brief on return to remand.

In Ex parte Land, 775 So. 2d 847 (Ala. 2000), overruled on other grounds by State v. Martin, 69 So. 3d 94 (Ala. 2011), the Alabama Supreme Court stated:

> "We agree with the Court of Criminal Appeals that 'good cause' is the appropriate standard by which to judge postconviction discovery motions. In fact, other courts have adopted a similar 'good-cause' or 'good-reason' standard for the postconviction discovery process. See [State v.] Marshall, [147 N.J. 89, 690 A.2d 1 (1997)]; State v. Lewis, 656 So. 2d 1248 (Fla. 1994); People ex rel. Daley v. Fitzgerald, 123 Ill.2d 175, 121 Ill.Dec. 937, 526 N.E.2d 131 (1988). As noted by the Illinois Supreme Court, the good-cause standard guards against potential abuse of the postconviction discovery process. See Fitzgerald, supra, 123 Ill.2d at 183, 121 Ill.Dec. 937, 526 N.E.2d at 135. We also agree that New Jersey's Marshall case provides a good working framework for reviewing discovery motions and orders in capital cases. In addition, we are bound by our own rule that 'an evidentiary hearing must be held on a [petition for postconviction relief] which is meritorious on its face, i.e., one which contains matters and allegations (such as ineffective assistance of counsel) which, if true, entitle the petitioner to relief.' Ex parte Boatwright, 471 So. 2d 1257, 1258 (Ala. 1985).
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> "We emphasize that this holding -- that postconviction discovery motions are to be judged by a good-cause standard -- does not automatically allow discovery under Rule 32, Ala. R. Crim. P., and that it does not expand the discovery procedures within Rule 32.4. Accord Lewis, supra, 656 So. 2d

at 1250, wherein the Florida Supreme Court stated that the good-cause standard did not affect Florida's rules relating to postconviction procedure, which are similar to ours. By adopting this standard, we are only recognizing that a trial court, upon a petitioner's showing of good cause, may exercise its inherent authority to order discovery in a proceeding for postconviction relief. In addition, we caution that postconviction discovery does not provide a petitioner with a right to 'fish' through official files and that it 'is not a device for investigating possible claims, but a means of vindicating actual claims.' People v. Gonzalez, 51 Cal.3d 1179, 1260, 800 P.2d 1159, 1206, 275 Cal.Rptr. 729, 776 (1990), cert. denied, 502 U.S. 835, 112 S.Ct. 117, 116 L.Ed.2d 85 (1991). Instead, in order to obtain discovery, a petitioner must allege facts that, if proved, would entitle him to relief. Cf. Porter v. Wainwright, 805 F.2d 930, 933 (11th Cir. 1986) ('a hearing [on a habeas corpus petition] is not required unless the petitioner alleges facts which, if proved, would entitle him to federal habeas relief'), cert. denied, 482 U.S. 918, 919, 107 S.Ct. 3195, 96 L.Ed.2d 682 (1987). Furthermore, a petitioner seeking postconviction discovery also must meet the requirements of Rule 32.6(b), Ala. R. Crim. P., which states:

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

"That having been said, we must determine whether Land presented the trial court with good cause for ordering the requested discovery. To do that, we must examine Land's basis for the relief

> requested in his postconviction petition and determine whether his claims are facially meritorious. Only after making that examination and determination can we determine whether Land has shown good cause."

775 So. 2d at 852 (footnote omitted).

Bryant argues on return to remand that he established good cause for discovery of "videotape, photos, and drawings or diagrams that police made of the crime scene" (Bryant's RTR brief, p. 19); of "original photos of the crime scene, the evidence, and the victim" (Bryant's RTR brief, p. 21); of "high-quality photos of the crime scene" (Bryant's RTR brief, p. 18); of "the original negatives" of all photographs of the crime scene (Bryant's RTR brief, p. 26); and of all "clothing worn by the potential participants in the crime" (Bryant's RTR brief, p. 27). He argues that these items of evidence were necessary to prove his claim that his trial counsel at his first trial were ineffective for not retaining a blood-spatter expert and that he adequately established that these items were necessary through an affidavit he attached to his supplemental motion for discovery from his postconviction blood-spatter expert, Tom Bevel, in which Bevel averred that

these items were necessary for him to conduct a blood-spatter analysis.

Bryant further argues that he established good cause for discovery of "the mixed DNA sample found on Bryant's jeans" and of "the used condoms found at the crime scene." (Bryant's RTR brief, p. 18.) He argues that these items were necessary to prove his claim that his trial counsel at his first trial were ineffective for not retaining a DNA expert. Finally, Bryant argues that he established good cause for discovery of the entire "DFS [Department of Forensic Sciences] file for the case" (Bryant's RTR brief, p. 18), including "all of the testing notes in the case file, the chain of custody documents, any bench notes, any descriptions of the evidence, any descriptions of the stains, any DNA results present (including the DNA profiles that were obtained), and the standard operating procedures for the lab." (Bryant's RTR brief, p. 28.) Bryant argues that the file of the Alabama Department of Forensic Sciences ("DFS") was necessary for his postconviction DNA expert, Matthew Quartaro, "to review the DFS's work." (Bryant's RTR brief, pp. 20-21.) He also argues that he adequately established the necessity of this evidence

by attaching to his supplemental discovery motion a "Case Review Submission Form" from Orchid Cellmark, the forensic-testing company where Quartaro was employed, which listed the above items as necessary for a "case review." (RTR, C. 752-53.)

Assuming, without deciding, that the circuit court's denial of the above-listed items of discovery constituted error, we find that any error was harmless. The harmless-error rule has been applied in Rule 32 proceedings in various contexts. See, e.g., Jenkins v. State, 105 So. 3d 1234, 1242 (Ala. Crim. App. 2011), aff'd, 105 So. 3d 1250 (Ala. 2012); Ingram v. State, 51 So. 3d 1094, 1106 (Ala. Crim. App. 2006), rev'd on other grounds, 51 So. 3d 1119 (Ala. 2010); Beckworth v. State, [Ms. CR-07-0051, May 1, 2009] ___ So. 3d ___, ___ (Ala. Crim. App. 2009), rev'd on other grounds, [Ms. 1091780, July 3, 2013] ___ So. 3d ___ (Ala. 2013); Hyde v. State, 950 So. 2d 344, 371 (Ala. Crim. App. 2006); Wilson v. State, 911 So. 2d 40, 46 (Ala. Crim. App. 2005); and Young v. State, 600 So. 2d 1073, 1075-76 (Ala. Crim. App. 1992) (all applying harmless-error analysis in Rule 32 proceedings). Rule 45, Ala. R. App. P., provides, in part:

> "No judgment may be reversed or set aside, nor new trial granted in any civil or criminal case on the ground of misdirection of the jury, the giving or refusal of special charges or the improper admission or rejection of evidence, nor for error as to any matter of pleading or procedure, unless in the opinion of the court to which the appeal is taken or application is made, after an examination of the entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties."

"The purpose of the harmless error rule is to avoid setting aside a conviction or sentence for small errors or defects that have little, if any, likelihood of changing the result of the trial or sentencing." Davis v. State, 718 So. 2d 1148, 1164 (Ala. Crim. App. 1995), aff'd, 718 So. 2d 1166 (Ala. 1998).

As explained in Part III.A. of this opinion, we conclude that Bryant failed to prove that his trial counsel's not retaining a blood-spatter expert and a DNA expert constituted deficient performance under Strickland v. Washington, 466 U.S. 668 (1984). The results of any blood-spatter or DNA analyses, although relevant to Bryant's claims that his trial counsel at his first trial were ineffective for not retaining a blood-spatter expert and a DNA expert, were relevant only to whether Bryant was prejudiced by counsel's performance, i.e., the

prejudice prong of Strickland, not to whether counsel's performance was deficient, i.e., the performance prong of Strickland. Indeed, in requesting discovery of these items in his supplemental discovery motion, Bryant himself admitted as much, arguing that he was entitled to the items listed above because, "in order to show prejudice with respect to his blood-spatter claim, Mr. Bryant must show what testimony a blood-spatter expert would have offered if Mr. Bryant's counsel had retained such an expert at trial" (RTR, C. 731; emphasis added), and because, "[i]n order to show prejudice with respect to his DNA claim, Mr. Bryant must show what testimony a DNA expert would have offered if Mr. Bryant's counsel had retained such an expert at trial." (RTR, C. 733; emphasis added.) Additionally, in the spreadsheet he attached to his supplemental discovery motion, Bryant asserted as to each of the 53 categories of evidence of which he requested discovery that the evidence was relevant and necessary because he was required "[t]o show prejudice" or "[t]o establish that [he] was prejudiced" by his trial counsel's alleged errors. (RTR, C. 740-46.)

Because the requested items listed above would have been relevant and necessary only to establish prejudice, as opposed to deficient performance, and because, for the reasons stated in Part III.A. of this opinion, we agree with the circuit court that counsel's performance was not deficient, any error in denying discovery of the above-listed items was harmless. See, e.g., Evans v. State, 788 N.W.2d 38, 49-50 (Minn. 2010) (applying harmless-error rule to denial of postconviction discovery).

III.

Bryant also contends on return to remand that the circuit court erred in denying the claims of ineffective assistance of counsel for which this Court remanded this case for further proceedings.

Derek Yarbrough, Deborah Seagle, and Gene Spencer represented Bryant at his first trial. Michael Crespi and John Byrd, Jr., represented Bryant at his second penalty-phase trial. At the evidentiary hearing on remand, Bryant called Yarbrough, Seagle, Spencer, and Crespi to testify. Bryant did not call Byrd to testify. Additionally, Bryant called to testify at the hearing Thomas Bevel, a crime-scene-

investigation and bloodstain and blood-pattern expert; Angelo Della Manna, a forensic scientist with DFS who reviewed the DNA testing conducted with respect to this case; Matthew Quartaro, a forensic scientist with Orchid Cellmark in Dallas, Texas; Sheliah Gail Bryant (hereinafter "Sheliah"), Bryant's sister; and Ricky Vickers, a State's witness at Bryant's trials.

At the hearing, Yarbrough testified that he was first licensed to practice law in 1996 and that, in 1997, not long after he had passed the bar exam, he was appointed to represent Bryant. Yarbrough said that he had been practicing law for only a few months when he was appointed but that he had been doing "[m]ostly criminal" work in the few months he had been practicing. (RTR, R. 97.) Yarbrough also testified that, during law school, he had worked in his stepfather's law firm and had assisted in preparing cases during that time. Yarbrough testified that he had never tried a capital case or even a murder case at the time he was appointed to represent Bryant but that he had tried other cases. Subsequently, Seagle was also appointed to represent Bryant. Because Seagle had five years of experience, she was considered lead counsel,

but, as a practical matter, Yarbrough was "in control of the case" and tried most of the case. (RTR, R. 100.) At a later date, Yarbrough said, he requested that a third attorney be appointed to assist in the case because neither he nor Seagle "had ever been involved in a mitigation case," and Spencer was then appointed. (RTR, R. 100-01.) Spencer's primary role was to prepare for and try the penalty phase of the trial.

Spencer confirmed Yarbrough's testimony, stating that he was the last of three attorneys appointed to represent Bryant and that he had "handled the penalty phase" of the first trial. (RTR, R. 18.) According to Spencer, Yarbrough was lead counsel for the guilt phase of the trial, but Spencer provided advice to Yarbrough regarding the guilt phase.

Seagle testified that she had been practicing law since 1988 when she was appointed to represent Bryant. Before her appointment to Bryant's case, she had never represented a defendant in a capital case, but she had tried a murder case, as well as a rape case that involved DNA evidence. Seagle testified that she and Yarbrough "worked together" on the guilt phase of the trial while Spencer was responsible for the penalty phase of the trial. (RTR, R. 56.) Although they

worked together in preparation for the trial, Seagle testified, at trial she "focused more on the DNA evidence, and [Yarbrough] handled a lot of the other witnesses." (RTR, R. 56.)

Crespi testified at the hearing that in 1998 he was practicing law in Dothan and had been licensed to practice for 25 years at that time. He was appointed to represent Bryant on appeal from Bryant's capital-murder conviction and sentence of death. The appeal was successful "in part" in that he obtained a reversal of the death sentence and a new penalty-phase trial. (RTR, R. 22.) Crespi said that he represented Bryant in the second penalty-phase trial in 2004, along with John Byrd, Jr. According to Crespi, at that time, he had tried "four or five" capital trials and "100 percent" of his law practice was devoted to criminal work. (RTR, R. 43.) Crespi testified that he was lead counsel for the second penalty-phase trial and made the decisions regarding strategy.

To satisfy his burden of proof under Strickland v. Washington, 466 U.S. 668 (1984), Bryant had the burden of proving (1) that his counsel's performance was deficient and (2) that the deficient performance actually prejudiced his

defense. To prove deficient performance, Bryant had the burden to prove that his counsel's performance "fell below an objective standard of reasonableness ... considering all the circumstances" at the time. Ex parte Lawley, 512 So. 2d 1370, 1372 (Ala. 1987). In order to eliminate the distorting effects of hindsight, there is "a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance," Strickland, 466 U.S. at 689, and Bryant had the burden to prove "that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Chandler v. United States, 218 F.3d 1305, 1314 n.15 (11th Cir. 2000) (quoting Kimmelman v. Morrison, 477 U.S. 365, 384 (1986)). In other words, Bryant had the burden to prove that no reasonable attorney would have chosen the course of action that his attorneys chose. See, e.g., Harvey v. Warden Union Corr. Inst., 629 F.3d 1228, 1239 (11th Cir. 2011) ("To put it another way, trial counsel's error must be so egregious that no reasonably competent attorney would have acted similarly."). Moreover, "[c]ourts are 'required not simply to give the attorneys the benefit of the doubt, but to

affirmatively entertain the range of possible reasons ... counsel may have had for proceeding as they did.'" Stallworth v. State, [Ms. CR-09-1433, May 2, 2014] ___ So. 3d ___, ___ (Ala. Crim. App. 2013) (opinion on return to remand) (quoting Cullen v. Pinholster, ___ U.S. ___, ___, 131 S. Ct. 1388, 1407 (2011)).

To prove prejudice, Bryant had the burden to prove "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome," id., and "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. With respect to errors that allegedly occurred at the penalty phase of the trial, Bryant had the burden to prove that "there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Id. at 695. "'It is firmly

established that a court must consider the strength of the evidence in deciding whether the Strickland prejudice prong has been satisfied.'" James v. State, 61 So. 3d 357, 364 (Ala. Crim. App. 2010) (quoting Buehl v. Vaughn, 166 F.3d 163, 172 (3d Cir. 1999)).

Moreover, in reviewing claims of ineffective assistance of counsel, this Court need not consider both prongs of the Strickland test. See Thomas v. State, 511 So. 2d 248, 255 (Ala. Crim. App. 1987) ("In determining whether a defendant has established his burden of showing that his counsel was ineffective, we are not required to address both considerations of the Strickland v. Washington test if the defendant makes an insufficient showing on one of the prongs."). Because both prongs of the Strickland test must be satisfied to establish ineffective assistance of counsel, the failure to establish one of the prongs is a valid basis, in and of itself, to deny the claim. As the United States Supreme Court has explained:

> "Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant

> makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."

Strickland, 466 U.S. at 697.

With these principles in mind, we address in turn each of the ineffective-assistance-of-counsel claims Bryant raised in his first amended petition.

A.

Bryant alleged in his first amended petition that his trial counsel at his first trial were ineffective for not properly investigating and retaining a blood-spatter expert and a DNA expert. In its order on remand, the circuit court found that trial counsel had made reasonable strategic decisions not to hire a blood-spatter or DNA expert and that Bryant had not been prejudiced. The court stated:

> "At his trial, [Bryant] was represented by Derek Yarbrough and Deborah Seagle (hereinafter collectively referred to as 'Trial Counsel' and individually referred to as 'Mr. Yarbrough' and 'Ms. Seagle'). Mr. Yarbrough acted as lead counsel. As his first ground of ineffective assistance of counsel, [Bryant] alleges that trial counsel at his

first trial was ineffective for not properly investigating and retaining a blood-spatter expert and a DNA expert. [Bryant] argues that had trial counsel investigated and retained such experts, trial counsel would have been able to explore a different defense strategy to explain the mixed sample of blood found on [Bryant's] jeans, specifically that [Bryant] and the deceased, Mr. Hollis, engaged in consensual sex as the explanation for the blood on his jeans.

"....

"After considering the evidence presented at the Rule 32 hearing along with the briefs filed by [Bryant] and the State of Alabama, the Court makes the following findings: Trial Counsel and [Bryant] developed a trial strategy for the guilt phase based in large part on [Bryant's] statement to law enforcement that he was not present when Mr. Hollis was shot but that he assisted in moving Mr. Hollis' body for drugs. Further, the Court finds that Trial Counsel, in consult with [Bryant], based this strategy on [Bryant's] inconsistent versions of the events that happened, along with investigations conducted, including, but not limited to, interviewing people in the community that knew [Bryant]. Trial Counsel considered testing the condoms but believed that the risk of doing so was too great because, if the results indicated that [Bryant] had used those condoms, the defense strategy they had developed would be sunk. Trial Counsel knew that if the condoms were tested and [Bryant's] DNA were identified, they could not argue that he was not present at the time Mr. Hollis was killed but only helped move the body after Mr. Hollis was killed. Also, Trial Counsel did not believe that a negative result on the condoms would have added to the defense strategy because the condoms were out in the parking lot with other trash which would have been a basis for rebuttal by the State. Trial Counsel's investigation led them to

information that [Bryant] was possibly bisexual which increased their concern for testing the condoms and the potential damage to their defense strategy if the condoms were linked to [Bryant]. Notwithstanding concerns over DNA testing of the condoms, Trial Counsel did seek extraordinary funds for DNA testing and did in fact contact Cellmark Diagnostic testing regarding testing the condoms. However, ultimately Trial Counsel made the strategic decision to forgo DNA testing of the condoms due to the risk a positive DNA result would have had on the most plausible defense strategy they had to work with ... that [Bryant] helped move Mr. Hollis' body after he was killed in exchange for drugs.

"In addition to considering testing the condoms, Trial Counsel considered the blood stain found on [Bryant's] pants. Trial Counsel felt that the blood stain on [Bryant's] pants was consistent with [Bryant's] statement to law enforcement that he was not present when Mr. Hollis was killed but that he simply helped move his body. Additionally, Mr. Yarbrough indicated that the State did not contend that the blood stain on [Bryant's] pants resulted from a gunshot wound. Lastly, at the time of the trial, DNA [sic] testing was relatively new and none of the criminal defense attorneys in Houston County, including those more senior attorneys with whom Mr. Yarbrough practiced, had retained a blood splatter expert before. Mr. Yarbrough consulted with his step-father, a licensed, practicing attorney, in Houston County about the case and had previously held a third year practice card and had worked on cases with his step-father and represented clients under his third year practice card. Therefore, he had experience in analyzing cases and developing trial strategies. Further, [Bryant] was also represented by Ms. Seagle who was an experienced criminal defense attorney. Although Mr. Yarbrough acknowledged that the defense could have tried to show that [Bryant] lied to law enforcement, he felt that such strategy would not have been effective in

this case and could have been detrimental. Further, although Mr. Yarbrough acknowledged that if DNA testing of the condoms proved that the DNA contained therein belonged to someone other than [Bryant] such results could have been beneficial to [Bryant's] defense. Trial Counsel ultimately chose to defend the charge based on [Bryant's] statement to law enforcement that he helped move Mr. Hollis' body in exchange for drugs as a result of a thorough investigation and analysis of the facts.

"Based on the foregoing analysis of trial counsel's actions, the Court finds that Trial Counsel made strategic decisions regarding DNA testing of the condoms and the blood stain on [Bryant's] pants based on their reasonable investigation, [Bryant's] actions and statement to law enforcement, consultations with [Bryant] and a reasonable analysis of the potential effects of DNA testing upon the defense strategy formulated. It is easy to argue that the outcome would have been different if DNA testing had been conducted and a blood splatter expert had been engaged; however, there is no way to reasonably show that the jury's verdict at the guilt phase would have been different or the death sentence would have been avoided had trial counsel pursued the alterative theory based on consensual sex. '[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. Hindsight does not elevate unsuccessful trial tactics into ineffective assistance of counsel.' Davis v. State, 44 So. 3d [1118, 11]32 [(Ala. Crim. App. 2009)]. Accordingly, the Court finds that Trial Counsel were not ineffective for not properly investigating and retaining a blood-spatter expert and a DNA expert."

(RTR, C. 1332-34.)[6] For the reasons explained below, we agree with the circuit court's finding that trial counsel's performance was not deficient for not investigating and retaining a blood-spatter expert and a DNA expert.[7]

Initially, we point out that, at the evidentiary hearing, Yarbrough testified that the defense theory at trial was based on Bryant's statement to police. Specifically, Yarbrough testified:

> "The overall -- it's kind of a difficult question, because we were kind of having problems in the beginning from [Bryant] about getting actually what had happened, what had occurred. And we would get kind of different stories about what exactly had happened. Ultimately, we decided to go with the theory that he had actually told the police, because we thought we could sell that theory.
>
> "....

[6]In his brief on return to remand, Bryant appears to argue that the circuit court's findings were not sufficiently specific because they did not include a detailed recitation of every aspect of counsel's investigation. However, the court's findings are sufficient to comply with Rule 32.9(d), Ala. R. Crim. P.

[7]Because we agree with the circuit court's finding as to the performance prong of Strickland, we need not address the prejudice prong of Strickland. Likewise, we need not address Bryant's argument in his brief on return to remand that the circuit court applied the wrong standard when evaluating the prejudice prong of Strickland.

> "[A]s part of the investigation, we had sent [the investigator] out to talk with people in the community, talk about [Bryant] and things of that nature. And based on what we were told about [Bryant] and maybe -- let me back up. We were kind of told that [Bryant] might have been bisexual by some witnesses. Whether or not that was true or not, I have no idea. We were told -- [the investigator] had come to me and said that one witness had said that he would dress up as a woman at times, things of that nature. So as part of that, you know, I was concerned about the actual -- maybe whether or not there was sex involved in this particular case. We had a lot of discussions about that, you know, how were we going to proceed with that. And ultimately, we decided that going on his statement was really the only way that we could proceed, because I don't think we could prove anything else."

(RTR, R. 175-76.)

In his statement to police, Bryant admitted to riding around with Hollis and Hollis's cousin, Bert Brantley, on the night of the murder. He also admitted that, at some point during the evening, he asked Brantley to leave and that he and Hollis then continued riding around until they met up with a man named Terry Johnson. Bryant said that, after he obtained crack cocaine from Johnson, Hollis got in a vehicle with Johnson and allowed Bryant to keep possession of Hollis's vehicle. A short time later, Bryant said, he saw Johnson at Mickey's Lounge in Dothan, at which point Johnson asked him to

move Hollis's body. Bryant admitted that he agreed to move Hollis's body in exchange for drugs and that he obtained the assistance of his cousin, Ricky Vickers, to move the body. Bryant stated that he and Vickers took Hollis's body to Florida and dumped it in the woods, drove around the panhandle of Florida for a while, and then returned to Dothan and abandoned Hollis's vehicle. At the end of his statement, when asked why it took three shots to kill Hollis, Bryant responded, "Man I don't know, I think I need help ... Sometimes I am just not Jerry," and then put his head down on the table and refused to speak further. (Record on Direct Appeal ("RDA"), R. 788.)

To support the defense theory and Bryant's statement to police, trial counsel presented testimony at trial that Raymond Mathis -- who testified against Bryant and who was admittedly with Bryant and Vickers when they dumped Hollis's body in Florida -- was also known as Terry Johnson -- the man who Bryant had implicated in Hollis's murder. Bryant's counsel also presented testimony that Mathis was bisexual and that he had been seen in Dothan at Mickey's Lounge speaking with Bryant the night of the murder. Further, counsel

elicited on cross-examination of Mathis that Mathis had thrown away the clothing and shoes he had been wearing the night of the murder and then argued to the jury that the only rational basis for Mathis to get rid of all of his clothing from the night of the murder was because his clothing and shoes had been covered in blood, unlike Bryant's clothing.

Blood-Spatter Expert

In his first amended petition, Bryant asserted that "[t]rial testimony revealed that blood spatter was found on a building, on trees, and on the ground in the area where the murder occurred," and that "the medical examiner [had] testified that Donald Hollis was shot three times at close range," but that "only a minuscule amount of blood (a drop the size of an eraser on a pencil) was found on Bryant's clothing." (C. 465.) Bryant alleged that counsel should have retained a blood-spatter expert "to independently analyze the crime scene and Bryant's clothing to determine whether the blood spatter found on Bryant was consistent with the types of wounds Donald Hollis sustained" because, according to Bryant, had counsel done so, a blood-spatter expert "would have conducted tests to recreate the crime" and "may have testified

that a person who shoots another at close proximity should have a significant amount of blood on his person" or that "where the gun shot wounds create blood spatter in the pattern as on and proximity to the building at the location where Hollis was shot, the shooter would have a significant amount of blood on his clothing or, at a minimum, more than a minuscule drop of blood that cannot even be attributed solely to the victim." (C. 465-66.) Bryant asserted that, at the time of his trial, "numerous blood spatter experts were available to testify, including Captain Tom Bevel, owner of TBI LLC located in Oklahoma, and Gary Rini, forensic science consultant located in Cleveland, Ohio." (C. 466.)

Yarbrough testified at the evidentiary hearing that he had access to the evidence and to the photos of the murder scene before trial and that he knew that only a small amount of blood had been found on Bryant's jeans even though Hollis had been shot three times at point-blank range. Yarbrough said that he did not remember whether, when he was preparing for trial, he had thought about the fact that point-blank shots would probably have generated a lot of blood. Yarbrough said that he did not hire a blood-spatter expert and that he

did not remember whether or not he spoke to someone at Cellmark Laboratories about blood spatter. Yarbrough further testified that he could not remember whether he made a strategic decision not to hire a blood-spatter expert. Yarbrough said, however, that the State never argued to the jury that the blood on Bryant's jeans came from the gunshots but, rather, argued simply that the blood contained a mixture of Bryant's DNA and Hollis's DNA.

Yarbrough conceded that with "hindsight being 20/20, would I have done something different, yes, possibly." (RTR, R. 141.) However, when asked whether a blood-spatter expert and whether the blood found on Bryant's jeans were big components of the defense, Yarbrough answered in the negative because, according to Yarbrough, "it would be reasonable that there would be blood on Jerry Bryant based on our defense." (RTR, R. 184.) Specifically, according to Yarbrough, the blood found on Bryant's jeans was consistent with and supported the defense theory. Yarbrough also said that it was not common in 1998 in Houston County to retain blood-spatter experts, and that there were several more experienced attorneys in his law firm that he could discuss cases with,

but that none of them had mentioned to him the idea of getting a blood-spatter expert. Seagle also testified that she was not familiar with blood-spatter experts at the time of Bryant's trial and that she had never in her practice at that time seen a blood-spatter expert called to testify on a defendant's behalf.

At the hearing, Bryant presented the testimony of Thomas Bevel, the president of Bevel, Gardner and Associates, a forensic education and consulting group. Based on his credentials, Bevel was deemed an expert by the circuit court in crime-scene investigation and bloodstain and blood-pattern analysis. Bevel said that he was providing consulting services in 1997 and 1998 and that, at that time, lawyers would learn of his services primarily by "word of mouth" but that he also had a "rudimentary website." (RTR, R. 212.) Bevel stated that he would have been available to consult in 1998. Bevel said that, in this case, he reviewed the district attorney's file on Hollis's murder, which included investigative reports, the autopsy protocol, and "a number of printed-out photographs that were black and white originally" but that he also later examined "in color." (RTR, R. 217.)

From the documents he reviewed, Bevel determined that Hollis had been shot three times in the head with a .25 caliber pistol at close range. Such close-range gunshots, Bevel said, "can" create blood spatter. (RTR, R. 217.) However, Bevel said that he was unable to determine what type of blood spatter was created in this particular case based on the information he had.[8]

Bryant failed to prove that his trial counsel's not retaining a blood-spatter expert constituted deficient performance. Yarbrough testified that he could not remember whether the decision not to hire a blood-spatter expert was strategic. Thus, the record is silent on this critical issue. "'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)). Indeed:

[8]Most of the testimony Rule 32 counsel elicited from Bevel at the evidentiary hearing was geared toward establishing that Bevel was unable to perform a crime-scene or blood-spatter analysis because of the circuit court's denial of Bryant's postconviction discovery requests.

> "'Time inevitably fogs the memory of busy attorneys. That inevitability does not reverse the Strickland [v. Washington, 466 U.S. 668 (1984),] presumption of effective performance. Without evidence establishing that counsel's strategy arose from the vagaries of "ignorance, inattention or ineptitude," Cox [v. Donnelly, 387 F.3d 193 (2nd Cir. 2004)], Strickland's strong presumption must stand.'"

Johnson v. State, [Ms. CR-05-1805, June 14, 2013] ___ So. 3d ___, ___ (Ala. Crim. App. 2007) (opinion on return to remand) (quoting Greiner v. Wells, 417 F.3d 305, 326 (2d Cir. 2005)).

Moreover, after thoroughly reviewing the record from Bryant's direct appeal and bearing in mind the strong presumption that counsel's conduct was reasonable, we conclude, as the circuit court did, that trial counsel was not deficient for not retaining a blood-spatter expert. There are a range of logical reasons that may have informed Yarbrough's decision not to hire a blood-spatter expert. The drop of blood on Bryant's jeans was consistent with the defense theory that Bryant had moved Hollis's body but had not participated in the murder, which was supported not only by Bryant's statement to police but also by other evidence presented at trial. Additionally, common sense indicates that when a person is shot three times at point-blank range, there will in

all likelihood be a large amount of blood spatter on the shooter. Yarbrough could have reasonably concluded, even without having actually consulted with a blood-spatter expert, that he could create the necessary reasonable doubt as to Bryant's involvement in the murder simply by having the jury hear Bryant's statement to the police, and the other evidence supporting Bryant's statement to police, and having the jurors use their own common sense. Although a blood-spatter expert may have strengthened the defense theory at trial, "'[c]ounsel's failure to call an expert witness is not per se ineffective assistance, even where doing so may have made the defendant's case stronger, because the State could always call its own witness to offer a contrasting opinion.'" Benjamin v. State, [Ms. CR-10-1832, December 20, 2013] ___ So. 3d ___, ___ (Ala. Crim. App. 2013) (quoting People v. Hamilton, 361 Ill. App. 3d 836, 847, 838 N.E.2d 160, 170, 297 Ill. Dec. 673, 683 (2005)). Simply put, we cannot say that no reasonable attorney would have chosen not to hire a blood-spatter expert under the circumstances in this case.

Therefore, the circuit court properly denied Bryant relief on this claim of ineffective assistance of counsel.

DNA Expert to Test DNA Sample on Bryant's Jeans

Bryant alleged in his first amended petition that although the State presented expert testimony that a "tiny blood spot found on Bryant's pants was a mixture of Bryant's and the victim's blood[, that] expert[] ... testified that he could not be absolutely sure," and Bryant argued that counsel should have retained a DNA expert "to contradict or provide the jury an alternative explanation regarding the blood and to whom it belonged." (C. 467.) Bryant further argued that a DNA expert "would have evaluated the viability of obtaining a positive DNA match on such a small amount of blood," which, "[h]ad the DNA expert indicated that it was impossible to obtain a reliable DNA result on this sample, ... would have removed the one piece of physical evidence tying Bryant to Hollis' homicide."[9] (C. 467.)

At the evidentiary hearing, Seagle testified that the defense team received a list of all the physical evidence that the police had collected in reference to Bryant's case and

[9]We note that this assertion is not entirely accurate. There was one other piece of physical evidence linking Bryant to Hollis: the key to Hollis's vehicle, which was found in Bryant's possession at the time of his arrest.

that they requested and received records from the Dothan Police Department. Seagle testified that there was a "mixed blood sample" on Bryant's blue jeans that testing indicated "was consistent with being the victim's and Mr. Bryant's" DNA but that the State's expert could not conclusively say that it was, in fact, the victim's and Bryant's DNA. (RTR, R. 65.) Seagle said that, other than the DNA on Bryant's blue jeans, there was no other physical evidence tying Bryant to the murder scene but that there was other evidence linking Bryant to the murder.

Because there was no physical evidence tying Bryant to the murder scene other than the DNA evidence on his jeans, Seagle said, the defense did challenge the admissibility of that DNA evidence, and a pretrial hearing on the admissibility of the DNA evidence was conducted. Additionally, at trial, Seagle cross-examined the State's DNA expert, Angelo Della Manna, in an attempt to "poke holes" in the State's case. (RTR, R. 80.) In cross-examining Della Manna, Seagle tried to show that because they were Bryant's blue jeans there could be no way of knowing when his DNA got on them and that merely

because the DNA was consistent with someone does not mean that it conclusively was that person.

Seagle further testified that Yarbrough prepared "the bulk" of the pretrial motions and that she did not recall whether they received funds for a DNA expert. (RTR, R. 70.) Seagle said that they did not hire a DNA expert to independently analyze DFS's test results of the blood on Bryant's jeans or to review DFS's testing procedures but that she could not recall why they did not. Seagle testified that she did recall discussing the possibility of a DNA expert with Yarbrough but that she just could not remember why they chose not to pursue it.

Yarbrough testified that the State's DNA expert testified at trial that both Bryant's DNA and Hollis's DNA were found on a mixture on Bryant's jeans. Yarbrough said that he filed a motion asking for funds for a DNA expert, specifically for Cellmark Laboratories, but that, "on the DNA issue, that was something that Deborah Seagle -- that I felt that Deborah Seagle was to handle." (RTR, R. 109.) Yarbrough said, however, that he was "sure" there were discussions between himself and Seagle about the DNA evidence but that he did "not

remember" what those discussions involved. (RTR, R. 109.) Yarbrough also could not independently recall any of the meetings or telephone calls involving DNA. Yarbrough did recall going to Birmingham to look at the physical evidence, but he did not recall contacting Cellmark Diagnostics, Inc., a forensic laboratory located in Germantown, Maryland, although his file reflected that he did. Yarbrough testified that he was familiar with DNA and that he knew that DNA testing was available because, as a law student, he had worked at his stepfather's law firm and "had been involved in cases with my stepfather as a law student that involved DNA." (RTR, R. 114.) In some of those cases, his stepfather had retained and called to testify DNA experts. Yarbrough testified that he did "not remember a strategic reason as to why [they] did or did not call a DNA expert." (RTR, R. 116.) Yarbrough said, however, that "if, for whatever reason, I would have thought there should have been a DNA expert, I'm sure that I would have done what I thought to be -- to get one." (RTR, R. 117.) Yarbrough admitted that during opening statements at trial he conceded that the State's DNA testimony regarding the blood on Bryant's jeans was correct "due to [Bryant] moving

the body." (RTR, R. 126.) When questioned whether his decision to concede the DNA was strategy based on discussions with DNA experts or co-counsel, Yarbrough said:

> "I don't know that I can answer that, because, undoubtedly, I talked to somebody about this [possible DNA testing]. There's notes that I talked with somebody. So I mean, I could have talked to them about it and made the decision, or I couldn't. I don't know -- I don't know the answer to it."

(RTR, R. 130.)

Matthew Quartaro testified at the hearing that he had been the supervisor of forensics at Orchid Cellmark in Dallas, Texas, since 2005 and that he had been a DNA analyst for Orchid Cellmark since 2002. Quartaro explained in detail the items of evidence Orchid Cellmark would have needed in 1997 or 1998 to have completed a DNA case review but stated that he was not provided any of the evidence he needed.

Bryant failed to prove that his trial counsel's not retaining a DNA expert to test the blood found on Bryant's jeans constituted deficient performance. Neither Yarbrough nor Seagle could recall whether the decision not to hire a DNA expert to test the blood on Bryant's jeans was strategic. Thus, the record is once again silent on this critical issue. As already noted, "'[i]f 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)).

Moreover, after thoroughly reviewing the record from Bryant's direct appeal and bearing in mind the strong presumption that counsel's conduct was reasonable, we conclude, as the circuit court did, that trial counsel was not deficient for not retaining a DNA expert to test the blood on Bryant's jeans. Yarbrough testified at the evidentiary hearing that, based on Bryant's inconsistent stories to counsel regarding what had happened and based on information his investigator had found, he chose to pursue a theory of defense consistent with Bryant's statement to police, i.e., that Bryant had moved Hollis's body but had not been involved in Hollis's murder.

> "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information.

> For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. See United States v. Decoster, [199 U.S. App. D.C. 359,] 372-373, 624 F.2d [196,] 209-210 [(D.C. Cir. 1976)]."

Strickland, 466 U.S. at 691. Based on the record, we cannot say that counsel's choice to pursue a theory consistent with Bryant's statement to police was unreasonable, especially in light of the fact that counsel was able to present evidence to support that statement. Under the theory presented, a DNA expert to test the mixture found on Bryant's jeans was unnecessary because the fact that Hollis's DNA was found on Bryant's jeans was consistent with the defense theory that Bryant had moved Hollis's body after the murder, and counsel in fact used the DNA evidence to support their theory of defense.

Additionally, we point out that "'"the failure to call an expert and instead rely on cross-examination does not constitute ineffective assistance of counsel."'" Davis v. State, 44 So. 3d 1118, 1136 (Ala. Crim. App. 2009) (quoting State v. Hartman, 93 Ohio St. 3d 274, 299, 754 N.E.2d 1150, 1177 (2001), quoting in turn State v. Nicholas, 66 Ohio St. 3d 431, 436, 613 N.E.2d 225, 230 (1993)).

> "'"[H]ow to deal with the presentation of an expert witness by the opposing side, including whether to present counter expert testimony, to rely upon cross-examination, to forego [sic] cross-examination and/or to forego [sic] development of certain expert opinion, is a matter of trial strategy which, if reasonable, cannot be the basis for a successful ineffective assistance of counsel claim."'"

Stallworth v. State, [Ms. CR-09-1433, November 8, 2013] ___ So. 3d ___, ___ (Ala. Crim. App. 2013) (quoting Brown v. State, 292 Ga. 454, 456, 738 S.E.2d 591, 594 (2013), quoting in turn Phillips v. State, 285 Ga. 213, 222-23, 675 N.E.2d 1 (2009)). "'A defendant's lawyer does not have a duty in every case to consult experts even if the government is proposing to put on expert witnesses.... There may be no reason to

question the validity of the government's proposed evidence or the evidence may be so weak that it can be demolished on cross-examination.'" Stallworth, ___ So. 3d at ___ (quoting Miller v. Anderson, 255 F.3d 455, 459 (7th Cir. 2001) (citations omitted)). Indeed, "it can often be more effective to elicit beneficial testimony from the State's expert than to present the same evidence through an expert retained and paid by the defense." Dowthitt v. Johnson, 180 F. Supp. 2d 832, 857 (S.D. Tex. 2000).

Here, the trial record indicates that Seagle thoroughly cross-examined Angelo Della Manna, the State's DNA expert at trial, regarding the DNA found on Bryant's jeans and elicited testimony beneficial to the defense. At trial, Della Manna testified that the sample on Bryant's jeans was "consistent" with a mixture of Bryant's DNA and Hollis's DNA. Through cross-examination, Seagle elicited testimony that Della Manna could not conclusively state that the mixture on Bryant's jeans did, in fact, contain the DNA of both Hollis and Bryant and that Della Manna could not even provide a statistical probability of the mixture's containing both Hollis's and Bryant's DNA. Additionally, Seagle elicited testimony from

Della Manna on cross-examination that a blood stain on a pair of sweatpants found in the apartment where Bryant was arrested contained DNA that did not match either Bryant's DNA or Hollis's DNA, but which was so similar to Bryant's DNA that it was possibly the DNA of one of Bryant's relatives. We cannot say it was unreasonable for counsel to choose to rely on cross-examination instead of retaining their own expert.

Therefore, the circuit court properly denied Bryant relief on this claim of ineffective assistance of counsel.

DNA Expert to Test Condoms Found at the Murder Scene

Bryant also alleged in his first amended petition that his trial counsel should have had tested for DNA two used condoms found at the scene where Hollis was killed. Specifically, Bryant alleged that although counsel "believed that the crime was sexually motivated, [they did not] conduct[] an adequate investigation into any possible connections regarding the sexual undertone of this crime" because they "failed to get the condoms tested, or file appropriate motions regarding this evidence." (C. 467.) Bryant asserted that counsels' failure "to present an expert on DNA evidence is below the objective standard of

reasonableness and seriously prejudiced Bryant because the expert may have presented exculpatory evidence." (C. 467.) According to Bryant, Yarbrough's case file indicated that he had contacted Cellmark Diagnostics, Inc., and that Cellmark Diagnostics "was available and willing to do DNA testing on the evidence in this case" and that, "[b]ut for counsel's failure to call a DNA expert, there is a reasonable likelihood that Bryant would have been acquitted or would have avoided a death sentence." (C. 467-68.)

At the evidentiary hearing, Seagle said that the State did not have the condoms tested for DNA and that the defense likewise did not have the condoms tested for DNA. Seagle said that she was familiar with the murder scene, that it was not uncommon for the area to have a lot of trash in and around it, and that it was "[c]ertainly" a possibility that the condoms found in the area were completely "unrelated" to the crime. (RTR, R. 90.) Seagle also said that it "could have been a problem" if they had had the condoms tested for DNA and the result showed Bryant's DNA. (RTR, R. 91.) Seagle testified that, during closing arguments, they used the State's failure to test the condoms in arguing reasonable doubt, which they

could not have done had the condoms been tested and found to have Bryant's DNA on them. Seagle said she could not recall whether she and Yarbrough discussed filing an ex parte motion to have the condoms tested.

Yarbrough testified that he was aware of the condoms found at the murder scene, was aware that semen and blood were found on Hollis's boxer shorts, was aware that semen was found on Hollis's penis, and was aware that two pairs of underwear were found on Hollis. Yarbrough said that he may have viewed the condoms with the other evidence but that he did not move to preserve the condoms. When asked if he made any "ex parte attempts to determine whether the condoms were exculpatory," Yarbrough stated that "[w]e were afraid of what the condoms might show. So, no, I did not." (RTR, R. 134.) Specifically, Yarbrough testified that the defense team "felt that the risk ... was just too great" to test the condoms in the event the DNA on the condoms was Bryant's because, Yarbrough said,

> "our defense was that he wasn't there. He wasn't at that location; he was never at that location except for -- I don't remember if it was moving the body or not. But we just felt that if any of the DNA came back him at that parking lot [the murder scene], that -- then we would have no defense."

(RTR, R. 177.) Yarbrough further explained:

> "The testing on the condoms was it was either going to come back [Bryant] or not, and if it came back [Bryant], then it would have killed our defense. If it didn't come back, then I don't know -- you know, it could -- you know, I don't know what the jury would have thought of that at that point in time."

(RTR, R. 195.) When asked specifically what would have happened if the DNA on the condoms had matched Hollis's DNA, Yarbrough said that he did not consider that option, although he admitted it "might have been" relevant to the kidnapping aspect of the case. (RTR, R. 196.) Yarbrough also conceded that if the DNA on the condoms had matched Raymond Mathis's DNA, it would have been "very helpful" (RTR, R. 196), and that if it had matched Bert Brantley's DNA, it "[m]ight" have been helpful. (RTR, R. 197.)

We agree with the circuit court that counsel's decision not to hire a DNA expert to test the two used condoms found at the murder scene was an objectively reasonable strategic decision. Yarbrough and Seagle both testified that having the condoms tested could have potentially been detrimental to the defense and that they deliberately chose not to test the condoms and, instead, chose to use the State's failure to test

the condoms against the State. "[C]ounsel may reasonably avoid presenting evidence or defenses for a number of sound reasons that lead him to conclude that the evidence or defense may do more harm than good." Moore v. State, 659 So. 2d 205, 209 (Ala. Crim. App. 1994). Bryant failed to present any evidence indicating that counsel's decision in this regard was not reasonably strategic. In his brief on return to remand, Bryant argues that counsel could have had the condoms tested ex parte, thereby removing any risk that the State would have learned of the test results had those results been detrimental to Bryant. However, this argument fails to recognize that the condoms were in the State's possession. Although counsel could have, and in fact did, move for funds for DNA testing ex parte, because the condoms were in possession of the State it would have been impossible to have had the condoms transferred from the State's possession to an outside laboratory for testing without the State's knowledge. Once the State was aware of the defense's testing, the State could have requested discovery of the test results or could have conducted its own DNA testing on the condoms. In either case, if the DNA-test results were harmful, it would have provided the State with

more evidence against Bryant. Counsel's decision not to take that risk was reasonable.

Therefore, the circuit court properly denied this claim of ineffective assistance of counsel.

B.

Bryant also alleged in his first amended petition that Yarbrough and Seagle were ineffective for not properly investigating and presenting evidence to support a motion to suppress the first statement Bryant made to police. Bryant argued in his petition that "[c]ounsel failed to present evidence by Sheliah Gayle Bryant McCree[10] that Bryant had asked for an attorney prior to the January 29 police interrogation." (C. 474.) Specifically, Bryant alleged:

> "On the night of January 29, 1997, the night of Bryant's first interrogation by the Dothan Police Department, he phoned his sister Sheliah Gayle Bryant McCree. Their conversation took place on speakerphone with Sgt. Stanley in the room. Bryant told Sheliah Bryant they were accusing him of capital murder. She advised Bryant to ask for an attorney and not to say anything until he received one. The speaker phone remained on after she and Bryant said goodbye. She then heard Bryant ask for cigarettes and a lawyer. The police told Bryant they would get him a lawyer, but continued the

[10]At the evidentiary hearing, Sheliah was identified as Sheliah Gail Bryant.

interrogation and told him he needed to 'answer their questions.' After approximately thirty seconds, someone realized the speaker was still on, and ended the call. Ms. McCree told Bryant's attorney what she had overheard. That attorney had to withdraw due to a conflict of interest. Ms. McCree subsequently told court appointed attorneys Mr. Motley and Mr. Yarbrough about the portion of the interrogation that she had overheard. Ms. McCree's testimony about what she overheard and Sgt. Stanley's refusal to honor Bryant's exercise of his right certainly provided grounds for excluding the entirety of Bryant's January 29, 1997 statement. Without that statement, the State would have had no basis for asserting that Bryant made a comment during the interrogation which the police took as an admission of killing Hollis. (According to Sgt. Stanley, in response to Stanley's question regarding why Bryant shot Hollis three times and what was on Bryant's mind, Bryant responded 'I don't know, I think I need help.... Sometimes I am just not Jerry.').

"In addition, during the second interrogation, which was tape-recorded, Bryant consistently asked for a lawyer. The police ignored his requests and continued asking him questions, despite Bryant's very clear and repeated invocation of his right to counsel.

"In spite of being in possession of such critical information, Mr. Yarbrough failed to move to suppress the first (un-recorded) statement, to call Ms. McCree to testify at the suppression hearing, and to introduce this critical piece of evidence of a constitutional violation under Miranda v. Arizona, 384 U.S. 436 (1966). Subsequently, the motion to suppress the second statement was denied in substantial part (the first 66 pages of the written transcript from the January 30, 1997 interrogation were not suppressed, even though Bryant had requested a lawyer numerous times prior

> to page 66 of the transcript) and Bryant's interrogation and statements were admitted at trial through Sgt. Stanley's testimony. Had Mr. Yarbrough called Ms. McCree to testify, there is a reasonable likelihood that the court would have excluded Bryant's statements from trial. Ms. Bryant's testimony would have demonstrated that Bryant sought counsel immediately upon arrest and therefore none of the statements he made were voluntary and freely given.
>
> "Mr. Yarbrough's failure to provide critical evidence at the suppression hearing prejudiced Bryant because Bryant's statements were admitted at trial. Mr. Yarbrough's actions cannot be attributed to reasonable trial strategy."

(C. 474-76.)

At the evidentiary hearing, Yarbrough testified that he knew Sheliah Bryant, Bryant's sister, and that she was a witness during Bryant's trial. Yarbrough said that he did not recall Sheliah ever telling him that she had overheard on speakerphone Bryant asking for a lawyer during his first statement to police. Yarbrough further stated that if he had been provided with that information, he "would have definitely pursued it" by moving to suppress the statement on that ground and requesting a suppression hearing. (RTR, R. 191.) Being familiar with the practices of the Dothan Police Department, however, Yarbrough said that it would have been unusual for the officers to allow anyone to make a telephone call during

an interrogation. In fact, Yarbrough said that "[t]hey won't even let the attorneys call in. There would be no way that -- when they get them back in the police department, defendants do not get contact with anyone." (RTR, R. 190.) Nonetheless, Yarbrough made clear that if he had been "told that by Sheliah, it would not be my -- it's not my job to determine whether or not Sheliah is truthful or not" and that he "would have pursued it in a motion to suppress the statement." (RTR, R. 191.)[11]

Sheliah testified at the hearing that she remembered the day Bryant was taken into custody and that she received a telephone call from Bryant that day. However, contrary to the allegations Bryant made in his petition, Sheliah testified that she did not speak to Bryant that day. Rather, Bryant left a message on her home answering machine. Sheliah said that the message was left on her machine at "about 10:00" p.m.

[11]We note that Yarbrough's testimony in this regard occurred on cross-examination by the assistant attorney general. Bryant failed to question Yarbrough on direct examination about this claim, and on redirect examination Bryant asked only a single question about Yarbrough's "certainty" about what he would have done, at which point Yarbrough reiterated that "as a defense attorney ... if I was told that, I would have pursued that." (RTR, R. 192.)

(RTR, R. 323.) Sheliah said that her answering machine indicated that she had missed a call "[f]rom the City of Dothan" and that, when she checked the message on her machine, she heard that it was from Bryant. (RTR, R. 318.) Sheliah said that she heard Bryant ask for a lawyer and then "heard this other man say something about my Dad." (RTR, R. 318.) Sheliah also said that she heard the man, whom she later claimed was a "detective," say "something about a watch." (RTR, R. 321.) At that point, the message ended. Sheliah said that she did not keep the message from that day because she "didn't think it was important." (RTR, R. 321.)

Although Sheliah indicated that she believed Bryant left the message while he was being interrogated by police, she admitted that her belief in this regard was based on speculation. Specifically, the following exchange occurred on cross-examination:

> "[Assistant Attorney General]: But you don't know exactly what time this was, or you don't know where he was specifically in jail?
>
> "[Sheliah]: Yeah. I know where he was. He was at the City because I followed him there.
>
> "[Assistant Attorney General]: You don't know where he was in the city jail or what he was specifically doing at the time he made the phone

call, because it was an answering machine recording. Correct?

"[Sheliah]: Well, he had to be interrogated.

"[Assistant Attorney General]: You are guessing that. Right?

"[Sheliah]: Well, I could hear the detectives saying something to him about my dad and about a watch.

"[Assistant Attorney General]: And so you are guessing, based on what you said, that he was being interrogated?

"[Sheliah]: You can say I'm guessing, but that's had to be what happened. If he was at the County jail, he wouldn't -- wouldn't nobody be asking him about a watch and my dad.

"[Assistant Attorney General]: So he could have been sitting in his cell making a phone call --

"[Sheliah]: I doubt it -- not. Because if he was at the County jail, he would have called me collect. He did not call me collect.

"[Assistant Attorney General]: So basically any time he was in the City jail, he had to have been being interrogated? Is that what you are trying to say?

"[Sheliah]: Yes. I believe they allowed him his phone call, and he called me, and they had him on the answering machine, because I guess they wanted to hear what he was saying or probably hear what I had to say, and they just forgot to disconnect. That's it. It wasn't long. They just forgot to disconnect.

> "[Assistant Attorney General]: And that's your guess, your speculation about what happened?
>
> "[Sheliah]: That is true."

(RTR, R. 324-25.)

Sheliah testified that she had told Blake Green, who Bryant alleged at the hearing was his first attorney before Yarbrough was appointed, about what she had heard on her answering machine. However, Sheliah stated, contrary to the allegation Bryant made in his first amended petition, that she did not inform any of Bryant's trial attorneys, i.e., Yarbrough, Seagle, or Spencer, about the message she had heard from Bryant. According to Sheliah, she was available and willing to testify at the pretrial suppression hearing, but Yarbrough never asked her to testify.

In its order on remand, the circuit court made the following findings regarding this claim:

> "Next, [Bryant] alleges that trial counsel at his first trial were ineffective for not properly investigating and presenting evidence to support a motion to suppress the first statement he made to the police. Specifically, [Bryant] alleges that his sister, Sheliah McCree, informed Trial Counsel that she had a telephone conversation with [Bryant] when he was at the Dothan Police Department which was on speaker, and she heard him ask for a lawyer. Mr. Yarbrough testified that he is familiar with the practices of the Dothan Police Department and the

> interviewing of witnesses and that to allow such a telephone call would not have been consistent with the police department's practices. Mr. Yarbrough testified that there is no way the alleged conversation happened [but] if he had been told of it he would have filed a Motion to Suppress [Bryant's] statement. Mr. Yarbrough cannot be held ineffective for failing to file a Motion to Suppress [Bryant's] statement in this instance when he was not made aware of [Bryant's] alleged request for an attorney."

(RTR, C. 1334-35.) These findings are supported by the record. Based on the testimony at the hearing, it is clear that, contrary to the allegation Bryant made in his first amended petition, Sheliah never told Yarbrough, Seagle, or Spencer about the message she received from Bryant the night he was arrested, and we agree with the circuit court that counsel cannot be held ineffective for not presenting evidence that counsel did not know existed.

Moreover, we point out that Bryant also failed to prove that he actually requested a lawyer during his January 29 interrogation. Although Bryant alleged in his first amended petition that Sheliah spoke to Bryant while he was being interrogated on January 29, Bryant did not prove that factual allegation at the hearing. To the contrary, Bryant's evidence established that Sheliah did not speak with Bryant during his

interrogation the day of his arrest, but merely heard a message on her answering machine from Bryant that she assumed was left while Bryant was being interrogated. Bryant also failed to present any evidence at the hearing indicating that he had left the message on Sheliah's answering machine before or during the interrogation on the day of his arrest. Sheliah testified only that she speculated that the message was left while Bryant was being interrogated. Indeed, Sheliah testified at the hearing that the message was received at approximately 10:00 p.m.; however, the record from Bryant's direct appeal reflects that his statement to police began at 8:15 p.m.

Under these circumstances, Bryant clearly failed to prove that his counsel's performance relating to the motion to suppress was deficient or that counsel's performance prejudiced him in any way. Therefore, the circuit court properly denied this claim.

C.

Finally, Bryant alleged in his first amended petition that trial counsel at his first trial and trial counsel at his second penalty-phase trial were ineffective for not adequately

impeaching Ricky Vickers and that trial counsel at his second penalty-phase trial were ineffective for not adequately challenging Vickers's unavailability.

1.

In his first amended petition, Bryant alleged that Yarbrough was ineffective for not adequately impeaching Ricky Vickers at his first trial. Specifically, Bryant alleged:

> ""Mr. Yarbrough failed to properly impeach State's witness Ricky Vickers [at his first trial] by: (1) not pointing out the major inconsistencies between prior statements made by Vickers; (2) not adequately exploring what the State offered to Vickers in exchange for his cooperation and testimony; (3) not revealing Vickers'[s] previous felony convictions; and (4) not pointing out Vickers' general lack of character for truthfulness.
>
> "Vickers gave a statement to Sergeant Jim Stanley on January 30, 1997 and gave another statement to Sergeant David Jay on January 31, 1997. Both these statements differed from each other and from the story that Vickers ultimately told on the stand during Bryant's original trial.
>
> "For example, at trial, Vickers testified that Bryant drove to the house of a person who Vickers identified at trial as being Raymond Mathis. Vickers said that Bryant and Mathis discussed the sale of the cell phone, following which Mathis carried the phone to 'some guy' in exchange for some dope. In his January 29 and 30, 1997 statements to the police, Vickers never mentioned anything about going to Raymond Mathis's house or Mathis's involvement with the cell phone. In fact, in his January 29 and 30 statements, Vickers never

mentioned anything about the cell phone (other than Bryant talking on the cell phone) or Bryant selling the cell phone until January 30, when the police asked whether Bryant still had the cell phone when they left the body on the dirt road. In response, Vickers gave varying answers before finally settling on saying that he thought, but could not be sure since he was on drugs, that Bryant had pulled off at a store and given a man standing on the corner at the store the cell phone in exchange for some drugs. In his January 31 statement, Vickers gave yet a different version of the event. Vickers said that Bryant went to Mathis's house, gave Mathis the cell phone, Mathis gave Bryant directions to the house of a woman, Mathis went into the woman's house, and when Mathis returned to the car, he no longer had the cell phone but did have some dope. Again, Mr. Yarbrough did not highlight any of these inconsistencies.

"Vickers also testified at trial that Mathis told him and Bryant where they could leave a body; knew there was a body in the car; rode with them and identified the dirt road where they could leave the body, and got out of the car and watched while Vickers and Bryant removed the body from the trunk and placed it on the hill. In his January 29 statement to the police, Vickers never mentioned anything about Mathis's involvement in moving the body.

"At trial, Vickers testified that he was with Bryant when Bryant parked the car. In his January 30 statement to the police, Vickers outright denied being with Bryant when Bryant parked the car. In that same statement, Vickers also said that he did not, at any time during the night, hold the gun that Bryant allegedly had been holding or possessed during the entire time he was with Vickers. In his January 31 statement, however, Vickers admitted holding the gun.

"Mr. Yarbrough also failed to adequately explore what the State offered to Vickers in exchange for his cooperation and testimony. While Mr. Yarbrough did question Vickers, Mr. Yarbrough's examination was grossly inadequate. Mr. Yarbrough's examination of Vickers on this issue consisted of whether he had been convicted of selling dope and brief questioning regarding whether capital murder charges had been dropped against Vickers in exchange for his testimony. Mr. Yarbrough failed to question and impeach Vickers using his prior bad acts which would have revealed Vickers['s] extensive history of drug use and would have emphasized Vickers['s] overwhelming incentive to cut a deal with the prosecutor.

"Although the police initially questioned Vickers for murder, the State subsequently reduced the charge to hindering prosecution. The District Attorney's standard procedure when seeking the cooperation of a witness who had other criminal charges pending was to get the guilty plea prior to the witness's testimony and then schedule the sentencing hearing for some time after the case in which the witness would testify. Depending on 'how good' the prosecutor determined the witness's testimony to be, the prosecutor would determine the recommended sentence for the witness in his criminal case. The prosecutor followed the same procedure when dealing with Vickers. Trial counsel's failure to discover and impeach Ricky Vickers's testimony in this regard could not be considered strategic.

"Mr. Yarbrough also failed to call character witnesses to testify to Vickers'[s] character for truthfulness; residents of the Bottoms neighborhood would have testified that Vickers had an acute drug problem and therefore his statements were unreliable and that he was generally an untruthful person. These character witnesses would have also testified that Vickers was clearly under the influence of drugs during his testimony at trial.

> "But for Mr. Yarbrough's failures described above, there is a reasonable probability that Bryant would have been acquitted or would have avoided a death sentence. Mr. Yarbrough's deficient performance fell below the objective standard of reasonableness and prejudiced Bryant because Mr. Yarbrough permitted biased and unreliable testimony against Bryant."

(C. 476-79.)

In its order on remand, the circuit court made the following findings regarding this claim:

> "[Bryant] alleges multiple inconsistencies in statements from Mr. Vickers that trial counsel could have used to impeach Mr. Vickers. Mr. Yarbrough testified that he was aware at the time of trial of some damaging information that could be introduced through Mr. Vickers that was not brought out during direct examination by the State. Further, Mr. Yarbrough testified that he used inconsistencies to impeach Mr. Vickers but proceeded cautiously in his cross-examination of Mr. Vickers to prevent the damaging information that he was aware of from being introduced. Lastly, he felt that Mr. Vickers's testimony on direct was not so helpful to the State. In his [post-hearing] briefs, [Bryant] also discusses trial counsel's lack of memory as to why he made certain decisions in the cross-examination of Mr. Vickers which occurred approximately fourteen years ago. Simply because Mr. Yarbrough cannot remember in 2012 specifically why he did or did not cover certain inconsistencies between Mr. Vickers's statement and his testimony at the trial approximately fourteen years ago does not have any bearing on whether he was effective. Further, [Bryant's Rule 32] counsel argues that the problem is not that Mr. Yarbrough did not impeach Mr. Vickers, but instead that he was ineffective in the way he impeached him and that had he done a better

> job of impeaching Mr. Vickers, a reasonable probability exists that [Bryant] would not have been convicted or may have avoided a death sentence. Simply because [Bryant's] Rule 32 counsel sets forth a multitude of ways Mr. Yarbrough could have better impeached Mr. Vickers doesn't mean Mr. Yarbrough was ineffective. Viewing the alleged deficiencies in Mr. Yarbrough's performance at the time of the trial rather than in hindsight, the Court finds that Mr. Yarbrough made well informed and reasonable strategic decisions at the time of trial with regard to whether and how to attempt to impeach Mr. Vickers. Accordingly, the Court finds that trial counsel was not ineffective by failing to adequately impeach Mr. Vickers."

(RTR, C. 1335.) These findings are supported by the record.

Initially, we point out that, with respect to Bryant's allegations that his counsel did not adequately explore what the State offered to Vickers in exchange for his testimony, did not reveal Vickers's prior felony convictions, and did not present evidence of Vickers's reputation for untruthfulness, Bryant did not question Yarbrough, Seagle, or Spencer at the evidentiary hearing regarding these specific matters. "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). As already noted, "[i]f 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." Id. at 1256 (citations omitted). Moreover, Bryant did not present at the evidentiary hearing evidence of Vickers's reputation for untruthfulness that he believed his counsel should have presented at his trial. Simply put, Bryant presented no evidence at the evidentiary hearing regarding these specific allegations. "[A] petitioner is deemed to have abandoned a claim if he fails to present any evidence to support the claim at the evidentiary hearing." Brooks v. State, 929 So. 2d 491, 497 (Ala. Crim. App. 2005). See also Jackson v. State, 133 So. 3d 420, 436 (Ala. Crim. App. 2012) (opinion on return to remand); Burgess v. State, 962 So. 2d 272, 300 (Ala. Crim. App. 2005) (opinion on application for rehearing); and Payne v. State, 791 So. 2d 383, 399 (Ala. Crim. App. 1999). Moreover, because Bryant failed to present any evidence of these specific allegations at the hearing, he necessarily failed to prove that Yarbrough was ineffective for not adequately impeaching Vickers with the deal Vickers had made with the State for his testimony and with Vickers's prior

felony convictions and for not presenting evidence of Vickers's reputation for untruthfulness.

With respect to Bryant's allegation that his counsel did not adequately impeach Vickers with Vickers's three prior inconsistent statements to police, at the evidentiary hearing Yarbrough said that he had reviewed Vickers's three statements to police before Bryant's trial but that he could not recall, at the time of evidentiary hearing, the specifics of those statements. However, Yarbrough stated that he had a strategic reason for not cross-examining Vickers about every inconsistency between his statements and his trial testimony. Specifically, Yarbrough said:

> "We had to be careful with Vickers, because there were some things that he had told our investigator about what had happened, and we were tip-toeing around certain things that he had told [the investigator]."

(RTR, R. 166.) According to Yarbrough, they "had to tiptoe around Vickers in [their] cross-examination of him, because of certain things that [they] knew that [they] may open the door up to." (RTR, R. 166.) Yarbrough further explained:

> "Do I recall specifically why I did not attack Vickers on some inconsistencies that may or may not have been in the police reports? No, I don't remember that. I do remember, though, that there

> were some things that we were concerned about -- and to tell you today, I do not specifically remember -- but that we thought Vickers could hurt us."

(RTR, R. 167-68.)

Yarbrough also testified that, in addition to trying to avoid bringing out damaging information from Vickers on cross-examination, during his testimony on direct examination by the prosecutor Vickers testified to some information that was not helpful to the prosecution and the prosecutor himself had to impeach Vickers with his prior inconsistent statements, which Yarbrough believed was helpful to the defense.[12] Yarbrough explained:

> "I think his testimony, for the most part, was -- we felt was going good for us, better than what we had probably expected. There were some things that we were afraid we were going to open the door on, and that's the reason we took the tactic -- or I took the tactic that I did with Vickers."

[12]This testimony is supported by the record from Bryant's direct appeal, which reflects that Vickers was less than forthcoming during direct examination by the prosecutor, so much so that the trial court declared Vickers an adverse/hostile witness and allowed the prosecutor to use leading questions, over defense counsel's objection. The prosecutor also impeached Vickers with Vickers's prior inconsistent statements to police, and defense counsel used the State's impeachment of its own witness to argue that Vickers was not credible.

(RTR, R. 187.) Overall, with respect to Vickers's testimony, Yarbrough said that he felt he had "made the points that [he] needed to make." (RTR, R. 188.)

Bryant argues in his brief on return to remand that the circuit court erred in finding that Yarbrough's decision regarding how to cross-examine Vickers regarding his prior inconsistent statements was a reasonable strategic decision because, he says, the circuit court should not have "credited" Yarbrough's testimony that the nature and extent of his cross-examination of Vickers was strategically calculated to avoid eliciting information that would have been damaging to Bryant. (Bryant's RTR brief, p. 96.) Bryant appears to argue that because Yarbrough was unable to recall, at the time of the evidentiary hearing, the exact details of each of Vickers's statements to police and Vickers's trial testimony, Yarbrough's testimony that he made a strategic decision regarding the cross-examination of Vickers was vague and conflicted with his otherwise lacking memory and was not sufficient to establish that he had a valid reason for not impeaching Vickers with the specific inconsistencies Bryant alleged in his first amended petition. In other words,

Bryant's argument is based on his belief that Yarbrough's testimony was not credible. He even goes so far as to argue in his reply brief on return to remand that Yarbrough's explanation for not further impeaching Vickers with his prior inconsistent statements was simply "a pretext." (Bryant's RTR reply brief, p. 31.)

However, as noted above, "[t]he credibility of witnesses is for the trier of fact, whose finding is conclusive on appeal. This Court cannot pass judgment on the truthfulness or falsity of testimony or on the credibility of witnesses." Hope v. State, 521 So. 2d 1383, 1387 (Ala. Crim. App. 1988). It is well settled that, in order to be entitled to relief, a postconviction "petitioner must convince the trial judge of the truth of his allegation and the judge must 'believe' the testimony." Summers v. State, 366 So. 2d 336, 343 (Ala. Crim. App. 1978). See also Seibert v. State, 343 So. 2d 788, 790 (Ala. 1977). Bryant made the same argument regarding Yarbrough's credibility in his post-hearing brief in the circuit court, and the circuit court specifically rejected the argument, finding that Yarbrough's lack of memory regarding specific details some 14 years after Bryant's trial was not

relevant in determining whether Yarbrough's actions at the time of trial constituted deficient performance. In other words, the circuit court found Yarbrough's testimony to be credible and, after thoroughly reviewing the record, we see no reason to disturb that finding on appeal.

"'The method and scope of cross-examination "is a paradigm of the type of tactical decision that [ordinarily] cannot be challenged as evidence of ineffective assistance of counsel."'" Davis v. State, 44 So. 3d 1118, 1135 (Ala. Crim. App. 2009) (quoting State ex rel. Daniel v. Leqursky, 195 W.Va. 314, 328, 465 S.E.2d 416, 430 (1995)). "'"[D]ecisions whether to engage in cross-examination, and if so to what extent and in what manner, are ... strategic in nature."'" Hunt v. State, 940 So. 2d 1041, 1065 (Ala. Crim. App. 2005) (quoting Rosario-Dominguez v. United States, 353 F. Supp. 2d 500, 515 (S.D.N.Y. 2005), quoting in turn, United States v. Nersesian, 824 F.2d 1294, 1321 (2d Cir. 1987)). Moreover, what "[s]ubjects [are] covered during cross-examination are generally matters of trial strategy and left to the judgment of counsel." State v. Mahoney, 165 S.W.3d 563, 568 (Mo. Ct. App. 2005). Yarbrough's decision regarding how to cross-

examine and impeach Vickers was reasonable and strategically calculated to avoid eliciting or opening the door for the admission of damaging information about Bryant that was within Vickers's knowledge. Therefore, the circuit court properly denied Bryant relief on this claim of ineffective assistance of counsel.

2.

In his first amended petition, Bryant also alleged that his trial counsel at his second penalty-phase trial was ineffective for not adequately impeaching Vickers by introducing evidence of his prior statements to police. Specifically, Bryant alleged:

> "Resentencing counsel was also ineffective by not impeaching Vickers's trial testimony with prior inconsistent statements made by Vickers on several other occasions, including statements made to police on January 29 and 30, 1997. Resentencing counsel only focused on Vickers's prior convictions to impeach Vickers; this was not effective because Vickers's previous convictions were revealed during his transcript testimony. (R. 386-395 Remand.) In fact, the State did not even object to the introduction of an additional conviction because he didn't think the admission of additional convictions would 'make a big difference anyway.' (R. 392-95 Remand.) Resentencing counsel acted ineffectively because he did not offer Vickers'[s] prior inconsistent statements to police that demonstrate that Vickers clearly changed his story on a number of occasions. (A full description of Vickers'[s]

> inconsistent statements is located at [paragraphs] 91 to 93, supra [as quoted above in Part III.C.1. of this opinion])."

(C. 483.)

In its order on second remand, the circuit court stated, in relevant part, the following regarding this claim:

> "'When reviewing claims of ineffective assistance of counsel during the penalty phase of a capital trial we apply the following legal standards.
>
> > "'"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."
>
> "'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."'

"Davis v. State, 44 So. 3d 1118, 11[37] (Ala. Crim. App. 2009) (citations omitted).

"....

"The testimony given by Mr. Crespi at the Rule 32 hearing with regard to the allegations of ineffective assistance of counsel based on his failure to impeach the prior testimony of Mr. Vickers by use of his alleged inconsistent statements to the police officers is summarized as follows: Mr. Crespi testified that he was aware that Mr. Vickers gave three statements to at least two different police officers over the course of three days; to wit: January 29, 1997, January 30 1997, and January 31, 1997. Further, he believes that he was in possession of each of the three statements at the time of the second penalty phase [trial]. He had assessed the importance of Vickers's testimony to the State's case prior to beginning the resentencing trial; specifically, Vickers alleged involvement in getting the body of the deceased put in the car and moved to Florida, the alleged sale of the cell phone, and the events Vickers claimed happened in Tallahassee culminating in the return to Dothan from the Live Oak area of Florida, all of which the State alleged showed an intentional killing for pecuniary gain as an aggravating circumstance. Also, Mr. Crespi testified of his intent to cross examine Vickers

regarding the sale of the cell phone and other issues that he testified about regarding pecuniary gain had Vickers been present. He further testified that he did not attempt to offer Vickers's statements to the police to impeach Vickers's testimony because the thought of doing so did not occur to him and not doing so was not part of any strategy. However, he did offer the felony convictions of Vickers for impeachment of Vickers's testimony from the first trial.

"It is the duty of the Court to analyze counsel's performance at the time of representation and not with hindsight. Almost invariably, an attorney will analyze his own performance in any trial and second guess whether he should have done something differently, especially if the outcome is not favorable. It is even easier to second guess someone else's actions and decisions. Although [Bryant's Rule 32] attorneys have alleged that Mr. Crespi was ineffective for not impeaching Mr. Vickers's testimony with the inconsistent statements that he gave to the police officers, they did not ask Mr. Crespi any questions regarding any of the specific inconsistent statements that they contend should have [been] used to impeach Mr. Vickers's testimony. Yet, in their briefs in support of the Rule 32 Petition they allege several inconsistencies that they believe should have been introduced into evidence to impeach Mr. Vickers's testimony. The Court finds that Bryant's attorney at the second penalty phase [trial] impeached Vickers with felony convictions but did not attempt to elicit testimony from police officers regarding Mr. Vickers's prior inconsistent statements. The Court reviewed the alleged inconsistencies in Mr. Vickers's statements to the police officers set forth in [Bryant's] Petition, which [Bryant's] attorneys did not specifically address with Mr. Crespi. The Court finds that even if Mr. Vickers's alleged inconsistent statements had been presented to the jury, the jury may still have found that Petitioner

> killed the victim and disposed of the cell phone for pecuniary gain and that such aggravating circumstances outweighed any mitigating circumstances, warranting a sentence of death. Therefore, the Court finds that [Bryant] has failed to demonstrate 'a reasonable probability that, absent the [alleged] errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.' Davis v. State, 44 So. 3d [1118, 1137 (Ala. Crim. App. 2009)], citing Strickland v. Washington. Furthermore, as the jury's verdict was an advisory verdict, the trial judge, the Honorable Edward Jackson, determined the sentence to be imposed pursuant to Ala. Code § 13A-5-47. The Court finds that, even if Mr. Vickers's inconsistent statements had been presented and the jury [had] returned an advisory verdict of life without parole, a reasonable probability exists that Judge Jackson may have found that the aggravating circumstances outweighed the mitigating circumstances and may have entered a sentence of death. Accordingly, the Court finds [that Bryant] has failed to show that the result of the penalty phase would have been different ... i.e., the jury would have rendered an advisory verdict of life without parole and the trial court also would have entered a sentence of life without parole.
>
> "In conclusion, the Court finds that trial counsel at his second penalty phase trial was not ineffective for failing to adequately impeach Ricky Vickers's testimony by not introducing into evidence at the second penalty phase trial several prior statements Vickers had made to police that were inconsistent with his trial testimony."

(Record on Return to Second Remand ("RTR2"), C. 6-8.)

In his brief on return to second remand, Bryant argues that the circuit court used an incorrect standard in analyzing

this claim of ineffective assistance of counsel. Specifically, Bryant takes issue with the circuit court's statements that "the jury may still have found" that the murder was for pecuniary gain and that the aggravating circumstances outweighed the mitigating circumstances, that even had the jury recommended a sentence of life imprisonment without the possibility of parole the trial judge "may have found that the aggravating circumstances outweighed the mitigating circumstances and may have entered a sentence of death," and that Bryant failed to prove that "the result of the penalty phase would have been different ... i.e., the jury would have rendered an advisory verdict of life without parole and the trial court also would have entered a sentence of life without parole." (RTR2, C. 8.) The burden imposed by the circuit court, Bryant argues, was much higher than the "reasonable probability" test enunciated in Strickland and requires that the circuit court reconsider this claim a third time. We disagree.

In its order, the circuit court correctly set forth the standard under Strickland for evaluating claims of ineffective assistance of counsel relating to the penalty phase of a

capital trial -- whether there is a reasonable probability that, absent the errors, the sentencer, including the appellate court, would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. Additionally, there is a presumption that circuit judges know the law and follow it in making their decisions. See Ex parte Slaton, 680 So. 2d 909, 924 (Ala. 1996) ("Trial judges are presumed to follow their own instructions, and they are presumed to know the law and to follow it in making their decisions."). Although the circuit court's order contains imprecise language and is not artfully worded, it is clear to us from reading the order as a whole that the circuit court knew the correct standard for analyzing ineffective-assistance-of-counsel claims and applied that standard in determining that counsel's performance did not prejudice Bryant.

Moreover, we agree with the circuit court that counsel's failure to introduce evidence of Vickers's prior inconsistent statements to police did not prejudice Bryant.[13] The jury was

[13]Because we conclude that Bryant was not prejudiced, we need not specifically address whether counsel's performance was deficient.

well aware that Vickers had multiple prior felony convictions and that he had initially been arrested for capital murder in connection with Hollis's death but that the charge had been reduced to hindering prosecution in exchange for Vickers's cooperation. In other words, the jury knew that Vickers had a strong incentive to lie -- specifically, to minimize his role in Hollis's murder and to maximize Bryant's role in Hollis's murder. We have thoroughly reviewed the record of the second penalty-phase trial as well as Vickers's three statements to police, which were introduced into evidence at the Rule 32 hearing. Although there were several inconsistencies among the three statements as well as between the statements and Vickers's trial testimony, those inconsistencies are not nearly as stark as Bryant makes them out to be, and many of those inconsistencies were highlighted during Vickers's testimony. Even had the three prior inconsistent statements been presented to the jury in their entirety, we are convinced beyond a doubt that there is no reasonable probability that "the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of

aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695. Therefore, the circuit court properly denied Bryant relief on this claim of ineffective assistance of counsel.

3.

Finally, Bryant alleged in his first amended petition that his trial counsel at his second penalty-phase trial was ineffective for not adequately contesting Vickers's unavailability with counsel's own knowledge of Vickers's whereabouts. Specifically, Bryant alleged:

> "Resentencing counsel failed to effectively challenge the State's proffer of Ricky Vickers's trial transcript instead of live testimony because Ricky Vickers was 'unavailable' to testify under Ala. R. Evid. 804(a)(5). (R. 11-19; R. 316-18 Remand.) The Alabama Supreme Court stated in Ex parte Scroggins, 727 So. 2d 131 (Ala. 1998), that the prosecution must make 'a good faith effort to obtain the presence of the declarant at trial' in order to offer the statement of a witness who is not present at trial and satisfy the right of confrontation. The State must exercise due diligence in its attempt to procure the presence of a witness. Johnson v. State, 623 So. 2d 444 (Ala. Crim. App. 1993). The court imposes a high standard for proving that such due diligence took place. The party seeking to introduce the declarant's statement has to show that it is unable to procure the declarant's attendance either by legal process or by other reasonable means. Williams v. Calloway, 281 Ala. 249, 251-52, 201 So. 2d 506, 508 (Ala. 1967).

"Resentencing counsel was ineffective for failing to demonstrate to the Court that the State did not exercise due diligence in its search for Ricky Vickers. On the first day of [the second penalty-phase] trial, the State indicated that it would be offering the transcript of Vickers's prior trial testimony because Vickers could not be located during the previous weekend. (R. 11-12 Remand.) Resentencing counsel never pointed out that the State did not exercise due diligence in procuring Vickers for trial. Resentencing counsel failed to point out that the 'Bottoms', the neighborhood where Vickers resided, spans just a couple of streets and thus it would have been very easy for the Houston County Sheriff's Office to canvass the neighborhood in search of Vickers. Resentencing counsel did not argue that the State had failed to meet the due diligence standard by questioning only those people closest to Vickers, who had strong motives to keep his whereabouts secret.

"In fact, resentencing counsel was aware of Vickers's whereabouts and knew of individuals who could testify to Vickers's location. In fact, in a recent interview with Vickers, he stated that he remembers being in the Bottoms and that he was accessible at the time that Bryant's resentencing hearing occurred. This alone, establishes the fact that the State did not exercise due diligence in attempting to procure Vickers for trial. Resentencing counsel were ineffective because they should have requested a recess to procure witnesses, including Vickers himself, to testify to Vickers's whereabouts and demonstrate that the State did not exercise due diligence in its search for Vickers.

"While resentencing counsel did not bear the burden of producing Vickers for trial, resentencing counsel did have the responsibility to demonstrate that the State's search for Vickers fell below the standard of due diligence. Resentencing counsel was ineffective because they did not challenge whether

> the State had met its burden to show that Vickers was 'unavailable' when the facts clearly demonstrated that Vickers was available to testify. This failure is particularly acute because Vickers's hearsay testimony is the only evidence linking Bryant to the alleged sale of Hollis's cell phone. The sale of the cell phone is one of only two aggravating factors on which the State relied in seeking the death penalty. Removal of Vickers's hearsay testimony was crucial to Bryant's defense."

(C. 481-83.)

Initially, we point out that Bryant's general allegations in his amended petition that counsel at his second penalty-phase trial, Michael Crespi, "never pointed out that the State did not exercise due diligence in procuring Vickers for trial" and "did not challenge whether the State had met its burden to show that Vickers was 'unavailable'" are belied by the record from the transcript of Bryant's second penalty-phase trial. Crespi did, in fact, strenuously object to the State's using Vickers's previous trial testimony against Bryant, and he argued that the State had not adequately established that Vickers was unavailable. The issue of Vickers's unavailability was thoroughly litigated just before the second penalty-phase trial began and was decided adversely to Bryant by the trial court. Also, the issue was argued on appeal and rejected by this Court. Specifically, this Court held:

"The State offered the following facts in support of its claim that it had exercised due diligence in attempting to secure the attendance of Ricky Vickers to testify at Bryant's new sentencing hearing: Upon contacting the Department of Corrections ('DOC') to secure Vickers's attendance, the prosecution was informed that Vickers had completed his sentence and that he was no longer in the custody of DOC. The prosecution also contacted the Board of Pardons and Paroles to see if it had an address for Vickers, but was told that Vickers had completed his sentence and was no longer required to report to it. An investigator was sent out to question Vickers's family members about his location. When questioned about Vickers's whereabouts, various members of Vickers's family advised the investigator that they did not know where he was. Some speculated that Vickers might be at his girlfriend's house, but were either unwilling or unable to supply the State with a name or address for the girlfriend. When Vickers's grandmother told investigators that he might 'come by,' the State issued a subpoena for Vickers 'in care of his grandmother's house,' and had a Houston County sheriff's deputy spend three days attempting to locate and serve Vickers with the subpoena.

"Given these circumstances, we conclude that the State proved that it used due diligence in an attempt to secure the attendance of Ricky Vickers. The State did 'more than simply issue a subpoena and stop when it [was] returned "not found."' Flowers v. State, 799 So. 2d [966,] 980 [(Ala. Crim. App. 1999)] (opinion on return to remand) (quoting Manuel v. State, 803 P.2d 714, 716 (Okla. Crim. App. 1990)). We know of no prescribed period of time that the State is required to search for a witness in order to have exercised 'due diligence.' Certainly, some individuals will be easier to find than others. As a convicted felon and acquaintance of Bryant's, Vickers obviously had no desire to be found by the State's investigator or by a sheriff's

> deputy. If located, he would be required to testify against Bryant. '"'Rule 804(a)(5) does not require a proponent to butt his head against a wall just to see how much it hurts.'"' Flowers v. State, 799 So. 2d at 980 (opinion on return to remand) (quoting Urbano v. State, 808 S.W.2d 519, 522 (Tex. App. 1991), quoting in turn, United States v. Kehm, 799 F.2d 354, 360 (7th Cir. 1986)). The State having exhausted all leads and expended considerable resources in its attempt to locate Vickers, we cannot say that the trial court abused its discretion when it determined that Vickers was an 'unavailable witness' and permitted the State to read Vickers's previous testimony into the record at Bryant's new sentencing hearing."

Bryant III, 951 So. 2d at 743.

Therefore, contrary to Bryant's belief, this Court did not remand this case to allow Bryant an opportunity to generally relitigate the issue of Vickers's unavailability. Rather, this Court found this specific claim to be sufficiently pleaded because it was "based on additional evidence that [Bryant] claimed was not, but should have been, presented to the trial court and this Court regarding Vickers's unavailability." Bryant IV, ___ So. 3d at ___ (some emphasis added). The only additional evidence that Bryant alleged in his first amended petition was known to counsel but not presented to the trial court was that Crespi was aware of Vickers's specific whereabouts at the time of the second

penalty-phase trial and also knew of specific individuals who could testify to Vickers's whereabouts, including Vickers himself, and that Crespi should have requested a continuance so that he could present the testimony of those witnesses.[14]

However, Bryant does not even mention this specific allegation in his brief on return to remand, much less make any argument regarding it.[15] It is well settled that this Court "will not review issues not listed and argued in brief." Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995). "'[A]llegations ... not expressly argued on ... appeal ... are

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[14]Bryant also alleged in his first amended petition that his counsel should have made additional arguments to the trial court in support of his objection. Specifically, Bryant alleged that Crespi should have argued that the neighborhood where Vickers lived, known as the "Bottoms," was small and could have easily been canvassed by law enforcement and that the State should have contacted people other than Vickers's family members in their attempts to locate him. Suffice it to say, after thoroughly reviewing the record from the second penalty-phase trial, we conclude that these additional arguments would not have made any difference in the trial court's, and subsequently this Court's, conclusion that the State had exercised due diligence in its attempts to locate Vickers.

[15]Rather, Bryant makes all new arguments on appeal regarding this claim of ineffective assistance of counsel -- new arguments based on factual assertions that were not included in Bryant's first amended petition and, thus, for the reasons stated in Part II.A. of this opinion, are not properly before this Court for review and will not be considered.

deemed by us to be abandoned.'" Burks v. State, 600 So. 2d 374, 380 (Ala. Crim. App. 1991) (quoting United States v. Burroughs, 650 F. 2d 595, 598 (5th Cir. 1981)). Because Bryant chose not to pursue this allegation in his brief on return to remand, it is deemed to be abandoned.

Nonetheless, out of an abundance of caution, we also note that this specific allegation is meritless based on the evidence presented at the evidentiary hearing. Contrary to the allegation Bryant made in his first amended petition, Crespi testified that he did not know Vickers's location at the time of the second penalty-phase trial. Additionally, Vickers testified at the hearing that he never spoke with Bryant's attorneys in 2004 and, therefore, they could not have known his location at that time. As noted in Part II.A. of this opinion, we remanded this case to give Bryant an opportunity to present evidence to prove the specific facts he had alleged in his first amended petition. Bryant failed to do so; he failed to prove that Crespi knew Vickers's whereabouts at the time of the second penalty-phase trial. After thoroughly reviewing the Rule 32 record as well as the record of Bryant's second penalty-phase trial, we agree with

the circuit court that counsel's performance in this regard was not deficient. Therefore, the circuit court properly denied Bryant relief on this claim of ineffective assistance of counsel.

Conclusion

Based on the foregoing, the judgment of the circuit court is affirmed.

AFFIRMED.

Windom, P.J., and Welch, Burke, and Joiner, JJ., concur.