Rel: January 11, 2019

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2018-2019

CR-15-0257

Larry Donald George

v.

State of Alabama

Appeal from Talladega Circuit Court
(CC-94-203.60 and CC-94-204.60)

KELLUM, Judge.

The appellant, Larry Donald George, appeals the circuit court's partial summary dismissal and partial denial of his petition for postconviction relief filed pursuant to Rule 32,

Ala. R. Crim. P., in which he attacked his capital-murder convictions and sentences of death.

Facts and Procedural History

In 1994, George was convicted of two counts of murder made capital because two people were killed as the result of one course of conduct, see § 13A-5-40(a)(10), Ala. Code 1975, and because the murders occurred during the course of a burglary, see § 13A-5-40(a)(4), Ala. Code 1975. George was also convicted of attempted murder, see § 13A-4-2 and § 13A-6-2, Ala. Code 1975. By a vote of 10-2, the jury recommended that George be sentenced to death; the trial court accepted the jury's recommendation and sentenced George to death on the capital-murder convictions. The trial court also sentenced George to life imprisonment on the attempted-murder conviction. This Court affirmed George's convictions but remanded the case with instructions that the trial court hold a new penalty-phase hearing and reevaluate its imposition of the death penalty. George v. State, 717 So. 2d 827 (Ala. Crim. App. 1996). On certiorari review, the Alabama Supreme Court reversed this Court's judgment and remanded the case with instructions that the death penalty be reinstated. George v.

State, 717 So. 2d 844 (Ala. Crim. App. 1996). On remand from the Alabama Supreme Court, this Court addressed George's remaining penalty-phase issues on appeal and affirmed George's death sentences. George v. State, 717 So. 2d 849 (Ala. 1997). The Alabama Supreme Court subsequently affirmed this Court's decision. Ex parte George, 717 So. 2d 858 (Ala. 1998). The United States Supreme Court denied certiorari review. George v. Alabama, 525 U.S. 1024 (1998).

In our opinion affirming George's convictions, we set out the facts of the crime as follows:

> "[O]n the evening of February 12, 1988, the appellant shot his wife Geraldine George. The injuries she sustained as a result of the shooting rendered her a paraplegic. He also shot and killed Janice Morris and her boyfriend, Ralph Swain. Dr. Joseph Embry, a medical examiner for the State of Alabama, testified that Morris died as a result of a gunshot wound to the left side of his head. The lower half of the appellant's wife's body was paralyzed as a result of the damage caused by a bullet that entered her arm and passed through the mid-portion of her body.
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> "Geraldine George testified that on the evening of February 12, 1988, she finished her shift at the Wal-Mart discount department store and went to her apartment complex. George had left her two children with her neighbor, Janice Morris, so she went to Morris's apartment to pick up her children. As she was leaving the apartment she saw the appellant talking to her son. The appellant approached her and pulled a pistol from his jacket pocket. She ran into

> Morris's apartment, yelling for Morris to telephone the police. She heard gunshots, turned, and saw the appellant pointing a gun at her before he fired. Janice Morris was shot while she was at the telephone, and Ralph Swain was shot as he ran up the stairs to the second floor.
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> "Andrew Watkins was visiting a friend at the apartment complex on the night of the shootings. He testified that he heard gunshots and that he watched the appellant leave an apartment and drive away in his automobile. Watkins followed the appellant's automobile and wrote down his license tag number. He then went to police Captain Willard Hurst's house, where he reported the incident. The appellant was apprehended in Delaware six years after the murders as a result of an episode of the television show America's Most Wanted on which the case was featured."

George, 717 So. 2d at 831.[1]

On November 19, 1999, George timely filed the instant Rule 32 petition, raising several claims, including claims of ineffective assistance of trial counsel.[2] On February 4, 2000, the State filed an answer and on February 7, 2000, a

[1]This Court may take judicial notice of its own records and we do so in this case. See Nettles v. State, 731 So. 2d 626, 629 (Ala. Crim. App. 1998), and Hull v. State, 607 So. 2d 369, 371 n.1 (Ala. Crim. App. 1992).

[2]The time for filing a Rule 32 petition in a case in which the death penalty has been imposed was amended by Act No. 2017-417, Ala. Acts 2017. However, that Act does not apply retroactively to George. See § 3, Act No. 2017-417, Ala. Acts 2017.

motion to summarily dismiss those claims in George's petition the State believed were subject to the procedural bars in Rule 32.2(a), Ala. R. Crim. P., and were insufficiently pleaded under Rule 32.6(b), Ala. R. Crim. P. On July 7, 2005, George filed an amended petition in which he reasserted the claims raised in his original petition. On October 20, 2005, the State filed an answer and a motion to summarily dismiss those claims in George's petition the State believed were subject to the procedural bars in Rule 32.2(a), insufficiently pleaded under Rule 32.6(b), and presented no material issue of fact or law. On February 2, 2006, the circuit court granted the State's motions and summarily dismissed several of the claims in George's petition.

Following several continuances at the request of both parties, the circuit court set a hearing for July 25, 2011, to consider George's Rule 32 claims that had survived summary dismissal. On July 5, 2011, George moved to amend his amended petition to clarify existing claims that had not been dismissed. On July 25 and 26, 2011, the circuit court conducted an evidentiary hearing on George's remaining Rule 32 claims. The parties then submitted the deposition testimony

of Dr. Glen King, testifying on behalf of the State, and Dr. Bryan Hudson, testifying in rebuttal on behalf of George.

On October 23, 2015, the circuit court issued an order denying George's claims. On November 20, 2015, George filed a postjudgment motion to reconsider the circuit court's judgment; the court denied the motion by written order on November 30, 2015.

Standard of Review

"On direct appeal we reviewed the record for plain error; however, the plain-error standard of review does not apply to a Rule 32 proceeding attacking a death sentence." Ferguson v. State, 13 So. 3d 418, 424 (Ala. Crim. App. 2008). See also Mashburn v. State, 148 So. 3d 1094, 1104 (Ala. Crim. App. 2013).

> "'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, 172 So. 3d 348, 352 (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., 143 So. 3d 159, 166 (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).

Analysis

On appeal, George reasserts several claims of ineffective assistance of counsel raised in his Rule 32 petition. Specifically, George contends that his counsel was ineffective for failing to prepare and present a mental-health defense at the guilt phase of trial, failing to adequately prepare and

present mitigation evidence at the penalty phase of trial, and failing to remove a biased juror.[3]

> "'In order to prevail on a claim of ineffective assistance of counsel, a defendant must meet the two-pronged test articulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984):
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> > "'"First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."
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> "'466 U.S. at 687, 104 S.Ct. at 2064.

[3]Those claims George raised in his petition but does not pursue in his brief on appeal are deemed abandoned and will not be considered by this Court. See Ferguson v. State, 13 So. 3d 418, 436 (Ala. Crim. App. 2008) ("[C]laims presented in a Rule 32 petition but not argued in brief are deemed abandoned.").

> "'"The performance component outlined in Strickland is an objective one: that is, whether counsel's assistance, judged under 'prevailing professional norms,' was 'reasonable considering all the circumstances.'" Daniels v. State, 650 So. 2d 544, 552 (Ala. Cr. App. 1994), cert. denied, [514 U.S. 1024, 115 S.Ct. 1375, 131 L.Ed.2d 230 (1995)], quoting Strickland, 466 U.S. at 688, 104 S.Ct. at 2065. "A court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.
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> "'The claimant alleging ineffective assistance of counsel has the burden of showing that counsel's assistance was ineffective. Ex parte Baldwin, 456 So. 2d 129 (Ala. 1984), aff'd, 472 U.S. 372, 105 S.Ct. 2727, 86 L.Ed.2d 300 (1985). "Once a petitioner has identified the specific acts or omissions that he alleges were not the result of reasonable professional judgment on counsel's part, the court must determine whether those acts or omissions fall 'outside the wide range of professionally competent assistance.' [Strickland,] 466 U.S. at 690, 104 S.Ct. at 2066." Daniels, 650 So. 2d at 552. When reviewing a claim of ineffective assistance of counsel, this court indulges a strong presumption that counsel's conduct was appropriate and reasonable. Hallford v. State, 629 So. 2d 6 (Ala. Cr. App. 1992), cert. denied, 511 U.S. 1100, 114 S.Ct. 1870, 128 L.Ed.2d 491 (1994); Luke v. State, 484 So. 2d 531 (Ala. Cr. App. 1985). "This court must avoid using 'hindsight' to evaluate the performance of counsel. We

must evaluate all the circumstances surrounding the case at the time of counsel's actions before determining whether counsel rendered ineffective assistance." Hallford, 629 So. 2d at 9. See also, e.g., Cartwright v. State, 645 So. 2d 326 (Ala. Cr. App. 1994).

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

> case. Even the best criminal defense attorneys would not defend a particular client in the same way."

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

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

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

> "'"When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."

> "'Strickland, 466 U.S. at 697, 104 S.Ct. at 2069, quoted in Thompson v. State, 615 So. 2d 129, 132 (Ala. Cr. App. 1992), cert. denied, 510 U.S. 976, 114 S.Ct. 467, 126 L.Ed.2d 418 (1993).
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> "'....'
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> "Bui v. State, 717 So. 2d 6, 12-13 (Ala. Cr. App. 1997), cert. denied, 717 So. 2d 6 (Ala. 1998)."

Dobyne v. State, 805 So. 2d 733, 742-44 (Ala. Crim. App. 2000), aff'd, 805 So. 2d 763 (Ala. 2001). "[I]n reviewing claims of ineffective assistance of counsel, this Court need not consider both prongs of the Strickland test." Clark v. State, 196 So. 3d 285, 303 (Ala. Crim. App. 2015). "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." Id.

With these principles in mind, we address each of George's claims in turn.

I.

George first contends that his trial counsel was ineffective for failing to prepare and present a mental-health defense at the guilt phase of trial.

The record on direct appeal reflects that George's trial counsel filed a motion for a psychological evaluation and a motion for a psychiatric examination in September 1994. On September 30, 1994, Gary Garner, a therapist at the Cheaha Mental Health Center, conducted a mental-status evaluation of George. In a letter to the trial court, Garner noted that George was "capable of understanding right from wrong at present" and assisting his attorney but that George "reported experiencing possible psychotic symptoms in the past and present that would warrant further psychological evaluation through Taylor Hardin Secure Medical Facility." (C. 1315.) The trial court subsequently ordered a mental examination of George that was completed by Dr. Kathy Ronan, a psychologist employed at the Taylor Hardin Secure Medical Facility in Tuscaloosa. Dr. Ronan summarized her findings in a forensic-evaluation report that was submitted to the trial court and to the parties. In the report, Dr. Ronan stated:

> "To summarize, Mr. George is an individual who presents no signs or symptoms of a major psychiatric disorder such as Schizophrenia or Major Depression, but at the present time he does appear to have an Adjustment Disorder with some Depression and perhaps Anxiety, although depressed feelings are primary. Additionally, there is evidence of a Personality Disorder with dependent, avoidant, passive-

> aggressive, paranoid, and perhaps schizotypal features. Such an individual would have a longstanding history of maladjustment, particularly when dealing with interpersonal issues, with adaptive mistrust and suspiciousness of others, and periodic episodes of deterioration into more maladaptive thought processes or perceptual disturbances. Mr. George is an intelligent individual and his conversation suggests that his intelligence level may be higher than measured during current IQ testing, suggesting that to some degree emotional resources are at present being channeled to continue adequate stability and appropriate functioning overall, reducing cognitive functioning mildly."

(Supp. R., C. 1191.) With regard to George's mental state at the time of the alleged offense, Dr. Ronan concluded:

> "I found no evidence that Mr. George has ever suffered from a major psychiatric disorder which would render him to be out of touch with reality or unable to understand right from wrong. He does report that during the time of the alleged offense he heard voices telling him to shoot the victims. However, the presentation of such, if he indeed did experience these, is not consistent with a major mental illness. Mr. George does have a personality disorder which at times of severe stress and disintegration may possibly result in some perceptual disturbances[;] however, there is no evidence that he was in a psychotic state or unable to understand right from wrong during the time in question. It is possible that Mr. George is simply reporting these voices in an attempt to escape legal ramifications. However, some other subtle factors suggest that there is a possibility that his representation may be true. Nevertheless, I do not find that he was experiencing major mental illness during the time in question, nor would the reported

> symptoms have impaired his understanding of right from wrong."

(Supp. R., C. 1193.)

At trial, trial counsel called Dr. Ronan as a witness to testify during the penalty phase. Dr. Ronan testified that she administered intelligence and personality testing on George during the evaluation. Dr. Ronan testified that George was "unstable," however, "[n]ot in the sense of having a major psychiatric illness, but he would be an emotionally unstable person." (Record on Direct Appeal, R. 574.)

A.

In challenging the failure of trial counsel to prepare and present a mental-health defense, George first contends that his trial counsel did not adequately investigate George's behavior in the weeks leading up to the murders. George contends that trial counsel conducted "minimal and delayed investigation" and ignored "information detailing aspects of Mr. George's situation that would warrant investigation into a mental health defense, such as odd behaviors and escalating conflict with his wife." (George's brief, pp. 54-55.) The circuit court found that counsel's investigation was reasonable.

At the Rule 32 hearing, George presented the testimony of his nephew, his half-sister, his childhood friends, and a friend who served with him in the Army Reserves. Byron Jackson, a close friend of George, described George as "an everyday guy" up until the murders. (R. 176.) Jackson testified that he never saw George act aggressively toward anyone. Jackson saw George on the day of the murders. According to Jackson, George appeared to be worried, "like he had something on his mind," but looked like he always did in appearance. (R. 180.) Jackson was interviewed by George's trial counsel but was not called to testify at trial. Mary Alice Thomas, a childhood friend of George's, testified that she knew George as a child and described George as "an average, normal child trying to make it from day to day." (R. 185.) Qurientan Payne is George's nephew. Payne testified that he saw George approximately one week before the murders and that George was "just a plain normal guy." (R. 190.) Payne saw George again the day before the murders and stated that George was not acting strange. Eddie Jones was George's neighbor growing up. Jones testified that he observed violence in George's house when George's parents fought but that that was

not unusual. According to Jones, George was beaten; however, George stated that they all "got beat" back then. (R. 195.) Jones described George as a "normal kid" who "used to get in trouble and fight ... but he wasn't no bad person." (R. 196.) Jones testified that George was more aggressive when he returned from the Army. Jones saw George the day before the murders and noted that George was upset that he could not see his children because his wife would not let him. Rufus Thomas knew George as a child, and George lived with Thomas for a short period. Thomas visited with George two weeks before the murders and noted that George seemed "fine" at that time. (R. 205.) Alfred McCray served with George in the Army Reserves and testified that George "acted quite normal" while they served together. (R. 209.) McCray did not see George exhibit aggressive behavior. George's younger half-sister, Ellen Jones, testified that she and George grew up in a large family with both of their parents.[4] Ellen and George had six siblings. According to Ellen, she, George, and Zelda were the youngest of the siblings; her other siblings were 11 to 16

[4]Jones testified that she always thought George's father, Ransom George, Jr., was her biological father also but later learned that he was not her "real father." (R. 211.)

years older than her. Ellen testified that George was three or four years older than her. Ellen testified that the older siblings moved out of the house at some point and that she was too young to remember when all the family lived together in the same house. Ellen testified that her parents were normal and that they had occasional disagreements, particularly when her father would drink alcohol on the weekends. Ellen testified that her father never got "physical" with the children. (R. 219.) Ellen stated that George was a "normal" child who was an excellent student and played football. As a child, George built a tree house where he spent a lot of his time. Ellen saw George when he visited her at her house the week before the murders. According to Ellen, George appeared "normal" during the visit. (R. 232.)

George also presented the testimony of his trial attorneys, Jeb Fannin[5] and Steve Giddens. Fannin was appointed as second chair on George's case approximately six weeks before trial. Fannin testified that he met with George before trial. Fannin described George as "very calm," "polite," and

[5]The record indicates that Jeb Fannin was a district court judge in Talladega County at the time he testified at the Rule 32 hearing.

"very cordial." (R. 120.) Fannin testified that George was talkative and answered all questions asked. According to Fannin, George did not report hearing voices while he was incarcerated before trial. Fannin spoke with some of George's family members before trial but could not remember the names of those he spoke to in preparation for trial. Fannin testified that he visited the crime scene and spoke to witnesses and neighbors. According to Fannin, George's wife refused to talk to him before trial. Based on Dr. Ronan's report and his interactions with George, Fannin did not believe that insanity was a viable defense in George's case.

Steven Giddens was the lead attorney on George's case. Once assigned the case, Giddens conducted discovery and learned that George had confessed to the crime and that the State intended to call George's wife to testify at trial as both a victim and an eyewitness. Based on that information, Giddens developed a trial strategy to get the jury to recommend life in prison without the possibility of parole "because the facts were very bad for Mr. George." (R. 149.) Giddens evaluated the case to determine if there was an alibi defense, a third-party defense, or an insanity defense

available to George. Giddens testified that George did not display any behavior that made him question George's mental-health status. Giddens, however, moved for a psychological evaluation and a psychiatric evaluation after meeting with George in jail to prepare for the penalty phase of trial and to ascertain the existence of any nonstatutory mitigating evidence. Giddens testified that he made his own observations when meeting with George but felt it best to get someone else to assist him in evaluating George's mental health. Giddens testified that he did not consult other mental-health experts outside Garner and Dr. Ronan because "based on [his] discussions with [George] and based on the evaluations, [he] didn't feel that there was any need to explore it further." (R. 159.) Giddens testified that the majority of his investigation was focused on the mitigation evidence for the penalty phase of trial. Giddens spoke to George's family members and attempted to talk to George's wife but was unsuccessful. Giddens did not obtain George's school records, medical records, or records pertaining to George's parents. Giddens did review George's Army records. On cross-examination, Giddens testified that George seemed intelligent

and that George was cooperative, polite, and honest. According to Giddens, George never indicated that the reason he committed the crime was because he heard voices telling him to kill his wife or to shoot his wife. Further, George never told Giddens that he believed that his mother-in-law put a "curse or hex on him." (R. 167.) Giddens discussed George's childhood with George and George's sisters, and there was no indication of abuse or excessive drinking by George's father. Giddens testified that Dr. Ronan did not ask for any additional records before completing her psychiatric evaluation of George.

> "'Counsel have a duty to investigate but this duty is confined to reasonable investigation. See Strickland [v. Washington], 466 U.S. [668] at 691, 104 S.Ct. at 2066 [(1984)]. In Funchess v. Wainwright, 772 F.2d 683, 689 (11th Cir. 1985), this Court found counsel reasonably investigated despite the fact that he had not investigated his client's psychological problems because the client never told him of any problems and the competency evaluation did not suggest any problems existed. The client also acted competently while assisting counsel in preparing his case. See id. Thus the court held that counsel was not put on notice of any problems and could not be faulted for not pursuing the matter. See id.; cf. Collins v. Francis, 728 F.2d 1322, 1349 (11th Cir. 1984) (determining that counsel who failed

> to investigate witnesses that the defendant did not tell him about was not ineffective).'
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> "'Reliance upon some family members[']statements that other mitigation witnesses did not exist was considered permissible in Singleton v. Thigpen, 847 F.2d 668, 670 (11th Cir. 1988). Rejecting a per se rule of ineffective assistance where counsel does not consult family members, we held in Williams v. Head, 185 F.3d 1223, 1237 (11th Cir. 1999), that counsel's investigation was reasonable when he did not interview the defendant's sister or father, the latter because the defendant had not lived with him for very long. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 690-91, 104 S.Ct. at 2066.'

"Holladay v. Haley, 209 F.3d 1243, 1251-52 (11th Cir. 2000). See also Davis v. State, 9 So. 3d 539 (Ala. Crim. App. 2008).

> "'"The reasonableness of counsel's investigation and preparation for the penalty phase, of course, often depends critically upon the information supplied by the defendant. E.g. Commonwealth v. Uderra, 550 Pa. 389, 706 A.2d 334, 340-41 (1998) (collecting cases). Counsel cannot be found ineffective for failing to introduce information uniquely within the knowledge

> of the defendant and his family which is not provided to counsel."'
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> "Waldrop v. State, 987 So. 2d 1186, 1195 (Ala. Crim. App. 2007)(quoting Commonwealth v. Bond, 572 Pa. 588, 609–10, 819 A.2d 33, 45–46 (2002)).
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> "'In assessing counsel's investigation, we must conduct an objective review of their performance, measured for "reasonableness under prevailing professional norms," which includes a context-dependent consideration of the challenged conduct as seen "from counsel's perspective at the time."'
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> "Wiggins v. Smith, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)."

Washington v. State, 95 So. 3d 26, 43-44 (Ala. Crim. App. 2012).

The evidence presented at the Rule 32 hearing indicates that trial counsel conducted an investigation in preparing to defend George on capital-murder and attempted-murder charges. The investigation included, among other things, speaking with George and his family, touring the crime scene, speaking to witnesses, and requesting psychological and psychiatric evaluations. Contrary to George's contention otherwise, the evidence presented at the Rule 32 hearing does not support his argument that his behavior in the weeks leading up to the crime suggested a mental illness that warranted a more

extensive investigation than the investigation conducted by trial counsel. In fact, witnesses called to testify at the Rule 32 hearing described George as "normal" and "average." The descriptions given by those witnesses were also given by trial counsel who testified at the Rule 32 hearing that they observed no behaviors on the part of George that would call into question his mental health. Although Giddens requested further psychiatric evaluation on behalf of George, the record indicates that he did so in order to prepare for the penalty phase of trial, given the damning evidence of guilt against George. Accordingly, the circuit court did not abuse its discretion in denying relief on this claim.

B.

George next contends that his trial counsel failed to investigate whether George had the ability to form the specific intent necessary to murder the victims and to present an insanity defense during the penalty phase.

Concerning this claim, this circuit court stated:

> "George called Dr. Byron Hudson, a clinical neuro-psychologist from Massachusetts to testify at the evidentiary hearing. Over a period of years, Dr. Hudson administered tests to George, conducted a number of interviews with George, reviewed George's school, military and other records, and conducted

collateral interviews with members of George's family and others that knew him. Dr. Hudson diagnosed George with Schizotypal Disorder and mild cognitive disorder or Static Encephalothy. (H.R. 248-249.) Dr. Hudson testified that factors conducive to a psychotic break were present around the time of the murders and that if George had had such a break he could have had a breach in reality. (H.R. 270.)

"In rebuttal, the State presented the testimony of Dr. Glen King via deposition. Dr. King has been recognized as an expert in clinical and forensic psychology. (K.D. 12.) Dr. King reviewed the results of the tests administered by Dr. Hudson as well as other data sources and conducted a clinical interview with George. Dr. King opined that George did not meet the criteria for a diagnosis of Schizotypal Disorger. (K.D. 32.) Dr. King also concluded that George was able to understand the nature and wrongfulness of his actions at the time of the murders. (K.D. 34.)

"In response to Dr. King's testimony, this Court permitted George to submit rebuttal testimony from Dr. Hudson via deposition. At his deposition, Dr. Hudson expressed his opinions regarding the reliability and accuracy of Dr. King's conclusions and his qualifications to render those opinions. On cross-examination, Dr. Hudson indicated that George knew shooting the victims was wrong. (H.D. 212-213.)

"Judge Fannin testified that he spoke with George on numerous occasions prior to trial and had no recollection of George ever complaining about hearing voices. (H.R. 58, 72.) Based on his interaction with George and the results of Dr. Ronan's evaluation, Judge Fannin opined that an insanity defense was not a viable guilt phase defense. (H.R. 74.) Mr. Giddens also believed that a mental disease or defect defense was not a viable guilt phase defense. (H.R. 88.) According to Mr.

> Giddens, George never displayed any behavior or psychotic symptoms that caused him to question George's mental state. (H.R. 92, 96.) George never told Mr. Giddens he shot the victims because voices told him to murder his wife. (H.R. 105.) In her written mental evaluation, Dr. Ronan reports that she found no evidence George was psychotic at the time of the offense or that he suffered from any major mental illness that would have interfered with his ability to understand right from wrong. (C.R. 23.)
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> "... The testimony of Dr. Hudson does not prove Mr. Giddens and Judge Fannin were ineffective during the guilt phase."

(C. 1198-1200.) Those findings are supported by the record.

Dr. Hudson, a neuropsychologist, testified at the Rule 32 hearing that he met with George three times at Holman Prison between October 2005 and May 2009. During his visits, Dr. Hudson conducted several psychological and neuropsychological tests on George. Dr. Hudson testified that he reviewed the results of those tests and approximately 500 pages of documents that included George's medical records, military records, and academic records. Dr. Hudson also spoke with two of George's sisters, two of George's friends, and George's grandmother. Based on this information, Dr. Hudson diagnosed George with schizotypal disorder -- a personality disorder -- and static encephalopathy. Dr. Hudson testified that a person

with schizotypal disorder was an "individual who really doesn't fit into [sic] with the world", who would "rather be alone" and "isolated." (R. 321.) Dr. Hudson stated that there was no "evidence of unusual perceptual experiences such as hearing things or feeling things." (R. 327.) Further, Dr. Hudson testified that, in George's case, the breakdown of a relationship would probably not cause enough distress to trigger a psychotic episode. Dr. Hudson guessed that the distress would "more than likely come from a lack of control over the relationship that he used to have control over." (R. 330.) When asked whether George had a psychotic break when he committed the murders, Dr. Hudson replied that he had all the factors that would be conducive to a psychotic break and that George "had all the makings for a psychotic break." (R. 331.) Dr. Hudson opined that "[i]f [George] had a psychotic break, by nature [he had] breached reality." (R. 331-32.)

In response to Dr. Hudson's testimony, the State retained Dr. Glen King to conduct an evaluation of George. Dr. King did not administer any psychological or neuropsychological tests on George, but, instead, relied on the report generated by Dr. Hudson and the test results set forth in that report. Dr. King

explained that he was prepared to conduct psychological tests or neuropsychological tests on George but did not do so because he "couldn't see anything in the records that would lead [him] to believe that was necessary." (C. 1132.) After conducting a clinical interview of George, reviewing the results of tests administered by Dr. Hudson, and reviewing other data, Dr. King found no evidence of serious mental disease or defect in George. Dr. King testified that George communicated with him well during the interview, that George was pleasant, and that George was cooperative. Dr. King said that George laughed at the suggestion that George practiced voodoo. Dr. King opined that George did not fit the diagnostic criteria for schizotypal personality disorder. According to Dr. King, George understood the nature and gravity of his actions and the wrongfulness of his acts at the time he committed the crimes.

In rebuttal to Dr. King's deposition testimony, George deposed Dr. Hudson. At his deposition, Dr. Hudson discredited Dr. King's conclusions. Dr. Hudson testified that Dr. King was not a neuropsychologist and questioned whether Dr. King was qualified to interpret the evaluations Dr. Hudson conducted on

George. Dr. Hudson also questioned the methodology used by Dr. King in reaching his conclusions and was troubled by Dr. King's failure "to evaluate [George] outside of a psychiatric interview dependent on a self-report." (C. 646.) Dr. Hudson opined that George wanted order and structure. According to Dr. Hudson, "a total loss of stability" and "a total eradication of [George's] power base ... would have caused enough distress for a schizotypical individual to go over and become psychotic and deranged." (C. 846.) Dr. Hudson believed that is what happened in George's case. Dr. Hudson testified that George's flight from the crime scene and the years spent in hiding indicated that George knew what he did was wrong.

When analyzing the adequacy of an investigation by trial counsel, this Court has stated:

> "'The reasonableness of the investigation involves "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further."' St. Aubin v. Quarterman, 470 F.3d 1096, 1101 (5th Cir. 2006) (quoting Wiggins v. Smith, 539 U.S. 510, 527, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)). '[B]efore we can assess the reasonableness of counsel's investigatory efforts, we must first determine the nature and extent of the investigation that took place....' Lewis v. Horn, 581 F.3d 92, 115 (3d Cir. 2009). Thus, '[a]lthough [the] claim is that his trial counsel should have done something more, we [must] first look at what

> the lawyer did in fact.' Chandler v. United States, 218 F.3d 1305, 1320 (11th Cir. 2000)."

Broadnax v. State, 130 So. 3d 1232, 1248 (Ala. Crim. App. 2013).

> It is well settled that
>
> > "'the mere fact a defendant can find, years after the fact, a[n] ... expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial. See, e.g., Horsley v. Alabama, 45 F.3d 1486, 1495 (11th Cir. 1995)("That experts were found who would testify favorably years later is irrelevant."); Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987).'"

Daniel v. State, 86 So. 3d 405, 423 (Ala. Crim. App. 2011) (quoting Davis v. Singletary, 119 F.3d 1471, 1475 (11th Cir. 1997)).

The evidence presented at the Rule 32 hearing indicated that trial counsel did not believe that insanity was a viable defense. Counsel based this conclusion on, among other things, their interaction with George and the results of a report made by Dr. Ronan following a psychiatric evaluation. Indeed, Giddens testified at the Rule 32 hearing that he requested the evaluation only in order to prepare for the penalty phase of trial and to ascertain any nonstatutory mitigating evidence. Giddens testified that he did not consult other mental-health

experts because, he said, his interaction with George and Dr. Ronan's evaluation demonstrated that it was unnecessary to do so.

To support his assertion that trial counsel was ineffective for not presenting an insanity defense, George presented the testimony of Dr. Hudson. Dr. Hudson diagnosed George with a schizotypal personality disorder and static encephalopathy and testified that George had all the factors that would be conducive to a psychotic break. Dr. Hudson, however, did not testify that George suffered a break from reality when he committed the crimes. In his deposition in rebuttal to Dr. King's deposition, Dr. Hudson testified that George knew that shooting the victims was wrong. Therefore, we agree with the circuit court that Dr. Hudson's testimony does not prove that trial counsel's decision to not pursue an insanity defense during the penalty phase constituted deficient performance. Accordingly, the circuit court did not abuse its discretion in denying relief on this claim.

C.

George also contends that trial counsel should have hired an independent mental-health expert to examine George before trial in order to possibly discover additional evidence in support of an insanity defense.

The circuit court stated the following concerning counsel's failure to obtain an independent mental-health expert:

> "The Court in Holladay v. Haley, 209 F.3d 1243 (11th Cir. 2000), held that 'counsel is not required to seek an independent evaluation when the defendant does not display strong evidence of mental problems.' As stated above, neither his counsel nor the friends and family members who testified during the evidentiary hearing had any indication that [George] was suffering from mental illness. The friends and family members who testified regarding his childhood presented the picture of a normal boy growing up during that era. While his childhood may not have been storybook perfect, it reflected the childhood of other boys in similar socio-economic and geographic positions. No testimony was presented that as an adult he suffered from more than everyday frustrations and aggravations that many male adults face. There was repeated testimony that he appeared and acted normal in the weeks preceding the incident and even on the day of the incident.
>
> "There was nothing in Dr. Ronan's report indicating that additional psychological testing and/or investigation would have produced any beneficial information for the guilt phase. ... No evidence was presented that Dr. Ronan's examination was incomplete.

> "George was initially evaluated by Mr. Gary Garner with the Cheaha Regional Mental Health Center. (H.R. 48-55.) Mr. Garner recommended that George be evaluated at Taylor Hardin Secured Medical Facility. (H.R. 52.) George received further evaluation by Dr. Ronan. This Court finds that George failed to prove Mr. Giddens' and Judge Fannin's performance was deficient at the guilt phase because they did not request funds so that George could be evaluated by another mental health expert."

(C. 1200-01.) The circuit court's findings are supported by the record on direct appeal and are supported by the evidence presented at the Rule 32 hearing.

As discussed in Part I.B, supra, the record on direct appeal and trial counsel's testimony at the Rule 32 hearing indicated that George's trial counsel declined to pursue an insanity defense after meeting with George on several occasions, speaking with some of George's family members, and reviewing Dr. Ronan's forensic evaluation of George. Fannin testified that he did not believe that insanity was a viable defense based on his interactions with George and based on the results of Dr. Ronan's report. Similarly, Giddens testified that George did not display behavior that caused him to question George's mental-health status. Giddens stated that he did not explore the question of George's mental health any

further after his discussions with George and after reviewing the evaluations.

In Ray v. State, 80 So. 3d 965 (Ala. Crim. App. 2011), Ray filed a postconviction petition for relief pursuant to Rule 32, Ala. R. Crim. P., alleging, among other things, that his trial counsel was ineffective for failing to engage a mental-health expert. While representing Ray, trial counsel received a mental-health report that had been completed by Dr. Ronan at Taylor Hardin. At the Rule 32 hearing, trial counsel stated that he did not move for an independent evaluation because it would not have been "fruitful." Ray, 80 So. 3d at 989. Trial counsel testified that he based his decision on conversations with Ray and Ray's family members. The circuit court denied Ray's ineffective-assistance-of-counsel claim and this Court affirmed, recognizing:

> "'[T]rial counsel had no reason to retain another psychologist to dispute the first expert's findings. "A postconviction petition does not show ineffective assistance merely because it presents a new expert opinion that is different from the theory used at trial." State v. Combs, 100 Ohio App.3d 90, 103, 652 N.E.2d 205, 213 (1994). See also State v. Frogge, 359 N.C. 228, 244-45, 607 S.E.2d 627, 637 (2005). "Counsel is not ineffective for failing to shop around for additional experts." Smulls

> v. State, 71 S.W.3d 138, 156 (Mo. 2002). "Counsel is not required to 'continue looking for experts just because the one he has consulted gave an unfavorable opinion.' Sidebottom v. Delo, 46 F.3d 744, 753 (8th Cir. 1995)." Walls v. Bowersox, 151 F.3d 827, 835 (8th Cir. 1998).'
>
> "Waldrop v. State, 987 So. 2d 1186, 1193 (Ala. Crim. App. 2007). See also Ward v. Hall, 592 F.3d 1144, 1173 (11th Cir. 2010) ('"[T]he mere fact a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial."' Quoting Davis v. Singletary, 119 F.3d 1471, 1475 (11th Cir. 1997)); Gilbert v. Moore, 134 F.3d 642, 654–55 (4th Cir. 1998) ('We cannot say that in light of the reports of the mental examinations performed, counsel's failure to retain a psychiatric expert to investigate this area further or to provide mitigating testimony fell outside the broad range of professionally adequate conduct.')."

Ray, 80 So. 3d at 989-90.

In this case, trial counsel had no reason to pursue additional expert opinions regarding George's mental health based on counsel's initial investigation, their interaction with George, and the results of Dr. Ronan's forensic evaluation. The mere fact that George found a psychiatric expert who gave favorable testimony years after the fact did not render trial counsel's performance in this case deficient. See Ray, supra.

To the extent George challenges the performance of trial counsel based on counsel's failure to request the assistance of a defense expert pursuant to Ake v. Oklahoma, 470 U.S. 68 (1985), Alabama courts have recognized:

> "In Ex parte Moody, 684 So. 2d 114 (Ala. 1996), the Alabama Supreme Court defined the standard by which a trial court must assess an indigent defendant's request for expert assistance:
>
> > "'Although the [United States] Supreme Court has not specifically stated what "threshold showing" must be made by the indigent defendant with regard to the need for an expert, the Court refused to require the state to pay for certain experts when the indigent defendant "offered little more than undeveloped assertions that the requested assistance would be beneficial." Caldwell v. Mississippi, 472 U.S. 320 at 323, 105 S.Ct. 2633 at 2637, 86 L.Ed.2d 231 (1985). As we stated in Dubose [v. State, 662 So. 2d 1189 (Ala. 1995),] the Supreme Court cases of Ake [v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985),] and Caldwell, viewed together, seem to hold that an indigent defendant must show more than a mere possibility that an expert would aid in his defense. "Rather, the defendant must show a reasonable probability that an expert would aid in his defense and [must show that] a denial of an expert to assist at trial would result in a fundamentally unfair trial." Dubose, 662 So. 2d at 1192, citing Moore v. Kemp, 809 F.2d 702 (11th Cir.), cert. denied, 481 U.S. 1054, 107 S.Ct. 2192, 95 L.Ed.2d 847 (1987).

"'....

> "'Based on the foregoing, we conclude that for an indigent defendant to be entitled to expert assistance at public expense, he must show a reasonable probability that the expert would be of assistance in the defense and that the denial of expert assistance would result in a fundamentally unfair trial. To meet this standard, the indigent defendant must show, with reasonable specificity, that the expert is absolutely necessary to answer a substantial issue or question raised by the state or to support a critical element of the defense. If the indigent defendant meets this standard, then the trial court can authorize the hiring of an expert at public expense.'

"Moody, 684 So. 2d at 119."

Billups v. State, 72 So. 3d 122, 129–30 (Ala. Crim. App. 2010).

Given the facts and evidence in this case, trial counsel could not show a reasonable probability that an additional examination by an independent mental-health expert would aid in George's defense and that the denial of his request for an expert would result in a fundamentally unfair trial. See Billups, supra. Therefore, trial counsel was not ineffective for failing to request funds to hire an independent mental-health expert on behalf of the defense. Accordingly, the

circuit court did not abuse its discretion in denying relief on this claim.

D.

George next contends that the "Rule 32 trial court's denial of relief on this [ineffective-assistance-of-counsel] claim is erroneous because it rests on the misapplication of the Strickland standard, fact-findings contradicted by the record, failure to consider evidence properly before the court, and evidentiary rulings that deprived Mr. George of due process." (George's brief, p. 80.)[6]

1.

George contends that the judgment of the circuit court denying George's Rule 32 rests on errors of both fact and law. Specifically, George contends that those errors include the misapplication of the Strickland standard, the failure to consider the district attorney's files, the police department's file, and affidavits of George's witnesses which were considered by Dr. Hudson and presented in his rebuttal

[6]George specifically lists seven arguments in support of this issue. For purposes of review on appeal, however, we have consolidated the issues and address them as three separate arguments.

deposition testimony, the misconstruing of the testimony of Dr. Hudson, and the decision to accord more credit to the opinion of Dr. King than the opinions of Dr. Hudson and Dr. Ronan.

Regarding findings made by the circuit court at an evidentiary hearing in postconviction proceedings, this Court has explained:

> "'The resolution of ... factual issue[s] required the trial judge to weigh the credibility of the witnesses. His determination is entitled to great weight on appeal.... "When there is conflicting testimony as to a factual matter ..., the question of the credibility of the witnesses is within the sound discretion of the trier of fact. His factual determinations are entitled to great weight and will not be disturbed unless clearly contrary to the evidence."'
>
> "Calhoun v. State, 460 So. 2d 268, 269–70 (Ala. Crim. App. 1984) (quoting State v. Klar, 400 So. 2d 610, 613 (La. 1981))."

Brooks v. State, 929 So. 2d 491, 495–96 (Ala. Crim. App. 2005).

Before addressing each of George's claims in its final order, the circuit court stated, in pertinent part:

> "After having read the original trial transcript, reviewed the exhibits, considered the evidence presented at the evidentiary hearing and

> the depositions, and reviewing all other material submitted during the postconviction process, plus reviewing the applicable law in the case, the Court finds...."

(C. 1193.)

Contrary to George's contention otherwise, the record indicates that the circuit court properly assessed trial counsel's performance under the Strickland standard. As discussed in Parts I.A., I.B., and I.C., of this opinion, the circuit court considered whether trial counsel properly investigated George's mental health in the weeks leading up to the crimes, whether trial counsel's decision to not pursue an insanity defense amounted to deficient performance, and whether trial counsel was ineffective for failing to hire an independent mental-health expert to examine George before trial. The circuit court considered the testimony of the witnesses presented at the evidentiary hearing, including, among others, trial counsel, Dr. Hudson, and Dr. King. In each instance, the circuit court applied the standard of review set forth in Strickland to the facts and evidence presented at trial and at the evidentiary hearing. Further, contrary to George's contention, the circuit court's order indicates that it considered the totality of the evidence in reaching its

decision. While George is correct, insofar as he asserts that the circuit court failed to specifically reference in its order the district attorney's file, the police department's file, or the affidavits, the circuit court did make it clear in its order that it considered the totality of the evidence when it denied George's Rule 32 petition. Moreover, when considering the evidence, the circuit court considered the testimony of Dr. Ronan, Dr. Hudson, and Dr. King before concluding that "the testimony of Dr. Hudson [did] not prove Mr. Giddens and Judge Fannin were ineffective during the guilt phase." (C. 1200.) This conclusion, along with the resolution of conflicting expert testimony, was solely for the circuit court, as the trier of fact, to make. See Brooks, supra. The record does not support George's claims. Therefore, he is not entitled to relief.

2.

George next contends that the he was denied a full and fair opportunity to prove his claims when the circuit court refused to subpoena out-of-state witnesses or to take their testimony by some alternative means and when the court refused to admit the affidavits of two deceased witnesses. George

contends that the circuit court's refusal to admit the affidavits of unavailable witnesses as substantive evidence "denied [him] due process and a full and fair hearing." (George's brief, p. 98.)

The record indicates that on July 16, 2010, George filed a motion to take testimony by deposition. In his motion, George informed the circuit court that five witnesses he expected to call at the Rule 32 evidentiary hearing lived in Delaware. Specifically, George intended to call as witnesses at the hearing Gayle George Bailey, Linda Faye George Wright, Rosanna Brown Simmons, Darlene Brown Jackson, and Eddie Cooper. With regard to Wright, George specifically alleged that Wright was unable to travel to Alabama to testify because she suffered from severe diabetes, had recently had her leg amputated, and received treatment for her condition at least twice a week.

On July 28, 2010, George filed a motion to accept affidavits in lieu of testimony. In his motion, George asked the circuit court to consider the affidavits of Calvin George, George's oldest brother, and Clarence Brown, George's cousin. George attached to his motion copies of the certificates of

death and copies of the affidavits of Calvin and Brown. In Calvin's affidavit, Calvin stated that he lived with George until Calvin was eight or nine years old when Calvin moved to Delaware. Calvin recounted a childhood riddled with poverty and stated that his parents beat him and his siblings regularly for not doing chores and for getting in trouble at school. Calvin stated that George was a playful child but that he usually kept to himself. Calvin stated that George moved to Delaware in 10th grade and described him as a "good person" who "was lively and into sports in high school." (C. 246.) According to Calvin, George changed after basic training in the Army and became more aggressive. In Brown's affidavit, Brown described George as a loner who had a quick temper and who "dabbled in voodoo." (R. 252.)

On January 18, 2011, the circuit court held a hearing on George's motion to take testimony by deposition and his motion to accept affidavits in lieu of testimony. George represented to the circuit court at that hearing that he expected the witnesses to testify regarding the guilt and penalty-phase claims and, in particular, "George's mental state and his family upbringing." (R. 31.) The State objected on the basis

that the State could not "cross-examine a sheet of paper" and the circuit court needed to see a witness in order to make credibility determinations and assess the demeanor of the witness. (R. 31.) The circuit court concluded that the witnesses needed to be present in Alabama to testify and on January 20, 2011, entered an order denying both motions.

On July 11, 2011, George filed an expedited motion to take witness testimony via videoconferencing or, in the alternative, by telephone deposition, and filed an expedited motion to declare certain witnesses material and necessary for purposes of the Rule 32 evidentiary hearing. In both motions, George represented to the court that he sought to present testimony from eight out-of-state witnesses, including Gayle George Bailey, Linda Faye George Wright, Rosanna Brown Simmons, Darlene Brown Jackson, Eddie Cooper, Clifford Lewis, Kendall Storey, and Gwendolyn Green Hall. George alleged that Bailey and Wright were mitigation witnesses at George's trial and would testify regarding their contact with trial counsel before trial. George further alleged that Simmons and Brown were George's cousins and that they shared a household with George during his adolescence in Delaware. George alleged

that Cooper and Lewis were George's friends during his childhood and adolescence and that both had personal and unique knowledge relevant to George's mental state. Finally, George alleged that Storey and Hall had known George during his military service at a time when problems developed in George's marriage. On July 15, 2011, George filed a motion to reconsider its January 20, 2011, order and to accept the affidavits of Calvin George and Clarence Brown in lieu of testimony.

Before conducting the evidentiary hearing, the circuit court considered George's expedited motions related to the witnesses' testimony and George's motion to reconsider. The court denied George's motion to declare material certain witnesses, finding that there was no indication as to why the witnesses could not get to court on their own. Further, the court found that their testimony would be cumulative. The court also denied George's motion to reconsider its decision not to accept the affidavits of Calvin George and Clarence Brown in lieu of their testimony, finding that many years had passed between the filing of the initial Rule 32 petition and the deaths of the respective witnesses in 2008 and 2009, that

the State had not been given the opportunity to cross-examine the witnesses, and that the affidavits indicate that the testimony would be cumulative to other testimony George intended to offer at the Rule 32 hearing. The circuit court reserved ruling on George's motion to take witness testimony via videoconferencing until the end of the presentation of George's case.

During the evidentiary hearing, George asked the circuit court to revisit his motion to take testimony via videoconferencing. George argued that Bailey and Wright, two of George's older sisters who testified at trial, were the only ones who could testify regarding their contact with trial counsel and preparation for trial. George further argued that the testimony of his cousins, Simmons and Jackson, was necessary because "[t]hey have personal relations about the home environment that was there" and they were "outside observers and not members of the nuclear family." (R. 241.) The circuit court disagreed, however, and determined that testimony from George's cousins would be cumulative. The circuit court also found that George's older sisters would not necessarily be able to offer additional evidence given the

large gap in age between them and George. Further, the circuit court noted that both Bailey and Wright testified during cross-examination at trial that there had been no abuse in the family.

Rule 32.9(a), Ala. R. Crim. P., states, in pertinent part:

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

(Emphasis added.) When addressing the scope of this Rule, this Court has stated:

> "Rule 32.9(a), Ala. R. Crim. P., is discretionary, not mandatory and leaves the question of the admission of evidence by affidavits to the discretion of the trial court. This Court has upheld a circuit court's exclusion of affidavits when those affidavits were introduced for the first time at the Rule 32 evidentiary hearing."

Hunt v. State, 940 So. 2d 1041, 1050 (Ala. Crim. App. 2005).

In Hamm v. State, 913 So. 2d 460 (Ala. Crim. App. 2002), this Court upheld a circuit court's ruling denying the

admission of an affidavit presented to the State at the evidentiary hearing. We reasoned that the admission of such an affidavit "would have denied the State the right to cross-examine the witness" and "the opportunity to prepare a counter affidavit" and would not have "allow[ed] the trial court the opportunity to closely examine the complete testimony." Hamm, 913 So. 2d at 478-79 (quoting Callahan v. State, 767 So. 2d 380, 403 (Ala. Crim. App. 1999)).

Here, the record indicates that George moved the circuit court on July 28, 2010 -- approximately 14 months after Calvin George had died and approximately 28 months after Brown had died -- to accept affidavits in lieu of the testimony of Calvin George and Clarence Brown. As in Hamm, supra, the admission of the affidavits of George's deceased relatives would have left the State at a disadvantage without the ability to cross-examine the witnesses. Further, the circuit court would not have had the benefit of considering the testimony as a whole. Accordingly, the circuit court did not abuse its discretion in denying George's motion to consider the affidavit testimony of Calvin George and Clarence Brown.

Likewise, we find that the circuit court did not abuse its discretion in refusing to subpoena out-of-state witnesses or to take their testimony by some alternative means. When denying George's request, the circuit court noted, among other things, that there had been no indication why the out-of-state witnesses could not make it to the Rule 32 evidentiary hearing on their own. Indeed, with the exception of Wright, one of George's older sisters who George alleged was physically unable to attend the Rule 32 hearing for medical reasons, there was no explanation regarding why the remaining witnesses could not otherwise appear to testify. With regard to Wright, the record supports the circuit court's conclusion that her testimony was cumulative to testimony offered by George's other sister, Gayle George Bailey. "The Alabama Supreme Court has held that the exclusion of admissible evidence 'does not constitute reversible error' if the evidence 'would have been merely cumulative of other evidence of the same nature, which was admitted.' Ex parte Lawson, 476 So. 2d 122 (Ala. 1985)." Craft v. State, 90 So. 3d 197, 221 (Ala. Crim. App. 2011).

Contrary to George's contention otherwise, the exclusion of the testimony of witnesses who were unavailable and whose

testimony he sought to elicit by affidavit or deposition at the Rule 32 evidentiary hearing did not violate his due-process rights or prevent him from having a full and fair hearing. The United States Supreme Court has explained that, when "a State creates a liberty interest, the Due Process Clause required fair procedures for its vindication." Swarthout v. Cooke, 562 U.S. 216, 220 (2011). By enacting rules allowing for postconviction relief, the State of Alabama has created a liberty interest. However, "[b]ecause a criminal defendant convicted after a fair trial no longer enjoys the presumption of innocence, his liberty interest is more limited and the State has more flexibility in deciding what procedures are necessary." Cunningham v. District Attorney's Office for Escambia County, 592 F. 3d 1237, 1260 (11th Cir. 2010)(citing District Attorney's Office for Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2320 (2011)).

In this case, the circuit court conducted an evidentiary hearing at which George presented the testimony of 15 witnesses. The testimony presented by George included his trial counsel, childhood friends, friends of his family, a nephew, his half-sister, and a mental-health expert. Following

the hearing, George was permitted to present additional testimony in the form of a deposition of his mental-health expert in order to rebut expert testimony presented by the State. Although George was prohibited from introducing the testimony of additional witnesses through affidavits or deposition testimony, the circuit court's refusal to allow this testimony did not render his evidentiary hearing unfair or violate his due-process rights. Accordingly, we find that the circuit court did not abuse its discretion when it prohibited George from introducing testimony of additional witnesses through affidavits and deposition testimony.

To the extent George contends on appeal that the hearing was "fundamentally unfair" because the State was allowed to present the testimony of its expert by deposition, we find that George's argument fails to comply with Rule 28(a)(10), Ala. R. App. P.

> "'"It is not the job of the appellate courts to do a party's legal research .... Nor is it the function of the appellate courts to 'make and address legal arguments for a party based on undelineated general propositions not supported by sufficient authority or argument.'" Pileri Ind., Inc. v. Consolidated Ind., Inc., 740 So. 2d 1108, 1110 (Ala. Civ. App. 1999), quoting Dykes v. Lane Trucking, Inc., 652 So. 2d 248, 251 (Ala. 1994). Because Jennings has failed to present sufficient argument, authority, or

> citation to the facts in support of this issue, we conclude that the he has failed to comply with Rule 28(a)(10) and that this issue is therefore, deemed to be waived.'"

Benjamin v. State, 156 So. 3d 424, 453-54 (Ala. Crim. App. 2013)(quoting Jennings v. State, 965 So. 2d 1112, 1136 (Ala. Crim. App. 2006)).

3.

George next contends that "[t]he cumulative effect of all the Rule 32 court's errors, both legal and factual, renders its decision denying relief unreasonable." (George's brief, p. 112.) Specifically, George maintains that the cumulative effect of the circuit court's errors that included the improper exclusion of evidence in its final order, unreasonable conclusions regarding evidence presented at the Rule 32 hearing, and the misapplication of the law require reversal.

The Alabama Supreme Court has set forth the cumulative-error rule as follows: "[W]hile, under the facts of a particular case, no single error among multiple errors may be sufficiently prejudicial to require reversal under Rule 45, [Ala. R. App. P.,] if the accumulated errors have 'probably injuriously affected substantial rights of the parties,' then

the cumulative effect of the errors may require reversal." Ex parte Woods, 789 So. 2d 941, 942-43 n. 1 (Ala. 2001)(quoting Rule 45, Ala. R. App. P.). As previously discussed, we found no error with regard to George's claims.

> "'Because we find no error in the specific instances alleged by the appellant, we find no cumulative error. "Where no single instance of alleged improper conduct constituted reversible error, we do not consider their cumulative effect to be any greater. Sprinkle v. State, 368 So. 2d 554, writ. quashed, Ala., 368 So. 2d 565 (1978)." Thomas v. State, 393 So. 2d 504, 509 (Ala. Cr. App. 1981).'
>
> "Fisher v. State, 587 So. 2d 1027, 1039 (Ala. Cr. App.), cert. denied, 587 So. 2d 1039 (Ala. 1991), cert. denied, 503 U.S. 941, 112 S.Ct. 1486, 117 L.Ed.2d 628 (1992)."

Chandler v. State, 615 So. 2d 100, 110 (Ala. Crim. App. 1992). Accordingly, George is not entitled to relief on this issue.

II.

George next contends that his trial counsel was ineffective for failing to adequately prepare and present mitigation evidence at the penalty phase of trial.

A.

As he did in attacking his trial counsel's performance during the guilt phase, George argues that his trial counsel

rendered ineffective assistance by failing to conduct an adequate investigation in preparation of George's mental-health defense during the penalty phase. In support of his contention, George reasserts that trial counsel failed to investigate and failed to hire a defense mental-health expert. George also contends that his trial counsel failed to "collect evidence pertinent to other aspects of [George's] background, such as the [alcoholism,] poverty and domestic violence to which he was exposed as a child."[7] (George's brief, p. 116.)

At the Rule 32 hearing, George questioned trial counsel regarding their investigation in the case and their defense strategy. Fannin testified that he met with George before

[7]George also claimed in his amended Rule 32 petition attacking his counsel's performance: (1) that trial counsel failed to present testimony about his years in high school, his employment, and his family life; (2) that trial counsel failed to object to the consolidation of his capital murder trial and his attempted murder trial; (3) that trial counsel failed to object to instances of prosecutorial misconduct; (4) that trial counsel failed to object to the prosecution's improper closing arguments; (5) that trial counsel failed to object to the State's presentation of rebuttal evidence before the testimony of expert mitigation testimony; and (6) that he received ineffective assistance of counsel on direct appeal. Because none of these claims are argued by George in his brief on appeal, they are deemed abandoned and will not be considered by this Court. See, e.g., Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995)("We will not review issues not listed and argued in brief.").

trial and that, based on his interaction with George and on Dr. Ronan's report, he did not believe that an insanity defense was viable in George's case. Fannin testified that he spoke with some of George's family members, visited the crime scene, and spoke to witnesses and neighbors before trial. When questioned about preparation for the penalty phase of trial, Fannin could not recall whether a mitigation specialist was hired or who decided which witnesses to call to testify during the penalty phase. Giddens testified that his trial strategy was focused on preparation for the penalty phase. Giddens explained that he formulated his trial strategy after conducting discovery and meeting with George. Giddens testified that he did not believe insanity to be a viable defense. Nevertheless, in preparation for the penalty phase of trial and in an effort to ascertain nonstatutory mitigators, Giddens requested a psychiatric evaluation. Giddens testified that he also spoke with some of George's family members, including George's mother and one of George's sisters. Giddens testified that he called two of George's sisters to testify during the penalty phase of trial because he felt like they were "closer to [George] maybe and had more information or ...

I felt would be a good witness on his behalf." (R. 168.) Giddens stated that he discussed with the sisters George's background and George's upbringing with his family and siblings.

Lucia Penland, a mitigation specialist who was employed with the Alabama Prison Project ("APP") at the time of George's trial, testified that the APP was a prison advocacy organization that offered mitigation services to attorneys who represented defendants charged with capital crimes. Penland testified that the APP routinely mailed letters to attorneys offering services and that such a letter was sent in George's case. According to Penland, one of the attorneys in George's case responded to the letter but there was no follow-up after that initial response. Penland testified that the APP did not work on George's case.

George called several friends to testify at the Rule 32 hearing. Byron Jackson testified that he had known George for approximately 16 years and that he had never seen George act in an aggressive manner. Jackson saw George on the day of the murders and testified that George appeared to be depressed. Qurientan Payne, George's nephew, saw George approximately one

week before the murders and one day before the murders. Payne testified that, on both occasions, George acted like he normally did. Alfred McCray served with George in the Army Reserves and also described George as normal. Rufus Thomas, a childhood friend of George's who lived with George for a short period, visited with George two weeks before the murders and did not observe any abnormal behavior.

Mary Alice Thomas and Eddie Jones were childhood friends of George's. Thomas testified that she lived next door to George and described George as a normal child. Jones was also one of George's neighbors and grew up with George. Jones testified that, as a child, he went over the George's house. Jones testified that George's house was an "average size" that was "appropriate." (R. 194-95.) Jones testified that George's parents fought and that the children were beaten; however, Jones stated that they all "got beat" back then. (R. 195.) According to Jones, George would have bruises after he was beaten. Jones described George as a normal kid who "used to get in trouble and fight, you know, like kids do, but he wasn't no bad person." (R. 196.) Jones testified that he saw

George the day before the murders and that George was upset that his wife would not let him see his children.

Ellen Jones, George's half sister, testified that she and George had six siblings. Ellen testified that she and George grew up in a four-bedroom house. Ellen testified that the older siblings moved out at some point and that she could not recall the sleeping arrangements when the family all lived together in the same house. According to Ellen, the house was heated with fireplaces and heaters and had running water. Ellen testified that her parents had occasional disagreements, particularly when her father would come home drunk. Ellen testified that her father did not get drunk everyday but would get drunk approximately two weekends out of every month. Ellen testified that she did not know if her father and mother ever got into physical altercations with each other. According to Ellen, her father never got "physical" with the children. (R. 219.) Ellen testified that George was a normal child. George visited with Ellen for one hour the week before the murders. Ellen testified that George acted like his normal self during the visit.

As his final witness, George called Dr. Bryan Hudson, a neuropsychologist who had evaluated George, to testify at the Rule 32 evidentiary hearing. Dr. Hudson prepared a report containing the results of his evaluation that was admitted into evidence at the hearing. In his report, Dr. Hudson concluded that George suffered from a "longstanding psychiatric disorder (i.e., schizotypal disorder)." (Supp. R., C. 1389.) Dr. Hudson stated that "schizotypal disorder, as a characterlogical condition, manifests in ways that diminishes a person's ability to form stable interpersonal relationships and also results in significant intrapersonal experiences, which might be most prevalent during times of extreme distress." (Supp. R., C. 1389.) Dr. Hudson opined that George experienced an acute exacerbation of his underlying psychiatric disorder "shortly before and during the time that he committed the offenses." (Supp. R., C. 1389.) In making his diagnosis, Dr. Hudson considered George's medical history and his developmental history, which included a review of George's school records, military records, criminal record, and interviews with members of George's family. Dr. Hudson

also conducted several psychological and neuropsychological tests on George.

The State deposed Dr. Glen King, a clinical and forensic psychologist, who had evaluated George at the request of the State. Dr. King conducted a clinical interview with George and reviewed the results of the neuropsychological testing performed by Dr. Hudson. Dr. King also reviewed data sources that included Dr. Ronan's report and her testimony from trial, George's military records and medical records, and affidavits of some of George's family members. Dr. King found no evidence indicating that George suffered from any serious mental illness or mental defect.

In rebuttal, George deposed Dr. Hudson, and Dr. Hudson questioned Dr. King's qualifications, as well as the methodology used by Dr. King in reaching his conclusions. Dr. Hudson believed that George, as a schizotypal individual, suffered a total loss of stability and became psychotic. Dr. Hudson, however, testified that George knew that committing the murders was wrong.

The record from George's direct appeal reflects that trial counsel called two of George's older sisters who lived

in Delaware to testify during the penalty phase of trial. Gail Joyce Bailey testified that she moved out of the family home when she was 18 and George was "about 13 or 11." (Record on Direct Appeal, R. 519.) Bailey testified that George was a "normal" boy who kept mostly to himself unless "you did something to him." (Record on Direct Appeal, R. 518.) Bailey testified that she was not aware of George ever getting in trouble with the law or whether George had a criminal history. Bailey had not spoken to George in several years. Bailey testified that she was unaware of George being subjected to any abuse by her parents or siblings as a child. Linda Faye George Wright was 41 years old at the time of trial. Wright testified that George kept to himself as a child but that he was also friendly. Wright was unaware of George getting into trouble as a child. Wright testified that she had not seen George in several years.

Trial counsel also called Dr. Ronan to testify during the penalty phase. Dr. Ronan testified that she met with George for approximately 4 hours and that George completed testing that took an additional 30 to 45 minutes. Dr. Ronan diagnosed George with a "mixed personality disorder that had dependent,

avoidant, passive-aggressive, paranoid, and perhaps schizotypal features." (Record on Direct Appeal, R. 568.) She also diagnosed him with an "adjustment disorder with depression." (Record on Direct Appeal, R. 568.) In arriving at her diagnosis, Dr. Ronan noted George's longstanding history of instability, particularly in personal relationships and George's relationship with his wife. Dr. Ronan considered information provided in witnesses' reports that referenced problems between George and his wife. Dr. Ronan also considered information provided by the district attorney's office. Dr. Ronan testified that George discussed his military background and his problems with his superiors in the military. According to Dr. Ronan, George reported "things that could suggest schizotypal features" such as disorganized thoughts and perceptual aberrations at times of extreme stress. (Record on Direct Appeal, R. 570.) Dr. Ronan stated that extreme marital strife could be a stressful factor. Dr. Ronan conducted intelligence testing that indicated George had an IQ of 90, which was the lower part of the average range. Dr. Ronan concluded that George was an emotionally unstable

person with a personality disorder but that he did not suffer from a major psychiatric disorder.

In its order denying George relief on his Rule 32 petition, the circuit court found that George did not prove his allegation that trial counsel failed to adequately prepare and present mitigation evidence. Regarding George's allegations that trial counsel failed to adequately investigate George's character and mental health, the circuit court noted that "family and friends who testified at the evidentiary hearing portrayed a normal childhood" and that two of George's sisters who testified at trial gave no indication that George had anything other than a normal childhood and that he has shown no signs of mental illness. (C. 1203-04.) The circuit court also found that there was no evidence presented at the evidentiary hearing indicting that trial counsel had rendered ineffective assistance by not hiring a mitigation investigator. Specifically, the court found that "George failed to prove what beneficial evidence and information a mitigation investigation by Ms. Penland or someone else with the APP might have uncovered if the APP had been retained by Mr. Giddens and Judge Fannin." (C. 1206.)

Regarding trial counsel's performance during the penalty phase, the circuit court found:

> "During the penalty phase, Mr. Giddens and Judge Fannin called two of George's sisters to testify about his personal character and the fact he did not have any criminal history. Mr. Giddens and Judge Fannin also called Dr. Ronan to testify relative to George's state of mind at the time of the offense. Dr. Ronan testified that George suffered from a mixed personality disorder. (R. 568.) Dr. Ronan also testified that George had a history of unstable relationships and that at times of extreme stress he could lapse into 'disorganized' thoughts. (R. 569-570.)
>
> "Under the facts of the case, this Court finds that Mr. Giddens' and Judge Fannin's penalty phase strategy was reasonable. Additional testimony regarding George's background and testimony from another mental health professional does not establish that Mr. Giddens and Judge Fannin were ineffective. See Daniel v. State, [86 So. 3d 405, 437 (Ala. Crim. App. 2011)](holding that '"the existence of alternative or additional mitigation theories generally does not establish ineffective assistance of counsel"')(citation omitted).
>
> "Moreover, this Court notes that George was 32 years old at the time of the offense. George served almost 10 years active duty in the U.S. Army and was still in the Army Reserves at the time of the offenses. George was married to Geraldine George and had fathered two children. Under the facts of this case, this Court is confident that, even if there was testimony George had witnessed or been subjected to domestic abuse some years before he murdered the victims, there is no reasonable probability the outcome of the penalty phase would have been different. See Tompkins v. Moore, 193 F.3d 1327, 1337 (11th Cir. 1999)(holding that 'where there are

> significant aggravating circumstances and the petitioner was not young at the time of the capital offense, "evidence of a deprived and abusive childhood is entitled to little, if any, mitigating weight"')(citation omitted); see also Beckworth v. State, 946 So. 2d 490, 507 (Ala. Crim. App. 2005)(holding that 'Beckworth was 33 years old at the time this murder was committed and he had a family of his own. Additional evidence about his chaotic upbringing decades earlier would have been entitled to little weight as mitigation for this crime')."

(C. 1207-08.)

With regard to George's claim that trial counsel was ineffective for failing to obtain an independent mental-health expert to testify at the penalty phase, the circuit court found as follows in its order:

> "Trial counsel called Dr. Ronan at the penalty phase of the trial regarding [George's] capacity to appreciate the criminality of his conduct and wether it was substantially impaired. She concluded that Mr. George: suffered from a personality disorder; had a history of being unstable, especially in personal relationships; had paranoid features and was 'mistrustful' of others; that he reported things that could suggest schizotypal features and when under great stress could exhibit disorganized thought and may have 'perceptual aberrations' (hearing voices). However, she also stated that there was no evidence that [George] was psychotic at the time of the offense or that he suffered from a major mental illness.
>
> "At the evidentiary hearing, Dr. Hudson testified similarly, concluding that [George] had a personality disorder and an occasional 'quasi-

> psychotic disorder' (H.R. 321-325). Dr. Hudson also testified that there was no evidence of him 'hearing things' (H.R. 327). However, he goes on to testify that Mr. George had a 'psychotic break.' (H.R. 331.) After the evidentiary hearing a deposition was taken of State's witness, Dr. Glen King, a clinical and forensic psychologist. He concluded that [George] understood the nature and the quality of his actions and does not suffer from a serious mental illness. (K.D. 34.)
>
> "Then a deposition was taken of Dr. Hudson after he reviewed Dr. King's deposition. He claimed that Dr. King did not do a thorough investigation, but he also concluded that [George] knew his act was wrong. (H.D. 58.)
>
> "Waldrop v. State, 987 So. 2d 1186 (Ala. Crim. App. 2007), addressed the issue by stating 'Counsel is not ineffective for failing to shop around for additional experts.' The testimony presented at the evidentiary hearing does not support the fact that trial counsel were ineffective."

(C. 1210.)

> "'[T]rial counsel's failure to investigate the possibility of mitigating evidence [at all] is, per se, deficient performance.' Ex parte Land, 775 So. 2d 847, 853 (Ala. 2000), overruled on other grounds, State v. Martin, 69 So. 3d 94 (Ala. 2011). However, 'counsel is not necessarily ineffective simply because he does not present all possible mitigating evidence.' Pierce v. State, 851 So. 2d 558, 578 (Ala. Crim. App. 1999), rev'd on other grounds, 851 So. 2d 606 (Ala. 2000). When the record reflects that counsel presented mitigating evidence during the penalty phase of the trial, as here, the question becomes whether counsel's mitigation investigation and counsel's decisions regarding the presentation of mitigating evidence were reasonable."

Reeves v. State, 226 So. 3d 711, 751-52 (Ala. Crim. App. 2016).

In Ray v. State, 80 So. 3d 965 (Ala. Crim. App. 2011), this Court explained:

> "'"[F]ailure to investigate possible mitigating factors and failure to present mitigating evidence at sentencing can constitute ineffective assistance of counsel under the Sixth Amendment." Coleman [v. Mitchell], 244 F.3d [533] at 545 [(6th Cir. 2001)]; see also Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005); Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). Our circuit's precedent has distinguished between counsel's complete failure to conduct a mitigation investigation, where we are likely to find deficient performance, and counsel's failure to conduct an adequate investigation, where the presumption of reasonable performance is more difficult to overcome.'
>
> > "'"[T]he cases where this court has granted the writ for failure of counsel to investigate potential mitigating evidence have been limited to those situations in which defense counsel have totally failed to conduct such an investigation. In contrast, if a habeas claim does not involve a failure to investigate but, rather, petitioner's dissatisfaction with the degree of his attorney's investigation, the presumption of reasonableness imposed by

> Strickland will be hard to overcome."
>
> "'Campbell v. Coyle, 260 F.3d 531, 552 (6th Cir. 2001) (quotation omitted) ...; see also Moore v. Parker, 425 F.3d 250, 255 (6th Cir. 2005). In the present case, defense counsel did not completely fail to conduct an investigation for mitigating evidence. Counsel spoke with [the defendant's] parents prior to [the] penalty phase of trial (although there is some question as to how much time counsel spent preparing [the defendant's] parents to testify), and presented his parents' testimony at the sentencing hearing. Defense counsel also asked the probation department to conduct a presentence investigation and a psychiatric evaluation. While these investigatory efforts fall far short of an exhaustive search, they do not qualify as a complete failure to investigate. See Martin v. Mitchell, 280 F.3d 594, 613 (6th Cir. 2002) (finding that defense counsel did not completely fail to investigate where there was "limited contact between defense counsel and family members," "counsel requested a presentence report," and counsel "elicited the testimony of [petitioner's] mother and grandmother"). Because [the defendant's] attorneys did not entirely abdicate their duty to investigate for mitigating evidence, we must closely evaluate whether they exhibited specific deficiencies that were unreasonable under prevailing professional standards. See Dickerson v. Bagley, 453 F.3d 690, 701 (6th Cir. 2006).'

"Beuke v. Houk, 537 F.3d 618, 643 (6th Cir. 2008). '[A] particular decision not to investigate must be directly assessed for reasonableness in all the

> circumstances, applying heavy measure of deference to counsel's judgments.' Wiggins, 539 U.S. at 521–22, 123 S.Ct. 2527. 'A defense attorney is not required to investigate all leads....' Bolender v. Singletary, 16 F.3d 1547, 1557 (11th Cir. 1994). 'A lawyer can almost always do something more in every case. But the Constitution requires a good deal less than maximum performance.' Atkins v. Singletary, 965 F.2d 952, 960 (11th Cir. 1992). 'The attorney's decision not to investigate must not be evaluated with the benefit of hindsight, but accorded a strong presumption of reasonableness.' Mitchell v. Kemp, 762 F.2d 886, 889 (11th Cir. 1985)."

Ray, 80 So. 3d at 983–84 (emphasis omitted). Additionally,

> "'"'[C]ounsel is not required to present all mitigation evidence, even if the additional mitigation evidence would not have been incompatible with counsel's strategy. Counsel must be permitted to weed out some arguments to stress others and advocate effectively.' Haliburton v. Sec'y for the Dep't of Corr., 342 F.3d 1233, 1243–44 (11th Cir. 2003) (quotation marks and citations omitted); see Herring v. Sec'y, Dep't of Corr., 397 F.3d 1338, 1348–50 (11th Cir. 2005) (rejecting ineffective assistance claim where defendant's mother was only mitigation witness and counsel did not introduce evidence from hospital records in counsel's possession showing defendant's brain damage and mental retardation or call psychologist who evaluated defendant pre-trial as having dull normal intelligence); Hubbard v. Haley, 317 F.3d 1245, 1254 n. 16, 1260 (11th Cir. 2003) (stating this Court has 'consistently held that there is "no absolute duty ... to introduce mitigating or character evidence"' and rejecting claim that counsel were ineffective in failing to

> present hospital records showing defendant was in 'borderline mentally retarded range') (brackets omitted) (quoting Chandler [v. United States], 218 F.3d [1305] at 1319 [(11th Cir. 2000)])."

> "'Wood v. Allen, 542 F.3d 1281, 1306 (11th Cir. 2008). "The decision of what mitigating evidence to present during the penalty phase of a capital case is generally a matter of trial strategy." Hill v. Mitchell, 400 F.3d 308, 331 (6th Cir. 2005).'"

McWhorter v. State, 142 So. 3d 1195, 1246-47 (Ala. Crim. App. 2011)(quoting Dunaway v. State, 198 So. 3d 530, 547 (Ala. Crim. App. 2009)).

This case does not present a situation where George's trial counsel conducted no investigation or where George's counsel had information concerning George's childhood that would warrant a more thorough investigation. At the Rule 32 hearing, trial counsel testified that they spoke to George and reviewed a psychiatric evaluation performed by Dr. Ronan. In her forensic-evaluation report, Dr. Ronan concluded that George did not present any signs or symptoms of a major psychiatric disorder. Trial counsel also spoke with witnesses and several of George's family members, including two sisters counsel called to testify during the penalty phase of George's trial, who both testified that George was a normal, well-

behaved child. According to trial counsel, their investigation did not indicate that George suffered from any mental-health issues. Evidence presented at the Rule 32 hearing regarding George's character did not substantially deviate from the evidence presented at trial. Several witnesses who testified at the evidentiary hearing and knew George as a child and as an adult described George as normal.

In this case, the circuit court's finding that George did not prove his allegation that trial counsel failed to adequately prepare and present mitigation evidence is supported by the record. Therefore, the circuit court properly denied this claim of ineffective assistance of counsel.

B.

George also contends that his trial counsel rendered ineffective assistance when counsel gave what George says was an inadequate closing argument during the penalty phase of trial in which counsel "failed to tie together" the evidence presented and did not ask the jury to spare George's life. (George's brief, p. 133.)

In addressing this claim the circuit court stated "At the evidentiary hearing, [George] presented no testimony on this

issue; therefore it is deemed to be abandoned." (C. 1211.) The circuit court's findings are supported by the record. George presented no evidence in support of this claim at the evidentiary hearing; thus, he failed to meet his burden of proving this claim. See Rule 32.3, Ala. R. Crim. P.

C.

Finally, in challenging his trial counsel's performance during the penalty phase, George contends that the "Rule 32 trial court's denial of relief on this [ineffective-assistance-of-counsel] claim is erroneous because it rests on the misapplication of the Strickland standard, fact-findings contradicted by the record, failure to consider substantial evidence that was properly before the court, and evidentiary rulings that deprived [him] of due process." (George's brief, p. 135.) George raised this same issue on appeal in challenging the performance of trial counsel during the guilt phase of trial and reasserts the same arguments in challenging his counsel's performance during the penalty phase. As explained in Parts I.D.1., I.D.2., and I.D.3., supra, George is not entitled to relief on those claims. However, in

challenging counsel's performance during the penalty phase, George makes additional arguments relevant to his penalty-phase claims; we address each in turn.

1.

George contends that the circuit court misapprehended and misrepresented the testimony presented at the evidentiary hearing. Specifically, George contends that Jones's testimony did, in fact, support allegations of domestic violence, that medical records of George's father substantiated claims of alcoholism and domestic violence in George's childhood home, and that Jackson's testimony indicated George was acting differently in the days before the murders.

In addressing Jones's testimony in its order, the circuit court found that Jones's "testimony at the evidentiary hearing did not support the allegations that both parents were 'violent alcoholics,' poverty and problems with water." (C. 1205.) The circuit court also found that "the claims involving domestic abuse between the parents, violence on the mother's part towards George, and 'savage' beatings were not supported by Jones's testimony." (C. 1205.)

With regard to Jackson's testimony, the circuit court found:

> "Mr. Jackson testified at the evidentiary hearing and his testimony did not support [George's] allegations. At the evidentiary hearing, Mr. Jackson testified he was close with [George] and viewed him as a regular guy. He didn't see him act aggressively. He saw him the day of the incident and said he looked like he had something on his mind and was worried. (H.R. 174-181.) He also testified that the trial attorney interviewed him."

(C. 1209.)

The circuit court's findings of fact are supported by the record. Jones testified that George lived in an "average" house during his childhood and that George was a normal child. According to Jones, George was beaten and sometimes sustained bruises, but, Jones testified, it was typical of all the children to get beaten back then. Jones, however, did not testify that George's parents were violent alcoholics and that George lived in poverty without running water. Indeed, George's half sister Ellen testified that the house she shared with George as a child had heat and running water. Ellen also testified that George's father did not get drunk on alcohol everyday or hit the children. Jackson testified that George "looked like, you know, he was worried about something. Like

he was depressed or something like that, you know." (R. 181.) Accordingly, George's contention that the circuit court misapprehended or misrepresented the testimony presented at the Rule 32 hearing is without merit.

Furthermore, contrary to George's contention otherwise, the circuit court did not err when it failed to rely on the medical records of George's father, Ransom George, to find that George was raised in a violent environment with an alcoholic father. The record indicates that the medical records of George's father were admitted as exhibits to Dr. Hudson's deposition testimony. The medical records show that a treating physician noted in September 1982 that Ransom had been drinking considerable amounts of alcohol when he arrived at the emergency room for treatment and that he had been in multiple altercations while in jail due to his drinking problem. Those records, however, do not prove that George was raised in a violent environment with an alcoholic father.

Accordingly, George is not entitled to relief on this claim.

2.

George also contends that the circuit court ignored federal law when it denied him relief on his penalty-phase ineffective-assistance-of-counsel claim. Specifically, George contends that the circuit court erred when it found that the fact that George was 32 years old when he committed the murders meant that evidence from his childhood and background was not entitled to too much weight. George relies on the United States Supreme Court decision in Porter v. McCollum, 558 U.S. 30 (2009), in support of his argument.

In its order denying George relief, the circuit court found, in pertinent part:

> "Moreover, this Court notes that George was 32 years old at the time of the offense. George served almost 10 years active duty in the U.S. Army and was still in the Army Reserves at the time of the offenses. George was married to Geraldine George and had fathered two children. Under the facts of this case, this Court is confident that, even if there was testimony George had witnessed or been subjected to domestic abuse some years before he murdered the victims, there is no reasonable probability the outcome of the penalty phase would have been different. See Tompkins v. Moore, 193 F.3d 1327, 1337 (11th Cir. 1999)(holding that 'where there are significant aggravating circumstances and the petitioner was not young at the time of the capital offense, "evidence of a deprived and abusive childhood is entitled to little, if any, mitigating weight"')(citation omitted); see also Beckworth v.

> State, 946 So. 2d 490, 507 (Ala. Crim. App. 2005)(holding that 'Beckworth was 33 years old at the time this murder was committed and he had a family of his own. Additional evidence about his chaotic upbringing decades earlier would have been entitled to little weight as mitigation for this crime')."

(C. 1207-08.)

In Porter, supra, Porter was convicted of two counts of first-degree murder and was sentenced to death. During the penalty phase of Porter's trial, trial counsel presented mitigation evidence that consisted only of the testimony of Porter's ex-wife and an excerpt from one deposition. Trial counsel presented no evidence regarding Porter's mental health. Porter subsequently filed a postconviction petition. During an evidentiary hearing, Porter presented extensive mitigating evidence that "described his abusive childhood, his heroic military service and the trauma he suffered because of it, his long-term substance abuse, and his impaired mental health and mental capacity." Porter, 558 U.S. at 33. The trial judge who conducted the state postconviction hearing held that Porter had not been prejudiced, finding the evidence of Porter's alcohol abuse inconsistent and discounting evidence of Porter's abusive childhood because he was 54 years old at

the time of trial. On appeal to the United States Supreme Court, the Court concluded that Porter's trial counsel was ineffective and that,

> "[h]ad Porter's counsel been effective, the judge and jury would have learned of the 'kind of troubled history we have declared relevant to assessing a defendant's moral culpability.' Wiggins [v. Smith, 539 U.S. 510, 535 (2003)]. They would have heard about (1) Porter's heroic military service in two of the most critical -- and horrific -- battles of the Korean War, (2) his struggles to regain normality upon his return from the war, (3) his childhood history of physical abuse, and (4) his brain abnormality, difficulty reading and writing, and limited schooling."

Porter v. McCollum, 558 U.S. at 41.

Unlike the trial court in Porter, the circuit court in this case was not presented with overwhelming evidence that George had witnessed or had been subjected to domestic violence during his childhood. Instead, the circuit court heard testimony from one witness, Jones, who testified that George had been beaten as a child. However, George's half sister, Ellen, testified that George's father, Ransom, never got physical with the children. The circuit court also considered testimony from several witnesses who testified that George was a normal child who grew up in an average house. The circuit court considered this evidence, in addition to

evidence of George's age at the time of the murders, his length of military service, and other facts of the case in concluding that George's exposure, if any existed, to domestic violence years before the murders occurred would not have changed the outcome during the penalty phase. Contrary to George's contention otherwise, the circuit court's conclusion does not run afoul of the Supreme Court's holding in Porter. Accordingly, George is not entitled to relief on this claim.

III.

George next contends that his trial counsel was ineffective for failing to remove from the venire prospective juror D.H. because, George argues, D.H. was biased and knew George's wife.

The record from George's direct appeal reflects that the venire was questioned in four panels. During questioning of the second panel, trial counsel asked the venire whether they knew George's wife. D.H. raised her hand, indicating that she knew George's wife. Trial counsel asked no follow-up questions of D.H. and D.H. served on George's jury.

At the Rule 32 hearing, D.H. testified that she was asked during voir dire whether she knew any of the victims; D.H.

answered that she knew George's wife. D.H. testified that she went to church with George's wife but that she did not know George. D.H. testified that she did not know the other victims in the case but that she attended their funerals "out of remorse of knowing [George's wife] and the situation that had happened." (R. 105.) When asked if she recalled the funeral, D.H. stated that it was "very sad." (R. 106.) D.H. remembered George's photograph appearing on television in the television programs "America's Most Wanted" and "Unsolved Mysteries." D.H. could not recall any specifics about the television programs she saw that featured George. George's trial counsel were not questioned at the Rule 32 hearing regarding voir dire of D.H.

In its order denying George's claim, the circuit court summarized D.H.'s testimony, noted that neither trial counsel was questioned about D.H. and concluded that there was no testimony presented at the Rule 32 hearing to indicate that juror D.H. was biased.

In Lee v. State, 44 So. 3d 1145 (Ala. Crim. App. 2009), this Court upheld the denial of a petitioner's ineffective-assistance-of-counsel claim in which the petitioner alleged

that counsel was ineffective for failing to strike three allegedly biased jurors, stating:

> "'The Fifth Circuit Court of Appeals considers an attorney's actions during voir dire to be a matter of trial strategy, which "cannot be the basis for a claim of ineffective assistance of counsel unless counsel's tactics are shown to be 'so ill chosen that it permeates that entire trial with obvious unfairness.'" Teague v. Scott, 60 F.3d 1167, 1172 (5th Cir. 1995) (quoting Garland v. Maggio, 717 F.2d 199, 206 (5th Cir. 1983)). Federal courts have held that an attorney's failure to exercise peremptory challenges does not give rise to a claim of ineffective assistance of counsel absent a showing that the defendant was prejudiced by the counsel's failure to exercise the challenges. United States v. Taylor, 832 F.2d 1187 (10th Cir. 1987). See also Mattheson v. King, 751 F.2d 1432, 1438 (5th Cir. 1985).'"

44 So. 3d at 1164-65. "'[W]here a postconviction motion alleges that trial counsel was ineffective for failing to raise or preserve a cause challenge, the defendant must demonstrate that a juror was actually biased.' Carratelli v. State, 961 So. 2d 312, 324 (Fla. 2007)." Perkins v. State, 144 So. 3d 457, 472 (Ala. Crim. App. 2012).

Further,

> "It is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions, or inactions, of counsel that occurred outside the record. Indeed, 'trial counsel

should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective.' Rylander v. State, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003). This is so because it is presumed that counsel acted reasonably:

> "'The presumption impacts on the burden of proof and continues throughout the case, not dropping out just because some conflicting evidence is introduced. "Counsel's competence ... is presumed, and the [petitioner] must rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 2588, 91 L.Ed.2d 305 (1986) (emphasis added)(citations omitted). An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption. Therefore, "where the record is incomplete or unclear about [counsel]'s actions, we will presume that he did what he should have done, and that he exercised reasonable professional judgment." Williams [v. Head,] 185 F.3d [1223,] 1228 [(11th Cir. 1999)]; see also Waters [v. Thomas,] 46 F.3d [1506,] 1516 [(11th Cir. 1995)] (en banc) (noting that even though testimony at habeas evidentiary hearing was ambiguous, acts at trial indicate that counsel exercised sound professional judgment).'

"Chandler v. United States, 218 F.3d 1305, 1314 n.15 (11th Cir. 2000). '"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."' Dunaway v. State, [198] So. 3d [530], [547] (Ala. Crim. App. 2009)[, rev'd on other grounds, 198

> So. 3d 567 (Ala. 2014)] (quoting Howard v. State, 239 S.W.3d 359, 367 (Tex. App. 2007))."

Broadnax v. State, 130 So. 3d 1232, 1255–56 (Ala. Crim. App. 2013). See also Stallworth v. State, 171 So. 3d 53, 92–93 (Ala. Crim. App. 2013) (opinion on return to remand).

"The burden of proof of a post-conviction allegation is on the petitioner, Montalvo v. State, 488 So. 2d 25 (Ala. Cr. App. 1986), and this Court will not presume error from a silent record. Robinson v. State, 444 So. 2d 884 (Ala. 1983)." McCollough v. State, 678 So. 2d 199, 200–01 (Ala. Crim. App. 1995). George failed to prove that juror D.H. was biased and that his trial counsel was ineffective for failing to remove D.H. on that basis. Therefore, the circuit court properly denied this claim.

IV.

Finally, George contends that the circuit court improperly dismissed subparts of claims based on the State's erroneous redivision of the claims and that the circuit court's dismissal of claims that incorporated facts and arguments from other claims was improper.

Rule 28(a)(10), Ala. R. App. P.,requires that an argument contain "the contentions of the appellant/petitioner with

respect to the issues presented, and the reasons therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on." "Failure to comply with Rule 28(a)(10) has been deemed a waiver of the issue presented." C.B.D. v. State, 90 So. 3d 227, 239 (Ala. Crim. App. 2011).

In approximately two pages of his brief, George lists examples in the record of claims in his Rule 32 petition that he alleged were improperly subdivided by the State. George makes no argument concerning the claims -- individually or as a whole -- and generally cites Strickland v. Washington, supra. Strickland, however, is irrelevant to George's particular claim that the circuit court failed to consider the totality of the evidence because of the redivision of the Rule 32 claims by the State.

Similarly, in two short paragraphs, George addresses the circuit court's dismissal of claims that incorporated facts and arguments from other claims and lists examples in the record, generally alleging that he was "deprived ... of due process under the Fifth and Fourteenth Amendments and Alabama law." (George's brief, p. 150.) Again, George provides no argument in support of his contention on appeal and, on this

particular claim, fails to cite any specific authority in support of his argument.

In Taylor v. State, 157 So. 3d 131 (Ala. Crim. App. 2010), this Court addressed a similar issue:

> "We are aware that application of Rule 28(a)(10) to find a waiver of arguments in an appellate brief has been limited to those cases in which the appellant presents general assertions and propositions of law with few or no citations to relevant legal authority, resulting in an argument consisting of undelineated general propositions unsupported by sufficient legal authority or argument. Although Rule 28(a)(10) is to be cautiously applied, it has been applied recently by the Alabama Supreme Court and by this Court when appropriate. E.g., Ex parte Theodorou, 53 So. 3d 151 (Ala. 2010); Jefferson County Comm'n v. Edwards, 32 So. 3d 572 (Ala. 2009); Slack v. Stream, 988 So. 2d 516 (Ala. 2008); James v. State, 61 So. 3d 357 (Ala. Crim. App. 2006) (opinion on remand from Alabama Supreme Court); Scott v. State, [Ms. CR-06-2233, March 26, 2010] ___ So. 3d ___ (Ala. Crim. App. 2010); Baker v. State, 87 So. 3d 587 (Ala. Crim. App. 2009); Lee v. State, 44 So. 3d 1145 (Ala. Crim. App. 2009); Bush v. State, 92 So. 3d 121 (Ala. Crim. App. 2009); and Franklin v. State, 23 So. 3d 694 (Ala. Crim. App. 2008).
>
> "In Scott v. State, this Court stated:
>
> > "'"Recitation of allegations without citation to any legal authority and without adequate recitation of the facts relied upon has been deemed a waiver of the arguments listed." Hamm v. State, 913 So. 2d 460, 486 (Ala. Crim. App. 2002). "An appellate court will consider only those issues properly delineated as such and will

> not search out errors which have not been properly preserved or assigned. This standard has been specifically applied to briefs containing general propositions devoid of delineation and support from authority or argument." Ex parte Riley, 464 So. 2d 92, 94 (Ala. 1985) (citations omitted). "When an appellant fails to cite any authority for an argument on a particular issue, this Court may affirm the judgment as to that issue, for it is neither this Court's duty nor its function to perform an appellant's legal research." City of Birmingham v. Business Realty Inv. Co., 722 So. 2d 747, 752 (Ala. 1998).'

"Scott v. State, ___ So.3d at ___. See also Hamm v. State, 913 So. 2d 460, 486 n. 11 (Ala. Crim. App. 2002)('Applying the federal counterpart to Alabama's Rule 28, Ala. R. App. P., the United States Court of Appeals for the Eighth Circuit stated, "[W]e regularly decline to consider cursory or summary arguments that are unsupported by citations to legal authorities. See United States v. Wadlington, 233 F.3d 1067, 1081 (8th Cir. 2000); United States v. Gonzales, 90 F.3d 1363, 1369 (8th Cir. 1996); see also United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991) ('Judges are not like pigs, hunting for truffles buried in briefs.')." U.S. v. Stuckey, 255 F.3d 528, 531 (8th Cir. 2001).').

"As the State correctly argues in its brief on appeal, many 'arguments' in Taylor's brief consist of little more than a cursory summary of the claims from the petition....

"....

"Clearly, Taylor's cursory summary of the allegations of the petition--with a citation only to the paragraphs of the petition in many arguments of the brief, and in other portions of the brief only

> to paragraphs of the petition and undelineated general principles of law--does not comport with Rule 28(a)(10). For many of the issues raised in the brief, Taylor presents no discussion of the facts or the law in the form of an argument demonstrating why the circuit court's dismissal of the specific claims was in error. Accordingly, we hold that Taylor has waived for purposes of appellate review in this Court those arguments in his brief ... that fail to comply with the requirements of Rule 28(a)(10)."

157 So. 3d at 142–45.

Here, too, we find that George's list of examples of claims that were improperly subdivided by the State and of claims dismissed that incorporated facts and arguments incorporated elsewhere in the Rule 32 petition with no specific discussion of the facts or law in the form of an argument regarding those claims and with only citation to general legal authority that is irrelevant is not sufficient to comply with Rule 28(a)(10). Therefore, those claims are deemed to be waived.

Conclusion

For the reasons stated above, we affirm the circuit court's denial of George's petition for postconviction relief.

AFFIRMED.

Welch, Joiner, and McCool, concur. Windom, P.J., recuses herself.