REL: May 29, 2020

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-14-1523

Michael Jerome Lewis

v.

State of Alabama

Appeal from Houston Circuit Court
(CC-97-1574.60)

On Return to Remand

MINOR, Judge.

Michael Jerome Lewis, an inmate on death row, appeals the Houston Circuit Court's denial of his petition for postconviction relief under Rule 32, Ala. R. Crim. P. We affirm.

Facts and Procedural History

A jury convicted Lewis in 2003 of capital murder for the 1997 killing of Timothy John Kaye "during a kidnapping in the first degree or an attempt thereof." See § 13A-5-40(a)(1), Ala. Code 1975. The jury recommended, by a vote of 10-2, that Lewis be sentenced to death; the circuit court accepted the jury's recommendation and sentenced Lewis to death.

In Lewis's direct appeal, we summarized the relevant facts and procedural history that led to Lewis's conviction and death sentence:

> "During the early morning hours of April 26, 1997, Lewis, James Anthony [('Tony')] Free, April Hargedon, and Timothy John Kaye went to Lewis's mobile home in Houston County. Free and Kaye became involved in an altercation, which resulted in Free's beating Kaye in the head with his fist and a beer bottle. At some point, Lewis also became involved in the altercation. Free and Lewis then started arguing over who would shoot Kaye. The badly beaten Kaye was subsequently shot twice in the head. Kaye was placed in the back of his pick-up truck and taken across the state line into Holmes County, Florida. Lewis and Free then threw Kaye's body from a bridge on Highway 2 into the Choctawhatchee River. Lewis and Free later returned to Houston County, Alabama, in Kaye's truck, drove the truck to a field alongside Sonny Mixon Road, and set it on fire.
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> "The evidence presented at trial tended to establish the following. On the afternoon of Friday, April 25, 1997, 38-year-old Timothy John Kaye left his parents' home in Houston County, telling his

parents that he planned to attend his daughter's softball game. Later that evening, around 7:30 or 8:00 p.m., Sarah Kaye talked to her son again. Kaye asked his mother to tell his father that he would be by to pick him up around 6:00 a.m. on Saturday; the two men planned to go to a relative's house in Mississippi to pick up some shrimp. Kaye failed to show up at his parents' house the following morning, or for his daughter's birthday party on Sunday, April 27; repeated attempts to contact him were unsuccessful.

"On April 27, Investigator Richard St. John of the Houston County Sheriff's Department was dispatched to a location on Sonny Mixon Road in Houston County. Upon arrival, Investigator St. John saw a burned pick-up truck in a field. The truck was towed to an impound lot in Dothan. After authorities determined that the vehicle was registered to Timothy John Kaye, the Houston County Sheriff's Department attempted to contact Kaye and left a message on Kaye's answering machine regarding the discovery of the vehicle and its condition.

"On the morning of Tuesday, April 29, after repeated attempts to contact their son, the Kayes 'broke into' Timothy Kaye's home. Inside the house they found a birthday card for his daughter on the kitchen bar; the shirt and jogging shorts he wore to sleep in were [lying] on his bed. As best the Kayes were able to determine, all that was missing from their son's closet were some 'casual clothes'--stone-washed jeans, a sports shirt, and a pair of athletic shoes. When the Kayes listened to the messages on their son's answering machine, they discovered a message from the Houston County Sheriff's Department asking that their son contact the sheriff's department. The Kayes then contacted the Houston County Sheriff's Department and subsequently filed a missing-person report on their son. Given the circumstances, an investigation was launched into Kaye's disappearance.

"The investigation of Kaye's disappearance led Houston County authorities to interview April Hargedon. During an April 30, 1997, interview, Hargedon told Investigator Donald Valenza and Commander Bill Land that on Friday, April 25, she accompanied Michael Lewis and Tony Free to the Corner Bar, located across the state line in Florida. The trio remained at the Corner Bar for several hours before returning to the Drifters' Club in Dothan, Alabama. According to Hargedon, [Lewis] was related to the Ready family, owners of the Drifters' Club. Inside the Drifters' Club, Hargedon lost contact with Free. However, Hargedon saw Lewis make contact with Kaye, a longtime acquaintance of Lewis's. At some point, Hargedon, Lewis, Kaye, and Kristy Hughes--Free's girlfriend--decided to leave the Drifters' Club and drive to the Players' Club. The group left the Drifters' Club, got into Lewis's Ford Bronco sport-utility vehicle, and proceeded toward the Players' Club. As Kristy Hughes was driving Lewis's Bronco to the Players' Club, the foursome was stopped by a Dothan police officer. After the officer determined that Hughes had an outstanding warrant, she was placed under arrest and taken into custody. Because Hargedon had no driver's license and Lewis and Kaye had been drinking, the officer called a taxi for them. When the taxi arrived, Hargedon, Lewis, and Kaye returned to the Drifters' Club. The trio went back inside the club for a while--long enough for Kaye to consume another beer and Lewis to purchase a bottle of Canadian Mist brand whiskey. Sometime after midnight--during the early morning hours of Saturday, April 26[1]--the trio left the Drifters' Club in Kaye's maroon truck and drove to Lewis's mobile home.

"At the mobile home Lewis and Kaye sat around, drinking and talking. Hargedon stated that Lewis and Kaye seemed to be on good terms with each other, with one of them commenting that they had known each other for 20 years. It was not until Tony Free showed up that difficulties arose. According to

Hargedon, Free exhibited 'an attitude.' At some point after Free arrived, Lewis and Kaye went outside to engage in what appeared to Hargedon to be a brief, good-natured wrestling match. After several minutes, Lewis and Kaye stopped wrestling and began walking back inside. However, Free told Kaye that it was Free's turn to wrestle. Kaye told Free that he did not want to wrestle again and continued walking toward the mobile home. At this point, Free hit Kaye in the back of the head with a beer bottle, causing Kaye to fall to the ground. Free fell to the ground with Kaye and began hitting him.

"While Lewis and Hargedon looked on, Free 'jumped on' Kaye and pinned Kaye to the ground by sitting on his chest and/or abdominal area, leaving Kaye unable to defend himself as Free continued to hit him. According to Hargedon, the beating lasted 15–20 minutes, and throughout the beating Kaye kept asking Free, 'Why are you doing this?' While Free continued to beat Kaye, Lewis went inside the mobile home and returned with a shotgun. Hargedon stated that Lewis returned with the shotgun, but that he made no effort to stop Free from beating Kaye. Instead, Hargedon stated that Lewis said '"We got to finish this" or something to that effect.' Not knowing what Lewis meant by this comment, Hargedon replied, 'I don't want nobody shooting nobody in front of me,' then took the shotgun from Lewis and put it back inside the mobile home. Because Hargedon had never seen a beating as vicious as the one Free was inflicting on Kaye, she became concerned for her own safety. As Kaye lay on the ground moaning, she heard first Free, and then Lewis say, 'Let me shoot him,' referring to Kaye. In Hargedon's words, 'I just knew I needed to get out of there.'

"Hargedon stated that during the exchange between Lewis and Free over who would shoot Kaye, Lewis looked up and called out to a man across the road, 'Look what I got.' According to Hargedon, the man declined, stating 'he didn't need no shit, he

was in enough.' Hargedon stated that she took advantage of Lewis's conversation with the unknown man to slip into the darkness and make her escape.

"The man whom Lewis called out to was Mike Harger, the husband of Lewis's cousin Kandy Harger. The Hargers lived near Lewis; in fact, Lewis's mobile home was directly across the road from the Hargers' barn. On the morning of April 26, 1997, Kandy Harger awakened around 4:00 a.m. She left her house and went to the barn to check on the couple's gamecocks, because the couple was preparing to go to a cockfight. While checking on the gamecocks, Harger heard the sounds of someone being hit and/or beaten; she also heard someone moaning. The sounds, which Harger described as 'loud,' came from the direction of Lewis's residence; she continued to hear these sounds as long as she was outside. After she went back inside her house, the telephone rang. When Harger answered the telephone, she discovered that it was her cousin, Mike Lewis. Lewis wanted Harger's husband to come over to his residence. Harger told her husband what Lewis had said. A short while later, she returned to the barn. Harger's husband subsequently drove the couple's truck to the barn to load the gamecocks. Harger heard Lewis call out to her husband to 'come over.' Harger stated she was fearful of what was going on at Lewis's and that she did not want her husband to go over there. Her husband did not go over to Lewis's residence. Instead, the couple loaded up their gamecocks and left. Although the sounds coming from Lewis's yard upset Harger, she did not call emergency 911 or notify the authorities because her husband would not let her. When she and her husband left around 5:00 a.m., Harger could still hear moaning and groaning coming from the area of Lewis's mobile home.

"Authorities obtained a search warrant for Lewis's mobile home and the surrounding yard. On April 30, Dothan Police Officer Ray Owens executed the search warrant. During the search, Owens

discovered spots of blood on two vehicles parked outside Lewis's mobile home; a hair was embedded in one of the blood spots. Authorities also found a number of items lying on the ground, including a man's Timex brand wristwatch with a torn band, a comb, a pack of cigarettes, several Canadian Mist brand whiskey bottles, and a number of beer bottles. Inside the mobile home, authorities discovered reddish stains that appeared to be 'watered-down blood' around the bathroom sink near the back bedroom, a loaded 12-gauge shotgun, and a 5-gallon can containing what appeared to be kerosene. The wristwatch found outside Lewis's mobile home was later identified by Sarah Kaye as belonging to her son, Tim Kaye.

"On May 4, 1997, Ray Darley was fishing in the Wildcat Cove area of the Choctawhatchee River in Holmes County, Florida, when he discovered the body of a white male 'up against a log jam' in the river. Darley contacted local authorities and reported finding the body. Later that day, Investigator Donald Valenza of the Houston County Sheriff's Department traveled to Holmes County to meet with Holmes County investigators concerning the recovery of the body from the Choctawhatchee River. Upon observing the body, Valenza noted that the body was clothed in a green t-shirt, jeans, and white athletic shoes. Authorities discovered a set of keys in the front pants pocket; those keys were released to Valenza to determine whether the keys fit any property belonging to Tim Kaye. It was later determined that the keys unlocked Tim Kaye's truck, toolbox, and shed.

"The body found in the Choctawhatchee River was identified as Tim Kaye. Dr. Marie Hermann, a district medical examiner for the 14th District of Florida--encompassing Holmes County--performed the autopsy on Kaye's body. Dr. Hermann's autopsy revealed that Kaye had suffered multiple blunt-force injuries, including three blunt-force injuries on

the back of Kaye's head. Dr. Hermann also discovered two gunshot wounds on the back of Kaye's head, which she determined came from a small caliber weapon; one of the gunshots traveled through the skull and exited the head. Dr. Hermann determined Kaye's cause of death to be blunt-force trauma and/or two gunshot wounds to the head.

"On May 8, 1997, Investigators Mark Johnson and Richard St. John of the Houston County Sheriff's Department traveled to 914 Matthews Road, DeFuniak Springs, Florida, to interview Rodney Ray Alford. The residence, located in an area identified as the Darlington Community, was approximately 3 miles from where Kaye's body was found and 50 miles from Houston County, Alabama. Alford told Johnson and St. John that Lewis had showed up at his son's residence on Saturday, April 26, 1997, between 6:00 and 6:30 a.m. as he, his son, and Buddy Slay were preparing to go fishing. Lewis was driving a maroon truck and was accompanied by a black-haired man that Lewis called 'James,' who Alford later identified as James Anthony Free.

"Alford observed that there was blood in the back of the truck as well as on the two men. Alford noticed that the blood on the two men appeared to be on their pants' legs and shoes. When Lewis got out of the truck, he had a bottle of Canadian Mist brand whiskey in his hand. Alford recalled Free and Lewis taking a hose and washing off their shoes. Alford stated that he did not ask Lewis and Free where the blood had come from and they did not volunteer any information about the source of the blood. Lewis and Free remained at the Alford residence for 45-60 minutes. While there, Alford observed them place a stick, a 'car tag,' and some floor mats in a fire that was burning outside the residence. However, before the two men left, one of them removed the tag from the fire and threw it in a well. Lewis asked Alford to accompany them to the liquor store, but he declined. Before leaving, Lewis told Alford, 'It's

family. Everything is all right.'

"Eddie Free testified that Lewis told him that he had shot Tim Kaye. According to Eddie, 'they [Lewis and Free] shot him and they went to Florida and dumped him in the river and burned his truck.' Lewis reportedly stated that he killed Kaye because he was a 'snitch' and informant for Houston County law-enforcement officials.

"Both Lewis and Free were indicted on charges of capital murder because the murder was committed during a kidnapping in the first degree or an attempt thereof. Free was tried first; he was convicted of capital murder and was sentenced to life imprisonment without the possibility of parole.[2] Free testified at length during Lewis's trial, setting out the details surrounding Kaye's murder and Lewis's involvement in it.

"After both sides had rested and the circuit court had instructed the jury on the law applicable to Lewis's case, the jury returned a verdict finding Lewis guilty of capital murder, as charged in the indictment.

"During the penalty phase of Lewis's trial, the State resubmitted all the evidence it had introduced during the guilt phase. Lewis offered the testimony of two witnesses: his parents, Wade Lewis and Collene Williams. Wade Lewis testified that his son was born in September 1953. Lewis's parents divorced in 1960, and both parents subsequently remarried. Lewis lived with his mother and stepfather until he was 16, when he went to live with his father. Wade Lewis described his son as a 'good kid.' He stated that his son worked with him in his floor-covering business; Lewis installed various types of floor covering for his father. According to Wade Lewis, his son was a good and conscientious worker who got along well with customers. Lewis testified that 'several years' before the instant trial, Lewis was

involved in an automobile accident that resulted in a broken neck. According to his father, Lewis had a lengthy and 'difficult' recovery, but eventually was able to go back to work.

"Collene Williams testified that following her divorce from Wade Lewis, she married Foy Ready. At the time of the marriage, Ms. Williams stated, Lewis was eight or nine years old. Ms. Williams described her son's relationship with his stepfather as 'not real good.' During the marriage, the family lived at the Parkway Motel. Ms. Williams testified that her son was required to perform certain chores before and after school. Ms. Williams stated that Ready drank heavily and that he had a violent temper. Ms. Williams testified that Ready was physically abusive to both her and her son. On several occasions, Ready was physically abusive to Lewis, whipping him so severely that Lewis was unable to go to school. Ms. Williams testified that Lewis also saw his stepfather physically abuse Lewis's younger half-brother, Jimmy Ready. According to Ms. Williams, because of her husband's abusive nature, Lewis's grades fell, and he lost interest in school activities. Finally, when Lewis was 16, Ready's behavior became so bad that Ms. Williams sent Lewis to live with his father. Ms. Williams believed that as the years passed, Ready's abusive behavior resulted in Lewis having more difficulties interacting socially. Ms. Williams stated that Lewis had a close relationship with his half-brother, Jimmy Ready. According to Ms. Williams, Jimmy's death in January 1997 greatly affected Lewis, causing a change in his behavior.

"During cross-examination, Ms. Williams admitted that despite his 'difficult' relationship with Ready, Lewis continued to maintain contact with the Ready family, and patronized two of his stepfather's businesses--the Drifters' Club and the Players' Club. Ms. Williams also stated that, during his lifetime, she had met the victim, Tim Kaye.

> According to Ms. Williams, her son and Kaye had known each other for approximately 20 years.
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> "After both sides rested, the circuit court instructed the jury on the law applicable to the penalty-phase proceeding. The jury returned a verdict recommending, by a vote of 10-2, that Lewis be sentenced to death.
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> "_____
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> "[1]Hargedon['s] testimony as to the exact time varied, mentioning just after midnight at one point, but later stating that they did not leave the Drifters' Club until 2:00 a.m. or later.
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> "[2]On September 20, 2002, this Court affirmed Free's conviction and sentence, by an unpublished memorandum. Free v. State (No. CR-01-1158), 868 So. 2d 484 (Ala. Crim. App. 2002) (table)."

Lewis v. State, 24 So. 3d 480, 492-97 (Ala. Crim. App. 2006) (opinion on return to remand).

In its order sentencing Lewis to death, the trial court found two aggravating circumstances: (1) Lewis murdered Kaye during a kidnapping and (2) the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses. See § 13A-5-49, Ala. Code 1975. As for the second aggravating circumstance, the trial court stated, in relevant part:

> "The evidence showed beyond a reasonable doubt that the crime committed shocks the conscience of the Court. The victim was beaten repeatedly about

> his head with a large rock as he begged for his life. He was then placed in the bed of his pick-up truck and shot twice with a handgun. The autopsy also showed that he sustained numerous pain-causing wounds to his body which were capable of causing death. Then to compound the atrocities that brought Timothy John Kaye's life to an end, his body was taken and dumped into the Choctawhatchee River where it stayed for almost a week. The motive behind this killing was apparently the fact that Timothy John Kaye had been a police informer in a large federal marijuana investigation in the Dothan area."

(Trial C. 265.[1])

The trial court found no statutory mitigating circumstances to exist under § 13A-5-51, Ala. Code 1975. The trial court found mitigating the following evidence that Lewis presented: (1) Lewis had "suffered at least three head injuries in his younger years, two of which were fairly severe"; (2) Lewis's stepfather had physically and verbally abused Lewis, and Lewis had been "forced to witness his stepfather physically and verbally abuse his mother and half-brother"; (3) Lewis had been "made to live in a motel room by himself as a child, and was required to work around the motel his stepfather operated before and after school even late into

[1]"Trial C." refers to the clerk's record in Lewis's direct appeal; "Trial R." refers to the reporter's transcript in the direct appeal. See Rule 28(g), Ala. R. App. P. See also Hull v. State, 607 So. 2d 369, 371 n.1 (Ala. Crim. App. 1992) (this Court may take judicial notice of its own records).

the night"; (4) Lewis had "abused a number of controlled substances and alcohol"; and (5) Lewis had "suffered mild cognitive impairment as a result of the injuries to his head." (Trial C. 265-66.) In weighing the aggravating and mitigating circumstances, the trial court found that "all the mitigating circumstances found to exist taken together are extremely weak in comparison to the aggravating circumstances of this offense." (Trial C. 266.)

On appeal, this Court initially remanded Lewis's case for the trial court to hold a hearing on Lewis's claim that the State had violated Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), by using its peremptory challenges to remove African-Americans from the jury venire. Lewis v. State, 24 So. 3d 480 (Ala. Crim. App. 2006). On return to remand, this Court affirmed Lewis's conviction and death sentence. Lewis v. State, 24 So. 3d 480, 492 (Ala. Crim. App. 2006) (opinion on return to remand). The Alabama Supreme Court affirmed. Ex parte Lewis, 24 So. 3d 540 (Ala. 2009). The United States Supreme Court denied Lewis's petition for a writ of certiorari. Lewis v. Alabama, 558 U.S. 1078 (2009). This Court issued a certificate of judgment, making Lewis's

conviction final, on June 17, 2009.

Lewis filed the underlying Rule 32 petition on May 24, 2010. (C. 14.) He filed amended petitions in April 2011, August 2011, and June 2014. (C. 182, 422, 1072.) In his third amended petition, Lewis alleged (1) that his defense counsel had not called two key witnesses because of an alleged conflict of interest; (2) that his defense counsel's investigation was inadequate for both the guilt phase and the penalty phase; (3) that the State had offered to accept a guilty plea in exchange for a 25-year sentence but his counsel did not tell him about it; (4) that the State had withheld exculpatory evidence; (5) that certain jurors had not answered questions truthfully about whether they knew Lewis; (6) that his defense counsel had failed to ask for certain necessary jury instructions; and (7) that Alabama's capital-murder statute is unconstitutionally overbroad. (C. 1073.)

The circuit court conducted a two-day evidentiary hearing in August 2014. Lewis testified on his own behalf and presented 12 witnesses and certain exhibits. After the hearing, the parties submitted briefs. (C. 1571, 1618.) In a four-page order, the circuit court denied the petition on July

2, 2015. (C. 1705.) Lewis appealed. See Rule 32.10, Ala. R. Crim. P.

This Court remanded the cause in 2018 for the circuit court to make specific findings of fact as to all the issues raised in Lewis's third amended petition. See Rule 32.9(d), Ala. R. Crim. P. See also Ex parte McCall, 30 So. 3d 400, 404 (Ala. 2008). On remand, the circuit court complied with our instructions.[2] (Record on Return to Remand C. 10.) The parties submitted more briefing on return to remand. See Rule 28A, Ala. R. App. P.

Standard of Review

> "'[Lewis] has the burden of pleading and proving his claims. As Rule 32.3, Ala. R. Crim. P., provides:
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> > "'"The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief. The state shall have the burden of pleading any ground of preclusion, but once a ground of preclusion has been pleaded, the petitioner shall have the burden of disproving its existence by a preponderance of the evidence."

[2]In his brief on return to remand, Lewis argues that the circuit court's other findings are insufficient. This argument lacks merit.

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

"Washington v. State, 95 So. 3d 26, 38-39 (Ala. Crim. App. 2012).

"[Lewis's] ... claims were denied by the circuit court after [Lewis] was afforded the opportunity to prove those claims at an evidentiary hearing. See Rule 32.9(a), Ala. R. Crim. P.

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

> presented with pure questions of law, that court's review in a Rule 32 proceeding is de novo.' Ex parte White, 792 So. 2d 1097, 1098 (Ala. 2001). 'However, where there are disputed facts in a postconviction proceeding and the circuit court resolves those disputed facts, "[t]he standard of review on appeal ... is whether the trial judge abused his discretion when he denied the petition."' Boyd v. State, 913 So. 2d 1113, 1122 (Ala. Crim. App. 2003) (quoting Elliott v. State, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992)).
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> "Finally, '[a]lthough on direct appeal we reviewed [Lewis's] capital-murder conviction for plain error, the plain-error standard of review does not apply when an appellate court is reviewing the denial of a postconviction petition attacking a death sentence.' James v. State, 61 So. 3d 357, 362 (Ala. Crim. App. 2010) (citing Ex parte Dobyne, 805 So. 2d 763 (Ala. 2001)). With these principles in mind, we review the claims raised by [Lewis] on appeal."

Marshall v. State, 182 So. 3d 573, 580-82 (Ala. Crim. App. 2014) (some citations omitted).

Discussion

On appeal, Lewis reiterates most of the claims raised in his petition.[3] We address them in turn.

I.

[3]The claims Lewis has not raised on appeal are deemed abandoned. Jones v. State, 104 So. 3d 296, 297 (Ala. Crim. App. 2012) ("Other claims raised in [the] petition were not pursued on appeal and, therefore, those claims are deemed abandoned. 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.').").

Lewis argues that his lead defense counsel, James Parkman,[4] was ineffective because, Lewis says, he had "numerous conflicts of interest" that "caused counsel to forgo plausible defenses." (Lewis's brief, p. 23.)

> "'To prevail on a claim of ineffective assistance of counsel, the petitioner must show (1) that counsel's performance was deficient and (2) that the petitioner was prejudiced by the deficient performance. See Strickland v. Washington, 466 U.S. 668 (1984).
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> > "'"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

[4]Lewis's defense team consisted of attorneys James Parkman and Martin Adams. Parkman served as lead counsel, and Adams did the closing at the penalty phase. John Steensland and Mark Johnson also assisted the defense as legal interns. Randy Herring provided investigative services.

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

"'Strickland, 466 U.S. at 689.

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

> appropriate, but only what is constitutionally compelled.' Burger v. Kemp, 483 U.S. 776, 107 S. Ct. 3114, 3126, 97 L. Ed. 2d 638 (1987)."
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> "'Chandler v. United States, 218 F.3d 1305, 1313-14 (11th Cir. 2000) (footnotes omitted).
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> "'An appellant is not entitled to "perfect representation." Denton v. State, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). "[I]n considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.'" Burger v. Kemp, 483 U.S. 776, 794 (1987).'
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> "Yeomans v. State, 195 So. 3d 1018, 1025-26 (Ala. Crim. App. 2013). Additionally, '"[w]hen courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger."' Ray v. State, 80 So. 3d 965, 977 n.2 (Ala. Crim. App. 2011) (quoting Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000)).
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> "We also recognize that when reviewing claims of ineffective assistance of counsel 'the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.' Strickland v. Washington, 466 U.S. 668, 698, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)."

Marshall, 182 So. 3d at 582-83. This Court has also stated:

> "'Addressing a lawyer's conflict of interest as it relates to the Sixth Amendment right to effective counsel, this Court has explained:

> "'"'"'[I]n order to establish a violation of the Sixth Amendment, ... [a defendant] must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.' Cuyler v. Sullivan, 446 U.S. [335] at 348, 100 S. Ct. [1708] at 1718 [(1980)]. Accord Williams v. State, 574 So. 2d 876, 878 (Ala. Cr. App. 1990). To prove that an actual conflict adversely affected his counsel's performance, a defendant must make a factual showing 'that his counsel actively represented conflicting interests,' Cuyler v. Sullivan, 446 U.S. at 350, 100 S. Ct. at 1719, '"and must demonstrate that the attorney 'made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other.'"' Barham v. United States, 724 F.2d 1529, 1532 (11th Cir.) (quoting United States v. Mers, 701 F.2d 1321, 1328 (11th Cir. 1983)), cert. denied, 467 U.S. 1230, 104 S. Ct. 2687, 81 L. Ed. 2d 882 (1984). Once a defendant makes a sufficient showing of an actual conflict that adversely affected counsel's performance, prejudice under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)--i.e., 'that, but for counsel's unprofessional errors, the result of the proceeding would have been

> different'--is presumed. Strickland, 466 U.S. at 694, 692, 104 S. Ct. at 2068, 2067. See United States v. Winkle, 722 F.2d 605, 610 (10th Cir. 1983); Williams v. State, 574 So. 2d at 878."'"
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> "'Jones v. State, 937 So. 2d 96, 99-100 (Ala. Crim. App. 2005) (quoting Wynn v. State, 804 So. 2d 1122, 1132 (Ala. Crim. App. 2000)). Additionally,
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> > "'"'[a]n actual conflict of interest occurs when a defense attorney places himself in a situation "inherently conducive to divided loyalties." Castillo [v. Estelle], 504 F.2d [1243] at 1245 [(5th Cir. 1974)]. If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.'
>
> "'"Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir. 1979)."'"

Acklin v. State, 266 So. 3d 89, 106-07 (Ala. Crim. App. 2017) (quoting Ervin v. State, 184 So. 3d 1073, 1080-81 (Ala. Crim. App. 2015)).

In his third amended petition, Lewis alleged that Parkman

had conflicts of interest based on Parkman's prior representation of John "Jay" Causey and Mike Harger.[5] Parkman represented Causey in a federal drug case that ended a year before Kaye's murder. He represented Harger in a state drug case that began about a month before Kaye's murder and ended within six months. A summary of the relevant evidence is necessary to examine these claims.

Parkman testified at the hearing that he has been a practicing attorney since 1979. He served as lead counsel for Lewis at his trial. (R. 121, 138.[6]) Parkman had represented Lewis in an assault case in which Lewis had "shot [a shotgun] at somebody running away from the house through a cornfield."[7]

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[5]Parkman testified he represented Free on a misdemeanor charge in 1988, and Causey testified that Parkman had also represented Kaye at some point. (R. 40, 314.) Lewis does not allege that either of those prior representations created a conflict for Parkman.

[6]The record on appeal includes a transcript of several hearings the circuit court held. Those transcripts are separately paginated. "R." refers to the reporter's transcript of the evidentiary hearing the circuit court held on August 19-20, 2014. Citations to the transcript of other hearings include the date of the hearing.

[7]Parkman stated that evidence about this prior conviction was the main reason he did not want Lewis to testify. (R. 158.) Lewis testified that a jury had convicted him of selling marijuana in 1984 but that Parkman did not represent him in that case. (R. 426.) Lewis testified that Parkman had

(R. 33.) Lewis's family paid Parkman to represent him in the case involving Kaye's death. (R. 25, 368.) Parkman testified that even before Lewis retained him for the murder case, he "knew pretty much all there [was] to know about [Lewis] and his family." (R. 140-41.)

Parkman met with Lewis at the jail, and Lewis told him in detail what had happened, including where he and Free had "dumped the body." (R. 21, 79.) "Within a week" of that interview, Parkman and an investigator went to the "bridge located in Florida where the body was allegedly dumped." (R. 79-80.) Parkman said he was "hoping to find ... some evidence that would indicate, for example, one track of shoes, and that [Lewis] didn't get out of the vehicle, and therefore it had to be the other person there." (R. 79-80.) Parkman's efforts were unsuccessful.

Parkman met with Lewis "several times after that," and he testified that Lewis's story remained consistent over time. (R. 26-27.) Parkman found "believable" Lewis's story of what had happened. (R. 147.) Parkman testified that what he "believed the facts to be" in Lewis's case was that Kaye

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represented Lewis a few years later when Lewis pleaded guilty to possession of cocaine. (R. 427.)

"ended up at a party with [Lewis] and Tony Free, and two girls, at [Lewis's] house. Tony got mad. My understanding with that was two-fold. The prosecution wanted to believe that it was because [Kaye] had been a snitch for the Federal Government in a marijuana case.

"....

"... I never believed that to be the case. There was no evidence pointing to that. The federal government did an investigation because it was a federal prosecution. They never charged anybody with that, or with having anything to do with a federal witness.

"So with that in mind, I went to what I believed to be the case, and that was that Mr. Kaye had made some gestures or moves toward Tony Free's girlfriend, at the time. Tony got mad about it. Probably Tony had been drinking quite a bit, got upset, and ultimately ended up in a fight, which was a one-sided fight, and really beat Mr. Kaye almost to death, or to death at that time.

"During this time period, Mr. Lewis comes out on the porch. Went and got a shotgun, came out on the porch, fired the shotgun up in the air to try to stop ... Free because [Tony] was a pretty big guy, and younger than anybody there. And it did not stop him.

"[Lewis] returned back inside. A pistol was obtained. I believe a .25 caliber. At that time, it was alleged that he -- that [Kaye] was shot in the head, which the autopsy indicated that's the case.

"Now, the problem [was] who did the shooting. My belief was -- is from the evidence that I obtained was that ... Free was the one that had the pistol. However, during the course of the trial, Foy Ready, who is related to ... Lewis, came to me and said

> that he had gone to the district attorney's office and had told the district attorney that Mike Lewis owned a .25 caliber pistol. And that he knew that, and that he had seen it at the house.[8] ... [N]o .25 caliber [was] ever found.
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> "Fortunately, for the defense, Mr. Foy Ready passed away. Unfortunately for him and his family, he passed away before the trial. So they never could get that statement into evidence that, in fact, Mike Lewis owned a .25 caliber, which, of course, benefitted us."

(R. 17-20.)

Parkman said he did not file a speedy-trial request in Lewis's case because the State had revealed it would try Free first. (R. 43.) Parkman testified that he "wanted [Free] to go to trial first at that moment .... to see what he would say, if he would say anything, and I wanted to see what [the State]

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[8]Parkman testified that when he learned that Foy Ready had talked to the district attorney, he said:

> "'[W]hat in the hell are you doing? Why would you do that?' And he said, 'I don't know, Jim. I just wanted to go do it.' And I said, 'Foy --
>
> "Q. You knew that wasn't a good thing?
>
> "A. I knew it was horrible. And he said, 'Jim, I know; I thought maybe it could help us.' I said, 'Foy, no.' And then he passed away, I believe, of cancer."

(R. 148.)

would put out as far as the evidence." (R. 44.) Parkman was particularly interested in hearing the testimony of Rodney Ray Alford, who "lived in Florida where they took the truck after they disposed of the body." (R. 44, 141.) Parkman had heard that Alford "was a schizophrenic" who "would do things like put aluminum foil on his head to keep the thought process away, the bad thoughts that were coming to him from wherever they were coming from." (R. 44-45, 141.)

Free did not testify at his own trial, but Parkman thought the evidence at Free's trial showed that Free "was really the bad guy, ... the one that did everything, not just the beating, but also the shooting." (R. 47.) Parkman said he tried to get a plea deal for Lewis, but the district attorney refused and never made a plea offer. (R. 47-48.)

Parkman testified that he was aware of federal "cases in Houston County that arose out of the Swedish cigar factory incidents." (R. 50.) He represented one of the defendants in those cases, Jay Causey, who pleaded guilty in April 1996 in the United States District Court for the Middle District of Alabama to possession of marijuana with intent to distribute. (C. 4108; R. 50-51, 53.) Parkman began representing Causey in

November 1995. (R. 68.) In July 1996, the district court sentenced Causey to 24 months in prison, and Parkman's representation of Causey ended. (C. 4108-09.)

Parkman testified that his investigation showed that Lewis was not involved in the cigar-factory cases. (R. 50, 54.) Parkman stated that federal officials had "wanted to investigate" whether Kaye had been killed "because he was a federal snitch." (R. 51.) When asked whether the FBI had questioned Lewis, Parkman stated that he was never told that the FBI had done so. He testified that he did not subpoena any FBI records about Kaye's death and that he did not have a copy of any such records. (R. 51-52.) He testified, however, that he thought the FBI did not find any connection between Lewis, the killing of Kaye, and the cigar-factory cases. Had such a connection existed, Parkman thought the federal government would have charged Lewis and "have [had] the case transferred to federal court." (R. 52-53.)

Parkman testified that he talked with Causey about the killing of Kaye:

> "I talked to Mr. Causey because I knew him very well. And, in fact, discussed with him the possibility of a federal investigation and [had he been] contacted. He indicated no at that point. And

> there was nothing that he gave me that indicated that Mr. Lewis was -- that he was involved in any way whatsoever. So there was no reason to go any further with that."

(R. 54.) Parkman testified that Lewis also denied that the killing of Kaye had been in retaliation for Kaye's being a federal informant. (R. 57-58.)

Parkman did not remember that the district attorney for Houston County, Doug Valeska, had argued in closing arguments at Lewis's trial that Kaye's killing had been a retaliation killing related to the drug charges against Causey. (R. 54-56.) But Parkman did not dispute that Valeska made the argument, stating: "Mr. Valeska argues a lot of things sometimes that are not in evidence." (R. 56.) Parkman was then shown the following from Valeska's closing argument at Lewis's trial:

> "[VALESKA]: But I know a second shot is fired, showing you more of an intent, make sure it is an execution killing, that he, in fact, killed and tortured the victim to send a message that not only did we beat him, kidnap him, killed him and we shot him in the back of the head execution-style. It sends a message to everybody, everybody.
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> "What's the reason? You know the motive. Because [Kaye] had told on someone. You know who it was. J-Bird Causey. Friends of who? Lewis."

(Trial R. 717.) In his testimony at the Rule 32 hearing,

Parkman pointed out that the trial record showed that he had immediately objected to this statement:

> "MR. PARKMAN: Objection to that. There is no evidence of that whatsoever in this case.
>
> "THE COURT: I sustain the objection to that."

(Trial R. 717.)

Parkman was also questioned about an April 29, 1997, incident report prepared by LaDon Joyner of the Houston County Sheriff's Office. (C. 4416.) That report includes the following statement:

> "[Kaye's] father advised that [Kaye] was a federal witness during the General Cigar Drug Operation and [Kaye] was threatened for his testimony during the trial. Jay Causey was the subject that threatened [Kaye], but Jay is in prison. [Kaye's] father advised writer that [Kaye] was scared from the incident at General Cigar. [Kaye's] father advised [that Kaye] had been followed and watched by several people since the trial and he is afraid [Kaye] might be in danger."

A copy of that report was in the file from Parkman's office, but it was not introduced at Lewis's trial. Parkman denied that the report "created for [him] a potential witness or an avenue to defend Mike Lewis." (R. 74.) Parkman testified:

> "It's my duty to present facts that are not misleading, they are true in nature, that I believe to be true. This statement was simply a statement made by ... the father. Jay Causey has never

> threatened anybody, that I know of, and I've known him in the community for a long time. Nor would he.
>
> "Number two, [the document from the Sheriff's office] even indicates that [Causey was] in prison.
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> "Next, if he had threatened somebody, I'm sure the feds would have picked him up on intimidation of a witness.
>
> "And, four, if he had of threatened somebody, when we got to sentencing, the feds would have put that before Court on obstruction of justice.
>
> "So, no, I did not believe it. I [didn't] believe it then; I don't believe it now. And nor did I believe that Jay Causey had -- that case had anything to do with Mike Lewis wanting to kill Mr. Kaye. Not at all.
>
> "Q. Did you call Mr. Causey as a witness in Mr. Lewis's case?
>
> "A. No, I did not. Absolutely not."

(R. 74-75.) Parkman denied that his prior representation of Causey had prevented him from calling Causey as a witness in Lewis's trial. (R. 62, 64.) Parkman testified that he chose not to bring up Causey at trial because he "certainly wouldn't have brought up that a friend of [Lewis's] and Tim Kaye had threatened a federal witness and that that was the reason for the murder." (R. 76.) When asked whether he subpoenaed employment records from the cigar factory to show that Lewis had not worked there, Parkman said he did not. (R. 120.)

As for Mike Harger, Parkman remembered talking to him about Lewis's case. (R. 63, 70.) After the State refreshed his recollection with documents, Parkman remembered that he had represented Harger on a misdemeanor possession-of-marijuana charge in 1997 and that his representation of Harger had ended within six months. (R. 65.) Parkman testified that he did not think his prior representation of Harger created a conflict for him as to Lewis. (R. 66.)

Parkman testified at first that the State had called Harger to testify at Lewis's trial. (R. 78.) The State clarified, however, that the State had called Harger's wife, Kandy, to testify. (R. 134.) Parkman was not asked why he did not call Harger to testify.

Parkman testified that his focus at trial was to try to impeach Free's testimony. When asked about his cross-examination of Kandy, Parkman testified:

> "I was concerned about [Kandy], because of her adamant, 'You're not going to go up there and party with them; I don't want you up there.' I was afraid -- I walked a little bit on eggshells hoping that we wouldn't open the door to past episodes of him being up there and partying, and whatever might come in that she might know about. So we danced on eggshells a little bit.
>
> "But I didn't think that she hurt us. I felt

> like that her testimony ended up with a phone call from [Lewis] for a cry for help; that he tried to go up there, she wouldn't let him. They didn't hear -- if I recall this correctly, she did not hear any gunshots. She didn't see anything out of the way. She just didn't want her husband up there. So that was number one."

(R. 135.)

Causey testified at the hearing that Parkman had represented him in 1995-1996 when Causey pleaded guilty in federal court to possession of marijuana with intent to distribute. (R. 312.) According to Causey, he "only pled guilty to 60 pounds," and "they never arrested anybody for the full load." (R. 312.) As to knowing Free, Kaye, and Lewis, Causey testified:

> "[LEWIS'S ATTORNEY]: Did Tony Free work -- did you know Tony Free?
>
> "A. Yes, I know him.
>
> "Q. Did Tony work at the cigar factory with you?
>
> "A. Yes. Well, he worked upstairs. Well, Tim Kaye got me on with them when I got out of prison, state prison.
>
> "Q. Okay. So would you consider yourself friends with Tony Free?
>
> "A. Not really.
>
> "Q. But y'all worked together?

"A. Knowledge, know him. But he didn't work where -- he worked at the same building, but not doing the same thing I did.

"Q. I understand. Would you consider yourself a friend of Tim Kaye?

"A. Yes.

"Q. What about Mike Lewis? Do you know Mike?

"A. I knew Mike.

"Q. Would you consider yourself friends with Mike?

"A. Yeah. I never had no problems with him.

"Q. Did Mike Lewis ever work at the Swedish cigar factory?

"A. No, not to my knowledge.

"Q. Did you ever put out a hit or a threat or anything towards Tim Kaye?

"A. No, sir.

"Q. Let me ask you this. It's interesting that Mr. Parkman seems to have represented everybody in this case.

"[STATE'S ATTORNEY]: I'm going to object to what --

"THE COURT: I sustain.

"[LEWIS'S ATTORNEY]: Let me ask you this. Are you aware that Mr. Parkman represented Tim Kaye in the past?

"A. Yes.

> "Q. Did Mr. Parkman — you've already said he represented you?
>
> "A. Yes. And he represented Tim Kaye.
>
> "Q. Okay. I think that's all. If you'll answer [the State's] questions, please.
>
> "[STATE'S ATTORNEY]: I don't have any questions. Thank you, Mr. Causey."

(R. 312-14.)

Harger testified at the Rule 32 hearing that he had known Lewis for "about 30-something years" and that Lewis had lived across the street from him. (R. 360.) Harger said he was arrested for possession of marijuana about a month before Kaye's death in 1997 and that Parkman had represented him. (R. 360.) Harger testified that after Kaye was killed, law enforcement had talked to him. When asked whether he was ever a suspect in Kaye's murder, Harger replied that as far as he knew, he was not, but "[t]here was a lot of rumors." (R. 361.) Harger said he heard that the State had looked at a lot of people as possible suspects. (R. 361-62.) Harger testified that he and Parkman spoke about whether Harger was a suspect in Kaye's death, and Parkman told him "they didn't have nothing on [you]." (R. 362.)

Harger testified about what he saw the night Kaye was

killed:

"Q. On the morning -- early in the morning on that night when Tim Kaye was killed, did you have an occasion to see Mr. Lewis yelling for you?

"A. Yes, sir. He was across the street from me.

"Q. He was across the street. Could you actually see where the fight was taking place?

"A. Yes, sir.

"Q. Was Mike Lewis involved in that fight?

"A. No, sir.

"Q. He was — where was he?

"A. He was from here to the benches right there from me, basically. Maybe a little further.

"Q. From you?

"A. From me, yeah. I was across the road, basically, from him.

"Q. And how far away was he from the fight?

"A. Probably 10 feet.

"Q. Was he calling for you?

"A. Yeah.

"Q. Why do you believe, or what do you think he was calling you for?

"[STATE'S ATTORNEY]: I'm going to object to what he thinks Mr. Lewis called him for. Your Honor.

"[LEWIS'S ATTORNEY]: That's not my question. My

question is what was his impression, not what Mr. Lewis --

"[LEWIS'S ATTORNEY]: Why did you think you were being called?

"A. Well, actually -- I mean, at the time, it looked like he was wanting to break the fight up. But my wife was at the barn, which was that far behind me --

"Q. Right.

"A. -- and she hollered out. 'If you go across the road, we're done.'

"Q. Okay.

"A. And that was it. So that's the reason I didn't go across the road.

"Q. I understand that. I've got a wife. And so your impression was that Mike Lewis was trying to call to help break up the fight?

"A. Well, that was -- I mean, actually -- I mean, even in hindsight, yeah."

(R. 364-65.) Harger testified that he did not tell Investigator Ashley Forehand that he heard Lewis say, "Come on over here and get your licks in."[9] (R. 365.) He said that he

[9]Inv. Forehand testified at the Rule 32 hearing that he interviewed Harger as a part of the investigation:

"[Harger] referred that he was called up there to the road by Mr. Lewis. And that him and his wife was -- the reason he was up at that time in the morning is him and his wife was getting ready to go fight roosters in Louisiana where it was legal. And

would have been willing to testify at Lewis's trial. (R. 366.)

Lewis testified on his own behalf at the Rule 32 hearing. Lewis testified that he and Free had known each other but had not seen each other "in years" until about two weeks before Kaye was killed when Free "started coming back over to [Lewis's] house." (R. 386-87.) Free came over the day of the offense, and he and Lewis drove to get something to drink. (R. 388.) They picked up April Hargedon and "went out in the country riding." (R. 389.) The three were drinking, and Hargedon drank so much that she got sick. (R. 390.)

Hargedon, Lewis, and Free "went to the corner bar" for more drinks. (R. 390.) After a while, they went back to Lewis's trailer. Free left, and Lewis and Hargedon went to

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> he was getting all the stuff together. And his wife was getting the other stuff to put in the vehicle so that they could go.
>
> "And Mike called him up to the road and made some comment about they had a nar[c] or something over there, he needed to come over there and enjoy the fun, words to that effect, more or less. And his wife told him to get back away from the road and come back to the house. And he did that."

(R. 258-59.) Inv. Forehand later testified that Harger told him that "Lewis said that night, 'We're beating his ass, come and get a lick or two.'" (R. 262.)

"the Drifters Lounge on 231 South," which Lewis's stepfather Foy Ready owned. (R. 393.) There, Lewis saw Kaye sitting at the bar. Lewis had known Kaye for a long time and considered him a friend.

Free's girlfriend, Kristy Hughes,[10] danced at the Drifters Lounge. Kristy was not working that night but was at the lounge. Kristy told Lewis she wanted to go out with the group, and Kaye, Kristy, Hargedon, and Lewis left to go to "the Players Club." (R. 394-95.) Kristy was driving, but police pulled her over for speeding and, based on an outstanding warrant, arrested her. (R. 396.) The police officer called a cab to come get Lewis, Hargedon, and Kaye. The cab took them back to the Drifters Lounge. (R. 396-97.) After a while, Kaye drove them all back to Lewis's trailer. (R. 397.)

After they got back to Lewis's trailer, Free arrived, and Lewis told him that Kristy had been arrested. Kaye laughed, and Free asked Lewis what he was "doing hanging around this nar[c]." (R. 398-99.) Lewis went to the bathroom, and when he returned, Kaye and Free were gone. (R. 399.)

Later, Free and Kaye started fighting in the backyard.

[10]Hughes's name is spelled "Kristy" and "Christy" in the trial record and in the Rule 32 record.

Lewis said he heard but did not see the fight because it was dark and the fight was happening behind Kaye's pickup truck. (R. 399-400.) Lewis eventually got an unloaded shotgun from his trailer and told Free and Kaye it was time for them to stop. (R. 402-03.) Hargedon wrestled the gun away from Lewis, and Lewis then ran to the road, where he saw Mike Harger. (R. 403.) Lewis said he told Harger he needed help breaking up the fight. Harger would not go because, Lewis said, his wife Kandy would not let him. (R. 403-04.) Lewis said that when he returned to his trailer, he did not see Free or Kaye but their vehicles were still there. (R. 438.) Lewis said he then went to bed. (R. 439.)

Lewis testified that around 10 a.m. the next day, Free knocked on his door and woke him up. (R. 406.) Free told Lewis that he needed to talk to him and said, "Let's go for a ride." (R. 406.) While they were riding, Free told Lewis that Kaye was dead. Lewis said he thought Free was joking because Free "was bad about playing practical jokes and stuff like that." (R. 407.) Lewis said he and Free went to Alford's house in Florida, arriving either late in the morning or early in the afternoon. (R. 447.) While there, Free washed the truck, which

Lewis learned was Kaye's. (R. 407-08.)

When they returned to Alabama, Lewis told Free he could not leave Kaye's truck at Lewis's trailer. (R. 409.) Free told Lewis to follow him while Free drove Kaye's truck. They drove in separate vehicles to a big field. Lewis saw Free set Kaye's truck on fire, and Lewis saw the truck explode. (R. 412.) Lewis said that they then rode back to his trailer. On the way, Free tried to put the keys to Kaye's truck in the glove box of Lewis's vehicle, but Lewis told him not to do so. Free then threw the truck keys out the window. (R. 412-13.)

Lewis testified that he did not work at the cigar factory and that he was not involved in the "cases having to do with the ... cigar factory." (R. 381.) Lewis said that the first time he "ever heard that this Tim Kaye incident was an execution-style murder to avenge Jay Causey's arrest .... was either in the newspaper or when Mr. Valeska was arguing it." (R. 382.) Lewis testified that there was not "any truth to that .... as far as [he knew]." (R. 382.)

Lewis denied having anything to do with Kaye's death or with disposing of Kaye's body in Florida. (R. 404-05, 411.) He denied ever getting into a fight with Kaye or yelling at Mike

Harger to come "look what I've got."[11] (R. 432.) Lewis testified that Parkman never came to see him in jail, that he never got to talk to Parkman before the trial, that Parkman was not present for the sentencing hearing, and that Parkman was either mistaken or lying about those things as well as Lewis's involvement in the crime. (R. 417-20, 429, 457.)

On appeal, Lewis argues that Parkman had conflicts of interest based on his prior representations of Causey and Harger. Lewis argues:

> "[Parkman] did not use information from Mr. Harger to support the argument that Tony Free was the principal actor, nor did he present testimony from Mr. Causey demonstrating that the State's motive theory involving a revenge hit by Mr. Causey was unsupportable and that, even if there had been such a hit, Tony Free worked at the same location where Mr. Causey worked (and where Mr. Causey ran his drug operation) while Mr. Lewis did not. Thus, [Parkman's] conflicts of interest foreclosed two reasonable lines of defense, and Mr. Lewis is entitled to a new trial."

(Lewis's brief, p. 28.)

Lewis cites the testimony of Eddie Free at Lewis's trial that Lewis told Eddie that he had killed Kaye because Kaye "was a snitch and informant." (Lewis's brief, p. 30, citing

[11]Hargedon testified that Lewis yelled to Harger, "Look what I got." (Trial R. 242.)

Trial R. 489-90.) Lewis also cites Tony Free's testimony that Lewis told him during the fight with Kaye, "[L]et's kill him. He is the one that got J-Bird." (Lewis's brief, p. 30, citing Trial R. 526.) Tony Free also testified that he had heard that Causey was "indicted by the feds for marijuana at the cigarette factory," and the district attorney at Lewis's trial argued that the killing of Kaye was "execution-style" and intended to send a message. (Lewis's brief, pp. 30-31, citing Trial R. 717.)

Lewis argues that Parkman should have put on evidence to counter the argument that Kaye was killed because of Kaye's involvement in Causey's federal drug charge. Lewis asserts that Parkman should have called Causey to testify, as Causey testified at the Rule 32 hearing, (1) that he considered Kaye a friend, (2) that he did not put out a "hit" on Kaye, and (3) that Free worked with him at the cigar factory but Lewis did not. Lewis argues that if the jury believed Causey, the State's "foundational theory" would have been "undercut." Or, Lewis argues, if the jury believed that Causey did put out a "hit" on Kaye, the jury would have been more likely to believe that Free committed the murder because Free, not Lewis, had

worked with Causey. (Lewis's brief, pp. 34-35.)

Lewis argues that Parkman could not call Causey to testify because he had represented Causey in the federal drug case. According to Lewis, even if Causey denied the State's theory, Causey could have been subjected to a charge of perjury (if the State's theory was correct) or to being charged as an accomplice in Kaye's murder. Or, Lewis says, Causey could have been questioned "about other aspects for the crime for which he had already been convicted."[12] (Lewis's brief, p. 36.)

As to Harger, Lewis argues that Parkman should have called Harger to testify that he thought Lewis wanted him to come over to help break up the fight between Free and Kaye. He argues that Harger's testimony would have helped rebut the inference that the Hargers did not want to get involved with Lewis because they feared he was a "troublemaker." Lewis asserts that it would have been beneficial to his case for the jury to hear (1) that Harger had been investigated as a possible suspect in Kaye's death and (2) that Harger had a marijuana-possession conviction. (Lewis's brief, pp. 38-40.)

[12]As noted below, the circuit court found no proof to support any of these assertions.

Or, Lewis asserts, Parkman should have used Harger's prior conviction to attempt to impeach Kandy. (Lewis's brief, p. 42.) Lewis argues that Parkman's representation of Harger created a conflict that prevented him from doing any of those things.

As to these ineffective-assistance-of-counsel claims and the alleged conflicts of interest, the circuit court held:

> "The Court further finds from the testimony of attorney Parkman and attorney Steensland that Mr. Parkman did represent two witnesses or prospective witnesses in a prior case. The Court further finds from Mr. Parkman's testimony that the representation of Mr. Causey and Mr. Harger did not affect the quality of Mr. Parkman's representation or dampen the ardor of his defense in order to placate those clients.
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> "Based on his discussion of the case with his client and his investigation, Mr. Parkman concluded that his best trial strategy was not to call Mr. Causey or Mr. Harger as witnesses, and that any benefit from their testimony could be received through cross-examination or from other witnesses. Lewis has failed to prove that counsel was ineffective for not calling these witnesses.
>
> "Mr. Causey testified at the hearing that he never threatened Mr. Kaye or put a hit out on him. Also, there was no proof that the State could have proven any link between Mr. Causey and Mr. Kaye's murder. Also, no proof that if Mr. Causey was called, he would have been charged with any other crime.
>
> "Also at the evidentiary hearing Mr. Lewis

> failed to elicit any additional information at the evidentiary hearing that would prove that due to Mr. Parkman's prior representation of Mr. Harger or Mr. Causey, he actually represented conflicting interest[s] or made a choice between possible alternate course[s] of action helpful to one client, but harmful to the other, or that he learned any information relevant to Lewis's defense, but due to representing Mr. Harger or Mr. Causey, chose not to present at Lewis's trial.
>
> "Mr. Lewis failed to prove Parkman's prior representation of Mr. Causey resulted in a conflict of interest or ineffective representation.
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> "The Court further finds that no evidence was produced at the evidentiary hearing that would have made Mr. Harger's misdemeanor marijuana conviction relevant or helpful for [Lewis] and harmful to Mr. Harger or admissible for that matter.
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> "Also, there was no evidence presented at the evidentiary hearing that Mr. Harger's marijuana conviction was linked to Mr. Causey's conviction or that it would be relevant or admissible in the questioning of Mrs. Kandy Harger.
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> "Mr. Lewis failed to prove Parkman's prior representation of Mr. Harger resulted in a conflict of interest or ineffective counsel."

(Record on Return to Remand C. 11-13.)

Lewis has not shown that the circuit court abused its discretion in finding no conflict of interest here. At the outset, we note that Parkman's representation of Causey ended almost a year before Kaye was killed, and his representation of Harger within six months of Kaye's death and about six

years before Lewis's trial.

As to Causey, Lewis's arguments that Parkman had a conflict based on his prior representation of Causey are merely speculative and are not based on evidence from the Rule 32 hearing.[13] The circuit court found (1) that "there was no proof that the State could have proven any link between Mr. Causey and Mr. Kaye's murder"; (2) that there was "[n]o proof that if Mr. Causey was called [to testify at Lewis's trial], he would have been charged with any other crime"; and (3) that there was no evidence that because of his prior representation of Causey, Parkman "actually represented conflicting interest[s] or made a choice between possible alternate course[s] of action helpful to one client, but harmful to the other, or that he learned any information relevant to Lewis's defense, but due to representing ... Mr. Causey, chose not to present at Lewis's trial." The record supports those findings, which show that Parkman did not have a conflict of interest based on his prior representation of Causey. See, e.g., Jones

[13]Those arguments, as noted above, are that Parkman did not call Causey to testify because doing so (1) would have required Causey to commit perjury; (2) might have led to Causey being prosecuted as an accomplice; or (3) might have led to Causey being prosecuted for other crimes.

v. State, 937 So. 2d 96, 99-100 (Ala. Crim. App. 2005); see also Ervin, supra.

Likewise, Lewis has not shown that the circuit court abused its discretion in finding that Lewis failed to prove Parkman had an actual conflict based on his prior representation of Harger. Lewis's arguments that Parkman had a conflict based on his prior representation of Harger are speculative and likewise not based on evidence presented at the Rule 32 hearing. The record supports the circuit court's findings "that no evidence was produced at the evidentiary hearing that would have made Mr. Harger's misdemeanor marijuana conviction relevant or helpful for [Lewis] and harmful to Mr. Harger or admissible for that matter" and "there was no evidence presented at the evidentiary hearing that Mr. Harger's marijuana conviction was linked to Mr. Causey's conviction or that it would be relevant or admissible in the questioning of Mrs. Kandy Harger." See, e.g., Jones, supra; Ervin, supra.

Although Lewis failed to prove that Parkman had an actual conflict based on his prior representation of Causey or Harger, Lewis also claims Parkman was ineffective for not

calling Causey and Harger as witnesses. In Clark v. State, 196 So. 3d 285, 306 (Ala. Crim. App. 2015), this Court stated:

> "'Trial counsel's decisions regarding what theory of the case to pursue represent the epitome of trial strategy.' Flowers v. State, 2010 Ark. 364, 370 S.W.3d 228, 232 (2010). 'What defense to carry to the jury, what witnesses to call, and what method of presentation to use is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess.' State v. Miller, 194 W. Va. 3, 16, 459 S.E.2d 114, 127 (1995).
>
> > "'"'[T]he mere existence of a potential alternative defense theory is not enough to establish ineffective assistance based on counsel's failure to present that theory.'" Hunt v. State, 940 So. 2d 1041, 1067 (Ala. Crim. App. 2005), quoting Rosario-Dominguez v. United States, 353 F. Supp. 2d 500, 513 (S.D.N.Y. 2005). "Hindsight does not elevate unsuccessful trial tactics into ineffective assistance of counsel." People v. Eisemann, 248 A.D.2d 484, 484, 670 N.Y.S.2d 39, 40-41 (1998).'
>
> "Davis v. State, 44 So.3d 1118, 1132 (Ala. Crim. App. 2009). '"The fact that [a] defense strategy was ultimately unsuccessful with the jury does not render counsel's performance deficient."' Bush v. State, 92 So. 3d 121, 160-61 (Ala. Crim. App. 2009) (quoting Heath v. State, 3 So. 3d 1017, 1029 (Fla. 2009)). See also Johnson v. State, 769 So. 2d 990, 1001 (Fla. 2000) ('"Simply because the ... defense did not work, it does not mean that the theory of the defense was flawed."' (citations omitted))."

See also Washington v. State, 95 So. 3d 26, 52 (Ala. Crim. App. 2012) ("'"'[T]he selection of witnesses and the

introduction of evidence are questions of trial strategy and virtually unchallengeable.'"'" (quoting Roberts v. State, 356 S.W.3d 196, 202-03 (Mo. Ct. App. 2011) (citations omitted))).

As noted above, Parkman thought that what Lewis told him about what happened was believable. Parkman thought, based on the evidence at Free's trial, that Free was "the bad guy, ... the one that did everything, not just the beating, but also the shooting." Once he learned at Lewis's trial that Free would testify, Parkman focused on undermining Free's credibility, "to make the jury believe [Free] was a liar." (R. 134.) That strategy included a thorough cross-examination of Free, "going all the way through on each little incident, and trying to show that it was Mr. Free who beat [Kaye] and that Mr. Free had a reason for testifying for the State." (R. 137.)

As to why he did not call Causey to testify to rebut Free's testimony that Lewis said that Kaye "was the one who got J-bird," Parkman emphasized that he had found no evidence showing that Causey had put out a hit on Kaye, and he did not want the jury to hear more evidence that Causey was suspected of putting out a hit on Kaye and that Lewis was friends with Causey. Parkman testified:

"Q. You don't think that -- would you agree with me that a witness who has previously threatened the deceased would be someone that might shed some light on this case for the jury?

"A. If that had been brought into evidence, your answer would be yes. That was never brought in.

"Q. But you chose not to bring it into evidence, didn't you?

"A. Of course I didn't.

"Q. Well, why did you say you didn't choose that? You made the decision --

"A. No.

"Q. -- as to what witnesses to --

"A. I certainly wouldn't have brought up that a friend of [Lewis's] and Tim Kaye had threatened a federal witness and that that was the reason for the murder.

"Q. Well, in fact --

"A. I would have defended that if it had come up.

"Q. What evidence did you have that Mike Lewis was ever a friend of Mr. Causey?

"A. They knew each other.

"Q. Well, knowing each other doesn't mean you would kill somebody --

"A. Absolutely, you're right."

(R. 76-77.)

As noted above, during the State's closing argument at trial the prosecutor asserted that Kaye had been murdered by Causey's friend Lewis and that the motive was that Kaye had informed on Causey. Parkman objected, and the trial court sustained that objection. Even if Causey had testified that he did not put out a hit on Lewis, the prosecution would have been able to question him about his prior conviction and his friendship with Lewis. Although the jury could have believed Causey if he denied putting out a hit on Kaye, Causey's prior conviction for possessing 60 pounds of marijuana with intent to distribute would have been elaborated on by the prosecution--as would Causey's friendship with Lewis. Thus, Causey's credibility would have been an issue, and extensive testimony about the cigar-factory drug cases could have created a risk of confusing the jury. Cf. Davis v. State, 44 So. 3d 1118, 1129 (Ala. Crim. App. 2009) ("'"To establish prejudice from counsel's failure to investigate a potential witness, a petitioner must show that the witness would have testified and that their testimony 'would have probably changed the outcome of the trial.'" [Hadley v. Groose, 97 F.3d 1131 (8th Cir. 1996)] (quoting Stewart v. Nix, 31 F.3d 741,

744 (8th Cir. 1994)) .... In conducting this analysis, we will consider: "(1) the credibility of all witnesses, including the likely impeachment of the uncalled defense witnesses; (2) the interplay of the uncalled witnesses with the actual defense witnesses called; and (3) the strength of the evidence actually presented by the prosecution." McCauley-Bey v. Delo, 97 F.3d 1104, 1106 (8th Cir. 1996).'") (emphasis added)). Here, by his own admission in his testimony at the Rule 32 hearing, Lewis was present for much of the fight between Free and Kaye, and Lewis was present for the explosion of Kaye's truck. There was extensive evidence at trial of Lewis's involvement in Kaye's death and in the attempts to dispose of evidence of the crime. Thus, the case, as Parkman recognized, turned on Free's credibility and the jury's resolution of whether Lewis's role in the murder made him guilty of capital murder. We cannot say that Parkman was ineffective in pursuing a strategy of trying to minimize evidence of whether Causey put out a hit on Kaye and evidence of any relationship between Causey, a felon, and Lewis, also a felon. See, e.g., Clark, 196 So. 3d at 316 ("'Matters of trial tactics and trial strategy are rarely interfered with or second-guessed on

appeal.' Arthur v. State, 711 So. 2d 1031, 1089 (Ala. Crim. App. 1996).").

Lewis also argues that Parkman should have introduced employment records from the cigar factory to show that Free--not Lewis--had worked with Causey. But that evidence would not have been admissible, if at all, without evidence about Causey and whether he put out a hit on Kaye. Given our holding that Parkman was not ineffective for trying to minimize evidence about Causey, Causey's prior conviction, and Causey's relationship with Lewis, we cannot say that Parkman was ineffective for not trying to show that Free, not Lewis, worked with Causey. Clark, supra.

The crux of Lewis's arguments about Harger is that Harger would have been a better witness than Kandy was. But that does not mean that Parkman was ineffective for failing to call Harger. See, e.g., Rogers v. Zant, 13 F.3d 384, 386 (11th Cir. 1994) ("Even if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable lawyer, in the circumstances, would have done so."). Because Lewis did not specifically ask Parkman why he did not call

Harger to testify, we presume that Parkman's actions were reasonable. See Broadnax v. State, 130 So. 3d 1232, 1255 (Ala. Crim. App. 2013) ("It is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim ...."; see also Brown v. State, 807 So. 2d 1, 15 (Ala. Crim. App. 1999) ("Counsel did not question Brown's trial attorneys about whether their failure to object was based on trial strategy. Gooch v. State, 717 So. 2d 50 (Ala. Cr. App. 1997). There was absolutely no evidence that satisfied the requirements of Strickland.").

Parkman did testify that he was cautious in his cross-examination of Kandy Harger because he did not want to "open the door to past episodes of [Harger] being up there [at Lewis's] and partying, and whatever might come in that she might know about." (R. 135.) Lewis has not shown that this strategy was unreasonable.

Through Kandy's testimony,[14] Parkman was able to show (1) that she heard the sounds of fighting off and on for 45 minutes and that, while she saw Lewis several times, she never

[14]In Part II.A.4. of this opinion, we discuss Kandy's testimony in more detail.

saw him where she thought the fighting was and she never saw him with anything in his hands (Trial R. 433, 435, 443); (2) that Lewis had called and asked to speak to Harger but did not say why (Trial R. 437-39); (3) that Harger had a black belt in karate and was trained in self-defense (Trial R. 438); (4) that Kandy heard Lewis say only "Harger, Harger, Harger" when he yelled for her husband (R. 439); and (5) that Kandy did not hear any gunshots (R. 417).

Thus, Kandy's testimony was evidence that could have supported these facts or inferences: (1) Lewis had not said, "Look what I got" to Harger; (2) Lewis may have been seeking help to end the fight; (3) that Lewis was not involved much, if at all, in the fight, and (4) that Free had fought with Kaye for much longer than the few minutes that Free had claimed he had.

Lewis's theories about why Parkman should have called Harger to testify are also inconsistent. On the one hand, Lewis says Parkman should have called Harger to testify that he thought Lewis was calling him to help break up the fight[15]

[15]As noted above, there was conflicting evidence about what Lewis said to Harger. Hargedon testified that Lewis said, "Look what I got." But Kandy testified that Lewis said nothing but "Harger, Harger, Harger."

between Kaye and Free--something Lewis would have wanted the jury to believe.[16] But Lewis also says that Parkman should have used Harger's marijuana conviction to challenge Kandy's testimony and any inference that the Hargers did not want to get involved with Lewis because they thought he was "trouble." That strategy--even assuming Harger's conviction would have been admissible through Kandy's testimony--also would have cast doubt on Harger's credibility. It also likely would have, as Parkman feared, "open[ed] the door to past episodes of [Harger] being up there [at Lewis's] and partying, and whatever might come in that [Kandy] might know about." Lewis's attempt to have it multiple ways shows why this Court does not use hindsight to evaluate counsel's decisions. We cannot say that Parkman was ineffective (1) for failing to call Harger as a witness or (2) for failing to bring up Harger's marijuana-possession conviction during his cross-examination of Kandy. See, e.g., Clark, supra. Lewis has no

[16]Parkman testified that Lewis had told him that he had telephoned Harger to and asked him to come help break up the fight. But when Parkman obtained Lewis's phone records, the records did not support what Lewis said. (R. 116-17.) Parkman testified: "I left it alone. If the records didn't show to substantiate it, I certainly didn't want to get in there and it contradict what [Lewis] said that he did. So I left it that there was a call." (R. 117.)

right to relief.

II.

In Part III of his brief, Lewis argues that his counsel was ineffective "at all stages of his trial and sentencing." (Lewis's brief, p. 44.)

A.

Lewis argues that his "defense counsel was ineffective for failing to investigate and failing to present significant facts which would have either undermined the State's case or provided a defense." (Lewis's brief, p. 44.)

1.

Lewis argues that his defense counsel was ineffective for "fail[ing] to introduce letters from Tony Free inculpating Tony Free and exonerating Mr. Lewis." (Lewis's brief, p. 50.) According to Lewis, Free wrote two letters and gave them to Lewis while Lewis and Free were in the Houston County jail. No letters from Free were admitted into evidence at the hearing, but Lewis asserts that in the letters Free "admitted that he was simply looking for a deal, and Mr. Free assured that Mr. Lewis would go free." (Lewis's brief, pp. 50-51.) Lewis testified at the Rule 32 hearing that, after the guilt phase

of his trial but before sentencing, he gave the letters to John Steensland, who worked at Parkman's firm. (R. 378-79.) To support this claim, Lewis offered into evidence a letter he wrote to Parkman and a letter he sent to Parkman's legal assistant, Pam Skinner. (C. 4329, 4335.) In those letters, Lewis claimed that he had letters from Free that "might help" Lewis's defense, but he did not state what the letters said.

Steensland testified that he did not "recall being given letters [by Lewis], whether or not they were exculpatory or had any -- whatever information." (R. 168.) Parkman also testified that he had no recollection of receiving any letters purportedly written by Free. (R. 90.)

As to the letters allegedly written by Free, the circuit court found that Parkman was not ineffective for not introducing letters Lewis says he received from Tony Free. The circuit court stated: "The attorneys have no recollection of receiving the letters. The Court finds that counsel is not ineffective for not introducing letters they have no recollection of receiving." (Record on Return to Remand C. 13.)

Lewis offered no evidence that the letters existed other

than his own self-serving testimony and letters that Lewis wrote. In Whitson v. State, 109 So. 3d 665, 675-76 (Ala. Crim. App. 2012), this Court stated:

> "'Courts have viewed claims of ineffective assistance of counsel with great caution when the only evidence of a missing witness's testimony is from the defendant. See, e.g., Schwander v. Blackburn, 750 F.2d 494, 500 (5th Cir. 1985); United States v. Cockrell, 720 F.2d 1423, 1427 (5th Cir. 1983), cert. denied, 467 U.S. 1251, 104 S. Ct. 3534, 82 L. Ed. 2d 839 (1984); Maxwell v. Mabry, 672 F.2d 683 (8th Cir. 1982); Washington v. Watkins, 655 F.2d 1346, 1363–64 (5th Cir. 1981), cert. denied, 456 U.S. 949, 102 S. Ct. 2021, 72 L. Ed. 2d 474 (1982).
>
> "'....'
>
> "... [He]re, the only evidence presented in support of this claim was Whitson's own self-serving testimony regarding his alleged alibi at the time of the shooting. Absent any testimony from [the alleged alibi witnesses], Whitson clearly failed to prove that his trial counsel was ineffective for not calling these witnesses to testify on his behalf at his trial."

(Quoting Williams v. State, 480 So. 2d 1265, 1268 (Ala. Crim. App. 1985).) And Lewis has not shown that the circuit court abused its discretion in believing the attorneys, who said they had no recollection of receiving any letters allegedly written by Free. Cf. Greene v. State, 295 Ga. App. 803, 806,

673 S.E.2d 292, 296 (2009) ("It is axiomatic that trial counsel cannot be deemed ineffective for failing to introduce nonexistent evidence.").

Lewis has no right to relief on this claim.

2.

Lewis argues that his defense counsel were ineffective for failing "to subpoena the FBI report into the investigation of Mr. Kaye's death." (Lewis's brief, p. 53.) Lewis argues that

> "the Federal Bureau of Investigation conducted an investigation into Mr. Kaye's death. Because no federal charges were brought, the investigation must have concluded that there was no link. As such, any reports of the investigation would have been inherently exculpatory as to Mr. Lewis's case, where the State knew it would be using the alleged link to Mr. Causey as the motive for Mr. Kaye's death."

(Lewis's brief, pp. 53-54.) Lewis cites testimony from Parkman and the district attorney that they had been told that the FBI had made a report. (R. 51, 240-41.)

As to this claim, the circuit court held:

> "[C]ounsel was not ineffective for not subpoenaing the FBI report concerning the investigation of Mr. Kaye's murder.
>
> "Mr. Parkman concluded from his investigation this report would not be helpful and that Mr. Parkman['s] findings from his investigation showed

> there was no link between the federal charges and Kaye['s] murder. The report was not produced at the Rule 32 evidentiary hearing. This claim on ineffective counsel was not proven."

(Record on Return to Remand C. 13.)

Lewis has not shown that the circuit court abused its discretion in so holding. Assuming a report from the FBI existed, Lewis's assertion that it was favorable to him is speculative. See Whitson, 109 So. 3d at 678 ("Speculation is woefully insufficient to satisfy a Rule 32 petitioner's burden of proof."). And Lewis does not explain what other evidence an FBI report contained that Parkman did not already know.[17] Thus, the information in the report would have been, at best, cumulative to what Parkman knew based on his own investigation.

> "'While counsel has a duty to investigate in an attempt to locate evidence favorable to the defendant, "this duty only requires a reasonable investigation." Singleton v. Thigpen, 847 F.2d 668, 669 (11th Cir. (Ala.) 1988), cert. denied, 488 U.S. 1019, 109 S. Ct. 822, 102 L. Ed. 2d 812 (1989) (emphasis added). See Strickland, 466 U.S. at 691, 104 S. Ct. at 2066; Morrison v. State, 551 So. 2d 435 (Ala. Cr. App. 1989), cert. denied, 495 U.S.

[17]Although Lewis asserts that Parkman was ineffective for failing to subpoena the report and to introduce it at trial, Lewis makes no attempt to explain how the report would have been admissible at his trial.

> 911, 110 S. Ct. 1938, 109 L. Ed. 2d 301 (1990). Counsel's obligation is to conduct a "substantial investigation into each of the plausible lines of defense." Strickland, 466 U.S. at 681, 104 S. Ct. at 2061 (emphasis added). "A substantial investigation is just what the term implies; it does not demand that counsel discover every shred of evidence but that a reasonable inquiry into all plausible defenses be made." Id., 466 U.S. at 686, 104 S. Ct. at 2063.'"

Washington, 95 So. 3d at 40–41 (quoting Jones v. State, 753 So. 2d 1174, 1191 (Ala. Crim. App. 1999)).

As noted, the circuit court found that Parkman did not think the report would help Lewis's defense. Although Lewis now disagrees with Parkman, that does not show Parkman was ineffective. See Hunt v. State, 940 So. 2d 1041, 1067 (Ala. Crim. App. 2005) ("'The mere existence of a potential alternative defense theory is not enough to establish ineffective assistance based on counsel's failure to present that theory.'" (quoting Rosario-Dominguez v. United States, 353 F. Supp. 2d 500, 513 (S.D.N.Y. 2005))).

Lewis has no right to relief on this claim.

3.

Lewis argues that his counsel "failed to introduce evidence that Mr. Free's testimony was unsupported by physical evidence from the scene of the murder." (Lewis's brief, p.

55.) Free testified at Lewis's trial that Lewis hit Kaye on the top of his head with a large rock. (Trial R. 526, 558.) Free said the rock was too large to hold with only one hand and that Lewis was using the rock "as some kind of prop that he worked on his cars with." (Trial R. 556.)

Parkman testified that he visited the crime scene but that he did not see any "decorative rocks"[18] or "large rocks" at the scene, and he did not take any photographs of the scene. Lewis asserts:

> "The theory that Mr. Lewis battered Mr. Kaye with a rock was central to the State's case. Having no gun, having failed to identify the caliber of gun used to kill Mr. Kaye, and having failed to show Mr. Lewis owned such a gun, the State relied on Mr. Free's gruesome testimony about the rock to convict Mr.

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[18]Lewis's Rule 32 counsel repeatedly calls the rock a "landscaping rock" or a "decorative rock." Free testified that Lewis's

> "mother, Miss Collene, had a bunch of these rocks around her house like to line a flower bed up with, but most of them were really too big to pick up like, you know, with two hands. This one here was a smaller one that [Lewis] kept as some kind of prop that he worked on his cars with."

(Trial R. 556.) He later testified that the rock looked "like one of those rocks you might line a flower bed with or a drive or walkway." (R. 562.) "It was a rough rock" that "maybe" had "jagged edges." (R. 562-63.) Free testified that Lewis hit Kaye with the rock "maybe" 20 times. (R. 566.)

> Lewis. Had the jury learned that no such rock existed, they likely would have found Mr. Free's testimony was not credible."

(Lewis's brief, pp. 56-57.)

> The circuit court found:
>
> "[T]he deceased suffered multiple blunt force injuries, including the blunt force injuries to the back of his head. This lends some support to Mr. Free's testimony that the deceased was bludgeoned with a decorative rock. Counsel was not ineffective for not producing a decorative rock, or by proving there were no decorative rocks where the fight took place."

(Record on Return to Remand C. 13.)

Lewis has not shown that the circuit court abused its discretion, and the record supports those findings. Lewis's claim, as alleged in his petition, is that Parkman did not visit the scene and that, if he had, he would have learned that there were no "decorative" rocks at the scene.[19] (C.

[19]The State points out--and Lewis does not dispute--that in his third amended petition, he did not allege that his counsel was ineffective for failing to "take photographs while he was at the scene of the fight or for not presenting testimony about the scene to impeach Free's testimony." (State's brief on Return to Remand, p. 67.) Lewis also did not make those allegations at the hearing. Thus, those allegations are not properly before us. See, e.g., Morrison v. State, 551 So. 2d 435, 437 (Ala. Crim. App. 1989) ("This particular allegation is made for the first time on the appeal of the denial of the petition for post-conviction relief. It was not a ground of the petition or amended petition. A petitioner for

1097.) Parkman testified that he did, in fact, visit the scene, and he testified that his strategy was to try to impeach Free's testimony. Parkman tried to do that on this issue by, as Lewis concedes, cross-examining Free extensively about the rock, its characteristics, and how Lewis used it to beat Kaye. (Trial R. 556-567.) In closing, Parkman argued that Free's testimony about those things could not be true based on the autopsy and the testimony of the doctor who performed the autopsy.[20] (Trial R. 738-40.) Like the circuit court, we cannot

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post-conviction relief may not raise on appeal grounds not presented in the petition or presented at the hearing on the petition.").

[20]For example, Parkman argued in closing:

> "Here is the kicker. Do you want to use your common sense a minute? You take a rock this big that's jagged. It's not a smooth rock. It's a jagged rock. He said it. You come down with that amount of force with this big rock on top of someone's head, standing right here, hit the top of the head, you are going to tell me that [the doctor who performed the autopsy] can't find any evidence of that? You are going to tell me she can't find any evidence of having a jagged rock slammed into someone's head? There is no way. Oh, yeah. Oh, yes. We found some lacerations on the side of the head. But do you remember what she said under cross-examination? There were no skull damage of any kind. Explain it to me. Explain to me how that could happen and there be nothing on top of the head, zero. You know why? Because it didn't happen that way."

say this was an unreasonable trial strategy or that Parkman was ineffective. See, e.g., Hutcherson v. State, 243 So. 3d 855, 866 (Ala. Crim. App. 2017) ("'"'[D]ecisions regarding whether and how to conduct cross-examinations and what evidence to introduce are matters of trial strategy and tactics.' Rose v. State, 258 Ga. App. 232, 236, 573 S.E.2d 465, 469 (2002)."'" (quoting Bush v. State, 92 So. 3d 121, 155 (Ala. Crim. App. 2009), quoting in turn A.G. v. State, 989 So. 2d 1167, 1173 (Ala. Crim. App. 2007))).

Lewis has no right to relief on this claim.

4.

Lewis argues that his defense counsel was ineffective for not "present[ing] phone records that would have countered the State's argument that Mr. Lewis had called Mr. Harger in an attempt to enlist his help in beating up Mr. Kaye." (Lewis's brief, p. 57.) Parkman filed a subpoena for records for Lewis's phone number and received those records before trial. Those records, according to Lewis, showed that no phone calls were placed from Lewis's home on the night of Kaye's murder.

At Lewis's trial, Hargedon testified that when she and

(Trial R. 739.)

Lewis got to the trailer, Lewis tried to call someone; Hargedon thought Lewis tried to call his girlfriend but she was not sure. (Trial R. 352.) On cross-examination, Parkman briefly confronted Hargedon with one statement she made to the police that she was unaware of any calls being made at the trailer. (Trial R. 358-59.) At that point, as well as other points in his cross-examination of Hargedon, Parkman emphasized Hargedon's statements and testimony that Free hit Kaye in the head with a beer bottle and pinned Kaye down and beat him for about 20 minutes. (Trial R. 229, 337-38, 359-61.) Parkman also brought out that Hargedon heard Free tell Lewis that Free wanted to shoot Kaye. (Trial R. 334-35.)

Kandy testified that Lewis telephoned her residence and wanted Harger to come over. (Trial R. 413.) Kandy said she intermittently heard fighting sounds coming from near Lewis's trailer for about 45 minutes. (Trial R. 415-16.) Kandy saw Lewis outside, near his porch. Kandy did not hear any gunshots. (Trial R. 417.)

Parkman asked Kandy if she could hear the sounds of fighting at the time that she saw Lewis on the porch at Lewis's trailer, and Kandy said that she did. (Trial R. 433.)

Parkman asked Kandy if she ever saw Lewis where it appeared that the fighting was happening and Kandy said that she did not. (Trial R. 433, 443.) When asked about hearing Lewis yell for her husband, she testified that Lewis yelled only, "Harger, Harger, Harger." (Trial R. 439.) Parkman confirmed with Kandy that Lewis said nothing else at that time.[21]

As to this claim, the circuit court found: "Counsel was not ineffective for not producing the phone records. Counsel was using the State's witness to impeach Mr. Free. His strategy was not to impeach the witness he was using to impeach Mr. Free." (Record on Return to Remand C. 13-14.)

The record supports this finding. As discussed above, Parkman thought Free was the most important witness for the State, and his strategy was focused on trying to show that Free was not credible. Parkman sought to do this by eliciting favorable testimony from the State's own witnesses through cross-examination. Parkman elaborated on how he used this strategy:

> "[T]he way I proceeded during the trial, was a very careful cross-examination of each witness,

[21]Hargedon testified that Lewis yelled to Harger, "Come here. Look what I got." (Trial R. 242.)

> especially Mr. Free. And in that, I laid out for the jury what our belief was about what happened through the questioning. Defenses are not just laid out by calling witnesses. They're also laid out by what you do with cross-examination and how you handle the witnesses."

(R. 95-96.)

At the Rule 32 hearing, Parkman stated that he viewed Kandy's testimony and Hargedon's testimony at trial as not "hurt[ing]" the defense overall, and their testimony gave him several points to try to discredit Free's testimony and to minimize Lewis's role in what happened. (R. 135-36.) During Parkman's opening argument, he asked the jury to listen carefully to Hargedon's testimony and to Kandy's testimony. (Trial R. 182.) In Parkman's closing argument, he cited testimony from several State witnesses to try to discredit Free and to discredit the State's theory of the case that it had provided in its opening arguments. (Trial R. 728-31, 738, 743-44.) Parkman specifically cited Hargedon's testimony about Lewis trying to call his girlfriend to discredit the State's statement in its opening that Lewis called someone and then Free showed up. (Trial R. 728-29.)

In his closing, Parkman cited Hargedon's testimony as discrediting Free's account of the fight. Free testified that

Kaye hit Free in the head with a beer bottle and that he fought with Kaye briefly on the ground but that he did not pin Kaye down. Free testified that his fight with Kaye lasted no more than five minutes. (Trial R. 551.) Parkman emphasized Hargedon's testimony, however, that Free had pinned Kaye down and that Free had beaten Kaye for about 20 minutes. (R. 731, 736-38.) He cited Hargedon's testimony that, after Hargedon put the shotgun away, Lewis remained outside. (Trial R. 730-31.) Parkman argued that Hargedon's account differed from a statement in the State's opening argument that Lewis had followed Hargedon inside when she took the shotgun away. (Trial R. 731.)

Parkman cited Kandy's testimony as well:

> "Kandy Harger -- remember this -- she was the only one that hasn't had anything to drink out of all the witnesses. She was the only one that didn't have anything messing up her mind. She said, I remember very clearly the phone rang and it was Mike saying, may I speak to Mike Harger, Mike being her husband. Didn't say, tell him to come over here and see what we got. No. No.
>
> "On top of that, when he came out later and ran over there to the edge of the property, there wasn't no, come over here and see what we have got, or come over here and look at this. No. It was simply, 'Harger, Harger, Harger.' That was it. That was her testimony. Totally different than what [the district attorney] promised you-all on opening statement."

(Trial R. 729-30.)

Parkman also cited Kandy's testimony to try to discredit Free's testimony. For example, he argued:

> "Kandy Harger said when we were fixing to leave, I heard a sound like somebody hitting tin or metal. Well, first of all, a sound? Not twenty sounds or twenty times, ever how many rattles a rock makes, that doesn't exist. And, on top of that, did you hear what Kandy said that clinches it, that shows that the evidence he is trying to convince you of is a total, total lie? Here is what it was. Kandy said, when we got down there and my husband and I got out of the truck, I heard the fighting. It was still going on. First of all, his witness, Tony Free, says, no, I done quit five minutes into this. Can't be. Except she said, I saw where Mike Lewis came from. He came from inside the trailer and ran out yelling 'Harger, Harger, Harger.'
>
> "Where did she say he went from there? She said, I saw him go back to the trailer. Kandy Harger, at any time, did you ever see Mike Lewis over where the sounds were coming from of the tin of the beating? And her answer was: 'No, sir, not any time. All I ever saw was Mike Lewis either standing up on the porch of the trailer or he came from inside it and went back in.' So that just destroys -- just destroys their case right there."

(Trial R. 743-44.)

Like the circuit court, we cannot say that Parkman was ineffective or that this was an unreasonable trial strategy. To be constitutionally effective, Parkman did not have to pursue every possible avenue of impeachment as a part of his

cross-examination of witnesses. See, e.g., Hutcherson, supra.

Lewis has no right to relief on this claim.

B.

In part III.B. of his brief, Lewis argues that his "defense counsel was ineffective for failing to seek appropriate jury instructions, failing to move for a judgment of acquittal, and failing to make necessary objections and arguments." (Lewis's brief, p. 62.)

1.

Lewis argues that his "defense counsel was ineffective for failing to object to the district attorney's personal attacks on defense counsel's integrity." (Lewis's brief, p. 62.) The circuit court found in its order that the underlying claim of prosecutorial misconduct was "addressed ... on direct appeal" and because it had no merit, counsel could not have been ineffective for failing to raise the issue. (Record on Return to Remand C. 15.)

On direct appeal, Lewis challenged, among other things, comments the district attorney made in his rebuttal closing argument:

> "I guess we heard two different trials. I did not understand that the district attorney was on

> trial. Shame. Shame. Shame, Mr. District Attorney. Mr. Parkman, you wouldn't know the truth if it hit you in the face. He is the one that stood up here and lied to you. I will resign as the district attorney. I will give up my office if there is a deal for Free, either one of them, in this case. So look and watch and be careful after you convict him of capital murder in this case. And if that occurs, I will give up the job as your district attorney. And Jimmy Parkman knows that."

(Trial R. 749-50.)

In addressing Lewis's claim on direct appeal "that the prosecutor's closing argument was 'so infected with improper and prejudicial comments that [Lewis] was denied his rights to due process and a fair trial,'" this Court, after noting that Lewis had not objected to the comments, held:

> "We have carefully reviewed the prosecutor's entire closing argument during the guilt phase of Lewis's trial, paying particular attention to the context of the prosecutor's remarks quoted in Lewis's brief. Based on that review, it is clear that the prosecutor's remarks were made in the heat of debate and in reply to various remarks made during defense counsel's closing argument. Therefore, no basis for reversal exists."

24 So. 3d at 514-15.

Besides the above-quoted statement by the district attorney, Lewis's ineffectiveness claim cites statements the district attorney made in his rebuttal closing argument:

"Slick talking Jimmy Parkman, you can't turn a pig's

> ear into a silk purse with a bunch of fancy sayings. You can't hide the facts, Mr. Parkman.
>
> "....
>
> "... He is a trained criminal defense lawyer standing up here taking a bunch of statements and trying to confuse you and talking about his grandmother.
>
> "...
>
> "... Parkman's cross-examination ... showed Parkman was not only wrong, mistaken, he was trying to slick or fool you.
>
> "....
>
> "... Parkman didn't hear the same testimony. He can take the words and twist them and change them in some way. ..."

(Lewis's brief, pp. 65-66, quoting Trial R. 750-51, 762-63.)

The circuit court denied Lewis's ineffectiveness claim as "without merit" and also found that the claim of prosecutorial misconduct had been "addressed at trial or on direct appeal and [is] therefore dismissed." (C. 1706.)

On appeal, Lewis argues that his defense counsel should have objected when, Lewis says, the prosecutor "personally attacked defense counsel in a highly demeaning and derogatory manner which encouraged the jury to convict, not on the basis of the evidence but, rather, on the notion that defense

counsel was 'slick' and deceitful." (Lewis's brief, pp. 64-65.) Lewis argues that defense counsel's failure to object limited this Court to plain-error review of the comments. He argues that "the prejudice standard applicable in Rule 32 presents a much lower bar for relief than the standard applicable on plain error review on direct appeal." (Lewis's brief, p. 70.)

Lewis is correct that a finding of no plain error on direct appeal does not automatically bar an ineffective-assistance-of-counsel claim based on the same alleged error. See, e.g., Ex parte Taylor, 10 So. 3d 1075, 1078 (Ala. 2005) ("Although it may be the rare case in which the application of the plain-error test and the prejudice prong of the Strickland test will result in different outcomes, a determination on direct appeal that there has been no plain error does not automatically foreclose a determination of the existence of the prejudice required under Strickland to sustain a claim of ineffective assistance of counsel. In determining whether to grant a Rule 32 petitioner relief on an ineffective-assistance claim, a court must examine both the plain-error and prejudice standards of review."). The State points out, however, that in

Lewis's direct appeal, this Court found "no basis for reversal," which, the State says, included both plain-error and preserved-error review. Cf. McNabb v. State, 991 So. 2d 313, 326 (Ala. Crim. App. 2007) ("Here, in our opinion on return to remand in McNabb's direct appeal, this Court noted that we found 'no error, plain or otherwise, in the guilt phase of the proceedings ....' McNabb [v. State], 887 So. 2d [929,] 990 [(Ala. Crim. App. 2001)] (emphasis added). Thus, we did not limit our findings to the lack of plain error, but rather we found no error, a finding which includes a preserved-error review."). In Lewis, this Court used the phrase "no basis for reversal exists" 13 times, and we used it in our evaluation of both preserved-error and plain-error claims. See, e.g., 24 So. 3d at 505 (rejecting Lewis's claim that "the trial court erred when, over his objection, it allowed the State to examine State's witness Rodney Ray Alford, using a statement Alford had given to a Houston County Sheriff's Department investigator" (emphasis added)); 24 So. 3d at 514 (rejecting Lewis's claims challenging the sufficiency of the evidence and the sufficiency of the evidence corroborating Free's testimony). Thus, this Court's

conclusion on direct appeal that "no basis for reversal exists" based on the prosecutor's comments included both plain-error and preserved-error review. Lewis's ineffectiveness claim based on a failure to object to those comments lacks merit. See, e.g., Yeomans v. State, 195 So. 3d 1018, 1034 (Ala. Crim. App. 2013) ("[B]ecause there is no merit to the legal theory underlying this claim of ineffective assistance, the claim was properly dismissed. See, e.g., Lee v. State, 44 So. 3d 1145, 1173 (Ala. Crim. App. 2009) (counsel cannot be ineffective for failing to raise a claim that has no merit).").

Even if our finding in Lewis's direct appeal had not included preserved-error review, Lewis has not shown that his defense counsel was ineffective for failing to object to the complained-of comments. First, Lewis did not ask Parkman about why he did not object to the comments. In Broadnax v. State, 130 So. 3d 1232, 1255 (Ala. Crim. App. 2013), this Court stated:

> "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, or 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 ...."

Lewis's claim turns on something in the record--counsel's failure to object--but the presumption that counsel acted reasonably applies regardless. Lewis has not shown that his counsel's failure to object was unreasonable or ineffective.

Lewis's challenges to the comments also largely ignore the context in which those comments were made. To take but one example, Lewis cites the prosecutor's statement: "Parkman's cross-examination ... showed Parkman was not only wrong, mistaken, he was trying to slick or fool you." (Lewis's brief, p. 66.) But placed in context, the prosecutor's comments were made in response to Parkman's characterization of the evidence:

> "Let's look at some of the facts real carefully. Remember them in this case. Remember what I asked Ray Alford what Mr. Parkman said to him. This is what the facts in the case are. The question I asked that impeached Jimmy Parkman's cross-examination and showed Mr. Parkman was not only wrong, mistaken, he was trying to slick or fool you.
>
> "'Ray, what did you tell the officers what Mike Lewis said that night when he was down there that early morning?'

> "'Well, I'm just not sure.'
>
> "'Let me refresh your memory. Do you remember the question?' I said, 'Jerry Hunt asked you this question: "Did you -- did you hear conversation between any of them talking about how much fun they had or anything to that effect?"'
>
> "Answer -- Jimmy Parkman doesn't like it, he can't change it. These are the facts of the case.
>
> "Answer by Ray Alford: 'Mike Lewis stood there and told me and Buddy he had more fun that night than he ever had in his life.'"

(Trial R. 751.) The record in Lewis's direct appeal does not support Lewis's claim that had his counsel objected to this comment or any of the complained-of comments, the result of his proceeding might have been different.

Lewis has no right to relief on this claim.

2.

Lewis argues that "defense counsel was ineffective for failing to move for [a] judgment of acquittal on the basis that the State had not proven the necessary kidnapping element of Mr. Lewis's capital charge." (Lewis's brief, p. 71.) The circuit court found that Lewis failed to prove this claim.[22]

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[22]In Lewis's posthearing brief, he summarily argued in part II.F. that his "defense counsel was ineffective for failing to move for judgment of acquittal on the basis that the State had disproved a necessary element of capital

On direct appeal, this Court thoroughly analyzed Lewis's claim challenging the sufficiency of the evidence. We held: "There was ample evidence from which the jury could have concluded that Lewis committed murder during the course of kidnapping in the first degree." 24 So. 3d at 512. Lewis contends that, although the evidence was sufficient to prove that Lewis intended to kill Kaye, his trial counsel should have argued specifically that the State had failed to prove that Lewis intended to kidnap the victim. Lewis also argues that his trial counsel should have objected to the following comment from the prosecutor, which Lewis says was a misstatement of the law:

> "Lewis, once again, goes and gets a pistol, in other words, so Tim Kaye's freedom was restrained. [Lewis] was armed with a deadly weapon. There had been an abduction. He didn't get in the back of that pick-up truck willingly and voluntarily. He was restrained by being in there."

(Lewis's brief, p. 75, quoting Trial R. 695.) Lewis argues that "while putting Kaye in the truck could be argued to

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murder." (C. 1596-97.) In denying this claim, the circuit court found: "[T]rial counsel were not questioned concerning any of the allegations in part II.F. of the petitioner's brief and failed to present any evidence proving those allegations." (Record on Return to Remand C. 15.)

constitute the actus reus of kidnap[ping], it represented no indication of the mens rea, or intent, to secretly confine or restrain." (Lewis's brief, p. 77.)

Section 13A-6-43(a)(4), Ala. Code 1975, provides: (1) A person commits the crime of kidnapping in the first degree if he abducts another person with intent to ... (4) [i]nflict physical injury upon him ...." This Court on direct appeal held that "the State presented sufficient evidence to prove the elements of the capital offense of murder committed during first-degree kidnapping." 24 So. 3d at 512 (emphasis added). Lewis's ineffectiveness claim is thus meritless, see, e.g., Yeomans, supra, and Lewis has no right to relief on this claim.

3.

Lewis argues that "defense counsel was ineffective for failing to request a jury instruction that, in order to find Mr. Lewis guilty via accomplice liability, the jury had to find that Mr. Lewis had a specific intent to kill." (Lewis's brief, p. 79.) The circuit court denied this claim as not proven and as without merit because the underlying claim was addressed on appeal. (Record on Return to Remand C. 15.)

On appeal, this Court examined the instructions to the jury on complicity. This Court held:

> "The jury was extensively and repeatedly instructed on the elements of capital murder, murder, felony murder, manslaughter, and first-degree kidnapping (R. 768-75, 793-96, 805-814), as well as the legal principles regarding accomplice liability (R. 789-91, 814-16), and accessory after the fact (R. 814-16). No error, plain or otherwise, occurred in connection with the aforementioned jury instructions."

24 So. 3d at 517 (emphasis added). Thus, this Court decided adversely to Lewis the claim underlying his ineffectiveness claim. Lewis's disagreement with that holding does not invalidate it.

Lewis has no right to relief on this claim. See Yeomans, supra.

C.

In part III.C. of his brief, Lewis argues that his "defense counsel were ineffective during the penalty phase of [his] trial by failing to investigate and present mitigation evidence to either the jury or the sentencing court." (Lewis's brief, p. 91.) In denying this claim, the circuit court found:

> "[T]he defendant failed to prove that counsel was ineffective during the penalty phase. Evidence was presented by the parents of the defendant of his difficult childhood, abuse by his step-father, the

> death of his half-brother, and other difficulties the defendant had in his childhood and during his life. This evidence was argued to the jury in mitigation. Also, there was some conflict as to what the defendant told the expert [Dr. Daniel Marson] and the version of events he told [Parkman] and the decision not to use this expert was reasonable under the circumstances and trial counsel was not ineffective for not calling Dr. Marson as an expert.
>
> "Also, counsel is not ineffective for not putting on cumulative evidence. The court finds that the argument of the State in its brief is well taken as to each position taken by the State as to the penalty phase."

(Record on Return to Remand C. 14.)

On appeal, Lewis argues:

> "Essentially, all defense counsel did was initially hire a mitigation specialist, Mr. Aaron McCall, to investigate Mr. Lewis's mitigation case, and he had a mental health evaluation performed by Dr. Daniel Marson. However, after initially hiring Mr. McCall, defense counsel then failed to follow up with Mr. McCall and failed to pay him for services rendered. In fact, even though defense counsel had failed to follow up with Mr. McCall, which resulted in Mr. McCall not having done a thorough investigation, defense counsel nonetheless sent Mr. McCall a letter only two weeks before Mr. Lewis's trial asking him to be prepared to testify on Mr. Lewis's behalf. This, of course, Mr. McCall did not do given the paucity of information he had to offer. Thus, Mr. McCall did very little other than a cursory initial evaluation of Mr. Lewis and recommend the hiring of Dr. Marson.
>
> "As to Dr. Marson, although he evaluated Mr. Lewis and was willing to testify on Mr. Lewis's behalf, defense counsel did not call Dr. Marson to

> testify. Rather, at the sentencing phase of trial, defense counsel simply turned the sentencing phase over to one of his co-counsel, Mr. Martin Adams, who had very recently worked at the prosecutor's office and had done very little to prepare for a capital sentencing in Mr. Lewis's case.
>
> "The most glaring error made by defense counsel concerns his failure to call Dr. Marson as a witness. After all ... had only a single additional juror voted for life instead of death, the law would not have considered the jury to have recommended a death sentence."

(Lewis's brief, pp. 91-93.)

As noted above, Lewis offered the testimony of two witnesses at the penalty phase: his parents, Wade Lewis and Collene Williams. Based on the evidence presented at the penalty phase, the trial court found mitigating the following evidence that Lewis presented: (1) Lewis had suffered at least three head injuries, (2) Lewis's stepfather had physically and verbally abused Lewis, and Lewis had been "forced to witness his stepfather physically and verbally abuse his mother and half-brother"; (3) Lewis had been "made to live in a motel room by himself as a child, and was required to work around the motel his stepfather operated before and after school even late into the night"; (4) Lewis had "abused a number of controlled substances and alcohol"; and (5) Lewis had

"suffered mild cognitive impairment as a result of the injuries to his head." (Trial C. 265-66.) But the trial court found those mitigating circumstances "extremely weak in comparison to the aggravating circumstances of this offense." (Trial C. 266.)

1.

As for Lewis's claim about mitigation specialist Aaron McCall, McCall testified that from 1997 to 2003 he was a mitigation investigator for the Alabama Prison Project. (R. 268.) Parkman contacted the Alabama Prison Project for assistance, and McCall met with Parkman and accompanied him to the Houston County jail to meet Lewis. (R. 272.) McCall did not complete his investigation because he was not paid. (R. 283.)

The State contends that Lewis fails to address the circuit court's finding that "'counsel is not ineffective for not putting on cumulative evidence'" and "'the argument of the State in its [post-hearing] brief is well taken ... as to the penalty phase.'" (State's brief on Return to Remand, pp. 44-45.) The State argues that Lewis's arguments about McCall do not comply with Rule 28(a)(10), Ala. R. App. P. We agree with

the State.

Lewis has no right to relief on this claim.

2.

Lewis argues that his defense counsel was ineffective for not calling Dr. Marson to testify at the penalty phase. Lewis argues that Dr. Marson's testimony would have provided the jury with a "consistent version of events" from Lewis and "a sympathetic outline of Mr. Lewis's life from a highly credible psychologist." (Lewis's brief, pp. 97-98.)

The evidence at the Rule 32 hearing showed that Parkman, at McCall's suggestion, retained Dr. Marson, a neuropsychologist and a scientific researcher in the neurology department at the University of Alabama at Birmingham, to evaluate Lewis for potential mitigating evidence. (R. 459-61.) Dr. Marson and an associate doctor evaluated Lewis at the Houston County jail in June 2002. (R. 459, 464.) Dr. Marson collected background information from Lewis and gave him a battery of tests to assess Lewis's cognitive abilities and his personality. (R. 464-65.). Dr. Marson found that Lewis suffered mild cognitive deficits consistent with having suffered head traumas. He concluded that Lewis had a

significant history of substance abuse and an anxiety disorder that stemmed from childhood experiences. (R. 483-84.) Dr. Marson sent Parkman an unsigned copy of his report about three months later. (R. 465.)

About a year later, Dr. Marson went to Dothan prepared to testify at Lewis's trial. (R. 473.) He believed that he discussed his report with Lewis's attorney Martin Adams. (R. 470.) Dr. Marson also spent a short time with Parkman. (R. 478.) Dr. Marson could not remember the specifics of what Lewis had told him about the crimes, but Dr. Marson testified that the fact that Lewis had talked with him about the circumstances of the crime "appeared to cause concern for Mr. Parkman." (R. 490-91.)

Parkman testified that he could not remember the specifics of what Lewis had told Dr. Marson about the crime, but Parkman testified that "it was completely opposite of everything, including the body, including washing out the thing. It was just completely opposite ...." (R. 131-32.) Parkman testified that based on that, he decided not to call Dr. Marson to testify during the penalty phase:

> "Q. Now, you testified ... that, after speaking to Dr. Marson about what [Lewis] had told him

concerning --

"A. Yes.

"Q. -- what had happened that night, and at the trailer, and following, you made the strategic decision not to call Dr. Marson for fear that certain evidence or information might have been elicited from Dr. Marson, right? That's a long-winded question, I know. But --

"A. I got your question. The answer is it wasn't that it might be. I've known Mr. Valeska [the district attorney] for all my life. And it would have been. And so with that in mind, I made the decision as an attorney not to put him up there because I knew it would be asked somewhere.

"Q. Well, you knew Mr, Valeska would certainly --

"A. I knew it.

"Q. -- would have the right to ask Dr. Marson --

"A. Yes.

"Q. -- what your client told him --

"A. Right.

"Q. -- had happened that night, correct?

"A. And I based that on experience, as well as watching him in other cases. And he is thorough enough that he would have asked that. And when it did come out, my opinion was that would not have helped us at that time.

"Now, I understand what [Lewis's Rule 32 counsel] alludes to. If I had 20/20 hindsight, I would put him up there, if I had nothing to lose.

> But I didn't know that at the time. My answer was simply it was my best judgment to take the risk with what we had and not try to contradict stuff that we had presented to a jury as a defense in this case, including closing.
>
> "Q. And since -- certainly part of your penalty phase strategy was to try to elicit sympathy from the jury in hopes that they would make a life without parole recommendation. Certainly you felt this information from Dr. Marson would have not gone toward getting sympathy from the jury?
>
> "A. My belief was it would have looked as though that we were playing games with the jury and that I was making the facts as I wanted them to be, not as they were from the client. And I felt like it would be detrimental."

(R. 129-31.)

On appeal, Lewis contends that the version of events he testified to at the Rule 32 hearing reflected what he told Dr. Marson and comported with the evidence presented at trial. But as noted above, Parkman said that Lewis told him about the crime, including where he and Free had dumped the body. (R. 21, 79.) Based on that, Parkman had investigated where the body was dumped, among other things. At the Rule 32 hearing, however, Lewis's version of events was much different from what he had told Parkman. At the Rule 32 hearing, Lewis denied having any involvement in the crime and did not testify that he was present when the body was dumped.

The circuit court, as noted, held that there was a conflict in the evidence on this point and that "the decision not to use this expert was reasonable under the circumstances and trial counsel was not ineffective for not calling Dr. Marston as an expert." The record and the law support this finding. See, e.g., Daniel v. State, 86 So. 3d 405, 424 (Ala. Crim. App. 2011) ("Counsel is not ineffective for failing to secure the services of an expert whose testimony would have been inconsistent with the 'defendant's own version of events.' Skrandel v. State, 830 So. 2d 109, 113 (Fla. Dist. Ct. App. 2002)."); Sheffield v. State, 87 So. 3d 607, 640 (Ala. Crim. App. 2010) ("'"'This Court will not second-guess tactical decisions of counsel in deciding whether to call certain witnesses.' United States v. Long, 674 F.2d 848, 855 (11th Cir. 1982)." Oliver v. State, 435 So. 2d 207, 208-09 (Ala. Cr. App. 1983).' Falkner v. State, 462 So. 2d 1040, 1041-42 (Ala. Crim. App. 1984). See Smith v. State, 756 So. 2d 892, 910 (Ala. Crim. App. 1997), aff'd, 756 So. 2d 957 (Ala. 2000) ('[I]t is not our function to second-guess the strategic decisions made by counsel.'). Such strategic decisions 'are virtually unassailable.' McGahee v. State, 885 So. 2d 191, 222

(Ala. Crim. App. 2003). See Slaton v. State, 902 So. 2d 102, 124 (Ala. Crim. App. 2003)."). Cf. Ex parte Mills, 62 So. 3d 574, 589 n.9 (Ala. 2010) (citing cases in which counsel was not ineffective for failing to request a jury instruction inconsistent with the defense or with the defendant's version of events).

Lewis has no right to relief on this claim.

3.

In a footnote, Lewis argues that if his defense counsel had talked to Dr. Marson earlier, he could have looked for a different expert to testify, "such as Dr. Daniel Grant, who, at the evidentiary hearing, offered a similar expert report and mitigating testimony to that which Dr. Marson would have provided." (Lewis's brief, p. 97 n.284.) We question whether this assertion complies with Rule 28(a)(10), Ala. R. App. P. And, as the State points out, "defense counsel had no reason to think the version of events Lewis gave him would be completely different from the version Lewis gave to Dr. Marson." (State's brief, p. 94.) The circuit court found that there was a conflict in the evidence on this point, and Lewis has not shown that the circuit court erred in that finding.

Nor has Lewis shown that counsel was ineffective for not obtaining the services of another expert witness. See, e.g., Waldrop v. State, 987 So. 2d 1186, 1193 (Ala. Crim. App. 2007) ("'Counsel is not ineffective for failing to shop around for additional experts.' Smulls v. State, 71 S.W.3d 138, 156 (Mo. 2002).").

Lewis has no right to relief on this claim.

4.

Lewis argues briefly that the circuit court erred in excluding an affidavit from Lewis's former wife, Donna Spivey-Hall. (Lewis's brief, p. 100.) Lewis asserts that Spivey-Hall was unable to attend the evidentiary hearing because of medical issues, and Lewis submitted an affidavit from Spivey-Hall and a letter from her physician at the Mayo Clinic about her illness. (C. 4568, 4570.) In the affidavit, Spivey-Hall states that Lewis told her about his difficult childhood and that she observed behavioral changes in Lewis after he suffered a head injury. Spivey-Hall also asserts that she contacted Parkman's office and left a message for him but that no one from his office contacted her.

The circuit court declined to consider the affidavit. (R.

525-26.) Lewis cites no authority to show that the circuit court abused its discretion in refusing to consider the affidavit. See Rule 28(a)(10), Ala. R. App. P. Thus, Lewis has no right to relief on this claim.

5.

Lewis argues that "[t]he cumulative effect of defense counsel['s] deficient performance prejudiced Mr. Lewis." (Lewis's brief, p. 108.) But "Alabama does not recognize a 'cumulative effect' analysis for ineffective-assistance-of-counsel claims." Carruth v. State, 165 So. 3d 627, 651 (Ala. Crim. App. 2014). We have repeatedly declined similar requests from petitioners to do so. See, e.g., Mashburn v. State, 148 So. 3d 1094, 1118 (Ala. Crim. App. 2013); Washington, 95 So. 3d at 58. And because Lewis has shown no deficient performance, there is no opportunity for this Court to engage in a cumulative-effect analysis.

III.

In part IV of his brief, Lewis argues that his sentence is illegal because, he says, Alabama's capital-murder statute is "unconstitutionally broad." (Lewis's brief, p. 112.) Citing authorities from other jurisdictions, he argues that Alabama's

statute charging murder made capital because it was committed during a kidnapping is not sufficiently narrowly drawn.

The circuit court did not enter specific factual findings on this claim or expressly hold that it was procedurally barred. The circuit court did find, however, that Lewis had failed to prove all claims in the petition or the claims lacked merit. And Lewis presented no evidence or even argument at the hearing about this claim.

The State argued in the circuit court--and the State argues on appeal--that the claim is nonjurisdictional and that it is barred by Rules 32.2(a)(3) and 32.2(a)(5), Ala. R. Crim. P. Lewis's only argument in response is that the claim is jurisdictional because his sentence was imposed under what he says is an unconstitutional statute. That argument, however, is wrong. "[I]t is well settled that a claim challenging the constitutionality of a statute is nonjurisdictional and is subject to the grounds of preclusion set forth in Rule 32.2, Ala. R. Crim. P." Marshall, 182 So. 3d at 622. Although the circuit court did not specifically hold that this claim was procedurally barred, we may affirm the circuit court's denial on that basis under the circumstances.

Lewis has no right to relief on this claim.

IV.

Lewis argues that his trial and appellate counsel were ineffective for not "assert[ing] that Alabama's sentencing scheme is unconstitutional because the judge makes the final determination as to whether aggravating facts, not necessarily found by a jury, outweigh mitigating facts and thus whether a death sentence should be imposed." (Lewis's brief, p. 123.) Lewis argues that his counsel should have made arguments like those made in Hurst v. Florida, 577 U.S. ___, 136 S. Ct. 616 (2016). (Lewis's reply, pp. 60-61.) Lewis also argues that his counsel should have objected to the verdict form because it did "not specify what aggravating and mitigating circumstances, if any, were considered or found by the jury." (Lewis's brief, p. 123.) The claims underlying these ineffective-assistance-of-counsel claims are baseless. See, e.g., Lindsay v. State, [Ms. CR-15-1061, Mar. 8, 2019] ___ So. 3d ___, ___ (Ala. Crim. App. 2019) ("The Alabama Supreme Court has held that Alabama's capital sentencing scheme does not violate Ring [v. Arizona, 536 U.S. 584 (2002),] or Hurst. See Ex parte Bohannon, 222 So. 3d 525 (Ala. 2016); Ex parte

Waldrop, 859 So. 2d 1181 (Ala. 2002)."). See also White v. State, 179 So. 3d 170, 241 (Ala. Crim. App. 2013); Mitchell v. State, 84 So. 3d 968, 993 (Ala. Crim. App. 2010); Bryant v. State, 951 So. 2d 732, 750 (Ala. Crim. App. 2003). Thus, Lewis has no right to relief on these claims of ineffective assistance of counsel. See, e.g., Yeomans, supra.

V.

In part VI of his brief, Lewis argues (1) that "[t]he State suppressed exculpatory evidence in violation of Brady v. Maryland[, 373 U.S. 83 (1963),]" and (2) that "the circuit court erred in denying many of Mr. Lewis's discovery requests." (Lewis's brief, p. 125.)

A.

Lewis argues that the State suppressed a report by the FBI on its investigation into Kaye's murder. (Lewis's brief, pp. 125-27.) The State argued that this claim was procedurally barred under Rules 32.2(a)(3) and 32.2(a)(5), Ala. R. Crim. P., because it could have been, but was not, raised at trial or on direct appeal. (C. 1270-71.) The circuit court found that Parkman knew about the report but determined based on his investigation that the report would not be helpful. The

circuit court noted that no report was introduced at the Rule 32 hearing. The circuit court held that these claims were procedurally barred on the grounds the State asserted. (Record on Return to Remand C. 13-14.)

Lewis did not present any evidence proving that the Brady claim was not procedurally barred. And even assuming the State had a copy of the alleged report,[23] "[c]ontrary to [Lewis's] apparent belief, 'not turn[ing] over evidence is not the equivalent of suppressing evidence for purposes of Brady." Bryant, 181 So. 3d 1087, 1123 (Ala. Crim. App. 2011). Parkman knew about the alleged report but did not ask for a copy of it. Thus, Lewis did not prove a violation of Brady. See, e.g., United States v. Cravero, 545 F.2d 406, 420 (5th Cir. 1976) ("[T]here is no Brady violation when the accused or his counsel knows before trial about the allegedly exculpatory information and makes no effort to obtain its production.").

Lewis has no right to relief on this claim.

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[23]Lewis states in his brief that he "cannot prove the existence of an FBI report relating to the Swedish Cigar Factory investigation." (Lewis's brief, p. 129 n.369.) See Bailey v. State, 421 So. 2d 1364, 1369 (Ala. Crim. App. 1982) ("[T]here must be some showing that such exculpatory and influential evidence actually exists before such a constitutional violation can be found.").

B.

Lewis contends that the circuit court erred in denying "his discovery requests that would likely have led to further information supporting a Brady claim." (Lewis's brief, p. 128.) The record shows that the circuit court granted some of Lewis's discovery requests, either in full or in part. (C. 1026.) Lewis summarily lists several items he sought to discover but did not get.[24] But other than trying to incorporate by reference pleadings he filed in the circuit court, he makes no specific argument about how the circuit

[24]Lewis lists these items: (1) "[t]he personnel files or records of any and all employees assigned to the investigation into the death of Mr. Kay and the resulting prosecution of Mr. Lewis and Mr. Tony Free"; (2) "[t]estimony provided at the grand jury proceeding resulting in the prosecution of Mr. Lewis and Mr. Tony Free"; (3) the "district attorney's files relating to cases that several witnesses had pending during and prior to the time of Mr. Lewis's arrest, pre-trial, incarceration and trial"; (4) "[c]ase files maintained by each city, county, state or federal law enforcement agency concerning the investigation into the death of Timothy Kaye and the resulting prosecution of Mr. Lewis and Mr. Tony Free including Federal Bureau of Investigation files relating to the Swedish Match Cigar Factory (involving Mr. Jay Causey, referenced previously)"; and (5) "[r]ecords from the Alabama Department of Corrections pertaining to Mr. Lewis, Mr. Tony Free, and other witnesses." (Lewis's brief, pp. 128-29.)

court erred.[25] This does not comply with Rule 28(a)(10), Ala. R. App. P.

> "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.' '[W]e are not required to consider matters on appeal unless they are presented and argued in brief with citations to relevant legal authority.' Zasadil v. City of Montgomery, 594 So. 2d 231, 231 (Ala. Crim. App. 1991). '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). Failure to comply with Rule 28(a)(10) has been deemed a waiver of the issue presented. See, e.g., Hamm v. State, 913 So. 2d 460, 486 (Ala. Crim. App. 2002). Therefore, because C.B.D.'s argument in this regard does not comply with Rule 28(a)(10), it is deemed to be waived."

C.B.D. v. State, 90 So. 3d 227, 239 (Ala. Crim. App. 2011).

Lewis has not shown that he has a right to relief on this issue.

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[25]Lewis attaches to his brief the pleadings he tries to incorporate by reference. This Court granted Lewis's motion to exceed the 75-page limitation in his principal brief--increasing that limitation to 150 pages. See Rule 28(j), Ala. R. App. P. Lewis's brief, without attachments, is 147 pages long. The additional attachments make the brief almost 200 pages in length.

VI.

Lewis argues that the circuit court erred in holding inadmissible testimony from inmates in the custody of the Alabama Department of Corrections--including James Miller, James Bailey, Timothy Crawford, and Tony Free ("the inmates") --whom Lewis had subpoenaed to testify at the evidentiary hearing. Lewis also challenges the circuit court's denial of his motion to transport the inmates to the evidentiary hearing. According to Lewis, Miller and Bailey would have testified that, while they were incarcerated with Free at Holman Correctional Facility, Free told them that he murdered Kaye. Lewis contends Crawford would have testified that Free had told another inmate that he was testifying against someone in the hope it would benefit him. Lewis asserts that Crawford's testimony would have corroborated Miller's and Bailey's testimony. (Lewis's brief, p. 131.)

The circuit court held that the evidence was inadmissible and denied the motions to transport the inmates for the reasons argued by the State in a brief and at a hearing on the motion on August 4, 2014. (C. 1434.) The State argued, correctly, that the inmates' testimony would be inadmissible

hearsay. See, e.g., Snyder v. State, 683 So. 2d 45, 46-47 (Ala. Crim. App. 1996) ("'The testimony of a witness that a person, other than the defendant, confessed to the witness that he himself committed the crime charged against the defendant, is hearsay and inadmissible. Welsh v. State, 96 Ala. 92, 96, 11 So. 450 (1891) [1892]. "Such declarations are hearsay evidence, the weakest, most uncertain, and most dangerous." Snow v. State, 58 Ala. 372, 375 (1877); Smith v. State, 9 Ala. 990, 995-96 (1846); Prince v. State, 356 So. 2d 750, 751 (Ala. Cr. App. 1978).'" (quoting Garrison v. State, 416 So. 2d 793, 794 (Ala. Crim. App. 1982)).

A.

Lewis, citing Chambers v. Mississippi, 410 U.S. 284 (1973), and Green v. Georgia, 442 U.S. 95 (1979), argues that "the circuit court's preclusion of testimony" from the inmates violated his right to due process of law. In State v. Acosta, 208 So. 3d 651, 655–56 (Ala. 2016), the Alabama Supreme Court discussed Chambers and Ex parte Griffin, 790 So. 2d 351 (Ala. 2000).

> "In Chambers, the United States Supreme Court held that 'where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically

to defeat the ends of justice.' 410 U.S. at 302. In Chambers, the trial court's application of the rules of evidence prohibited Leon Chambers, the defendant, from presenting evidence of a third party's culpability. Chambers was charged with killing Aaron Liberty. At trial, Chambers maintained that he did not shoot Liberty. In support of his defense, Chambers presented testimony from Gable McDonald, who had given a sworn statement to Chambers's counsel, that McDonald had shot Liberty. On cross-examination by the State, McDonald repudiated his confession and testified that he did not shoot Liberty and that he confessed to the crime in order to receive favorable treatment from law enforcement. When Chambers attempted to challenge McDonald's renunciation of his confession by having him declared an adverse witness, the trial court, applying Mississippi's rules of evidence, denied Chambers's request. Additionally, the trial court, applying Mississippi's rules of evidence, refused to admit testimony from individuals to whom McDonald had admitted that he shot Liberty. In reaching its conclusion that the trial court's application of the rules of evidence prevented Chambers from developing his defense that another, not he, shot Liberty, the United States Supreme Court stated that the evidence the trial court refused to admit was critical to Chambers's defense. The United States Supreme Court reasoned that because the strict application of Mississippi's rules of evidence had prohibited the admission of critical evidence in Chambers's defense, the trial court's strict application of those rules to exclude the critical evidence denied Chambers a trial that complied with due process. 410 U.S. at 302, 93 S. Ct. 1038.

"In Ex parte Griffin, 790 So. 2d 351 (Ala. 2000), this Court applied Chambers. In Ex parte Griffin, the State charged Louis Griffin with the murder of Christopher Davis after he had admitted, while pleading guilty to various offenses in federal court, that he had participated in the murder. At

trial, Griffin's defense was that he did not kill Davis and that he had lied to the federal court in his allocution to receive favorable treatment. To support this defense, Griffin attempted to present evidence indicating that two other men had been charged with killing Davis; that one of the men, Anthony Embry, had admitted under oath in court that he had killed Davis; that Embry had been convicted of Davis's murder; that Embry had been incarcerated for the conviction; and that a state court had dismissed Embry's conviction ex mero motu. The trial court, applying the Alabama Rules of Evidence, refused to admit the evidence of Embry's culpability. This Court, recognizing that the evidence of Embry's confession and conviction was critical in establishing Griffin's defense that another, not he, killed Davis, held that the trial court's ruling excluding the evidence with regard to Embry's confession and conviction prohibited Griffin from presenting his defense to the jury and violated his due-process rights under the 5th and 6th Amendments.

"The holdings in both Chambers and Griffin rest upon the fact that the trial court's strict application of the rules of evidence excluded critical evidence proffered by the defense, and the exclusion of the critical evidence resulted in the defendants' being denied their constitutional right to a fair trial and due process. Critical evidence is defined as '[e]vidence strong enough that its presence could tilt a juror's mind.' Black's Law Dictionary 674 (10th ed. 2014). In both Chambers and Griffin, the excluded evidence was critical to the defense because each defendant had denied participation in the offense and the excluded evidence indicated that another individual had admitted to committing the offense. When a defendant denies participation in an offense, evidence indicating that someone else has admitted to committing the offense and that that admission excludes the defendant as the offender, as it did in

> Chambers and Griffin, may be strong enough to influence a juror. Thus, depending on the facts of the case, the strict application of the rules of evidence to exclude critical evidence may render a trial fundamentally unfair."

In Green, the defendant was convicted of murder and rape. 442 U.S. at 95. During the penalty phase of Green's capital-murder trial, Green tried to prove that he was not present when the victim was killed and that he had not participated in the victim's death. Green called a witness who had testified for the State at the trial of Green's codefendant, Moore. According to that witness, Moore had told him that he had killed the victim after ordering Green to run an errand. The trial court excluded the testimony because it was inadmissible hearsay under Georgia law. 442 U.S. at 96.

The United States Supreme Court reversed. As in Chambers, it found "substantial reasons" to assume the testimony from the witness was reliable. The Court noted:

> "The evidence corroborating the confession was ample, and indeed sufficient to procure a conviction of Moore and a capital sentence. The statement was against interest, and there was no reason to believe that Moore had any ulterior motive in making it. Perhaps most important, the State considered the testimony sufficiently reliable to use it against Moore, and to base a sentence of death upon it."

442 U.S. at 97.

We agree with the State that Chambers, Green, and Ex parte Griffin are distinguishable. The evidence at issue in all three cases existed before the trials at issue in those decisions. Here, the supposed admissions by Free occurred after Free's 2001 trial and Lewis's 2003 trial--when Free had been convicted of capital murder and was serving a sentence of life imprisonment without the possibility of parole. We are aware of no application of Chambers, Green, and Ex parte Griffin to render admissible purely hearsay evidence that a defendant seeks to introduce years after a conviction.[26] Lewis

[26]In distinguishing those cases, the circuit court aptly stated:

> "All of the cases you basically have cited were at trial and it was due processed at the trial of the case before a jury. And this is after trial, after somebody has been convicted.
>
> "We're under a Rule 32 where the witness you're talking about, Free, testified at trial, and the case was appealed. And the appellate courts found, in considering the testimony, that the codefendant's accomplice testimony was amply corroborated by the evidence. So I'm not just going to bring in later-on testimony from somebody coming down, just saying he's changed his mind or told other people something else.
>
> "The case was tried, been appealed. His testimony was corroborated by other witnesses, according to the appellate courts for the State of

has no right to relief on this claim.

B.

Lewis also argues that the circuit court's refusal to grant his motion to transport the inmates "violated the plain language of Rule 32.9(a)," Ala. R. Crim. P. Rule 32.9(a) states that a petitioner has the right "to subpoena material witnesses" to testify at an evidentiary hearing. But that right is not absolute. First, Rule 32.9(a) gives the trial court "discretion [to] take evidence by affidavits, written interrogatories, or depositions." The court may rely on those means of evidence "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

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> Alabama. This is a Rule 32. And I'm just not going to get into practice of looking at whatever people say in the penitentiary to each other, they come down in Rule 32 hearing to try to inject that into it.
>
> "... [I]f it was a trial of the case before a jury, and you're actually coming in trying to impeach somebody's testimony if somebody had said that, that's one thing. But coming down to a Rule 32 hearing this late, I'm just not going to bring them down here and let them testify."

(R. 523-24.)

in an evidentiary hearing." Rule 32.9(a), Ala. R. Crim. P.

Second, Rule 32.8 vests the trial court with discretion to "hold a prehearing conference" at which the court "may order a showing by the petitioner of the materiality of the testimony expected to be presented by any witness subpoenaed by the petitioner ... and, upon petitioner's failure to show the requisite materiality, may order that the subpoena for such witness not be issued or quashed." The circuit court held a prehearing conference on August 4, 2014, at which it considered Lewis's motion to transport the inmates he had subpoenaed. The circuit court did not abuse its discretion in refusing Lewis's request for the presence of subpoenaed witnesses who would have supplied only inadmissible testimony.

C.

Lewis also argues that the circuit court's ruling on the admissibility of the testimony from the inmates was premature. He argues that their testimony could "have been admitted for a non-hearsay purpose, such as impeachment." (Lewis's brief, p. 142.) Lewis argues that the testimony from Miller, Bailey, and Crawford would have been admissible if Free had testified and had been asked about making the hearsay statements. But

Free's testimony about hearsay statements would also be inadmissible hearsay.[27] See, e.g., Benjamin v. State, 156 So. 3d 424, 457 (Ala. Crim. App. 2013) ("'The Alabama Rules of Evidence apply to Rule 32 proceedings. Rule 804, Ala. R. Evid., specifically excludes hearsay evidence.'" (quoting Hunt v. State, 940 So. 2d 1041, 1051 (Ala. Crim. App.2005)).

The circuit court did not abuse its discretion in ruling that the hearsay evidence from the inmates was inadmissible.[28]

Conclusion

The judgment of the circuit court is affirmed.

AFFIRMED.

McCool, J., concurs. Kellum and Cole, JJ., concur in the result. Windom, P.J., recuses herself.

[27]In a footnote in his brief, Lewis states that he "also appeals from, and renews his objection to, the circuit court's refusal ... to admit James Anthony Free's Rule 32 petition. (Lewis's brief, p. 132 n.375.) This violates Rule 28(a)(10), Ala. R. App. P.

[28]Because the inmates' testimony was inadmissible, Lewis's argument that the circuit court treated the inmates differently from non-inmates lacks merit.