Rel: August 6, 2021

Alabama Court of Criminal Appeals

OCTOBER TERM, 2020-2021

CR-17-1025

Cuhuatemoc Hinricky Peraita

v.

State of Alabama

Appeal from Escambia Circuit Court
(CC-00-293.60)

COLE, Judge.

Cuhuatemoc Hinricky Peraita, an inmate on Alabama's death row, appeals the Escambia Circuit Court's summary dismissal in part and denial in part of his Rule 32, Ala. R. Crim. P., petition for postconviction relief.

Facts and Procedural History

In September 2001, Peraita was convicted of two counts of capital murder for killing Quincy Lewis -- one count because Peraita killed Lewis while Peraita was under a sentence of life imprisonment, see § 13A-5-40(a)(6), Ala. Code 1975, and one count because Peraita had been convicted of murder within the 20 years preceding the capital offense, see § 13A-5-40(a)(13), Ala. Code 1975.[1]

On direct appeal, this Court summarized the facts underlying Peraita's convictions as follows:

> "[Peraita], Michael Castillo, and Quincy Lewis were incarcerated at Holman Prison on December 10 and 11, 1999. Around midnight, an incident occurred in which Lewis was stabbed several times. Shortly thereafter, he died as a result of his injuries.

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[1]In 1994, Peraita and Robert Melson killed three employees of a Popeye's Chicken restaurant in Gadsden. Melson was convicted of capital murder and sentenced to death, and this Court affirmed his convictions and sentence. See Melson v. State, 775 So. 2d 857 (Ala. Crim. App. 1999), aff'd, 775 So. 2d 904 (Ala. 2000). Peraita was also convicted of capital murder, but he was sentenced to life in prison without the possibility of parole, and this Court affirmed his convictions and sentence. See Peraita v. State (No. CR-95-1413, Sept. 26, 1997), 725 So. 2d 1075 (Ala. Crim. App. 1997) (table). While serving his life-without-parole sentence, Peraita and Michael Castillo killed Lewis.

"Kevin James Bishop was employed as a correctional officer at Holman Prison and worked from 10 p.m. on December 10, 1999, until 6 a.m. on December 11, 1999. At approximately 11:43 p.m., as officers were doing a body count to make sure all of the inmates who were assigned to Dorm 4 were accounted for, he saw [Peraita] in the dorm. [Peraita] said, ' "What's up Bishop," ' and did not indicate that he was scared for himself or Castillo. (R. 966.) Bishop testified that, if [Peraita] had asked to be removed from the dorm, he would have been placed in segregation in a cell by himself for his protection until the situation could be investigated. After the body count was completed, the lights were turned down for the night so that only about one-half of the lights were on.

"Charles Smith was incarcerated at Holman Prison on the night of the offense and knew [Peraita], Castillo, and Lewis. Five or six days before the offense occurred, he had seen the knife that was used to stab Lewis in a paper bag at the foot of Lewis'[s] bed. He testified that he had heard Lewis tell [Peraita] to get the knife out of the bag and that [Peraita] had taken the knife and hidden it under his clothes.

"Shortly before midnight and after the body count on the night the offense occurred, Smith saw Castillo and Lewis together. Lewis was walking toward the television room, but he stopped and sat on a bed across from Castillo's bed, where Castillo was sitting. When he did, [Peraita], who was sitting on a box that was between the beds, got up to walk away. As [Peraita] walked between Castillo and Lewis, Lewis slapped him. [Peraita] continued to walk to his own bed. Smith testified that, after Lewis slapped [Peraita], the other inmates were expecting something else to happen. He explained that some sort of response is common in a prison when one inmate slaps another inmate.

"Smith testified that [Peraita] stayed at his bunk for two or three minutes and then returned to the box on which he had previously been sitting. After about three to five minutes, [Peraita] stood up and started out like he was going to leave again. However, he spun around, grabbed Lewis around the neck, and 'snatched his neck back.' (R. 1044.) Castillo then started stabbing Lewis in the neck and in several other places. In the process, he also stabbed [Peraita] in the arm. Eventually, Lewis put a towel to his neck and staggered out of the dorm. As he was doing so, Castillo gave the knife to [Peraita]. [Peraita] then 'hit [Lewis] in the side' and said, ' "Die, n[_____]." ' (R. 1045-46.)

"Smith testified that [Peraita] and Castillo had paid Lewis two cartons of cigarettes to leave them alone and that he had asked Lewis several times to leave them alone. He also testified that Lewis could not stand the idea of [Peraita] being with Castillo. Finally, he stated that [Peraita] had been sleeping in the bed above Lewis'[s] bed, but that he had changed to a different bed.

"Alvin Hamner was also incarcerated at Holman Prison on the night of the incident and knew [Peraita], Castillo, and Lewis. During the night, he heard some movement and turned to look at what was happening. At that time, he saw [Peraita] 'holding Quincy Lewis around the neck and Castillo standing over him.' (R. 1029.) He first thought Castillo was punching Lewis in the neck, chest, and stomach. However, after more lights were turned on, he saw blood and realized that Castillo had been stabbing Lewis. He testified that Castillo had the knife, but handed it to [Peraita] when the lights came on and officers entered the dorm. He further testified that, as Lewis was falling to the floor, he saw [Peraita] stab Lewis in the side. Lewis subsequently walked out of the dorm and into the hallway, where he again fell to the floor. As [Peraita] walked

by Lewis, Hamner heard him say, ' "M_____ f_____, die." ' (R. 1031.)

"Alphonso Burroughs was also employed as a correctional officer at Holman Prison and worked from 10 p.m. on December 10, 1999, until 6 a.m. on December 11, 1999. When he walked into Dorm 4, he saw Lewis, who was covered with blood, walking from the area around Castillo's bed. [Peraita] and Castillo, who were also covered with blood, were in the same area only a few feet from Lewis, and [Peraita] had a knife in his hand.

"Lewis walked out of the dorm and collapsed during the time Burroughs was escorting [Peraita] and Castillo out of the dorm. Burroughs went to help Lewis, and he told [Peraita] and Castillo to 'go on up the hall.' (R. 952.) [Peraita] and Castillo complied, and Burroughs, another officer, and two inmates picked up Lewis to carry him to the infirmary to get medical attention. Part of the way there, [Peraita], who was still holding the knife, and Castillo turned around. [Peraita] waved the knife and said, ' "Drop the bastard and let the bastard die." ' (R. 953.) [Peraita], who appeared to be mad, continued to swing the knife and said, ' "Y'all get back too or we'll cut you too." ' (R. 954.)

"Bishop also saw [Peraita] and Castillo standing side by side in the dorm. Both were covered with blood, and [Peraita] had a knife in his hand. Shortly thereafter, Lewis walked out of the dorm and collapsed. As others helped Lewis, Bishop stayed between [Peraita] and Castillo and Lewis. He testified that he told [Peraita] several times to put the knife down. However, [Peraita] said he would not do so until he and Castillo were in segregation. [Peraita] and Castillo walked part of the way down the hall, but then they turned around,

[Peraita] swung his knife toward Bishop, and said, ' "Put the bastard down and let the son-of-a-bitch die." ' (R. 972.)

"Kevin Dale Boughner was also employed as a correctional officer at Holman Prison on December 10 and 11, 1999. He saw [Peraita], who had a knife in his hand, walking toward the segregation area. [Peraita] and Castillo were '[c]overed with blood, arm [in] arm, walking down the hall at a very brisk pace' toward him. (R. 980.) [Peraita] looked at him and said, ' "If you get us to a safe place I'll give you the knife." ' (R. 980.) Boughner put them in a holding cell and locked the door, and [Peraita] threw the knife out. Boughner described [Peraita] as 'really pumped up, hyper, adrenaline flowing, just really pumped up, hyped up.' (R. 981.) He also stated that, on two occasions, [Peraita] asked, ' "Is he dead?" ' (R. 982.)

"Bishop remained with [Peraita] and Castillo while Burroughs, the other officer, and the two inmates carried Lewis to the infirmary. Burroughs testified that, while he was going toward the infirmary, Bishop and Boughner tried to lock [Peraita] and Castillo in separate holding cells. However, he heard [Peraita] say that he and Castillo would not give up the knife unless they were locked up together. Burroughs testified that, after he and Castillo were locked in a holding cell together, [Peraita] threw the knife to the floor.

"Sergeant William James, the shift commander for the segregation area, saw [Peraita] and Castillo, who he described as 'covered from head to toe with blood,' as they were approaching the holding cell. (R. 991.) After he was secured in the holding cell, [Peraita] asked, ' "Is he dead?" ' (R. 991.)

"Dr. William John McIntyre treated Lewis in the emergency room at Atmore Community Hospital

approximately one hour after the offense occurred. He testified that Lewis had six wounds, including a very large wound to his neck, and that he was close to death because he had lost so much blood. He further testified that medical personnel tried to revive Lewis, that they were not able to because the blood loss was irreversible, and that he pronounced Lewis dead.

"Dr. Leroy Riddick, a medical examiner employed by the Alabama Department of Forensic Sciences, performed an autopsy on Lewis'[s] body. He testified that Lewis had a total of eighteen separate injuries, including six stab wounds. One stab wound to his neck cut his carotid artery. Another stab wound to the chest went through the chest cavity and caused a lung to collapse. He also had several superficial incised wounds. Dr. Riddick concluded that the cause of death was sharp force injuries from stab wounds and cuts.

"The defense called several inmates to testify on [Peraita]'s behalf. Michael Best testified that he knew [Peraita], Castillo, and Lewis and had seen them interact; that the three seemed to get along well at first, but that the situation deteriorated over time; that Lewis had admitted to him that he had made threats against [Peraita] and Castillo; and that he had discussed those threats with [Peraita] and Castillo. Finally, he testified that Lewis had a reputation for being sexually violent in Holman Prison.

"James Jones testified that he knew [Peraita], Castillo, and Lewis; that he had seen them interact; that they initially did not have problems; and that eventually problems developed. He explained that [Peraita] and Lewis 'were partners' before Castillo arrived at Holman Prison; that Castillo came between [Peraita] and Lewis; that [Peraita] and Castillo 'paid' Lewis two cartons of cigarettes to leave them

> alone; that Lewis left them alone for seven or eight days; and that problems started again. (R. 1134.) Finally, he stated that Lewis made a threat against [Peraita] in his presence and that he told [Peraita] about the threat.
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> "Darwin Knight testified that he knew [Peraita], Castillo, and Lewis; that [Peraita] and Lewis had been 'partners'; and that there was 'a major change' in the relationship between [Peraita] and Lewis after Castillo arrived at Holman Prison. (R. 1139.)"

Peraita v. State, 897 So. 2d 1161, 1175-78 (Ala. Crim. App. 2003).

After the jury found Peraita guilty of two counts of capital murder, Peraita waived the right to have the jury participate in the sentencing hearing, see § 13A-5-44(c), Ala. Code 1975. "Before accepting [Peraita's] waiver, the trial court thoroughly explained [to Peraita] the rights he would be waiving. It also questioned him extensively about his decision and his understanding of the consequences thereof. Throughout the proceeding, [Peraita] remained adamant about his decision to waive jury participation in his sentencing." Peraita, 897 So. 2d at 1197. Thereafter, the trial court accepted his waiver. See Peraita, 897 So. 2d at 1175. Peraita then told the trial court that he wished to waive the presentation of all mitigation evidence. (Record in Peraita, case no. CR-01-0289, R.

1315.)[2] After another colloquy with Peraita, the trial court accepted Peraita's decision to waive the presentation of mitigation evidence. (Record in Peraita, case no. CR-01-0289, R. 1315-21.) "The trial court then conducted a sentencing hearing, received a presentence investigation [report], and sentenced [Peraita] to death." Id.

In its sentencing order, the trial court found three aggravating circumstances to exist -- that the capital offense was committed by a person under a sentence of imprisonment; that Peraita previously had been convicted of another capital offense or a felony involving the use or threat of violence to the person; and that the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses. The trial court found no statutory mitigating circumstances to exist. The trial court found the following nonstatutory mitigating circumstances to exist:

> "[Peraita] was born in Los Angeles, California on May 19, 1976. He was the youngest of four children. Peraita's father was abusive toward Peraita's mother and the four children. When Peraita was about two years of age, his abusive father

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

> was killed by his mother and his aunt. They were convicted and his mother was imprisoned. [Peraita] lived in many foster homes and he claims to have been physically, sexually, and emotionally abused in these homes. He moved to Alabama in 1990 and spent two years at the Big Oak Ranch in Etowah County when he was fifteen and sixteen years of age. Peraita completed the 9th grade and he does not have a GED. He claims to have used alcohol, marijuana, and cocaine as a teenager. [Peraita] was evaluated at Taylor Hardin in 1994. This evaluation suggested a diagnosis of adjustment disorder with mixed disturbance of emotion and conduct; polysubstance abuse; and personality disorder not otherwise specified with antisocial features. Dr. DeFrancisco's mental evaluation report indicates that [Peraita] attempted suicide on more than one occasion. He has taken an overdose of medication and has tried to hang himself while incarcerated on the Etowah County capital murder charges. The Court has considered [Peraita's] difficult family history and childhood. The abuse, neglect, and absence of a stable home environment during his formative years have been considered by the Court. Also, the Court has weighed his abuse of alcohol and drugs which commenced when he was a teenager. In fact, the Court has searched all of the evidence in the case for evidence of mitigation, whether or not raised by the defense, in view of the fact that this is a capital case. The Court has considered all non-statutory mitigating circumstances presented throughout this proceeding which involved any aspect of [Peraita's] character or record and any of the circumstances of the offense."

(Record in Peraita, case no. CR-01-0289, C. 468-71.) The trial court then concluded that the aggravating circumstances "far outweigh" the

mitigating circumstances and sentenced Peraita to death. (Record in Peraita, case no. CR-01-0289, C. 472.) Peraita appealed.

On appeal, this Court affirmed Peraita's capital-murder convictions and death sentence. Peraita, 897 So. 2d at 1222. The Alabama Supreme Court affirmed this Court's decision. See Ex parte Peraita, 897 So. 2d 1227 (Ala. 2004). This Court issued a certificate of judgment on September 22, 2004, making Peraita's convictions and sentence final.

On September 16, 2005, Peraita timely filed a Rule 32 petition challenging his convictions and sentence. (C. 14-74.) In his petition, Peraita alleged that his trial counsel were ineffective during both the guilt phase and the penalty phase of his trial and that juror misconduct during the trial deprived him of his rights to a fair trial and to due process.[3] On

[3]Three pages of Peraita's original petition appear to have been omitted from the record on appeal, as Peraita's original petition goes from page 58 to page 62. (See C. 71-72). It is Peraita's duty to provide this Court with a complete record on appeal, and we will neither presume what Peraita's petition alleged in those missing pages nor presume error based on materials that are not included in the record. See Henderson v. State, 248 So. 3d 992, 1017 n.5 (Ala. Crim. App. 2017) (noting that even capital defendants have a duty to provide this Court with a complete record on appeal).

December 23, 2005, the State moved to dismiss Peraita's petition, alleging that Peraita's claims were either insufficiently pleaded, meritless, or precluded under Rule 32.2(a)(3) and (5), Ala. R. Crim. P. (C. 86-114.)

On July 3, 2006, Peraita filed his first amended Rule 32 petition. (C. 307-80.) In his first amended petition, Peraita reasserted his claims of ineffective assistance of counsel and juror misconduct and added a claim that the State had withheld "favorable evidence" from him.

On June 26, 2007, the circuit court issued an order summarily dismissing most of the claims Peraita raised in his petition and in his first amended petition. (C. 486-87.) The circuit court did, however, find that Peraita was entitled to an evidentiary hearing on some of the claims he raised in his petition. (C. 487.)

Thereafter, Peraita filed a second amended Rule 32 petition, adding claims that he did not knowingly and voluntarily waive his right to present mitigation evidence at his sentencing hearing, that his sentence is disproportionate when compared to the sentence of his more culpable codefendant, and that Alabama's method of execution violates the Eighth Amendment to the United States Constitution. (C. 588-672.)

On May 19, 2011, the State moved to dismiss Peraita's second amended petition. (C. 728-52.) On January 18, 2013, the circuit court issued an order summarily dismissing several of Peraita's remaining claims. (C. 853-67.) But the circuit court found that Peraita was entitled to an evidentiary hearing on the following claims:

> (1) That juror misconduct deprived him of his right to a fair trial and to due process.
>
> (2) That his trial counsel were ineffective for failing to "investigate and develop" testimony from Eddie John Campbell, who had been incarcerated at Holman Prison when Peraita and Castillo murdered Lewis.
>
> (3) That his trial counsel were ineffective for failing to "investigate and develop" testimony from Jack King, who had been incarcerated at Holman Prison when Peraita and Castillo murdered Lewis.
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> (4) That his trial counsel were ineffective because they failed to present evidence indicating that Peraita did not stab Lewis.
>
> (5) That his trial counsel were ineffective because they did not adequately "investigate and evaluate" Peraita's mental health throughout the proceedings.
>
> (6) That Peraita did not knowingly and voluntarily waive his right to present mitigation evidence at his sentencing hearing.

(C. 853-67.)

On April 26 and 28, 2016, the circuit court held an evidentiary hearing on those six claims. At that hearing, Peraita presented testimony from eight witnesses: V.J., a juror at Peraita's trial (R. 121-34); Dr. Daniel C. Marson (R. 134-247); Edmundo Peraita III, Peraita's brother (R. 255-99); Loretta Mancuso, Peraita's mother (R. 299-340); Eddie John Campbell (R. 343-68) and Jack King (R. 369-82), inmates who were at Holman Prison with Peraita; and J. Todd Stearns and Wade Hartley (R. 394-550), his trial counsel.[4] The State called Dr. Glen King. (R. 551-96.)

On June 18, 2018, the circuit court issued a written order denying the claims Peraita presented at the evidentiary hearing and setting out its reasons for doing so. (C. 1253-79.) This appeal follows. (C. 1232-34.)

[4]Peraita also submitted an affidavit from Dr. William McIntyre, who testified at Peraita's original trial. (R. 115.) "The nature of his testimony in that affidavit is to identify certain records as records of the hospital relating to -- business records of the hospital relating to his treatment of the victim Quincy Lewis." (R. 115.)

Standard of Review

Peraita's petition was summarily dismissed in part under Rule 32.7(d), Ala. R. Crim. P., and denied in part under Rule 32.9(a), Ala. R. Crim. P. Our standard of review in this case is well settled:

> "Rule 32.7(d), Ala. R. Crim. P., authorizes a circuit court to summarily dispose of a petitioner's Rule 32 petition without accepting evidence,
>
> > " '[i]f the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings ....'
>
> "See also Hannon v. State, 861 So. 2d 426, 427 (Ala. Crim. App. 2003); Cogman v. State, 852 So. 2d 191, 193 (Ala. Crim. App. 2002); Tatum v. State, 607 So. 2d 383, 384 (Ala. Crim. App. 1992). Summary disposition is appropriate if the record directly refutes a petitioner's claim or if the claim is obviously without merit. See, e.g., Shaw v. State, 148 So. 3d 745, 764-65 (Ala. Crim. App. 2013). Moreover, 'a judge who presided over the trial or other proceeding and observed the conduct of the attorneys at the trial or other proceeding need not hold a hearing on the effectiveness of those attorneys based upon conduct that he observed.' Ex parte Hill, 591 So. 2d 462, 463 (Ala. 1991).
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> " 'Once a petitioner has met his burden ... to avoid summary disposition pursuant to Rule 32.7(d), Ala. R. Crim. P., he is then entitled to an opportunity to present evidence in

order to satisfy his burden of proof.' Ford v. State, 831 So. 2d 641, 644 (Ala. Crim. App. 2001). Rule 32.9(a), Ala. R. Crim. P., provides:

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

"In Wilkerson v. State, 70 So. 3d 442 (Ala. Crim. App. 2011), this Court explained:

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

"70 So. 3d at 451.

> " '[W]here 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)). However, 'when 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). 'The sufficiency of pleadings in a Rule 32 petition is a question of law.' Ex parte Beckworth, 190 So. 3d 571, 573 (Ala. 2013).
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> "With limited exceptions not applicable here, the general rule is that this Court may affirm a circuit court's judgment if it is correct for any reason. See Bryant v. State, 181 So. 3d 1087, 1100 (Ala. Crim. App. 2011); Moody v. State, 95 So. 3d 827, 833 (Ala. Crim. App. 2011), and McNabb v. State, 991 So. 2d 313, 333 (Ala. Crim. App. 2007), and the cases cited therein. Moreover, '[o]n direct appeal we reviewed the record for plain error; however, the plain-error standard of review does not apply to a Rule 32 proceeding attacking a death sentence.' Ferguson v. State, 13 So. 3d 418, 424 (Ala. Crim. App. 2008). See also Mashburn v. State, 148 So. 3d 1094, 1104 (Ala. Crim. App. 2013)."

Woodward v. State, 276 So. 3d 713, 728-29 (Ala. Crim. App. 2018). Additionally, we note that " ' "the procedural bars of Rule 32 apply with equal force to all cases, including those in which the death penalty has been imposed." ' " Mashburn v. State, 148 So. 3d 1094, 1104 (Ala. Crim. App. 2013) (quoting Nicks v. State, 783 So. 2d 895, 901 (Ala. Crim. App.

1999), quoting in turn, State v. Tarver, 629 So. 2d 14, 19 (Ala. Crim. App. 1993)). With these standards of review in mind, we address the arguments Peraita raises on appeal.

Discussion

I.

Peraita first argues that the circuit court erred when it denied his juror-misconduct claim. (Peraita's brief, pp. 22-37.)

In his Rule 32 petition, Peraita alleged that,

> "[o]n the second day of the trial, when the jury was in one of the side rooms waiting to go back into the courtroom, the jury ... discussed the details of his prior murder convictions, details previously determined inadmissible by [the trial] Court. During this conversation, jurors discussed that Mr. Peraita was the person involved in the killings of three or four people at the Popeye's restaurant in Gadsden, Alabama. The jurors knew that the deaths involved forcing three or four people into a freezer and shooting them at the Popeye's restaurant. At least one juror assumed based on the jury's conversation that Mr. Peraita was the shooter in those previous murders -- an assumption that was false. Jurors listened intently as this information was shared.
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> "Outside the presence of the Court, the attorneys, and Mr. Peraita, the jury discussed the graphic details of these murders, including the role played [by] Mr. Peraita. The jury members carried this improper and extremely prejudicial information with them for the remainder of Mr. Peraita's trial

> and their deliberations. None of the jury members shared this information with Mr. Peraita's counsel or any members of the Court."

(C. 70.) Although Peraita did not identify which juror made the allegedly improper statement in either his Rule 32 petition or in any of the amendments to his Rule 32 petition, Peraita sent a letter to the circuit court on December 20, 2006, indicating that he had informed the State that "the juror who shared with his fellow jurors information regarding the details of [his] prior convictions was the foreperson, [E.P.]"[5] (C. 783.)

Because E.P. died before Peraita's evidentiary hearing, Peraita called V.J., another juror who had served on Peraita's jury, to testify about E.P.'s alleged comment. The State objected to V.J.'s testimony about what

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[5]As explained in note 13, an extrajudicial revelation of the identity of a juror who is alleged to have committed misconduct does not satisfy the full-fact pleading requirements of Rule 32.3 and Rule 32.6(b). But because the circuit court found this claim to be sufficiently pleaded and gave Peraita an opportunity to prove this claim at an evidentiary hearing, we cannot now hold that Peraita's juror-misconduct claim is insufficiently pleaded. See Ex parte McCall, 30 So. 3d 400, 404 (Ala. 2008) (By holding an evidentiary hearing, "the trial court implicitly found that the issues presented were 'material issue[s] of law or fact ... which would entitle [McCall] to relief,' Rule 32.7(d), and, under Rule 32.9(d), the trial court therefore had a responsibility to make findings of fact as to each of those issues.").

E.P. said, arguing that V.J.'s testimony was hearsay. (R. 124.) The circuit court sustained the State's objection but allowed Peraita to proffer V.J.'s testimony. According to V.J., on the second day of Peraita's trial, the jury was "[i]n the jury room" and they were "all sitting at the table" when E.P. said: "Do y'all know that this guy murdered three or four people there in Gadsden at Popeye's Chicken and put them in the freezer." (R. 124, 126, 131.) V.J. said that the other jurors had the opportunity to hear E.P., but she could not say whether the other jurors actually heard E.P. V.J. also said that she could not say whether the other jurors reacted to E.P.'s statement because she "really didn't look at their faces." (R. 132.) V.J. did not testify as to whether E.P.'s statement had any affect on her "personal decision on [Peraita's] guilt or innocence." (R. 133.) Additionally, V.J. did not testify as to whether E.P.'s statement was actually brought up during guilt-phase deliberations.

The circuit court denied Peraita's juror-misconduct claim for three reasons: (1) because "Peraita failed to establish that [V.J.'s] testimony was admissible over the State's hearsay objection" (C. 1256-57); (2) because "Peraita failed to prove that [E.P.'s] comment constituted extraneous

evidence" (C. 1254-55); and (3) because "Peraita failed to prove ... that the comment purportedly made by [E.P.] prior to the jury's guilt phase deliberations might have caused him to be prejudiced" (C. 1255-56). Peraita challenges all three findings on appeal. (Peraita's brief, pp. 22-37.)

First, Peraita argues that the circuit court erred when it found that V.J.'s testimony about what E.P. had allegedly told the other jurors was hearsay. Because the Alabama Rules of Evidence apply at evidentiary hearings on Rule 32 petitions, circuit courts "should exclude inadmissible hearsay" evidence from those proceedings. McWhorter v. State, 142 So. 3d 1195, 1254 (Ala. Crim. App. 2011). Rule 801(c), Ala. R. Evid., defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." (Emphasis added.) When a statement is not being offered for its truth, the statement is not hearsay and, thus, not excluded under the hearsay rule. See, e.g., Deardorff v. State, 6 So. 3d 1205, 1216 (Ala. Crim. App. 2004) ("A statement offered for a reason other than to establish the truth of the matter asserted therein is not hearsay. E.g.,

Smith v. State, 795 So. 2d 788, 814 (Ala. Crim. App. 2000)."). "Consequently, the most common approach for definitionally circumventing a hearsay objection is to argue that the statement is offered for some purpose in the case other than to prove the truth of the matter asserted." II Charles W. Gamble, et al. McElroy's Alabama Evidence § 242.01(1)(c) (7th ed. 2020).

Here, Peraita alleged that juror E.P. committed misconduct when he told other jurors about Peraita's prior criminal history, and he attempted to prove his allegation by introducing E.P.'s statement through V.J.'s testimony. When V.J. was about to testify to what E.P. allegedly said, the State objected that V.J.'s answer "[c]alls for hearsay." (R. 124.) Peraita later responded:

> "[T]he statement is not being introduced for the truth of the matter ascertained. It is being introduced as it would be introduced in a case of fraud or any other instance. The meaningful aspect of this testimony is that the juror said something to the other jurors concerning Mr. Peraita's prior convictions. If the statement was false it would be just as meaningful for our claim as if the statement were true. So the truth of whether or not what the foreperson said in the room is irrelevant to our claim. What is relevant is that the foreperson made a statement to the other jurors that concerned Mr. Peraita's prior convictions which were not

> presented as evidence at trial. That is the core of our juror claim."

(R. 128.) Peraita is correct.

As Peraita argued, the nature of his juror-misconduct claim did not turn on whether E.P. said something that was true. Rather, his juror-misconduct claim turned on the fact that E.P. made a statement -- specifically, that he told the other jurors that Peraita had "murdered three or four people there in Gadsden at Popeye's Chicken and put them in the freezer." (R. 124, 126, 131.)

As Dean Gamble has explained:

> "Some statements have significance in the case, without regard to whether they are true or not, simply because they were made. The statement, rather than being offered to prove the truth of the matter asserted, is being offered because it is an integral part of the issue to be resolved in the case. Some writers term such statements as ... operative facts. ... The number of instances when the mere fact of having made a statement forms part of the issue in a case is unlimited."

II Gamble, et al. McElroy's Alabama Evidence § 242.01(1)(c)(1) (footnotes omitted).

Juror E.P.'s statement about Peraita's criminal history to the other jurors, regardless of its truth, is an instance where the mere fact of having

made such a statement forms the basis of the issue at Peraita's Rule 32 hearing -- i.e., a juror-misconduct claim. The statement was introduced to show the impact the statement might have had on E.P.'s fellow jurors, not to show that Peraita did the act in question. Consequently, V.J.'s testimony about what E.P. said was not hearsay. Thus, the circuit court erred when it sustained the State's hearsay objection. Even so, it does not necessarily follow that V.J.'s testimony was admissible at Peraita's evidentiary hearing. As the circuit court found, V.J.'s testimony could still be excluded under Rule 606(b), Ala. R. Evid. Thus, we now turn to whether the circuit court correctly determined that V.J.'s testimony was inadmissible under that rule.

Rule 606(b), Ala. R. Evid., provides:

> "[A] juror may not testify in impeachment of the verdict or indictment as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, <u>except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror</u>. Nor may a juror's affidavit or evidence of any statement by the

> juror concerning a matter about which the juror would be precluded from testifying be received for these purposes."

(Emphasis added.) In other words, unless a juror's testimony concerns either (1) some extraneous prejudicial information that was improperly brought to the jury's attention or (2) an outside influence that "was improperly brought to bear upon any juror," then the juror cannot testify about what transpired between jurors during a trial.

Peraita does not contend that some "outside influence" was brought to bear upon any juror. Rather, Peraita argues only that E.P.'s comment to the other jurors about Peraita having killed three other people at a Popeye's restaurant was "extraneous prejudicial information." Thus, we address only that exception to Rule 606(b).

Generally, the extraneous-prejudicial-information exception to Rule 606(b) has been limited in scope " ' "to the visitation of a crime scene by a juror, the introduction of the definition of legal terms in the jury room, and [the reading of] concepts from general reference books." ' " Bethea v. Springhill Mem'l Hosp., 833 So. 2d 1, 7 (Ala. 2002) (quoting Lance, Inc. v. Ramanauskas, 731 So. 2d 1204, 1214 (Ala. 1999)). Although this list of

circumstances is not exhaustive, the listed instances of juror misconduct share two common characteristics. The first common characteristic "is the extraneous nature of the fact introduced to or considered by the jury." Sharrief v. Gerlach, 798 So. 2d 646, 652-53 (Ala. 2001) (emphasis added). Indeed, in each of these listed circumstances, a juror sought out information from an external source and then conveyed that information to the other jurors. The second common characteristic in each of these listed instances of misconduct is that the external source from which the juror gains his or her information is consulted during trial. See, e.g., Ex parte Arthur, 835 So. 2d 981, 984-85 (Ala. 2002) (holding that a juror committed misconduct when he consulted medical textbooks to determine whether the plaintiff's migraine headaches could be caused by some other reason than what she alleged in her trial and then shared that information with the other jurors); Apicella v. State, 809 So. 2d 841, 847 (Ala. Crim. App. 2000) (holding that a juror committed misconduct when the juror contacted an attorney and asked the attorney about a legal principle relevant to the case); Knight v. State, 710 So. 2d 511, 513-15 (Ala. Crim. App. 1997) (holding that a juror committed misconduct when

he "independently investigated the susceptibility of young female children to accidental infection of gonorrhea" and shared his findings with the other jurors); and Ex parte Lasley, 505 So. 2d 1263, 1264 (Ala. 1987) (holding that some jurors committed misconduct when they conducted "home experiments").[6]

[6]Admittedly, we have found two cases in which a juror was found to have committed misconduct when the juror's "outside knowledge" was ostensibly obtained before trial and was shared with other jurors. First, in Clarke-Mobile Counties Gas District v. Reeves, 628 So. 2d 368, 370 (Ala. 1993) (plurality opinion), a juror was found to have committed misconduct when she told the other jurors that " 'Clarke-Mobile Counties Gas District had gone across her son's land and messed it up and did not ask permission.' " Second, in Taite v. State, 48 So. 3d 1, 3 (Ala. Crim. App. 2009) (plurality opinion), a juror was found to have committed misconduct when that juror told other jurors "that Taite had a prior conviction and had been imprisoned." Both cases, however, are plurality opinions and, thus, are not binding "prior decisions." See Ex parte Dearman, [Ms. 1180911, June 26, 2020] ___ So. 3d ___, ___ n.1 (Ala. 2020) ("[W]e did not grant certiorari review as to Dearman's argument regarding Ex parte Walker[, 122 So. 3d 1287 (Ala. Civ. App. 2013),] because Ex parte Walker is a plurality decision and, thus, is not a 'prior decision[ ]' of the Court of Civil Appeals for purposes of Rule 39(a)(1)(D), Ala. R. App. P."). Additionally, as the State points out in its brief on appeal, in Taite the State "implicitly conceded at trial" that the juror's information was "extraneous information within the scope of the exception provided for in Rule 606(b)." Taite, 48 So. 3d at 7. The State has made no such concession here.

But when the alleged "prejudicial information" comes from an intrinsic source, meaning that a juror came to the trial with certain information learned outside the scope of trial and passed that information along to the jury, any testimony concerning that information is inadmissible under Rule 606(b). See, e.g., Reeves v. State, 226 So. 3d 711, 754-55 (Ala. Crim. App. 2016) (holding that a juror's comment "that Reeves's family 'would "come after" the jurors after trial' and stress[ing] to the other jurors that 'the decision to impose the death penalty truly belonged to the judge rather than the jury' " was not based on "extraneous" information); Marshall v. State, 182 So. 3d 573, 618 (Ala. Crim. App. 2014) (holding that a juror's comment to other jurors that the victim's "vaginal tear could not have been caused by female masturbation" was not shown to have been obtained through some process outside the scope of the trial); Bethea, 833 So. 2d at 4 (finding that the jurors' knowledge about the use of Pitocin during labor and delivery and their discussion of their knowledge about Pitocin during deliberations was intrinsic information and did not come within the Rule 606(b)). In sum,

> "for information to come within the extraneous-information exception to Rule 606(b), the information must come to the jurors from some external authority or through some process outside the scope of the trial, either (1) during the trial or the jury's deliberations or (2) before the trial but for the purpose of influencing the particular trial."

Bethea, 833 So. 2d at 8.

Peraita does not argue that the alleged prejudicial information that E.P. shared was obtained by E.P. before Peraita's trial for the purpose of influencing Peraita's trial; thus, we examine only whether Peraita established that V.J.'s testimony about what E.P. said showed that E.P.'s statement about Peraita came "from some external authority or through some process outside the scope of the trial ... during the trial or the jury's deliberations." Bethea, 833 So. 2d at 8. If it did not, the circuit court properly concluded that Peraita failed to show that E.P.'s comment about Peraita was extraneous information under Rule 606(b).

As explained above, the extent of Peraita's evidence concerning E.P.'s statement about Peraita was testimony that V.J. heard E.P. say: "Do y'all know that this guy murdered three or four people there in Gadsden at Popeye's Chicken and put them in the freezer." (R. 124, 126,

131.) Peraita presented nothing at the evidentiary hearing to show that E.P. became privy to that information from an "external authority" or some "process outside the scope of the trial" during Peraita's trial. Bethea, 833 So. 2d at 8. Because Peraita failed to make this showing, the circuit court correctly concluded that Peraita failed to establish that V.J.'s testimony was admissible under the extraneous-prejudicial-information exception to Rule 606(b).

Even so, the circuit court correctly concluded that Peraita failed to prove that he was prejudiced by E.P.'s comment. Recently, this Court explained what a Rule 32 petitioner must show to prove that a juror committed misconduct by introducing "extraneous information" to the jury during deliberations:

> "In regard to the introduction of extraneous facts during jury deliberations, we have stated:
>
> > "'"Extraneous facts introduced in jury deliberations can result in actual prejudice or in prejudice as a matter of law, also called presumed prejudice." Ex parte Arthur, 835 So. 2d 981, 983 (Ala. 2002). The Alabama Supreme Court in Ex parte Apicella[, 809 So. 2d 865 (Ala. 2001),] discussed the differences between presumed prejudice and actual prejudice:

> " ' "Apicella also argues that we should hold the extraneous material introduced through S.B.'s conversation with T.R. to be prejudicial as a matter of law. Apicella supports this argument with the following language from Knight [v. State], 710 So. 2d [511,] 517 [(Ala. Crim. App. 1997)]:
>
> > " ' " ' "Juror misconduct will justify a new trial ... when from the extraneous facts prejudice may be presumed as a matter of law." Whitten v. Allstate Ins. Co., 447 So. 2d 655, 658 (Ala. 1984) .... However, in some cases, "the character and nature of the extraneous material [constitute] prejudice as a matter of law and no showing that the jury was in fact influenced thereby in arriving at their verdict is necessary." Id. (prejudice presumed as a matter of law from jury's consulting encyclopedia and dictionary definitions ...).'
>
> " ' "(Quoting Minshew v. State, 594 So. 2d 703, 716 (Ala. Crim. App. 1991).)

> " ' "... Our holding in Pearson [v. Fomby, 688 So. 2d 239, 245 (Ala. 1997),] serves to emphasize the limitations of the doctrine of 'prejudice as a matter of law.'
>
> " ' "Generally, a presumption of prejudice applies only in a case in which the jury's consideration of the extraneous material was ' "crucial in resolving a key material issue in the case." ' Dawson v. State, 710 So. 2d 472, 475 (Ala. 1997) (citing Hallmark v. Allison, 451 So. 2d 270, 271 (Ala. 1984), and Ex parte Thomas, 666 So. 2d 855 (Ala. 1995)).
>
> " ' "We are not willing to presume prejudice as a matter of law in this case. No evidence indicates that extraneous information arising from S.B.'s conversation influenced S.B.'s vote or that the information was ever considered by any other member of the jury. This case is distinguishable from cases such as Nichols v. Seaboard Coastline Railway, 341 So. 2d 671 (Ala. 1976) (prejudice found as a matter of law where juror brought definitions into the jury room during deliberations and copied them onto a chalkboard). We conclude that the particular circumstances of this case provide no basis for finding prejudice as a matter of law." '

"Taite v. State, 48 So. 3d 1, 9 (Ala. Crim. App. 2009), quoting Ex parte Apicella, 809 So. 2d 865, 871-72 (Ala. 2001)."

Jackson v. State, 133 So. 3d 420, 437-38 (Ala. Crim. App. 2009).

Although a plurality of this Court has previously found that a juror's introduction of a defendant's prior criminal history resulted in "prejudice as a matter of law" because it "suggested that [the defendant] had a propensity to commit illegal acts, which was ' "crucial in resolving a key material issue in the case," ' " Taite, 48 So. 3d at 10 (quoting Dawson v. State, 710 So. 2d 472, 475 (Ala. 1997) (quoting other cases)), this is not a case in which a juror's introduction of a defendant's prior criminal acts results in prejudice as a matter of law because the prior criminal acts that E.P. allegedly mentioned to the other jurors were presented to the jury during the State's case-in-chief as part of the proof supporting the capital-murder charges.

As explained above, Peraita was charged with two counts of capital murder -- one count because Peraita killed Lewis while Peraita was under a sentence of life imprisonment, see § 13A-5-40(a)(6), Ala. Code 1975, and one count because Peraita had been convicted of murder within the 20 years preceding the capital offense, see § 13A-5-40(a)(13), Ala. Code 1975. Thus, as part of its case, the State had to prove that Peraita was serving

a sentence of life in prison at the time he killed Lewis and that Peraita had been convicted of murder within the 20 years before he killed Lewis.

At the outset of Peraita's capital-murder trial, Lieutenant Wayne Ragan of the Gadsden Police Department testified that he was present in the Etowah Circuit Court on March 19, 1996, when Peraita was convicted of four counts of capital murder and was sentenced to life in prison. (Record in Peraita, case no. CR-01-0289, R. 875-79.) As part of its proof, the State introduced (and the trial court admitted) several exhibits, including jury verdict forms, sentencing orders, and case-action-summary sheets, showing that Peraita had been convicted in Etowah County of murdering Darrell Collier, Nathaniel Baker, and Tamika Renee Collins during the commission of a first-degree robbery, that he did so pursuant to one scheme or course of conduct, that he committed a first-degree robbery against Bryant Archer, and that he was sentenced to life in prison. (Record in Peraita, case no. CR-01-0289, C. 547-608.)

Because the State had to prove that Peraita had previously murdered other people and that he was serving life in prison, and because the jury was well aware that Peraita had killed three people in Etowah

County, we will not presume prejudice as a matter of law based on E.P.'s comment. So we turn to whether Peraita showed that E.P.'s comment resulted in actual prejudice.

The Alabama Supreme Court has explained the actual-prejudice standard as follows:

> "Apicella argues that when a court is determining whether a juror's conduct has caused actual prejudice the standard applied is whether the extraneous material 'might have influenced that juror and others with whom he deliberated,' Roan v. State, 225 Ala. 428, 435, 143 So. 454, 460 (1932). Apicella relies heavily upon this statement in Roan:
>
> > " 'The test of vitiating influence is not that it did influence a member of the jury to act without the evidence, but that it might have unlawfully influenced that juror and others with whom he deliberated, and might have unlawfully influenced its verdict rendered.'
>
> "225 Ala. at 435, 143 So. at 460.
>
> "On its face, this standard would require nothing more than that the defendant establish that juror misconduct occurred. As Apicella argues, the word 'might' encompasses the entire realm of possibility and the court cannot rule out all possible scenarios in which the jury's verdict might have been affected.
>
> "However, as other Alabama cases establish, more is required of the defendant. In Reed v. State, 547 So. 2d 596,

598 (Ala. 1989), this Court addressed a similar case of juror misconduct:

> " 'We begin by noting that no single fact or circumstance will determine whether the verdict rendered in a given case might have been unlawfully influenced by a juror's [misconduct]. Rather, it is a case's own peculiar set of circumstances that will decide the issue. In this case, it is undisputed that the juror told none of the other members of the jury of her experiment until after the verdict had been reached. While the question of whether she might have been unlawfully influenced by the experiment still remains, the juror testified at the post-trial hearing on the defendant's motion for a new trial that her vote had not been affected by the [misconduct].'
>
> "It is clear, then, that the question whether the jury's decision might have been affected is answered not by a bare showing of juror misconduct, but rather by an examination of the circumstances particular to the case."

Ex parte Apicella, 809 So. 2d 865, 870-71 (Ala. 2001) (some emphasis omitted), abrogated on other grounds by Betterman v. Montana, 578 U.S. ___, 136 S. Ct. 1609, 194 L. Ed. 2d 723 (2016).

Here, at most, Peraita made a bare showing of misconduct -- that is, that E.P. made a statement concerning Peraita's past capital-murder convictions. After examining the circumstances of this particular case and

the evidence Peraita presented at his evidentiary hearing concerning this alleged misconduct, we cannot conclude that the jury's decision to convict Peraita might have been affected by E.P.'s statement. Indeed, as explained above, the jury was well aware that Peraita had previously killed three people in Etowah County and that he was serving a sentence of life imprisonment. Moreover, although V.J. said that E.P. made a comment about Peraita's past murders and that other jurors were present when E.P. made the comment, V.J. did not testify that any other juror heard E.P.'s statement, V.J. did not see any reaction from any of the jurors after E.P.'s statement because she "really didn't look at their faces" (R. 132), V.J. did not have any discussion with any other juror about E.P.'s statement, and V.J. did not testify that E.P.'s statement had any influence on her vote in Peraita's case (R. 133).

Because Peraita failed to prove that E.P.'s statement might have prejudiced him, the circuit court did not err when it concluded that "Peraita failed to prove that the isolated comment purportedly made by [E.P.] prior to the jury's guilt-phase deliberations was, in fact, considered, discussed, or even mentioned by jurors during their guilt-phase

deliberations or that it might have affected the outcome of the guilt-phase trial." (C. 1256.)

Accordingly, Peraita is not entitled to any relief on his juror-misconduct claim.

II.

Next, Peraita argues that the circuit court erred when it denied his claim that his "waiver of his right to present mitigation evidence was not voluntary." (Peraita's brief, p. 37.)

In his second amended petition, Peraita alleged that he "did not knowingly and voluntarily waive his right to present mitigation evidence at his sentencing hearing." (C. 660.) According to Peraita, "[t]he trauma and abuse [he] endured throughout his childhood ... compromised his cognitive and emotional functioning, and specifically rendered him incapable of making a knowing and voluntary waiver of his right to present mitigation evidence during his sentencing phase." (C. 660-61.) Peraita further alleged that the "trial record does not reflect that [his] purported waiver was a rational or reasoned decision based on an understanding of the sentencing phase or of the consequences of his

decision." (C. 661.) Peraita said that, had his counsel "secure[d] the services of a neuropsychologist to assess [his] capacity to make a knowing and voluntary waiver," trial counsel would have learned that Peraita did not have the capacity to waive the presentation of mitigation evidence and, thus, the trial court would have been required to "suspend proceedings or trial counsel would have been required to present ... the extensive mitigating evidence that would have supported the imposition of a sentence other than death." (C. 661.) The circuit court gave Peraita the opportunity to prove these allegations at an evidentiary hearing.

At the hearing, Peraita relied on the testimony of Dr. Marson, a neuropsychologist, to show that he was not able to knowingly and voluntarily waive the presentation of mitigation evidence. (R. 134-247.) Dr. Marson testified that he was hired by Peraita's postconviction counsel to conduct a neuropsychological examination on Peraita. (R. 142, 154.) Dr. Marson said that, "in twenty-five years, [he has] not ... seen a case of childhood trauma as severe as this one." (R. 154.) According to Dr. Marson, Peraita suffered "continuous physical and at times traumatic sexual abuse" from the time he was born until he was 12 years old, which,

he said, "had enormous psychiatric and developmental consequences for him as a child and as an adult." (R. 154.) As a result, Dr. Marson concluded, "there are a number of psychiatric disorders that flowed from this abuse and this childhood trauma," including "childhood traumatic stress disorder" and "childhood psychotic disorder," and Dr. Marson stated that Peraita is "on the schizophrenic spectrum." (R. 154-55.) Based on his examination of Peraita, Dr. Marson found as follows:

> "I think the constellation of psychiatric problems that I alluded to here and the intense personal shame [Peraita] felt about his past was this driving force that -- I think he was probably unconscious of himself but that made it almost impossible for him to be -- to make any decision other than to try to exclude this information from the Court in mitigation. So I don't think that [Peraita] was capable of giving a voluntary waiver because of the profound effects of these psychiatric problems."

(R. 157.) Dr. Marson explained that his findings about Peraita's mental health could have been revealed before Peraita's trial by "[a] very basic psychological evaluation involving standardized testing." (R. 158.)

The State, in response, called Dr. King, a clinical and forensic psychologist, to testify about his findings concerning Peraita's ability to waive the presentation of mitigation evidence. (R. 551-96.) Dr. King said

that he met with Peraita in 2015 and conducted a mental-status examination on him. (R. 559.) According to Dr. King, the examination he performed on Peraita assesses a person's "ability to think clearly, what their affective presentation is, whether they look depressed or animated, whether they are oriented as to person, place and time, [and] their ability to show adequate memory." (R. 560.) Dr. King said that the test he performed also detects the "presence of any delusional thinking, hallucinations, depersonalization, derealization and suicidal ideation or intent that may be present." (R. 560.) Dr. King found that Peraita "had no evidence of any thought disorder," that he had "no evidence of any overt depression or anxiety," that he "was animated throughout the interview [and] was cooperative, gentlemanly, laughed when appropriate, [and] looked a little distressed when appropriate." (R. 561.) Dr. King testified that Peraita "had no evidence of the presence of any delusional thinking, no hallucinations." (R. 561.) Dr. King also said that Peraita "denied that he had any kind of those symptoms" and"reported no suicidal ideations or intent." (R. 561.)

Dr. King explained the difficulty with determining someone's mental state 15 years earlier as follows:

> "I was really trying to determine his mental state fifteen years earlier [but] there are no psychological tests that will tell you that. The only psychological tests that may have some enduring qualities is really an intellectual examination like the Rorschach Intelligence Scale, which I brought with me [to Holman prison], but I chose not to give it because there was no indication that he had an intellectual deficit whatsoever."

(R. 561-62.) Dr. King explained that, in addition to meeting with Peraita, he examined the pretrial forensic evaluations conducted by Dr. Kimberly Ackerson and Dr. James Hooper at Taylor Hardin Secure Medical Facility, reviewed Dr. Robert DeFrancisco's report about Peraita, reviewed the transcript of the colloquy between the trial court and Peraita when Peraita waived the presentation of mitigation evidence, reviewed the presentence-investigation report that was ordered by the trial court, and reviewed the trial court's sentencing order. (R. 557-58.)

Based on his examination and his review of various documents, Dr. King concluded as follows:

> "First off, I found no evidence in my review, especially with the colloquy, that there's any difficulty, that Mr. Peraita had experienced any coercion whatsoever in waiving his

mitigation rights. He was asked repeatedly, over and over again if that were the case. He said that there wasn't.

"I find that when we look at it voluntarily we look for presence of any kind of serious mental illness or intoxication or mental defect that would adversely affect that kind of consideration. Of course, he was not intoxicated as he's been incarcerated. He takes some medications on a regular basis. In addition, he has no history from any mental defect. He never had any traumatic brain injuries that had been documented, no hospitalizations for traumatic brain injury. He had no history to that point of any serious mental illness. He had never been treated for any mental illness. He took no psychotropic medications for treatment. There had been a previous ten-day evaluation at Taylor Hardin Secure Medical Facility which is a prison hospital and the staff, there are multiple psychiatrists, psychologists, nurses, all of who contributed to a report finally generated by Doctors Ackerson and Hooper where they found that there was no evidence of any serious mental illness and had cleared him to actually proceed as competent to stand trial and assist legal counsel on defense for the case that was in Gadsden in Etowah County.

"There had been a previous evaluation by Dr. DeFrancisco, who also found no evidence for any serious mental illness or any defect.

"I did diagnose him with adjustment disorder, personality disorder and some drug dependence.

"So taking, as a whole, all of that information would indicate to me that he would meet that prong of consideration.

"In addition, Mr. Peraita had previously gone through a capital murder trial where mitigation evidence had been

> presented. So he had substantial knowledge about that process, what would occur there and why it would occur. So he certainly knew what mitigation evidence was and why it would be presented and what the outcome might be.
>
> "In addition, I have learned subsequent to my report that he is not only at least of average intelligence but probably functions in a high average range intellectual ability. So he has capacity to be informed, learn from information presented by legal counsel.
>
> "Taken altogether, I think that he has substantial evidence for the ability to waive his mitigation rights if he chooses to do that."

(R. 563-65.)

The circuit court denied Peraita's claim, finding that "Peraita failed to prove by a preponderance of the evidence that his waiver to present mitigation evidence was not knowingly and voluntarily made." (C. 1269.) The circuit court reasoned that this Court had found on direct appeal that "the record 'as a whole affirmatively establishes' that Peraita 'freely waived his right' to the jury's involvement in the penalty phase after having been 'expressly informed of such right' "; that, during Peraita's Rule 32 hearing, the circuit court had found that Peraita was "competent to waive his right to be present at the evidentiary hearing during the

testimony of his brother and mother"; that, "[h]aving been through one capital murder trial and sentencing, Peraita certainly knew if he permitted trial counsel to present mitigation evidence to the jury and judge, it was possible he could again be sentence to life without parole"; and that, instead of taking "that risk, Peraita made the knowing choice to waive his right to present mitigation evidence" because, although "[v]oluntarily waiving mitigation while knowing it would almost certainly lead to a death sentence is completely foreign and irrational to a vast majority of people," "to someone like Peraita ... a death sentence means being alone in a cell on death row away from the constant dangers of general population, and, to that person, such might seem entirely rational." (C. 1268-69.) The circuit court's conclusion that Peraita was competent to waive the presentation of all mitigation evidence and that he did so knowingly and voluntarily is supported by the record.

It is well settled that "a competent defendant can waive the presentation of mitigating evidence at a capital sentencing proceeding." Nelson v. State, 681 So. 2d 252, 255 (Ala. Crim. App. 1995) (opinion on remand from the Alabama Supreme Court).

> "Once a defendant is determined competent to stand trial, a presumption of competence attaches to the defendant in later proceedings. Durocher v. Singletary, 623 So. 2d 482, 484 (Fla. 1993). However, another competency hearing is required if a bona fide question as to the defendant's competency has been raised. Hunter v. State, 660 So. 2d 244, 248 (Fla. 1995)."

Boyd v. State, 910 So. 2d 167, 187 (Fla. 2005) (opinion as revised on denial of rehearing). When a competent defendant (against counsel's advice) wishes to waive the presentation of all mitigating evidence at his sentencing hearing, like Peraita did here, and

> "refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be. The court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence."

Koon v. Dugger, 619 So. 2d 246, 250 (Fla. 1993). Courts must do this to ensure that the defendant's waiver of the presentation of mitigation evidence is done knowingly and voluntarily. The record in this appeal and in Peraita's direct appeal support the circuit court's denial of Peraita's

claim that he did not knowingly and voluntarily waive his right to present mitigation evidence.

Before his trial, Peraita was evaluated for his competency to waive his rights under Miranda v. Arizona, 384 U.S. 436 (1966), and for his competency to stand trial. (Record in Peraita, case no. CR-01-0289, C. 122-25.) After those evaluations, Dr. DeFrancisco concluded that Peraita was both competent to stand trial and competent to waive his Miranda rights. (Record in Peraita, case no. CR-01-0289, C. 480-85.) Thus, a presumption of competence attached to Peraita throughout his trial, including the time when he made his decision to waive the presentation of mitigation evidence. And, as his counsel testified at the evidentiary hearing, Peraita did not do anything to make them believe that he was incompetent to assist in his defense. (R. 503.) Dr. Craig Haney, who Peraita's trial counsel hired as a mental-health expert, also never gave them any reason to believe that Peraita was not competent to waive the presentation of mitigation evidence. (R. 496). In fact, according to his trial counsel, they had discussions with Dr. Haney about Peraita's decision to waive mitigation evidence, and Dr. Haney "never gave [them]

any indication that he believed that there was an issue with Mr. Peraita's competency to waive the penalty phase." (R. 480.)

Although Dr. Marson testified at the evidentiary hearing that Peraita had psychological issues that, he said, would impact Peraita's ability to voluntarily waive the presentation of mitigation evidence, Dr. King concluded otherwise. Dr. King's opinion was consistent with Dr. DeFrancisco's opinion that Peraita was competent and could waive his rights.

Additionally, the record on appeal shows that Peraita made a knowing and intelligent waiver of the presentation of all mitigation evidence when he expressed his desire to waive such evidence. His counsel detailed for Peraita and the trial court what mitigation evidence they had intended to present, and Peraita confirmed that he did not want that evidence presented. (Record in Peraita, case no. CR-01-0289, R. 1295-1303.) After Peraita made it clear that he wanted to waive jury participation in sentencing, the following exchange occurred:

> "THE COURT: Okay. All right. Then the Court is going to allow the Defendant to waive a jury recommendation at this time and of course you realize this is irrevocable? This is it? I

mean once you waive it you waive it. It is going to be very difficult, if not impossible, to come back later and say I want a jury recommendation.

"[Peraita]: I understand.

"THE COURT: So that leads us to the next step as to whether we go forward with a hearing before a pre-sentence report is ordered or after the pre-sentence report is ordered.

"So I am going to ask the Defendant again since I have got to order one anyway and it's got to be received by the Court -- since I have got to order one anyway and have it before I can make a final ruling or decision, do you want to still have an immediate sentencing hearing or do you want to wait?

"[Peraita]: What do you mean sentencing hearing?

"THE COURT: The next phase would be to have a hearing in front of the Judge. Even if you had an advisory verdict from the jury you still have to have a sentencing hearing in front of the Judge. If you waive the jury's advisory verdict then there's a sentencing hearing in front of the Judge. Either way, there's going to be some sort of hearing in front of me.

"[Peraita]: Okay.

"THE COURT: And so with that said unless you consent to it we can't delay it until I receive a pre-sentence report. As I was telling you, it is my understanding that I cannot make a decision until I receive that pre-sentence report. So if you want to go forward with any type of hearing in front of the Court, if we don't do it today or tomorrow or Monday -- we will do it one of those three days, but we have still got to wait for

the pre-sentence report or we can wait until I get the pre-sentence report and have the hearing.

"[Peraita]: I have no problem with doing it now since we're all here and then wait until you get your opinion of what you're going to do. Since we're here I don't see no reason to wait.

"THE COURT: Well, I am not sure I am going to do it today. We might do it Monday. I might wait until Monday. Just don't wait until a pre-sentence report is received. Is that what you want to do rather than do it Monday?

"[Peraita]: Fine with me.

"THE COURT: Is that any problem for counsel?

"MR. STEARNS : Yes, sir, it could be. We need to -- Of course, Dr. Haney is here today and we need to -- the last time we had spoken with Mr. Peraita is that he had instructed us not to put on mitigating evidence whatsoever and if that's still his wish then we won't need to bring Dr. Haney back on Monday or go ahead and hear from him today. Judge, we had intended on -- we're prepared to go forward but Mr. Peraita has instructed us not to.

"THE COURT: Is that correct?

"[Peraita]: Yeah.

"THE COURT: You're in the position where you have instructed your attorneys not to present any mitigating testimony?

"[Peraita]: (Nods Head).

"COURT REPORTER: Would you answer out loud?

"[Peraita]: Oh, yeah. I thought he was going to go forward.

"THE COURT: I'm trying to decide where that puts us then as far as Dr. Haney.

"[Peraita]: He can go home.

"THE COURT: You don't want him to testify on your behalf?

"[Peraita]: No, I don't. There's nothing further to say from this point on.

"MR. STEARNS: He can go back to California today.

"THE COURT : Can either of you think of anything that we need to cover concerning this issue?

"MR. STEARNS: Judge, we would like to inform the Court of what we had intended to offer in way of mitigation just so it's a matter of record and Mr. Peraita hears it and he can inform the Court after hearing that that he's further instructed us not to offer any mitigation whatsoever.

"THE COURT: All right. What is it that you want to proffer?

"MR. STEARNS: Dr. Haney had prepared a social history outline of the family history of Cuhuatemoc Peraita. We would of course not be offering the social history outline into evidence but in it are family backgrounds and circumstances that we would expect to elicit from either Dr. Haney or Cuhuatemoc's

mother, Loretta Mancuso and his brother Edmundo who is here, both who are here and present in the courtroom. We expect that an extensive family background would have been developed through verbal testimony through Dr. Haney, Ms. Mancuso and Mr. Peraita and we would prove the social history outline prepared by Dr. Haney only for the purposes of showing what we would have expected to show and not as evidence itself.

"THE COURT: Okay. [Prosecutor], do you have any objection to that just to make sure the record reflects what is being done? Do you have anything that you want to add to that?

"[Prosecutor]: I have not had the opportunity to review the entire document, Your Honor, but I understand that they are offering that simply as an offer of proof that they would have attempted to introduce as mitigation evidence in response to questions from various people what is set forth on that document. I have no problem with them offering it for that purpose. Just the little bit that I did look at I think that there are probably things contained in there that would not have been admitted into evidence, but if it's just being offered just to show that they would have attempted to elicit; that they would have asked questions to witnesses that, if allowed, would have -- these responses would have been given, I have no problem with that.

"THE COURT: All right. It will be marked for identification and submitted for that limited purpose only to show that the attorneys for the Defendant were prepared to go forward with mitigation testimony and evidence in this case.

"Mr. Peraita, just to make sure, you understand that your attorneys were prepared to go forward with mitigation

evidence, and you're not doing this because you didn't feel like they were prepared or didn't have any evidence on your behalf?

"[Peraita]: No. I feel they did a very good job.

"Are you going to read that?

"THE COURT: Am I going to read it?

"[Peraita]: Yeah.

"THE COURT: I don't know.

"[Peraita]: I mean what I was trying to say is I prefer for you not to. I would not -- I know what they are doing. They did a good -- I'm saying that they did a very good job but I would prefer that you not read that. I don't want mitigating evidence so why put it in? I am saying right now they did a good job.

"THE COURT: It's just to show that they were prepared to go forward and you're not doing this because of any dissatisfaction with them.

"[Peraita]: No.

"THE COURT: You understand that they were prepared to go forward with evidence on your behalf, and we just wanted the record to reflect that.

"All right. Well, having waived the jury's advisory verdict and the State having consented and the Court having consented as well then I think what I could do is dismiss the jury. Then we can decide when we're going to have this

hearing we need to have, whether it be today or some other time.

"Is there anything else that y'all can think of that needs to be covered on the record at this time concerning this waiver of the right to an advisory verdict?

"Do you have any questions about this Mr. Peraita?

"[Peraita]: I just don't want you reading none of my background.

"THE COURT: I understand that. Do you have any questions about your waiver of an advisory verdict by this jury?

"[Peraita]: No.

"THE COURT: You feel like you understand it and you understand the law and that this is what you want to do?

"[Peraita]: Yes, sir.

"THE COURT: Do you feel this is in your best interest?

"[Peraita]: Yes, sir."

(Record in Peraita, case no. CR-01-0289, R. 1295-1303.)

Given Dr. King's testimony at the evidentiary hearing and the above-quoted colloquy, we cannot conclude that the circuit court erred

when it denied Peraita's claim that he did not knowingly and voluntarily waive the presentation of mitigation evidence at his trial.

Moreover, to the extent that Peraita alleged in his petition that his counsel were ineffective for failing to hire a neuropsychologist to assess his ability to waive the presentation of mitigation evidence, that claim also fails. It is clear from the testimony at Peraita's Rule 32 evidentiary hearing that expert witnesses can have varying opinions about the same subject matter. In part because of the variance in expert opinions, "to obtain relief on a claim that counsel were ineffective for failing to hire an expert witness, the petitioner must first plead the name of that expert, the substance of that expert's testimony, and that the expert is willing and available to testify at the petitioner's trial; then the petitioner must prove each of those allegations at an evidentiary hearing." Brooks v. State, [Ms. CR-16-1219, July 10, 2020] ___ So. 3d ___, ___ (Ala. Crim. App. 2020). Peraita failed to prove that Dr. Marson was available to provide his expert opinion about Peraita's mental state to trial counsel or for the court's consideration during Peraita's trial.

Indeed, although Dr. Marson did not recall having been retained by Peraita's trial counsel as an expert witness, one of Peraita's trial counsel testified that they had retained Dr. Marson as a psychological expert in Peraita's case before his trial but "had to look elsewhere" when Dr. Marson informed them that he had a conflict and could not serve as an expert for Peraita. (R. 474.) Thus, the evidence presented at the evidentiary hearing showed that not only did Peraita's trial counsel retain Dr. Marson (thus, foreclosing any claim that counsel were ineffective for failing to hire Dr. Marson), but also that Dr. Marson did not participate in Peraita's trial because he had a conflict that prevented him from doing so. In short, Peraita failed to prove that Dr. Marson was available to testify at his trial.

Accordingly, the circuit court did not err when it denied this claim.

III.

Next, Peraita argues that the circuit court erred when it denied his claim that his counsel were ineffective during the penalty phase of his trial when they "took no steps to investigate [his] capacity to make a knowing and voluntary waiver of his right [to present mitigation

evidence]." (Peraita's brief, pp. 44-70.) Specifically Peraita argues that his counsel (1) had a "duty to investigate [his] capacity to knowingly and voluntarily waive mitigation evidence" and failed to do so (Peraita's brief, pp. 53-56); (2) "had ample reason to investigate [his] capacity to knowingly and voluntarily waive mitigation" because of Peraita's history of "severe physical and sexual abuse," his "family history included severe psychiatric illnesses," his "history of suicidal acts," and his failure to "articulate[] any reason for his decision to waive mitigation evidence" (Peraita's brief, pp. 56-59); and (3) "failed to conduct a reasonable investigation regarding [his] mental capacity to waive mitigation" (Peraita's brief, pp. 59-65).

Peraita contends that effective counsel would have "sought the assistance of a psychologist to evaluate [his] capacity to knowingly and voluntarily waive mitigation evidence" and that, if his counsel had done so, "they would have learned of Peraita's significant psychiatric and psychological conditions -- for which many 'red flags' already existed in the record at the start of the 2001 trial."[7] (Peraita's brief, p. 52.)

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[7]In his brief on appeal, Peraita raises his arguments as Issues III.A.1, III.A.2, III.A.3, and III.B. Because all of these arguments concern

As we have often stated:

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

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his counsels' duty to investigate whether Peraita had the capacity to waive the presentation of mitigation evidence, we address his claims together.

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

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

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

> something more or something different. So, omissions are inevitable. But, the issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.' Burger v. Kemp, 483 U.S. 776, 107 S. Ct. 3114, 3126, 97 L. Ed. 2d 638 (1987)."
>
> " 'Chandler v. United States, 218 F.3d 1305, 1313-14 (11th Cir. 2000) (footnotes omitted).
>
> " ' ....'
>
> "....
>
> "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 v. State, 182 So. 3d 573, 582-83 (Ala. Crim. App. 2014).

In denying Peraita's claim that his counsel were ineffective for failing to investigate his capacity to waive the presentation of mitigation evidence and for failing to hire a psychologist to evaluate his capacity to knowingly and voluntarily waive mitigation evidence, the circuit court made several findings. The circuit court concluded that Peraita's trial counsel "did, in fact, investigate whether Peraita was competent to waive presenting mitigation"; that there was no indication that Peraita was not

competent to waive mitigation; and that trial counsels' reliance on Dr. Haney's opinion that Peraita was competent to waive mitigation evidence was reasonable. (C. 1260-62.) The circuit court also found that Peraita had failed to prove that his counsel were ineffective for failing to seek an additional mental-health examination by Dr. Marson because his trial counsel had retained Dr. Marson and Dr. Marson "withdrew due a scheduling conflict." (C. 1262.) The circuit court's findings are supported by the record.

As explained above, Peraita's trial counsel testified at the evidentiary hearing that they learned early in their representation of Peraita that he intended to oppose the presentation of mitigation evidence during the penalty phase of his trial. Even so, Peraita's counsel developed an extensive mitigation case, hoping that they could convince Peraita to change his mind. Contrary to Peraita's assertions, whether Peraita had the capacity to waive the presentation of mitigation evidence was not a question that his trial counsel did not explore. In fact, Stearns testified that, although they did not have a clinical psychologist or neuropsychologist examine Peraita to "determine whether there was a

psychological basis of [his] decision not to present mitigation evidence," they

> "had Dr. Marson at one point in time. He was a neuropsychologist and Dr. Haney was the clinical psychologist. [Dr. Haney] was present and he never gave us any indication that he believed that there was an issue with Mr. Peraita's competency to waive the penalty phase. Dr. Haney was here, and we proffered him as an expert on institutionalization. He stayed in anticipation that we might be able to change [Peraita's] mind and [Dr. Haney] could testify at the penalty phase. So we consulted with Dr. Haney and there was no indication."

(R. 480-81.) When questioned as to whether they asked Dr. Haney if Peraita should be "examined and tested concerning his decision not to present the mitigation evidence," Peraita's counsel explained that they "met with Dr. Haney and Aaron McCall[, the mitigation expert,] and [they] discussed it in great length." Peraita's counsel testified that "Dr. Haney didn't indicate[] that he thought that [Peraita] was not able to make that decision" (R. 481), and they "discussed whether [Peraita] was able to waive mitigation and [they] relied on Dr. Haney." (R. 482.)

In short, although Peraita alleged that his counsel were ineffective because they "took no steps to investigate [his] capacity to make a

knowing and voluntary waiver of his right [to present mitigation evidence]" (Peraita's brief, pp. 44-70), his counsel did take steps to answer the question whether Peraita had the capacity to waive the presentation of mitigation evidence by discussing the issue with Dr. Haney. Peraita's trial counsel were not ineffective for relying on Dr. Haney's judgment. See Brooks, ___ So. 3d at ___ ("Brooks's ' "[t]rial counsel had no reason to retain another psychologist to dispute [Dr. King's] findings," ' Ray v. State, 80 So. 3d 965, 989-90 (Ala. Crim. App. 2011) (quoting Waldrop v. State, 987 So. 2d 1186, 1193 (Ala. Crim. App. 2007)), were 'entitled to rely on [Dr. King's] opinion of [Brooks's] mental condition, and ... [were] not obliged to shop around for another diagnosis that postconviction counsel now says was more favorable to [Brooks].' White v. State, [Ms. CR-16-0741, April 12, 2019] ___ So. 3d ____, ____ (Ala. Crim. App. 2019)."). Thus, the circuit court did not err when it denied this claim.

Moreover, although Peraita contends that effective counsel would have "sought the assistance of a psychologist to evaluate [his] capacity to knowingly and voluntarily waive mitigation evidence," and that, if his counsel had done so in this case, "they would have learned of Peraita's

significant psychiatric and psychological conditions" (Peraita's brief, p. 52), the circuit court correctly denied this claim for a second reason. At the evidentiary hearing, Peraita presented Dr. Marson as the mental-health expert his counsel should have hired to evaluate Peraita's capacity to waive mitigation. Of course, Peraita's trial counsel did hire Dr. Marson, but Dr. Marson did not participate in Peraita's defense because he had a conflict. As the circuit court correctly found when it denied this claim, "[t]he fact that Dr. Marson withdrew was not the fault of trial counsel, so their failure to have Peraita evaluated by Dr. Marson cannot be considered against trial counsel." (C. 1262.)

Even if Peraita's counsel had not initially retained Dr. Marson, his counsel would still not have been ineffective for failing to hire a mental-health expert to examine Peraita's capacity to waive mitigation, because they hired Dr. Haney and relied on Dr. Haney's judgment. The fact that a Rule 32 petitioner has found, " 'years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial.' " Ward

v. Hall, 592 F.3d 1144, 1173 (11th Cir. 2010) (quoting Davis v. Singletary, 119 F.3d 1471, 1475 (11th Cir. 1997)).

Accordingly, the circuit court did not err when it denied this claim.

IV.

Peraita next argues that the circuit court erred when it summarily dismissed his claims that his counsel were ineffective during the guilt phase of his trial. (Peraita's brief, pp. 70-82.)

As set out above, "'"[t]o 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. 669 (1984)."'" Brooks, ___ So. 3d at ___ (quoting Marshall, 182 So. 3d at 582-83, quoting in turn Yeomans v. State, 195 So. 3d 1018, 1026 (Ala. Crim. App. 2013)). A Rule 32 petitioner also has the burden of adequately pleading claims of ineffective assistance of counsel in his or her petition.

This Court has explained the pleading requirements of Rules 32.3 and 32.6(b), Ala. R. Crim. P., as follows:

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

> "'[Boyd v. State,] 913 So. 2d [1113,] 1125 [(Ala. Crim. App. 2003)]. The burden of pleading under Rule 32.3 and Rule 32.6(b) is a heavy one. Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b). The full factual basis for the claim must be included in the petition itself. If, assuming every factual allegation in a Rule 32 petition to be true, a court cannot determine whether the petitioner is entitled to relief, the petitioner has not satisfied the burden of pleading under Rule 32.3 and Rule 32.6(b).'

"Hyde v. State, 950 So. 2d 344, 356 (Ala. Crim. App. 2006) (emphasis added). 'The pleading requirements of Rule 32 apply equally to capital cases in which the death penalty has

> been imposed.' Taylor v. State, 157 So. 3d 131, 140 (Ala. Crim. App. 2010."

Woods v. State, 221 So. 3d 1125, 1132-33 (Ala. Crim. App. 2016). We have also explained that, even if a claim of ineffective assistance of counsel is sufficiently pleaded, counsel is not ineffective for failing to raise a meritless claim. Id. at ___ (citing Carruth v. State, 165 So. 3d 627, 645 (Ala. Crim. App. 2014)). With these principles in mind, we address Peraita's arguments on appeal.

IV.A.

First, Peraita argues that the circuit court erred when it summarily dismissed his claim that his counsel were ineffective for failing "to investigate and present the self-defense case." (Peraita's brief, p. 73.) In his petition, Peraita divided this general claim of ineffective assistance of

counsel into several subcategories.[8] (See C. 323-42.) We address each argument in turn.

IV.A.1.

Peraita first argues that the circuit court erred when it summarily dismissed his claim that his counsel were ineffective for failing "to investigate threats against [him]." (Peraita's brief, p. 75.)

In his first amended petition, Peraita alleged that his counsel were ineffective because they "made no effort to present evidence that [his] life had been threatened days before the incident resulting in Mr. Lewis'[s] death." (C. 323.) According to Peraita, "[o]n December 2, 1999, a 'reliable source' advised Officer Darrell Owens that Mr. Peraita 'was going to get stabbed down if [Officer Owens] did not get [Mr. Peraita] out of

[8]Peraita argues, in passing, that the circuit court erred when it considered his several subcategories individually rather than as a "single unified claim." (Peraita's brief, p. 75.) Peraita's argument is meritless. " 'The claim of ineffective assistance of counsel is a general allegation that often consists of numerous specific subcategories. Each subcategory is an independent claim that must be sufficiently pleaded.' " Washington v. State, 95 So. 3d 26, 58 (Ala. Crim. App. 2012) (quoting Coral v. State, 900 So. 2d 1274, 1284 (Ala. Crim. App. 2004), overruled on other grounds, Ex parte Jenkins, 972 So. 2d 159 (Ala. 2005)). Thus, the circuit court did not err when it considered Peraita's claims individually.

population.' " (C. 323.) Peraita further alleged that, as a result of this reliable source's information, Peraita was removed from "population" while officers conducted an investigation. Peraita also alleged that the "threat to [his] life was related to his relationship with Mr. Castillo" and that, "[a]fter a limited investigation, [he] was returned to population." (C. 323-24.) The circuit court summarily dismissed this claim as insufficiently pleaded and as meritless. (C. 486.) We agree with the circuit court.

Indeed, although Peraita alleged that his counsel "made no effort to present evidence that [his] life had been threatened" days before he and Castillo murdered Lewis, Peraita did not allege who had allegedly threatened him -- a fact that would dictate whether such evidence would have been admissible at Peraita's trial. See Campbell v. State, 654 So. 2d 69, 74-75 (Ala. Crim. App. 1994) (holding that the circuit court properly excluded evidence of threats made to the defendant that were not made by the victim). Although Peraita alleged in his petition that a "reliable source" told Officer Owens of the threat, Peraita did not allege who the reliable source was who told Officer Owens about the threat. Thus, the

circuit court correctly concluded that Peraita's claim was insufficiently pleaded.

Moreover, Peraita's claim that his counsel failed to present evidence that Lewis had threatened him is clearly refuted by the record on direct appeal. At trial, Peraita's counsel put on evidence from inmate Michael Best who testified that Lewis had threatened Castillo and Peraita and that Best had told them that Lewis had made those threats. (Record in Peraita, case no. CR-01-0289, R. 1124-25.) Similarly, Peraita's counsel put on evidence from inmate James Jones, who testified that Lewis had made a threat to him "against Mr. Peraita" and that he had told Peraita about the threat. (Record in CR-01-0289, R. 1135-36.) Because the record on direct appeal shows that his trial counsel did present evidence that Lewis had threatened him, Peraita's claim that his counsel were ineffective for failing to present such evidence is refuted by the record and was properly dismissed. See Yeomans, 195 So. 3d at 1031 ("Thus, the record on direct appeal refutes this claim, and the circuit court did not err in summarily disposing of it. Rule 32.7(d), Ala. R. Crim. P.").

Accordingly, the circuit court did not err when it summarily dismissed this claim.

IV.A.2.

Next, Peraita alleges that the circuit court erred when it summarily dismissed his claim that his counsel were ineffective for failing to call various inmate witnesses to testify at his trial.

In his original petition, Peraita alleged that his counsel were ineffective because, he said, they failed to "investigate and develop" testimony from several inmate witnesses -- namely, Victor Ayler, Eddie John Campbell, Darwin Gregory Knight, Jimmy Harden, Jack King, Christopher Lane, Charles Davis, and Best. (C. 22-28.) In his first amended petition, Peraita reasserted this claim and alleged that "[s]everal of these witnesses would have offered testimony to either directly contradict evidence offered by the State or to provide context and background necessary to fully present [his] defense." (C. 325.) In reasserting this claim in his first amended petition, Peraita abandoned his allegations concerning inmate Victor Ayler and added allegations

concerning inmate Edward Junior. (C. 325-31.) Peraita, again, reasserted these allegations in his second amended petition. (C. 608-15.)

The circuit court summarily dismissed Peraita's claims as to inmates Knight, Harden, Lane, Davis, Best, and Junior as either insufficiently pleaded and/or without merit, but it granted him an evidentiary hearing on his claims as to inmates Campbell and King.[9] (C. 486-87, 695-96.)

On appeal, Peraita assumes that the circuit court summarily dismissed his claims concerning inmates Knight, Harden, Lane, Davis, Best, and Junior because it determined that their testimony would have been cumulative to other testimony presented at trial and argues that "the idea that additional witnesses would have been cumulative in a capital murder trial where the defense hardly presented any evidence at all does not withstand scrutiny" and that, even so, "the unpresented testimony was not cumulative by any definition." (Peraita's brief, pp. 77-78.) Peraita then lists the following six "facts [these witnesses] could have presented": (1) "Testimony that Peraita reported problems with Lewis to

[9]We address the circuit court's findings as to inmates Campbell and King in Part V.A. of this opinion.

prison officials"; (2) "Testimony that Peraita feared Lewis"; (3) "Testimony that Lewis had a reputation for carrying a knife"; (4) "Testimony that Peraita was controlled by Castillo"; (5) "Testimony that Peraita never stabbed Lewis"; and (6) "Testimony that Peraita did not make statements about wanting Lewis to die ... and that the statements were actually by Castillo." (Peraita's brief, p. 78.)

It is not clear whether the circuit court dismissed Peraita's claims as to inmates Knight, Harden, Lane, Davis, Best, and Junior because, as Peraita says, their testimony would have been cumulative. But we have held on numerous occasions that " 'Rule 32.7 does not require the trial court to make specific findings of fact upon a summary dismissal.' Fincher v. State, 724 So. 2d 87, 89 (Ala. Crim. App. 1998)." McAnally v. State, 295 So. 3d 149, 152 (Ala. Crim. App. 2019). Even though the grounds for dismissal of these claims by the trial court were not clear, the claims were properly dismissed because the proposed testimony was cumulative to other evidence presented at trial or inadmissible or because the failure to introduce it did not prejudice Peraita.

Concerning unpresented cumulative evidence, this Court has explained that,

> " ' " 'the failure to present additional mitigating evidence that is merely cumulative of that already presented does not rise to the level of a constitutional violation.' Nields v. Bradshaw, 482 F.3d 442, 454 (6th Cir. 2007) (quoting Broom v. Mitchell, 441 F.3d 392, 410 (6th Cir. 2006))." Eley v. Bagley, 604 F.3d 958, 968 (6th Cir. 2010). "This Court has previously refused to allow the omission of cumulative testimony to amount to ineffective assistance of counsel." United States v. Harris, 408 F.3d 186, 191 (5th Cir. 2005). "Although as an afterthought this [defendant's father] provided a more detailed account with regard to the abuse, this Court has held that even if alternate witnesses could provide more detailed testimony, trial counsel is not ineffective for failing to present cumulative evidence." Darling v. State, 966 So. 2d 366, 377 (Fla. 2007).'

"Daniel v. State, 86 So. 3d 405, 429-30 (Ala. Crim. App. 2011). '[P]ostconviction evidence can be cumulative to evidence presented during trial even where the postconviction evidence is more elaborate than the trial testimony. See Sweet v. State, 810 So. 2d 854, 863 (Fla. 2002).' State v. Bright, 200 So. 3d 710, 737 (Fla. 2016). ' "[T]his Court has held that 'even if alternate witnesses could provide more detailed testimony, trial counsel is not ineffective for failing to present cumulative evidence.' " ' Bailey v. State, 151 So. 3d 1142, 1151 (Fla. 2014). See also Davis v. State, 486 S.W.3d 898, 907 (Mo. 2016) ('[T]rial counsel's failure to develop or present evidence that is cumulative to that presented at trial does not constitute

> ineffective assistance of counsel.'); Commonwealth v. Mason, 130 A.3d 601, 648 (Pa. 2015) ('Nor may a determination of ineffective assistance of counsel be founded upon counsel's failure to present mitigating evidence that would have been cumulative of evidence presented at the penalty phase.'); Marcyniuk v. State, 436 S.W.3d 122, 135 (2014) ('[T]he failure to call witnesses whose testimony would be cumulative to testimony already presented does not deprive the defense of vital evidence.')."

Saunders v. State, 249 So. 3d 1153, 1171 (Ala. Crim. App. 2016). Although Saunders concerns trial counsel's failure to present penalty-phase evidence, Saunders applies equally to trial counsel's failure to present guilt-phase evidence.

At trial, Peraita's trial counsel called several inmate witnesses to testify concerning Peraita's relationship with Lewis, the events leading up to Lewis's murder, what happened when Lewis was murdered, and what happened after Lewis was murdered, including: Best, Harden, Knight, and Jones. Although Peraita alleged that his counsel were ineffective because they failed to present testimony from Best that "Lewis had a reputation for carrying a knife" and failed to present testimony from Harden, Junior, and Davis that "Peraita never stabbed Lewis," that testimony would have been cumulative to other evidence at Peraita's trial.

Indeed, at his trial, Peraita's counsel presented testimony from Harden that Lewis's "general reputation ... among the inmates" was that "[h]e's a notorious knife-fighter." (Record in Peraita, case no. CR-01-0289, R. 1142.) Additionally, as explained in part V.B. of this opinion, Peraita's counsel did present evidence through Dr. William John McIntyre and Dr. Leroy Riddick that Peraita did not stab Lewis. Counsel is not ineffective for failing to present cumulative evidence. Thus, the circuit court properly dismissed these claims of ineffective assistance of counsel.

As to Peraita's claims that his counsel were ineffective because they failed to present testimony from Knight and Best that "Peraita reported problems with Lewis to prison officials," failed to present testimony from Best that "Peraita feared Lewis," and failed to present testimony from Knight and Harden that "Peraita was controlled by Castillo," that testimony -- as characterized by Peraita in his petition -- would have been inadmissible in Peraita's trial. Indeed, testimony from Knight or Best regarding Peraita's "reporting" problems with Lewis to prison officials and comments from Knight or Harden about Castillo's "controlling" Peraita would have been inadmissible hearsay under the Alabama Rules of

Evidence, and testimony from Best concerning Peraita's "fear" of Lewis would have been inadmissible because " '[a] witness may not testify to the ... mental operation of another.' " Walker v. State, 194 So. 3d 253, 305 (Ala. Crim. App. 2015) (quoting Perry v. Brakefield, 534 So. 2d 602, 608 (Ala. 1988)). Counsel is not ineffective for failing to present inadmissible evidence. Thus, the circuit court did not err when it summarily dismissed these claims.

Additionally, as to Peraita's claim that his counsel were ineffective for failing to present testimony from Lane that "Peraita did not make statements about wanting Lewis to die ... and that the statements were actually by Castillo" (Peraita's brief, p. 78), Peraita failed to sufficiently plead how he was prejudiced by that failure. As we have explained,

> "to satisfy the burden of pleading a claim of ineffective assistance of counsel, a petitioner cannot merely allege that prejudice occurred or that there was some conceivable effect on the outcome of the trial; a petitioner must allege 'specific facts indicating how the petitioner was prejudiced,' i.e., how the outcome of the trial would have been different. Hyde v. State, 950 So. 2d 344, 356 (Ala. Crim. App. 2006)."

Mashburn, 148 So. 3d at 1116.

In his first amended petition, Peraita alleged that, if called, Lane would have testified that "Castillo was the person who said 'Let the bitch die' after the stabbing had occurred, and not Mr. Peraita," and that failing to introduce this testimony prejudiced Peraita because it "would have established Mr. Castillo as the aggressor at the scene of the stabbing, and not Mr. Peraita." (C. 329.) But Peraita did not plead how testimony from Lane that it was Castillo who said "Let the bitch die" would have resulted in a different outcome in Peraita's trial in light of other comments that Peraita made to Lewis, including, when he said to Lewis: "Die, n*****" (Record in Peraita, case no. CR-01-0289, R. 1045); when he said: "Mother fucker, die" (Record in Peraita, case no. CR-01-0289, R. 1031); and when Peraita swung the knife at corrections officers and told them: "Y'all get back or we'll cut you too" (Record in Peraita, case no. CR-01-0289, R. 954). Because Peraita did not adequately plead how he was prejudiced by his counsels' failure to present Lane's testimony in light of the other comments Peraita made to Lewis (which Lane's testimony does not contradict), the circuit court did not err when it summarily dismissed this claim.

IV.A.3.

Peraita next argues that the circuit court erred when it summarily dismissed his claim that his counsel were ineffective for failing "to introduce evidence of Mr. Lewis's history of violence." (Peraita's brief, p. 79.)

The totality of Peraita's argument on appeal regarding this issue is as follows:

> "The circuit court also erred when it summarily dismissed Peraita's claim of ineffective assistance of counsel resulting from trial counsel's failure to introduce evidence of Mr. Lewis's disciplinary records. C486; C331-32. The Circuit Court cited Rule 32.7, apparently accepting the State's argument that evidence of Mr. Lewis's disciplinary records could not have changed the outcome because this Court held there was sufficient evidence to convict Petitioner. C409 (citing Peraita v. State, 897 So. 2d 1161, 1211-12 (Ala. Crim. App. 2003)). But this Court's holding that the evidence presented at trial was legally sufficient to support a conviction has no bearing on whether counsel's failure to present other evidence had a reasonable probability of convincing the jury to reach a different conclusion."

(Peraita's brief, p. 79.) This argument does not satisfy Rule 28(a)(10), Ala. R. App. P., which 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." (Emphasis added.)

Indeed, Peraita cites no authority to support his contention that the circuit court erred when it summarily dismissed this claim. Instead, Peraita surmises that the circuit court erred when it "apparently accept[ed]" the State's reasons as to why his claim should be summarily dismissed. "'"It is not the function of this Court to .... to make and address legal arguments for a party based on undelineated general propositions not supported by sufficient authority or argument."'" Ex parte Borden, 60 So. 3d 940, 943 (Ala. 2007) (quoting Butler v. Town of Argo, 871 So. 2d 1, 20 (Ala. 2003), quoting in turn Dykes v. Lane Trucking, Inc., 652 So. 2d 248, 251 (Ala. 1994)). Consequently, Peraita's argument does not satisfy Rule 28(a)(10), and his argument that the circuit court erred when it summarily dismissed his claim is abandoned.

Even so, Peraita's argument on appeal is without merit. In his second amended petition, Peraita alleged that his counsel were ineffective for failing "to present evidence of Mr. Lewis'[s] violent history." (C. 615.) Specifically, Peraita alleged that his trial counsel should have introduced

"evidence of Mr. Lewis'[s] disciplinary record at the prison, which included approximately 89 disciplinary infractions." (C. 615.) Peraita alleged that "[n]ine of these infractions were for 'fighting,' four were for 'possession of contraband,' three were for 'threats,' one was for 'harassment,' and one was for 'assault.' " (C. 615.) Peraita further alleged that Lewis's disciplinary record "was admissible evidence" and "could have been used to support a theory of self-defense, as it is pertinent to Mr. Lewis's reputation for violence." (C. 615.) Peraita then alleged generally that his counsels' failure to introduce "this evidence of Lewis's violent actions and reputation was deficient performance that prejudiced the defense, and there is a reasonable probability that the result of the proceedings would have been different were it not for this error." (C. 615.) The circuit court summarily dismissed Peraita's claim on the basis that it was "without merit under Rule 32.7(d)." (C. 695.) We agree with the circuit court.

To start, although Peraita alleged that his counsel should have presented Lewis's prison-disciplinary records to prove "Mr. Lewis'[s] reputation for violence" (C. 615), Lewis's disciplinary records (assuming the records would have been admissible at trial) would have been

cumulative to other lawfully admitted evidence at Peraita's trial. Indeed, at his trial, Peraita's counsel presented testimony from inmates Best, Jones, and Harden. Best testified that, in his opinion, Lewis was "violent" and that Lewis had threatened Peraita and Castillo. (Record in Peraita, case no. CR-01-0289, R. 1123, 1124-25.) Jones testified that Lewis had made a threat against Peraita and that Castillo and Peraita "paid" Lewis two cartons of cigarettes to leave them alone. (Record in Peraita, case no. CR-01-0289, R. 1134-35.) Finally, Harden testified that Lewis's "general reputation ... among the inmates" was that "[h]e's a notorious knife-fighter." (Record in Peraita, case no. CR-01-0289, R. 1142.) Counsel is not ineffective for failing to present cumulative evidence. See Washington v. State, 95 So. 3d 26, 52 (Ala. Crim. App. 2012) (holding that counsel was not ineffective for failing to present evidence that would have been cumulative to other evidence presented at trial). Thus, the circuit court did not err when it summarily dismissed this claim.

Additionally, the circuit court properly dismissed this claim because it was insufficiently pleaded. Indeed, we have explained that, under Rule 404, Ala. R. Evid., evidence of " 'the deceased's violent nature may be

proved only by evidence of reputation and not by specific acts, ' " James v. State, 61 So. 3d 357, 366 n.5 (Ala. Crim. App. 2010) (quoting Quinlivan v. State, 627 So. 2d 1082, 1084 (Ala. Crim. App. 1992)), unless, in a case of self-defense, the accused had knowledge of a specific act of violence committed by the deceased. See Wright v. State, 641 So. 2d 1274, 1280 (Ala. Crim. App. 1993). Although Peraita pleaded facts showing that Lewis had a prison-disciplinary record and that the record included some specific incidences of Lewis's conduct, Peraita did not plead any facts as to the details of those specific incidences, who those specific incidences involved, when those specific incidences occurred, and whether Peraita actually had any knowledge of those incidences. Thus, Peraita failed to sufficiently plead any facts showing that Lewis's prison-disciplinary records would have been admissible had his trial counsel sought to admit them. Accordingly, Peraita is not entitled to any relief on this claim.

IV.A.4.

Peraita also argues that the circuit court erred when it summarily dismissed his claim that his counsel were ineffective "in [the] cross-examination of a State witness" by undermining his self-defense case

when they "asked [a] witness about his knowledge of threats by Lewis against [Peraita] even though the witness had specifically denied any such knowledge in [Department of Corrections] interviews." (Peraita's brief, p. 80.)

In his second amended petition, Peraita alleged that his counsel were ineffective when they "undermined the self-defense case in cross-examination" of Alvin Hamner when they asked Hamner whether he was aware of "trouble" between Lewis, Castillo, and Peraita and whether he was aware of threats that Lewis had made concerning Castillo and Peraita and Hamner denied having such knowledge. (C. 619.) Peraita alleged that his counsel had been provided with a statement that Hamner made to prison investigators in which he denied having any knowledge of "trouble between Mr. Lewis and Peraita and Mr. Castillo." (C. 620.) Peraita further alleged that, being armed with that knowledge, his counsel performed deficiently when they asked Hamner about the "trouble" and the "threats" because it made "it seem that Mr. Lewis never made any threats." (C. 620.) Peraita claimed that his counsels' cross-examination prejudiced him because, he said, "[t]his predictably fruitless

cross-examination could only increase the jury's doubts that Mr. Lewis had ever made any deadly threats." (C. 621.) The circuit court summarily dismissed this claim, in part, on the basis that it was meritless. (C. 695.) We agree with the circuit court.

The record on direct appeal shows the following exchange occurred between Peraita's counsel and Hamner during cross-examination:

> "[Peraita's counsel]: Had you known Quincy Lewis and Mr. Castillo and Lil' Warrior prior to [the stabbing]?
>
> "[Hamner]: Yeah, just from, you know, being at Holman Prison. I don't know them personally.
>
> "[Peraita's counsel]: You knew that they were having some trouble; didn't you?
>
> "[Hamner]: I didn't know nothing about them having no trouble.
>
> "....
>
> "[Peraita's counsel]: You don't know anything about Quincy Lewis threatening them?
>
> "....
>
> "[Peraita's counsel]: I believe my question to you is did you know of any threats that were made by Quincy Lewis against either Castillo or Mr. Peraita?

> "[Hamner]: No, sir.
>
> "[Peraita's counsel]: Do you know of any sort of transaction that occurred where Mr. Castillo and Mr. Peraita paid Quincy Lewis to leave them alone?
>
> "[Hamner]: No, sir.
>
> "[Peraita's counsel]: You don't know anything about that?
>
> "[Hamner]: No, sir."

(Record in Peraita, case no. CR-01-0289, R. 1034-36.) Thereafter, during the defense case, Peraita's counsel put on several other inmate witnesses to testify concerning the "trouble" between Peraita, Castillo, and Lewis. Specifically, there was testimony that Lewis was "violent," that the relationship between the three "deteriorated over time," that Lewis had made threats against Peraita and Castillo, that Peraita and Castillo were made aware of those threats, that there were "problems between the three of them," and that Peraita and Castillo "paid [Lewis] two cartons of cigarettes to leave them alone." (Record in Peraita, case no. CR-01-0289, R. 1122-23, 1124, 1125, 1133, 1134-35, 1136, 1143.)

Although Peraita alleged that his trial counsel should not have asked Hamner about the "trouble" and the "threats" when Hamner did not

have any personal knowledge of those things because doing so made "it seem that Mr. Lewis never made any threats" (C. 620), trial counsels' questioning Hamner about his lack of knowledge about the "trouble" and "threats," in the context of the entire trial, was a matter of trial strategy and does not amount to ineffective assistance of counsel.

> We have explained that
>
> > "'"[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). "'"[D]ecisions whether to engage in cross-examination, and if so to what extent and in what manner, are ... strategic in nature."'" Hunt v. State, 940 So. 2d 1041, 1065 (Ala. Crim. App. 2005), quoting Rosario-Dominguez v. United States, 353 F. Supp. 2d 500, 515 (S.D.N.Y. 2005), quoting in turn, United States v. Nersesian, 824 F.2d 1294, 1321 (2d Cir. 1987). "The decision whether to cross-examine a witness is [a] matter of trial strategy." People v. Leeper, 317 Ill. App. 3d 475, 483, 740 N.E.2d 32, 39, 251 Ill. Dec. 202, 209 (2000).'"

Bush v. State, 92 So. 3d 121, 155 (Ala. Crim. App. 2009) (quoting A.G. v. State, 989 So. 2d 1167, 1173 (Ala. Crim. App. 2007)). "'"[T]he scope of cross-examination is grounded in trial tactics and strategy, and will rarely constitute ineffective assistance of counsel."'" Stanley v. State, [Ms. CR-18-0397, May 29, 2020] ___ So. 3d ___, ___ (Ala. Crim. App. 2020) (quoting

Bonner v. State, 308 Ga. App. 827, 828, 709 S.E.2d 358, 360 (2011), quoting in turn Cooper v. State, 281 Ga. 760, 762, 642 S.E.2d 817, 820 (2007)).

Moreover, trial counsels' questioning Hamner about his lack of knowledge did not undermine Peraita's self-defense case because that line of questioning merely established that Hamner was unaware of the trouble between Castillo, Peraita, and Lewis and that he was unaware of the threats Lewis had made concerning Castillo and Peraita. It did not establish that those things never occurred. As set out above, Peraita's trial counsel put on evidence from other inmates that established that there was trouble between Castillo, Peraita, and Lewis and that Lewis had made threats concerning Castillo and Peraita.

Accordingly, the circuit court did not err when it summarily dismissed this claim.

IV.A.5.

Next, Peraita argues that the circuit court erred when it summarily dismissed his claim that his counsel were ineffective for failing "to

adequately prepare evidence of Mr. Lewis's intoxication." (Peraita's brief, p. 81.)

In his first amended petition, Peraita alleged that his counsel were ineffective for failing "to prepare adequate evidence of the fact that Mr. Lewis regularly used Artane, a drug that commonly makes users short-tempered, paranoid, and quick to anger, and that on the day of his death Mr. Lewis was behaving as though he was under the influence of Artane." (C. 337-38.) According to Peraita, his counsel "made two critical failures": (1) "they failed to secure an expert to testify as to the psychological effects of Artane" and (2) "they failed to proffer evidence that Mr. Lewis regularly obtained Artane by buying it from other inmates on the black market -- not from the prison pharmacy." (C. 338.) As to the second "critical failure," Peraita alleged that inmates Knight and Best "could have testified that Mr. Lewis regularly bought Artane from other inmates and regularly took it in doses that far exceed the normal prescription dosage." (C. 340.) The circuit court summarily dismissed this claim of ineffective assistance of counsel on the basis that it was insufficiently pleaded. (C. 486.) We agree with the circuit court.

First, although Peraita alleged that his counsel should have hired an expert witness to testify about the effects of Artane, Peraita failed to identify, by name, any expert witness his counsel should have called to testify at his trial. Consequently, Peraita's claim did not satisfy the full-fact pleading requirements of Rule 32.6, Ala. R. Crim. P. See Daniel v. State, 86 So. 3d 405, 425-26 (Ala. Crim. App. 2011) (holding that, because Daniel failed to identify, by name, an expert witness who could have testified at his trial, Daniel's claim was insufficiently pleaded).

Second, Peraita's claim that his counsel "failed to proffer evidence that Mr. Lewis regularly obtained Artane by buying it from other inmates on the black market -- not from the prison pharmacy" -- and that inmates Knight and Best "could have testified that Mr. Lewis regularly bought Artane from other inmates and regularly took it in doses that far exceed the normal prescription dosage," is likewise insufficiently pleaded because Peraita failed to plead how that testimony from Knight and Best would have been admissible at Peraita's trial. See Mashburn, 148 So. 3d at 1154 (holding that, to sufficiently plead a claim that counsel was ineffective for failing to present testimony from a witness, a petitioner must plead,

among other things, "what admissible testimony those witnesses would have provided had they been called to testify") (emphasis added). Indeed, Peraita failed to plead any facts as to how Knight and Best knew that Lewis purchased Artane on the "black market" (for example, that they personally observed him doing so or that they sold it to him); Peraita failed to plead how Knight and Best were qualified to testify as to the "normal prescription dosage" for Artane; and Peraita failed to plead how they knew how much Artane Lewis consumed. Further, the failure to name a witness that could establish the effects of Artane makes the proposed testimony of Knight and Best (that Lewis obtained and used the drug) inconsequential because evidence that Lewis used the drug without establishing the effects of that usage could not have assisted Peraita's defense. Consequently, Peraita's claim did not satisfy the full-fact pleading requirements of Rule 32.6. See Daniel, supra.

Accordingly, the circuit court did not err when it summarily dismissed this claim.

IV.A.6.

Peraita also argues that the circuit court erred when it summarily dismissed his claim that his counsel were ineffective for failing "to adequately present testimony from [Michael] Castillo" -- Peraita's codefendant. (Peraita's brief, p. 82.)

In his first amended petition, Peraita alleged that his counsel were ineffective because they "failed to present testimony from an eyewitness who knew the most about the fact that [he] was acting in self defense: Mr. Castillo." (C. 340.) Although Peraita acknowledged that Castillo was Peraita's codefendant and was "under indictment at the time of [his] trial," Peraita alleged that his counsel "made no effort to determine" whether Castillo would assert his right not to testify. (C. 341.) According to Peraita, because Castillo "cooperated with [Department of Corrections] investigators," "[t]here [was] a reasonable possibility that Mr. Castillo would have testified at trial."[10] (C. 342 (emphasis added).) The circuit

[10]In his first amended petition, Peraita also alleged that his counsel were ineffective for failing to ask the trial court to continue his trial until after Castillo pleaded guilty. (C. 342.) But Peraita does not raise that argument on appeal. Instead, Peraita argues only that the circuit court

court summarily dismissed this claim on the grounds that it was insufficiently pleaded under Rule 32.6(b), Ala. R. Crim. P., and was meritless under Rule 32.7(d), Ala. R. Crim. P. (C. 486.)

According to Peraita, he sufficiently pleaded this claim because, he says, he pleaded "details of the topics of Castillo's unpresented testimony" and pleaded "specific grounds to believe that Castillo may have been willing to testify." (Peraita's brief, p. 82.) But

> "counsel is not ineffective for failing to call a witness who is unavailable. As the Supreme Court of Florida has stated:
>
> > " 'With regard to an ineffective assistance of counsel claim, witness availability is integral to a movant's allegations of prejudice. See Nelson v.

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erred when it summarily dismissed this claim of ineffective assistance of counsel because he pleaded "details of the topics of Castillo's unpresented testimony" and "specific grounds to believe that Castillo may have been willing to testify." (Peraita's brief, p. 82.) So, to the extent that Peraita alleged that his counsel were ineffective for failing to ask for a continuance of his trial to secure Castillo's presence, that claim has been abandoned, and we will not review it. See Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995) (" ' "[A]llegations ... not expressly argued on ... appeal ... are deemed by us to be abandoned." United States v. Burroughs, 650 F.2d 595, 598 (5th Cir.), cert. denied, 454 U.S. 1037, 102 S. Ct. 580, 70 L. Ed. 2d 483 (1981).' Burks v. State, 600 So. 2d 374, 380 (Ala. Crim. App. 1991). We will not review issues not listed and argued in brief. Burks.").

> State, 875 So. 2d 579, 583 (Fla. 2004). When a witness is unavailable to testify, trial counsel is not automatically ineffective for his or her failure to present that witness. See White v. State, 964 So. 2d 1278, 1286 (Fla. 2007). In such instances, due to the unavailability of the witness, a defendant cannot establish deficient performance or prejudice. See Nelson, 875 So. 2d at 583. There are many reasons for a witness's unavailability, ranging from the assertion by the witness of his or her right to remain silent, or the inability to locate witnesses or serve them with a subpoena. See id. n. 3. ... In a defendant's postconviction motion, if he or she alleges that counsel was deficient for the failure to call a witness, he or she must establish that the witness was available to testify. See Nelson, 875 So. 2d at 583.'
>
> "Nelson v. State, 73 So. 3d 77, 88-89 (Fla. 2011) (footnote omitted)."

Stallworth v. State, 171 So. 3d 53, 71-72 (Ala. Crim. App. 2013).

Here, Peraita alleged that his trial counsel should have presented testimony from Castillo, but Peraita did not allege that Castillo would have actually testified had he been called to do so. Instead, Peraita alleged that it was possible that Castillo would not have invoked his right to remain silent and testified in Peraita's defense. Peraita's speculative assertion that Castillo might have testified at his trial falls well short of

satisfying the pleading requirements of Rule 32.3 and Rule 32.6(b). See, e.g., Mashburn, 148 So. 3d at 1125 ("Speculation is not sufficient to satisfy a Rule 32 petitioner's burden of pleading.").

Moreover, although Peraita correctly points out in his brief on appeal that he pleaded "details of the topics of Castillo's unpresented testimony" (Peraita's brief, p. 82), Peraita's reference to the topics that Castillo could testify to -- i.e., "the events leading up to Lewis'[s] death, including Lewis'[s] threats of predatory violence and the failure of prison authorities to respond to these threats" (C. 341) -- does not satisfy the full-fact pleading requirement of Rule 32. To sufficiently plead his claim that his counsel were ineffective for failing to call Castillo at trial, Peraita was required not only to plead that Castillo would testify if called, but also "to plead with specificity what admissible testimony [Castillo] would have provided had [he] been called to testify," not the general topics his testimony would cover. Mashburn, 148 So. 3d at 1151.

Additionally, because Peraita failed to plead the substance of Castillo's testimony, Peraita also failed to satisfy his burden that

Castillo's testimony would not have been merely cumulative to testimony that was presented during trial. See Mashburn, 148 So. 3d at 1151.

Finally, Peraita's allegation that his counsel were ineffective for failing to call Castillo to testify fails to sufficiently plead prejudice, as his allegations include nothing more than a bare assertion that he was prejudiced by his counsels' failure and that "there is a reasonable probability that the result of the proceedings would have been different were it not for the errors." (C. 342.)

Thus, the circuit court properly dismissed this claim as insufficiently pleaded.

IV.B.

Next, Peraita argues that the circuit court erred when it summarily dismissed the following claims: (1) that his trial counsel were ineffective because they failed to "follow through on opening statement promises" (Peraita's brief, p. 83); (2) that his trial counsel were ineffective for failing to "object to inflammatory descriptions of Peraita" (Peraita's brief, p. 83); (3) that his trial counsel were ineffective when they failed "to protect [his] right to be present at trial" (Peraita's brief, p. 84); (4) that his trial counsel

were ineffective for failing to "investigate and evaluate [Peraita's] mental health and to adequately advise Peraita's purported waiver of mitigation" (Peraita's brief, p. 85); (5) that his trial counsel were ineffective for "failing to present mitigation evidence" (Peraita's brief, p. 86); (6) that his trial counsel were ineffective for failing "to voir dire jury on knowledge of prior convictions" (Peraita's brief, p. 87); (7) that his sentence is disproportionate when compared to his codefendant's sentence (Peraita's brief, p. 87); (8) that "Alabama's method of execution constitutes cruel and unusual punishment" (Peraita's brief, p. 89); and (9) that the State had failed "to disclose exculpatory evidence" (Peraita's brief, p. 91). We address each of these claims in turn.

IV.B.1.

Peraita first argues that the circuit court erred when it summarily dismissed his claim that his counsel were ineffective for failing "to follow through on opening statement promises." (Peraita's brief, p. 83.) Peraita's argument, however, fails to satisfy Rule 28(a)(10), Ala. R. App. P., which 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." (Emphasis added.)

The totality of Peraita's argument on appeal is as follows:

> "While the Circuit Court dismissed Claim II.B. under 32.6(b) and 32.7(d) (C486), the Petition contains the requisite specificity: it explains the promises made in opening statement that were not followed through by trial counsel and how this failure exacerbated the prejudice from trial counsel's failure to present an adequate self-defense case. C342-48. And the State's suggestion in its motion to dismiss (C418-19) that his claim is subject to 32.7(d) dismissal because trial counsel actually did follow through on his opening statement promises is not supported by the record, including the State's own closing argument that emphasized the defense's failure to present any support for its claims of self-defense. AR1213-17."

(Peraita's brief, p. 83.)

In his one-paragraph, two-sentence argument, Peraita cites no authority whatsoever to support his contention that this claim of ineffective assistance of counsel was sufficiently pleaded. It is not this Court's duty to figure out how Peraita believes the circuit court erred when it dismissed this claim on the basis that it was insufficiently pleaded. See Ex parte Borden, 60 So. 3d 940, 943 (Ala. 2007) (It is not this Court's obligation to "'"address legal arguments for a party based on

undelineated general propositions not supported by sufficient authority or argument." ' " (quoting Butler v. Town of Argo, 871 So. 2d 1, 20 (Ala. 2003), quoting in turn Dykes v. Lane Trucking, Inc., 652 So. 248, 251 (Ala. 1994))). Thus, this argument is deemed abandoned, and we do not address it.

IV.B.2.

Next, Peraita argues that the circuit court erred when it summarily dismissed his claim that his counsel were ineffective when they failed "to object to inflammatory descriptions of Peraita" -- namely, the State's "repeated use" of Peraita's nickname, "Lil' Warrior." (Peraita's brief, p. 83.) This argument, like the argument addressed above, also fails to satisfy Rule 28(a)(10), Ala. R. App. P.

The totality of Peraita's argument on appeal is as follows:

> "The Circuit Court cited 32.7(d) to summarily dismiss the ineffectiveness claim based on trial counsel's failure to object to the repeated use by the State of the nickname 'Lil' Warrior' to refer to Mr. Peraita. C486; C348-50. The Court's dismissal apparently was based on the State's argument that this claim is barred because on direct appeal this Court did not find that the prosecutor committed misconduct in his closing statement. C420-21. But prosecutorial misconduct claims are governed by a wholly different standard than ineffectiveness claims,[23] and

> moreover this Court's holding did not address the appropriateness of the use of the 'Lil' Warrior' sobriquet -- it considered a different comment that '[e]verybody in Holman Prison is violent.' Peraita, 897 So. 2d at 1201.
>
> "_____
>
> "[23]Peraita v. State, 897 So. 2d 1161, 1201 (Ala. Crim. App. 2003) (statement in closing argument only warrants reversal if it 'so infected the trial with unfairness as to make the resulting conviction a denial of due process' (quoting Darden v. Wainwright, 477 U.S. 168, 181 (1986)))."

(Peraita's brief, pp. 84-85.)

Although Peraita cites to this Court's decision in his direct appeal, Peraita cites no authority showing that his claim is meritorious and did not warrant dismissal under Rule 32.7(d), Ala. R. Crim. P. Instead of explaining how his claim is meritorious, Peraita argues that the circuit court's "apparent" reason for dismissing his claim under Rule 32.7(d) was improper. Peraita's addressing of this one "apparent" reason fails to recognize that a circuit court does not have to give any reason when it summarily dismisses a claim under Rule 32.7(d), and, by focusing his argument on this one apparent reason, he ignores the other possible reasons on which the circuit court could have based its decision -- for

example, that Peraita's claim was meritless under Rule 32.7(d) because the use of the nickname "Lil' Warrior" did not prejudice Peraita.

Because Peraita's argument does not satisfy Rule 28(a)(10), Ala. R. App. P., this argument is deemed abandoned and we do not address it.

IV.B.3.

Peraita also argues that the circuit court erred when it summarily dismissed his claim that his counsel were ineffective when they failed "to protect [his] right to be present at trial." (Peraita's brief, p. 84.)

In his second amended petition, Peraita alleged that his counsel were ineffective when they did not "assert [Peraita's] unwaivable constitutional right to be present at the entire capital trial" when Peraita was absent from a portion of Dr. Haney's proffered testimony during the guilt phase of Peraita's trial. (C. 639.) Peraita alleged that he was prejudiced by this failure because he "had no opportunity to see the testimony of Dr. Haney before trial"; "[b]y not seeing the institutional self-defense testimony firsthand at trial, [he] was handicapped in assisting his counsel in how to present the self-defense case"; he "had less perspective with which to suggest alternate witnesses to cover the self-defense

evidence that was excluded"; and, had he "witnessed Dr. Haney's testimony, he may well have instructed his attorneys to present this evidence in the mitigation phase of his trial." (C. 639.) The circuit court summarily dismissed this claim on the grounds that it was insufficiently pleaded and without merit. (C. 695.) On appeal, Peraita challenges both conclusions.

The totality of Peraita's argument on appeal concerning the circuit court's finding that this claim was insufficiently pleaded is as follows: "As to 32.6(b), Peraita specifically pled the prejudice that resulted from his absence from the courtroom, including his potential ability to identify witnesses to try to mitigate gaps left by the exclusion of Dr. Haney's central testimony in the guilt phase." (Peraita's brief, p. 84.) This argument does not satisfy Rule 28(a)(10), Ala. R. App. P. Thus, it is deemed abandoned.

Even so, the circuit court properly dismissed this claim on the basis that it was insufficiently pleaded. As quoted above, on appeal, the only portion of this claim Peraita cites as showing that it was sufficiently pleaded was his alleged inability to "identify witnesses" that he could call

to "mitigate gaps left by the exclusion of Dr. Haney's central testimony in the guilt phase."[11] (Peraita's brief, p. 84.) In his petition, however, Peraita did not identify, by name, any witness who he could have called to testify. Nor did Peraita specifically allege what those witnesses would have testified to if he had called them. Thus, this claim was insufficiently pleaded, and the circuit court did not err when it summarily dismissed it.

IV.B.4.

Peraita argues that the circuit court erred when it summarily dismissed his claim that his trial counsel were ineffective for failing to "investigate and evaluate [his] mental health" and to "adequately advise [him] in connection with [his] purported waiver of mitigation." (Peraita's brief, p. 85.)

In his first amended petition, Peraita alleged that his counsel were ineffective for failing to "investigate and evaluate [his] mental health before trial." (C. 356-62.) According to Peraita:

[11]Because Peraita cites only this one allegation as showing that his claim was sufficiently pleaded, we address only that allegation.

> "In a letter to trial counsel, Aaron McCall, a mitigation specialist retained by trial counsel, expressed concern about Mr. Peraita's mental health and recommended securing the services of Daniel Marson, JD, PhD, a neuropsychologist, and Craig Haney, PhD, a psychology professor and social psychologist with an expertise [in] prison culture, and Marianne Rosenzweig, PhD, a clinical and forensic psychologist."

(C. 356.) Peraita further alleged that, instead of retaining "the services of Dr. Marson or any other neuropsychologist," his trial counsel "unreasonably relied on a limited evaluation by Robert DeFrancisco, PhD, a psychologist appointed by the Court to evaluate [his] 'competency to stand trial, mental state at the time of the offense and competency to waive Miranda warnings.'" (C. 357.) Peraita alleged that his counsel "had an obligation to pursue an independent mental health assessment to determine whether the persistent physical and psychological abuse [he] endured caused brain injury, a neuropsychological deficit or disassociative disorder." (C. 362.) The circuit court dismissed this claim as insufficiently pleaded. (C. 486.)

The record on direct appeal shows that Peraita's trial counsel moved the circuit court for funds to hire Dr. Marson, Dr. Haney, and Dr.

Rosenzweig. (Record in Peraita, case no. CR-01-0289, R. 112-14.) The circuit court granted Peraita's counsels' motion only as to Dr. Marson. (Record in Peraita, case no. CR-01-0289, C. 119.) After Peraita's counsel hired Dr. Marson, however, Dr. Marson withdrew from Peraita's case "due to scheduling conflicts," and the circuit court "allowed [Peraita's counsel] to retain and substitute Dr. Craig Haney as his psychological expert." (Record in Peraita, case no. CR-01-0289, C. 189.) Thus, contrary to Peraita's claim in his petition, his counsel did hire both Dr. Marson and Dr. Haney. And, although Peraita correctly alleged that his counsel did not hire Dr. Rosenzweig, the record on direct appeal clearly shows that his counsel moved the trial court for funds to hire her but that the trial court denied his request. Consequently, Peraita's claim is refuted by the record on direct appeal and was properly dismissed.

Moreover, to the extent that Peraita alleged that his counsel should have hired some other expert witness to assess his mental health, that claim is insufficiently pleaded. Indeed, Peraita did not identify, by name, any other expert witness his counsel should have hired to assess his mental health. See Daniel, 86 So. 3d at 425-26 ("Daniel failed to identify,

by name, any forensic or DNA expert who could have testified at Daniel's trial or the content of the expert's expected testimony. Accordingly, Daniel failed to comply with the full-fact pleading requirements of Rule 32.6, Ala. R .Crim. P.").

Accordingly, Peraita is due no relief on this claim.

IV.B.5.

Peraita next argues that the circuit court erred when it summarily dismissed his claim that his counsel were ineffective for failing to present mitigation evidence despite Peraita's telling his counsel that he wished to forgo the presentation of such evidence. In Adkins v. State, 930 So. 2d 524, 539 (Ala. Crim. App. 2001), however, this Court, joining "the majority of jurisdictions that have considered this issue," held "that a defendant is estopped from raising a claim of ineffective assistance of counsel for counsel's failure to present mitigating evidence when the defendant waived the presentation of mitigating evidence."

Because Peraita was competent to waive the presentation of mitigation evidence in this case, and because Peraita did, in fact, waive the presentation of mitigation evidence in this case, he cannot now

complain that his counsel were ineffective for honoring his wishes. See Brooks, ___ So. 3d at ___ ("Brooks cannot both dictate how his counsel presents mitigation evidence and later argue that his counsel were ineffective for following his instructions. This Court has never sanctioned such a tactic, and '[w]e refuse to find an attorney's performance ineffective for following his client's wishes.' Adkins v. State, 930 So. 2d 524, 540 (Ala. Crim. App. 2001)."). Accordingly, the circuit court did not err when it summarily dismissed this claim.

IV.B.6.

Peraita also argues that the circuit court erred when it summarily dismissed his claim that his counsel were ineffective for failing to voir dire the jury regarding its knowledge of Peraita's prior convictions.

Peraita's argument on appeal does not satisfy Rule 28(a)(10), Ala. R. App. P., which 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." (Emphasis added.) The totality of Peraita's argument on appeal is as follows:

> "The circuit court cited 32.6(b) in dismissing Peraita's claim that trial counsel were ineffective for failing to question jurors regarding their knowledge of Peraita's prior conviction. C486; C373-74. But this claim very specifically pled this deficient performance and the prejudice that resulted; as pled in Claims I [-- his juror-misconduct claim --] and II.H.2. [-- his voir-dire claim --] and demonstrated at the evidentiary hearing, the jury's foreperson shared extraneous (and inaccurate) information about Peraita's prior conviction with the other jurors. C318-19; C373-74; C783-84."

(Peraita's brief, p. 87.)

Peraita cites no authority to support his contention that this claim of ineffective assistance of counsel was sufficiently pleaded. Peraita's two-sentence "argument" that he believes the circuit court erred when it dismissed this claim on the basis that it was insufficiently pleaded does not sufficiently apprise this Court of the reasons that the issue was properly pleaded. See Borden, 60 So. 3d at 943.

Even so, a simple reading of Peraita's petition and his amended petitions shows that the circuit court correctly concluded that Peraita's claim was insufficiently pleaded. To sufficiently plead a claim that counsel was ineffective for failing to properly or effectively conduct voir dire, a Rule 32 petitioner must "identify each juror who served on the jury

who was biased against him" and must plead "facts that, if true, would establish a reasonable probability that the outcome of the trial would have been different" had counsel acted differently. Stallworth, 171 So. 3d at 83. See also Brown v. State, 807 So. 2d 1, 5 (Ala. Crim. App. 1999) (holding that a claim that jurors failed to accurately answer questions during voir dire was insufficiently pleaded when the petitioner failed to identify by name any juror who failed to answer questions).

In his original petition, Peraita alleged that his counsel were ineffective because they "did not question jurors regarding their knowledge of Mr. Peraita's prior convictions." (C. 67.) According to Peraita, this "error was particularly glaring" because of the media attention that his prior capital-murder case had garnered and because of the "violent nature of the crime." (C. 67-68.) But Peraita did not allege the name of any juror who knew of his prior convictions. Instead, Peraita alleged that "at least one juror was able to link Mr. Peraita to the Gadsden murders, and shared that information with the rest of the jury." (C. 68.)

In its answer to Peraita's petition, the State recognized this pleading deficiency and argued, in part, that Peraita did not sufficiently plead his voir dire claim because he failed "to plead in this claim which juror knew of the facts of the Gadsden murder and how this knowledge prejudiced the outcome of his case." (C. 107.) Thereafter, instead of correcting the pleading deficiency noted by the State when he filed his first amended petition, Peraita simply reasserted the same allegations from his original Rule 32 petition in his first amended petition, again not identifying by name any juror who knew of Peraita's prior convictions. (C. 373-74.)

In its answer to Peraita's first amended petition, the State again argued that Peraita's claim was insufficiently pleaded, noting that, although he alleged that " 'at least one juror' knew details about his prior crime, he fail[ed] to identify the juror." (C. 432.) The State, quoting Brown, supra, argued that " '[t]he way [Peraita's] allegations [are] framed [make] it impossible for the State to defend against this claim.' " (C. 433.)

Thereafter, the circuit court dismissed Peraita's claim on the basis that it was insufficiently pleaded.[12] (C. 486.)

Peraita advances two reasons as to why he believes the circuit court erred when it summarily dismissed this claim on the basis that it was insufficiently pleaded. Neither reason entitles him to relief.

First, Peraita points to the juror-misconduct claim he raised in his petition as showing that he properly pleaded his voir dire claim. But Peraita's juror-misconduct claim suffers from the same pleading deficiency as his voir dire claim -- i.e., Peraita did not allege in his juror-misconduct claim the name of the juror who allegedly made a statement about Peraita's prior convictions. So Peraita's reference in his brief on appeal to his juror-misconduct claim does not save the pleading deficiency of his voir dire claim.[13]

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[12]Peraita reasserted this ineffective-assistance-of-counsel claim in his second amended petition. In so doing, Peraita again merely copied the allegations from his previous petitions and did not identify by name the juror who knew of his prior convictions. (C. 658.)

[13]We recognize that Peraita revealed to the State the identity of the juror who he alleged had committed misconduct in a discussion outside of court and later memorialized that conversation in a letter written to the circuit court. (C. 759, 783-84.) But Peraita's extrajudicial revelation of

Second, Peraita points to the fact that he "demonstrated at the evidentiary hearing" that it was the jury foreperson who "shared extraneous (and inaccurate) information about Peraita's prior conviction with the other jurors" as a reason why his voir dire claim was sufficiently pleaded. But evidence presented at an evidentiary hearing that supports a claim that was summarily dismissed as insufficiently pleaded before the evidentiary hearing does not revive that claim or remedy the deficiency in pleading. " ' "Rule 32.6(b) requires that the petition itself disclose the facts relied upon in seeking relief." Boyd v. State, 746 So. 2d 364, 406 (Ala. Crim. App. 1999).' " A.G., 989 So. 2d at 1172 (quoting Boyd, 913 So. 2d at 1125).

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the identity of the juror who he alleged had committed misconduct does not remedy the deficiency in the pleading of either his juror-misconduct claim or his voir dire claim. Our caselaw is clear, " ' "Rule 32.6(b) requires that the petition itself disclose the facts relied upon in seeking relief." Boyd v. State, 746 So. 2d 364, 406 (Ala. Crim. App. 1999).' " A.G. v. State, 989 So. 2d 1167, 1172 (Ala. Crim. App. 2007) (quoting Boyd v. State, 913 So. 2d 1113, 1125 (Ala. Crim. App. 2003)) (some emphasis added). Although Peraita eventually revealed to the State the identity of the juror in a statement outside of court and in a letter (not a pleading), Peraita, who was represented by counsel, never amended either his voir dire claim or his juror-misconduct claim to include the name of the juror. Simply put, no petition disclosed the identity of the juror.

Because Peraita's voir dire claim and his amendments to that claim failed to disclose the name of any juror who would have answered that he or she was aware of Peraita's prior convictions, Peraita failed to plead sufficient facts to show that his counsel were ineffective when they failed to ask about his prior convictions during voir dire. Accordingly, the circuit court did not err when it summarily dismissed this claim.

IV.B.7.

Peraita also argues that the circuit court erred when it summarily dismissed his claim that his sentence "is disproportionate when compared to the sentence of his more culpable co-defendant." (C. 661.) In summarily dismissing this claim, the circuit court found as follows:

> "There is no need for an evidentiary hearing, as the facts are already in evidence, or are facts of which the Court can take judicial notice. [Peraita's] accomplice, Michael Castillo, was charged with murder, and eventually [pleaded] guilty to manslaughter and received a sentence of twenty years. Castillo could not be charged with capital murder, as he did not meet the requirements of the capital murder statute. ... Peraita was charged with capital murder, as he qualified under Ala. Code § 13A-5-40(6) and § 13A-5-40(13) (1975). Moreover, this issue was raised on direct appeal by [Peraita], and is precluded pursuant to Alabama Rules of Criminal Procedure 32.2(4) and 32.2(5)."

(C. 866-67.) We agree with the circuit court.

In his direct appeal, Peraita argued that his capital-murder conviction and death sentence "are disproportionate because his allegedly more culpable codefendant was not charged with capital murder." Peraita, 897 So. 2d at 1197. In rejecting this claim, this Court held:

> "The prosecutor explained that [Peraita] was charged with two counts of capital murder because he was serving a sentence of life in prison at the time of the murder and because he had been convicted of another murder in the twenty years preceding this murder. He further explained that Castillo was 'indicted for murder simply because there is no circumstance under which -- under the capital punishment scheme there was no circumstance under which he could be indicted for capital murder.' (R. 41.) Clearly, the disparity between the charges and possible punishment [Peraita] and Castillo faced was not based on their degrees of culpability or on some inappropriate decision by the prosecutor or the trial court. Rather, the disparity was based wholly on the nature of [Peraita's] prior convictions and the length of his prior sentences."

Peraita, 897 So. 2d at 1197-98 (emphasis added). This Court also noted that the record on direct appeal did not indicate that "Castillo had been tried or sentenced at the time the trial court sentenced [Peraita]" to death, and, thus, "the trial court could not compare [Peraita's] sentence to Castillo's sentence." Peraita, 897 So. 2d at 1198. This Court ultimately

concluded that Peraita's death sentence was neither disproportionate nor excessive "when compared to the penalty imposed in similar cases." Peraita, 897 So. 2d at 1222.

When examining a claim that a death sentence is disproportionate because a codefendant received a lesser sentence, we have explained as follows:

> " ' "The law does not require that each person involved in a crime receive the same sentence. Wright v. State, 494 So. 2d 726, 739 (Ala. Crim. App. 1985) (quoting Williams v. Illinois, 399 U.S. 235, 243, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970)). Appellate courts should 'examine the penalty imposed upon the defendant in relation to that imposed upon his accomplices, if any.' Beck v. State, 396 So. 2d 645, 664 (Ala. 1980). However, the sentences received by codefendants are not controlling per se, Hamm v. State, 564 So. 2d 453, 464 (Ala. Crim. App. 1989), and this Court has not required or directed that every person implicated in a crime receive the same punishment. Williams v. State, 461 So. 2d 834, 849 (Ala. Crim. App. 1983), rev'd on other grounds, 461 So. 2d 852 (Ala. 1984). ' "There is not a simplistic rule that a co-defendant may not be sentenced to death when another co-defendant receives a lesser sentence." ' Id. (quoting Collins v. State, 243 Ga. 291, 253 S.E.2d 729 (1979))."

> " 'Ex parte McWhorter, 781 So. 2d 330, 344 (Ala. 2000). "Because of 'the need for individualized consideration as a constitutional requirement in imposing the death sentence,' Lockett v. Ohio, 438 U.S. 586, 605, 98 S. Ct. 2954, 2965, 57 L. Ed. 2d 973, 990 (1978), the focus must be on the defendant." Wright v. State, 494 So. 2d 726, 740 (Ala. Crim. App. 1985), aff'd, 494 So. 2d 745 (Ala. 1986).' "

Belisle v. State, 11 So. 3d 256, 321 (Ala. Crim. App. 2007) (quoting Gavin v. State, 891 So. 2d 907, 994 (Ala. Crim. App. 2003)).

Here, as this Court explained on direct appeal, the reason why Peraita was charged with capital murder and why Castillo was not charged with capital murder was not because Peraita was more culpable in Lewis's murder than Castillo. Rather, the difference between their charges was based upon Peraita's past criminal convictions and the length of the sentences he was serving at the time he and Castillo murdered Lewis. The same is true for their respective punishments. Simply put, Peraita's past criminal convictions and the lengths of the sentences he was serving at the time he participated in Lewis's murder made his capital-murder conviction eligible for a death sentence. The fact that Castillo could not be charged with capital murder or sentenced to death does not mean that Peraita's death sentence was "disproportionate." As this Court

held in his direct appeal, Peraita's death sentence was neither disproportionate nor excessive "when compared to the penalty imposed in similar cases." Peraita, 897 So. 2d at 1222 (emphasis added). Because sentencing is individualized and because this Court concluded in his direct appeal that Peraita's sentence was neither excessive nor disproportionate when compared to cases similar to Peraita's, the circuit court did not err when it summarily dismissed this claim on the basis that it was precluded under Rule 32.2(a)(4), Ala. R. Crim. P.

IV.B.8.

Peraita also argues that the circuit court erred when it summarily dismissed his claim that Alabama's method of execution is unconstitutional. (Peraita's brief, pp. 89-90.) This argument is without merit. This Court has held on numerous occasions that Alabama's method of execution " 'does not violate the Eighth Amendment to the United States Constitution.' " Callen v. State, 284 So. 3d 177, 240 (Ala. Crim. App. 2017) (quoting Thompson v. State, 153 So. 3d 84, 180 (Ala. Crim. App. 2012)). Thus, Peraita's claim is meritless, and the circuit court did not err when it summarily dismissed it.

IV.B.9.

Peraita argues that the circuit court erred when it summarily dismissed his claim that the State had "withheld exculpatory or impeachment evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963)." (Peraita's brief, p. 91.) Peraita's Brady claim, however, was insufficiently pleaded and, thus, properly summarily dismissed.

In his second amended petition, Peraita pleaded general statements of law concerning Brady claims and alleged that,

> "[u]pon information and belief, a number of the State's inmate witnesses were transferred to other facilities, in exchange for their testifying at trial. The State failed to turn over evidence relating to the agreements that led to these transfers."

(C. 668 (emphasis added).)

To sufficiently plead a Brady claim brought under Rule 32.1(a), Ala. R. Crim. P., the Rule 32 petition itself must set out a full factual basis, which, "if true, entitle[s] a petitioner to relief. After facts are pleaded, which, if true, entitle the petitioner to relief, the petitioner is then entitled to an opportunity, as provided in Rule 32.9, Ala. R. Crim. P., to present evidence proving those alleged facts." Boyd, 913 So. 2d at 1125. So, under

Rule 32.3 and Rule 32.6(b), Ala. R. Crim. P., Peraita had to plead sufficient facts to show that a Brady violation occurred.

To establish a Brady violation, and thus sufficiently plead a Brady claim in a Rule 32 petition,

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

Bryant v. State, 181 So. 3d 1087, 1122 (Ala. Crim. App. 2011) (quoting Freeman v. State, 722 So. 2d 806, 810 (Ala. Crim. App. 1998)). Peraita's petition failed to set out a full factual basis of a Brady violation.

In his amended petition, Peraita did not allege that the State actually withheld or suppressed any evidence. Rather, Peraita's allegation about the State withholding Brady material was qualified by

the phrase "upon information and belief." (See C. 668.) In other words, Peraita's allegation was that he believed that the State had withheld certain material -- not that it did in fact do so. See Brooks, ___ So. 3d at ___ (recognizing that a Brady claim that is based "upon information and belief" that the State withheld Brady material is not an allegation that the State actually withheld any Brady material; thus, the Brady claim was insufficiently pleaded). Peraita's allegation that "upon information and belief" the State withheld evidence is nothing more than a speculative assertion that a Brady violation occurred. "Speculation is not sufficient to satisfy a Rule 32 petitioner's burden of pleading." Mashburn, 148 So. 3d at 1125. Consequently, the circuit court did not err when it summarily dismissed this claim.

V.

Peraita further argues that the circuit court erred when it denied his claims that his counsel were ineffective for failing to present self-defense evidence during the guilt phase of his trial. Specifically, Peraita alleges that his trial counsel were ineffective for failing to present testimony from two inmates at Holman Prison -- inmates Campbell and King -- and for

failing to present "medical evidence indicating that Peraita did not stab Mr. Lewis." (Peraita's brief, pp. 92-99.) Neither argument entitles Peraita to relief.

V.A.

First, Peraita argues that the circuit court erred when it denied his claim that his counsel were ineffective for failing "to call any defense eyewitnesses to refute the State's evidence." (Peraita's brief, p. 92.) According to Peraita, "Eddie John Campbell's and Jack King's eyewitness testimony (presented at the Rule 32 evidentiary hearing) was contrary to the most inflammatory evidence presented by the State at trial to support its theory that Peraita was an active participant in a premeditated murder." (Peraita's brief, p. 92.) The circuit court did not err when it denied this claim.

Concerning inmate Campbell, Peraita alleged in his second amended petition that his trial counsel were ineffective when they failed to call Campbell to testify in Peraita's defense. According to Peraita, Campbell had told investigators that Castillo stabbed Lewis, that Castillo had "pre-planned and orchestrated the killing," and that Peraita "swung the knife

[at Lewis] but he was not sure it connected." Peraita further asserted that Castillo "tried to give Mr. Peraita the knife after he finished stabbing Mr. Lewis and then he literally shoved it in Mr. Peraita's hand and closed Mr. Peraita's fist over it" and that Castillo "told Mr. Peraita not to give the knife to anybody." (C. 609.)

At the evidentiary hearing, Campbell testified that, when the incident between Castillo, Peraita, and Lewis first started, he was on his bed and heard his "home boy -- I heard him call, 'Don't let them do him like that.'" (R. 354.) Campbell said he then went to the "middle wall" in the dorm and saw that Peraita had "Lewis around the neck and Mr. Castillo had a knife in his hand trying to cut his throat." (R. 355.) Campbell testified that, when Peraita let Lewis go, Castillo gave Peraita the knife "and told [Peraita] don't give it to nobody." (R. 355-56.) Campbell said that Peraita looked "dumbfounded," like he "really don't even know what the hell going on." (R. 356.) Campbell said that Peraita then "walked up the floor behind Mr. Lewis and he swung the knife." (R. 357.) Campbell clarified, however, that he did not know whether Peraita struck Lewis with the knife. (R. 357.) Campbell said that, while Lewis

was on the ground and people were trying to move Lewis, Castillo "ran toward [them] with the knife," which caused them to drop Lewis, and that Peraita was with Castillo. (R. 361-62.) Campbell claimed that Peraita did not say anything. (R. 362.) Campbell said that he gave a statement of what he saw to investigators and that he was brought to the court for Peraita's trial, but he was not called to testify. (R. 363-64.) Campbell claimed that he did not speak with any attorneys while he was at the courthouse, but, he said, he did speak with people about what happened the night Lewis was stabbed while he was at the courthouse. (R. 364.)

One of Peraita's trial counsel, Stearns, testified at the evidentiary hearing that a writ of habeas ad testificandum was issued to bring Campbell to court for Peraita's trial. (R. 434.) Stearns said that, although he could not recall whether Campbell testified at Peraita's trial,

> "if [Campbell] didn't testify it was because he was up here and he told us he didn't want to testify and we were not putting on a state inmate who did not want to testify because we didn't know what he would say. So what he would have said I do not know. I know we have notes of what he told us at Holman but I cannot tell you what would have come out of his mouth on this witness stand."

(R. 436.) Stearns explained that he did not have any specific recollection about making a decision not to call Campbell to testify, but he did recall that there were "at least one or two [inmate witnesses] up here that when they were back in the witness room they told us they did not want to testify and we didn't call them." (R. 437.) Stearns stressed that every inmate who was brought to the courthouse was going to be called as a witness in Peraita's trial "unless they told us they weren't going to testify." (R. 437-38.) Stearns concluded: "So my best recollection would be [Campbell] was one of the ones that told us he didn't want to testify when he got up here but specifically as far as names, you know, I can't recall if he was specifically one of them." (R. 438.)

Hartley, Peraita's other trial counsel, testified that, although he did not have a recollection of Campbell, there was one particular inmate that was brought in to testify nicknamed "Cheese Curl or Cheese Fry" who "was crawfishing, back tracking and changing his story," so they did not call him as a witness. (R. 527.)

Concerning inmate King, Peraita alleged in his second amended petition that his trial counsel had a copy of King's "inmate statement" but

"never interviewed Mr. King," that King "saw Mr. Castillo stabbing Mr. Lewis and that Mr. Lewis was laying on top of Mr. Peraita on the bed," and that King said Castillo "stabbed Mr. Lewis a final time in front of the officers, and not Mr. Peraita." (C. 612.)

At the evidentiary hearing, King testified that, on the night Lewis was stabbed, King was on his bed and heard "[a] commotion." (R. 372.) King said that he "sat up" and he saw Castillo, Peraita, and Lewis. (R. 373.) King explained that Castillo was confronting Lewis and that Peraita was behind Lewis. (R. 374.) King said that, "at that time, [he] heard a bed shove and next thing you know Peraita done grabbed [Lewis] by the throat and he fell on the bed." (R. 374.) King then saw Castillo start stabbing Lewis with a knife. (R. 374.) King said that Castillo stabbed Lewis "three or four times" -- the "[t]hird one from the back" -- and then Peraita "turned [Lewis] loose and blood shot out of his neck." (R. 375.) King said that, when Peraita let go of Lewis, Peraita looked "[s]urprised, shocked." (R. 376.) According to King, Castillo yelled that he was not going to give up the knife until he and Peraita "get where [they are] going." (R. 376.) King further explained that, while Castillo, Peraita, and

Lewis were "walking the floor," people were saying that they were "still sticking that boy." (R. 377.) King said that, as they were walking out of the dorm, Castillo was stabbing Lewis in the back. (R. 382.) When Officer Burroughs came into the dorm, Castillo was still stabbing Lewis and Burroughs did not intervene. (R. 378.) King said that, during the altercation, he never saw Peraita with a knife. (R. 379.)

At the evidentiary hearing, Stearns said that, according to King's statement to prison investigators concerning Lewis's murder, "it didn't appear that [King] saw the entire event. When he first saw it he saw, according to what he said, Mr. Castillo standing over Mr. Lewis. So it didn't appear he saw anything."[14] (R. 443.) Additionally, Stearns said that King's statement to prison investigators does not say that he never saw Peraita with a knife. (R. 443.) Rather, King's statement says that Castillo gave Peraita the knife and "told him not to give up the knife until he got up there," which, Stearns said, "didn't really help Mr. Peraita. They put a knife in his hand." (R. 443.)

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[14]King's statement was admitted during the evidentiary hearing as Petitioner's Exhibit 7. (R. 438.)

In denying this claim, the circuit court concluded that Peraita had failed to prove that his counsel performed deficiently with respect to Campbell and King. (C. 1273.) We agree with the circuit court. As we have explained:

> "'"[I]n the context of an ineffective assistance claim, 'a decision regarding what witnesses to call is a matter of trial strategy which an appellate court will not second-guess.'" Curtis v. State, 905 N.E.2d 410, 415 (Ind. Ct. App. 2009). "[T]he decision of which witnesses to call is quintessentially a matter of strategy for the trial attorney." Boyle v. McKune, 544 F. 3d 1132, 1139 (10th Cir. 2008). "Whether to call a particular witness is a tactical decision and, thus, a 'matter of discretion' for trial counsel." United States v. Miller, 643 F. 2d 713, 714 (10th Cir. 1981).'
>
> "Johnson v. State, [Ms. CR-05-1805, June 14, 2013] ___ So. 3d ____, ____ (Ala. Crim. App. 2007) (opinion on return to remand), judgment vacated on other grounds, Johnson v. Alabama, 582 U.S. ____, 137 S. Ct. 2292, 198 L. Ed. 2d 720 (2017)."

Stanley v. State, [Ms. CR-18-0397, May 29, 2020] ___ So. 3d ___, ___ (Ala. Crim. App. 2020).

Here, Peraita's counsel intended on calling Campbell to testify in Peraita's defense, but they ultimately chose not to call Campbell to testify

because he, along with another inmate, expressed reluctance about testifying at Peraita's trial. Additionally, although Peraita's counsel did not intend on calling King to testify at trial, that decision was based on counsels' reading of King's statement to prison investigators in which King said that Peraita possessed the knife used to stab Lewis. Moreover, both Campbell and King provided testimony at the evidentiary hearing that would have been harmful to Peraita's defense. Specifically, Campbell testified that Peraita "walked up the floor behind Mr. Lewis and he swung the knife" at him (R. 357), and King testified that Castillo was stabbing Lewis in the back (R. 382), which contradicted counsels' theory that Lewis was not stabbed in the back.

Based on the evidence presented at the hearing, Peraita failed to prove that his counsel acted deficiently when they made the decision not to call Campbell or King to testify at Peraita's trial. Accordingly, the circuit court properly denied this claim.

V.B.

Finally, Peraita argues that the circuit court erred when it denied his claim that his counsel were ineffective when they "failed to present

medical evidence indicating that Peraita did not stab Mr. Lewis." (Peraita's brief, p. 96.)

In his second amended petition, Peraita alleged that his counsel were ineffective when they "failed to present evidence to rebut the State's assertion that [he] stabbed Mr. Lewis." (C. 616.) According to Peraita, there were several documents his counsel could have introduced to show that Peraita did not stab Lewis in the back or side, including the autopsy report and "accompanying drawing prepared by the Alabama Department of Forensic [Sciences]," a "drawing prepared by nursing staff attending to Mr. Lewis at Atmore Community Hospital," a "triage sheet," an "emergency physician record," and Dr. McIntyre's progress notes. (C. 618-19.)

At the Rule 32 evidentiary hearing, Peraita questioned Stearns about medical records that showed that Lewis did not have stab wounds on his back. Stearns explained that, in discovery, he received Lewis's medical records from the emergency room of Atmore Community Hospital and an autopsy report concerning Lewis's cause of death. (R. 447-48.) Stearns testified that he recalled that there was a statement from an

inmate that indicated that Peraita had stabbed Lewis in the back. (R. 448.) Stearns also testified that, during his cross-examination of Dr. McIntyre at Peraita's trial, he showed Dr. McIntyre a drawing of Lewis's body that indicated the location of Lewis's stab wounds. According to Stearns, Dr. McIntyre admitted that there were no stab wounds on Lewis's back, and Stearns attempted to admit the drawing into evidence. (R. 451, 453.) Stearns explained, however, that the State objected to the admission of the drawing. (R. 452.)

Stearns further explained that, although he wanted the drawing admitted because it shows that Lewis did not have a stab wound on his back, he did not try to get it admitted as a "business record" because "when [he] asked [Dr. McIntyre] about [the lack of stab wound in the back] and asked him about the diagram he said there was one wound missing on there" and, thus, Dr. McIntyre "was not qualifying it at that point." (R. 452.) Stearns admitted that at least one other medical record indicated

that Lewis did not have a stab wound on his back (R. 453),[15] but he explained that he did not present any other medical records

> "[b]ecause Dr. McIntyre testified on direct examination to what we needed him to say that there was no stab wounds in the back. And at [902] he -- page [902 of the trial transcript] he concerned me when he said there was a missing wound. So I got what I needed out of him and got out of there."

(R. 455-56.)

In denying this claim, the circuit court found as follows:

> "Peraita contended that trial counsel were ineffective for failing to have admitted into evidence a drawing prepared by nurses at Atmore Community Hospital, indicating that [Lewis] was not stabbed in the back. The nurses' drawing was identified at Peraita's trial as Defendant Exhibit 2. An enlargement of the nurses' drawing was identified as Defendant Exhibit 2-A. The enlargement of the nurses' drawing was displayed in front of the jury during Mr. Stearns'[s] cross-examination of Dr. McIntyre.

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[15]Stearns noted that one of the medical records Peraita says he should have used to prove that Lewis was not stabbed in the back states that Lewis had stab wounds "to the neck and trunk but it doesn't say what part of the trunk, whether it's front or back." (R. 454.) Stearns also explained that, although Peraita alleged that he should have used Dr. McIntyre's progress notes to prove that Lewis was not stabbed in the back, the drawing included with Dr. McIntyre's progress notes "doesn't designate ... the front of the trunk." (R. 455.)

> "... Mr. Stearns initially attempted to have the drawing admitted into evidence, but later reconsidered.
>
> "....
>
> "Mr. Stearns elicited the information from Dr. McIntyre that he believed was helpful to Peraita's defense. Moreover, during the cross-examination of the State medical examiner, Dr. Leroy Riddick, Mr. Stearns elicited additional testimony indicating that there were no fresh wounds on [Lewis's] back.
>
> "The record proves that members of the jury saw the nurses' drawing even though it was not ultimately admitted into evidence. Further, the information recorded on the nurses' drawing, that no stab wounds were on [Lewis's] back, would clearly have been cumulative to the testimony of Dr. McIntyre as well as Dr. Riddick. As such, this Court finds that Mr. Stearns'[s] performance on this matter was not deficient nor prejudicial."

(C. 1269-71 (footnotes omitted).) We agree with the circuit court.

Indeed, not only did the jury at Peraita's trial see the exhibit that Peraita claims his trial counsel should have admitted at his trial (see Record in Peraita, case no. CR-01-0289, R. 902), but it also heard evidence indicating that Lewis did not have a stab wound in his back through both Dr. McIntyre's testimony (see Record in Peraita, case no. CR-01-0289, R. 902-04) and Dr. Riddick's testimony (see Record in Peraita, case no. CR-01-0289, R. 918-19). Although the medical records Peraita says his

counsel should have presented also show that Lewis did not have a stab wound in his back, counsel is not ineffective for failing to present cumulative evidence. See Stallworth, 171 So. 3d at 71-72 (recognizing that counsel is not ineffective for failing to present testimony from a witness when that testimony would have been cumulative to other evidence presented at trial). Thus, the circuit court did not err when it denied this claim.

Conclusion

Based on these reasons, the judgment of the circuit court is affirmed.

AFFIRMED.

Windom, P.J., and McCool and Minor, JJ., concur. Kellum, J., concurs in the result.