REL: February 11, 2022

Alabama Court of Criminal Appeals

OCTOBER TERM, 2021-2022

CR-18-0739

State of Alabama

v.

Brandon Deon Mitchell

Brandon Deon Mitchell

v.

State of Alabama

Appeal from Jefferson Circuit Court
(CC-06-1059.60)

On Application for Rehearing

MINOR, Judge.

This Court withdraws its opinion of August 6, 2021, and substitutes the following in its place.

Brandon Deon Mitchell filed a postconviction petition under Rule 32, Ala. R. Crim. P., challenging his four capital-murder convictions and his resulting death sentence. The Jefferson Circuit Court denied all Mitchell's claims but one—that his counsel had been ineffective at the sentencing hearing before the trial court when that court overrode the jury's recommendation, by a 10-2 vote, that the trial court sentence him to life in prison without the possibility of parole. As to that claim, the circuit court granted Mitchell relief, ordering that he receive a new sentencing hearing.

The State appeals that part of the circuit court's judgment ordering a new sentencing hearing for Mitchell, and Mitchell cross-appeals that part of the judgment denying him relief. For the reasons below, we reverse that part of the judgment granting Mitchell a new sentencing hearing, we affirm the rest of the judgment, and we remand this matter to the circuit

court to reinstate Mitchell's death sentence.

Facts and Procedural History

On direct appeal, this Court summarized the relevant facts from Mitchell's trial:

> "At trial, the State presented evidence indicating that on November 24, 2005, Thanksgiving Day, Mitchell went to Jonathan Floyd's apartment where Roderick Byrd and his sister, Hellena, were staying. Mitchell entered the apartment to discuss his plan to rob the Airport Inn in Birmingham (hereinafter 'the Inn') with Byrd. After Byrd agreed to help with the robbery, Mitchell asked Floyd to take them to the Inn. Floyd drove Mitchell and Byrd to the Inn around 2:50 p.m. When Floyd let them out of the car, Mitchell was wearing a white sweatshirt and jeans and Byrd was dressed in all black. After letting Mitchell and Byrd out of the car, Floyd left to visit his 'god-sister.'
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> "Mitchell and Byrd entered the Inn where they encountered Kim Olney, the desk clerk, and John Aylesworth, a truck driver who was waiting in the lobby for a ride to Texas where he lived. Both Mitchell and Byrd were armed with pistols. Mitchell immediately focused his attention on Olney, who was behind the front desk, while Byrd used his gun to subdue Aylesworth, a former Marine. At some point during the robbery, Dorothy Smith, who was traveling back to New York after visiting her son in Alabama for Thanksgiving, entered the hotel lobby and was also held at gunpoint. During the robbery, Mitchell took money from a cash drawer and unsuccessfully attempted to open a safe located behind the front desk. Mitchell and Byrd also took various items from the three victims, including duffel bags, clothing, and money,

before shooting each of them behind the ear at close range with .38-caliber pistols.

"A video from the lobby security camera shows Mitchell shooting Olney twice, once in the arm and once in the head. Forensic testing of the projectiles recovered from the scene and from the victims' bodies established that Olney and Smith were shot with the same .38-caliber pistol and that Aylesworth was shot with a different .38-caliber pistol. The Jefferson County Medical Examiner testified that all three victims died as a result of a gunshot wound to the head.

"After the robbery, Mitchell and Byrd fled the scene on foot. They traveled around the Inn and jumped over a fence located behind the Inn, which separated the Inn from a neighborhood. Clifford James and James Jackson, who were sitting on the back porch of one of the houses behind the Inn, saw Mitchell and Byrd, who were carrying several bags, climb the fence and walk off in different directions. James and Jackson were not able to positively identify the individuals they saw climbing the fence, but they testified that one of the men was wearing all black and was carrying a book bag and the other man had lighter skin and was wearing light-colored clothing.

"After Mitchell and Byrd separated, Mitchell telephoned Floyd and asked Floyd to pick him up on First Avenue. Floyd met Mitchell on First Avenue and took Mitchell to Mitchell's 'god-sister's' house, which was three blocks from Floyd's apartment. During the ride, Mitchell, who was carrying a blue tote bag, told Floyd that he had 'just hit a lick.' After dropping Mitchell off, Floyd went back to look for Byrd. Floyd later returned to his apartment where he found Byrd and Mitchell. Byrd appeared nervous and was shaking and crying. At some point, Mitchell removed his clothing and placed the clothing in

> the dumpster behind Floyd's apartment. Mitchell later told Floyd that he had killed three people by shooting them behind the ear.
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> "Later that evening, Mitchell contacted his friend Warika Gunn and asked her for a ride to the bus station in Huntsville. Gunn, who had seen Mitchell's photograph on the news in connection with the shootings at the Inn, telephoned 'Crimestoppers,' an anonymous tip hotline. Mitchell later admitted that he was wanted by the police in connection with a robbery. While in contact with the authorities, Gunn agreed to meet Mitchell in Fairfield at 10:00 p.m. However, Mitchell was subsequently arrested before he could meet Gunn at the arranged location.
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> "At trial, Robert B[r]axton, a friend of Mitchell's, and James Floyd III, Jonathan Floyd's nephew, testified that they had recognized Mitchell's photograph on a news report and that Mitchell had told them that he had been involved in the hotel shootings."

Mitchell v. State, 84 So. 3d 968, 977-78 (Ala. Crim. App. 2010).

The jury convicted Mitchell of four counts of capital murder—one count for murdering each of the victims during a robbery, see § 13A-5-40(a)(2), Ala. Code 1975, and one count for murdering three persons by one act or pursuant to one scheme or course of conduct, see § 13A-5-40(a)(10), Ala. Code 1975. By a 10-2 vote, the jury recommended that the circuit court sentence Mitchell to life in prison without the possibility of

parole. The trial court, however, overrode the jury's recommendation and sentenced Mitchell to death.

The trial court found that five aggravating circumstances existed:

> (1) Mitchell committed the offense while he under a sentence of imprisonment—he was on probation for second-degree kidnapping, first-degree robbery, and discharging a firearm into an occupied vehicle.
>
> (2) Mitchell had a prior felony conviction involving the use or threat of violence.
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> (3) Mitchell committed the capital offense during the commission of a robbery.
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> (4) Mitchell killed two or more persons in one act or course of conduct.
>
> (5) The capital offense was especially heinous, atrocious, or cruel when compared to other capital offenses.

(Trial C. 23-24.[1]) The trial court found that no statutory mitigating circumstances existed. The court noted Mitchell's heavy involvement in the murders and his "extensive history with the criminal justice system"

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

including his prior convictions for unlawful breaking and entering of a vehicle, second-degree kidnapping, first-degree robbery, and shooting into an occupied vehicle. (Trial C. 24.)

The trial court found these nonstatutory mitigating circumstances to exist:

> (1) Mitchell was taken from his mother at a young age and lived in multiple foster homes.
>
> (2) While he lived with his grandmother, Mitchell was "whipped all the time" and "hit with extension chords and/or pans, tied to chairs, and beat for hours. ... Mitchell had a sad and abused childhood."
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> (3) Mitchell had a good environment with a foster parent, Betty Dickerson, but children bothered him at school because he was a foster child. Mitchell's school issues led to him being removed from Dickerson's home.
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> (4) The jury voted 10-2 for life without the possibility of parole, which the trial court weighed "very heavily."

(Trial C. 24-26.) The trial court stated, however, that,

> "[a]lthough the jury's recommendation weighs heavily in favor of [Mitchell], the court is strongly of the opinion that 10 jurors incorrectly determined that the mitigating factors outweighed the aggravating factors. Even with the jury's recommendation included as an additional mitigating circumstance, the court is of the opinion that the aggravating circumstances still outweigh the mitigating circumstances. The court is of the

> opinion that the State resting during the penalty phase without presenting any aggravating circumstances, but being allowed to reopen their case, may have made the jurors de-emphasize the weight that should have been attributed to evidence presented in support of the aggravating circumstances. Even if this did not [a]ffect the jury's deliberations, the court feels strongly that the aggravating circumstances outweigh the mitigating circumstances."

(Trial C. 26.)

This Court affirmed Mitchell's convictions and death sentence. Mitchell, supra. The Alabama Supreme Court granted certiorari review but then quashed the writ in 2011. Ex parte Mitchell, 84 So. 3d 1013 (Ala. 2011). The United States Supreme Court denied Mitchell's petition for a writ of certiorari in 2012. Mitchell v. Alabama, 568 U.S. 829 (2012).

In November 2012, the Equal Justice Initiative filed a "placeholder" Rule 32 petition for Mitchell. (C. 169-204.) His current counsel took over the case in May 2013 and, over the next three years, filed five amended Rule 32 petitions, plus an amendment to the fifth amended petition. (C. 334, 564, 742, 1021, 1260, 1579.) As amended, Mitchell's petition included these claims: (1) that the State violated Brady v. Maryland, 373 U.S. 83 (1963); (2) that there was juror misconduct; (3) that his counsel was

ineffective at both the guilt and penalty phases of his trial; (4) that his counsel was ineffective at the sentencing hearing; (5) that Alabama's former provision allowing a circuit court to override a jury's sentencing recommendation is unconstitutional; (6) that lethal injection is unconstitutional; and (7) that Act No. 2017-131, Ala. Acts 2017, abolishing judicial override is retroactive. In its answer, the State moved to dismiss the claims on several grounds, including that the claims were insufficiently pleaded under Rules 32.3 and 32.6(b), that they were precluded under Rule 32.2(a)(3) and (a)(5), and that they lacked merit under Rule 32.7(d), Ala. R. Crim. P. (C. 1483, 1585.)

The circuit court held an evidentiary hearing in May 2017. Mitchell offered hundreds of pages of records as well as affidavits from several witnesses and the transcript of a deposition of John Wuska, who had been Mitchell's juvenile probation officer. He called his trial counsel, Michael Shores and Ron Thrasher,[2] to testify as well as Dawn Jenkins, a

[2]Evidence at the Rule 32 hearing showed that Shores and Thrasher also represented Mitchell in another murder case ("the Brazzle case") that happened not long after the murders on which Mitchell's death sentence was based. Mitchell pleaded guilty in the Brazzle case. (R. 155-57, 163,

mitigation expert. In rebuttal, the State called Charlotte Ford Wilson, a former neighbor of Mitchell's, and Mitch Rector, who had testified as a firearm and toolmark expert at Mitchell's trial.[3]

After the hearing, the parties filed briefs. In a written order, the circuit court denied all claims except Mitchell's claim that his counsel had been ineffective during the sentencing hearing. The State timely appealed, and Mitchell timely cross-appealed.

Standard of Review

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

410.) Testing showed that a bullet recovered from Brazzle matched the firearm used to kill Aylesworth. (R. 410-11.)

[3]Rector also performed the analysis in the Brazzle case.

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

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

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

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

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

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

Discussion

We first address Mitchell's arguments in his cross-appeal that the circuit court erred in denying his claims for relief.[4]

[4]The claims not addressed in Mitchell's cross-appeal are deemed abandoned. Jones v. State, 104 So. 3d 296, 297 (Ala. Crim. App. 2012) ("Other claims raised in [the] petition were not pursued on appeal and,

I.

In Part III of his brief, Mitchell argues that "[t]he Rule 32 court erred by failing to consider trial counsel's ineffective assistance at the guilt phase." (Mitchell's brief, p. 52.)

> " '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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therefore, those claims are deemed abandoned. See, e.g., Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995) ('We will not review issues not listed and argued in brief.').").

> 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, [466 U.S. at 693,] 104 S. Ct. at 2067. Different lawyers have different gifts; this fact, as well as differing circumstances from case to case, means the range of what might be a reasonable approach at trial must be broad. To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the

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

On appeal, Mitchell argues that the circuit court did not specifically

address 28 allegations of ineffective assistance of counsel during the guilt phase of his trial:

(1) "[T]rial counsel did not spend enough time with [Mitchell] to render effective assistance" (C. 1682-83);

(2) Trial counsel did not hire "a forensics or ballistics expert despite requesting funds from the trial court to do so" (C. 1683-84);

(3) Trial counsel did not "obtain and review all relevant discovery before trial" (C. 1684-86);

(4) Trial counsel did not "investigate crucial phone records" (C. 1686-87);

(5) "[T]rial counsel missed the chance to investigate the contents of Hellena Byrd's seized cell phones" (C. 1687-88);

(6) Trial counsel did not "properly object to a lack of foundation for the admission of the time-lapse video" (C.1672-74);

(7) Trial counsel did not "move to transfer venue" (C.1688-89);

(8) Trial counsel did not "investigate a police payment to a key witness" (C.1689-90);

(9) Trial counsel did not "object to the State's improper use of victim-impact evidence" (C.1690-93);

(10) Trial counsel did not "challenge witnesses' identification of [Mitchell] based on enhanced still images" (C.1693-94);

(11) Trial counsel did not "object on proper grounds to the

admission of a prison phone recording" (C.1694-95);

(12) Trial counsel did not "object to the admission of irrelevant mannequin heads into evidence" (C.1695-96);

(13) Trial counsel did not "object to the relevance of an allegedly bloody shirt, which the State did not connect to the hotel robbery or to [Mitchell]" (C.1696-97);

(14) Trial counsel did not "object to testimony regarding weapons the State did not connect to the hotel robbery or to [Mitchell]" (C.1697-98);

(15) "[T]rial counsel did not adequately investigate and challenge the testimony of co-defendant Jonathan Floyd" (C.1698-99);

(16) "[T]rial counsel did not adequately investigate or confront James Floyd[, the nephew of Jonathan Floyd,] regarding his bias against [Mitchell]" (C.1699);

(17) "[T]rial counsel did not adequately confront Jonathan Floyd regarding his inconsistent testimony about [Mitchell's] location ..." (C.1699-1700);

(18) "[T]rial counsel did not adequately confront Robert Braxton with his prior inconsistent statement" (C.1700);

(19) "[T]rial counsel did not adequately confront Lasundra Mosley with her prior inconsistent statement" (C.1700-01);

(20) "[T]rial counsel did not adequately investigate and prepare [Mitchell's] only witness" (C.1701-03);

(21) "[T]rial counsel erred by insufficiently objecting to testimony by State witnesses regarding [Mitchell's] mental operation"

(C.1703-04);

(22) Trial counsel did not "object to improperly authenticated identification testimony from lay witnesses" (C.1705-06);

(23) Trial counsel did not "object to improper comments by the State on [Mitchell's] failure to testify" (C.1706-10);

(24) Trial counsel did not "object to prosecutorial misconduct during closing argument when the State urged the jury to imagine themselves in the victim's place and encouraged the jury to exact community vengeance" (C.1710-11);

(25) Trial counsel did not "object to prosecutorial misconduct when the State improperly invoked religion in its opening and closing statements" (C.1711-12);

(26) "[T]rial counsel's questioning during voir dire was ineffective" (C.1717);

(27) Trial counsel did not "adequately defend [Mitchell] during the guilt-phase jury instructions" (C.1712-14); and

(28) "[T]rial counsel's performance during the guilt phase of trial was cumulatively deficient" (C.1715-16).

(Mitchell's brief, pp. 52-55.)

In its order, the Rule 32 court found that Mitchell's "petition and the evidence in support thereof focus primarily on [Mitchell's] claim that he was denied effective assistance of counsel during the penalty and sentencing phases of his trial." (C. 126.) In denying Mitchell's

ineffectiveness claims related to the guilt phase of his trial, the Rule 32 court stated:

> "[Mitchell] further claims that trial counsel was ineffective for failing to [make] certain objections. These claims are denied because [Mitchell] failed to demonstrate either deficient performance or prejudice as required by Strickland. ... All other claims raised by [Mitchell] that are not addressed with specificity are denied or dismissed."

(C. 156.)

Mitchell offers only one sentence of argument about these claims: "For the reasons stated in [Mitchell's] post-Rule 32-hearing briefing, which he incorporates fully herein, [summary denial of those claims] was error." (Mitchell's brief, p. 55.) As the State argues, this "laundry-list approach"—and trying to incorporate arguments by reference—does not comply with Rule 28(a)(10), Ala. R. App. P., which requires an argument to include "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." See, e.g., Lewis v. State, [Ms. CR-14-1523, May 29, 2020] ___ So. 3d ___, ___ (Ala. Crim. App. 2018) (plurality opinion on return to remand) ("Lewis

summarily lists several items he sought to discover but did not get. But other than trying to incorporate by reference pleadings he filed in the circuit court, he makes no specific argument about how the circuit court erred. This does not comply with Rule 28(a)(10), Ala. R. App. P."); George v. State, [Ms. CR-15-0257, Jan. 11, 2019] ___ So. 3d ___, ___ (Ala. Crim. App. 2019) ("George's list of examples of claims that were improperly subdivided by the State and of claims dismissed that incorporated facts and arguments incorporated elsewhere in the Rule 32 petition with no specific discussion of the facts or law in the form of an argument regarding those claims and with only citation to general legal authority that is irrelevant is not sufficient to comply with Rule 28(a)(10). Therefore, those claims are deemed to be waived."); Taylor v. State, 157 So. 3d 131, 142 (Ala. Crim. App. 2010) ("Making a nonspecific reference to 'extensive legal arguments' in the Rule 32 petition does not comply with Rule 28(a)(10). Likewise, in many of the arguments in Parts III.C. and III.D. of his brief, Taylor makes only general allegations and refers only to paragraphs of the petition without presenting any substantive legal or factual argument at all in an attempt to demonstrate that the circuit court erred when it

dismissed those claims.").

In his reply brief, Mitchell argues that his incorporation-by-reference approach was "reasonabl[e]." (Mitchell's reply, p. 29.) But the above decisions show that such an approach does not comply with Rule 28(a)(10), Ala. R. App. P. Mitchell's attempt to distinguish those decisions is unavailing.

We are aware of the requirement in Rule 32.9(d), Ala. R. Crim. P., that a circuit court, after giving a petitioner a chance to prove his or her claims, "make specific findings of fact relating to each material issue of fact presented." And "[t]his Court has consistently remanded cases when no findings of fact are made by the circuit court following an evidentiary hearing on a postconviction petition." Lewis, ___ So. 3d at ___ (emphasis added) (agreeing with Lewis's and the State's arguments that the Rule 32 court's order did not comply with Rule 32.9(d)). Here, however, the circuit court made findings of fact, and it issued a written order of almost 40 pages that summarized the evidence offered at the evidentiary hearing and made findings on the claims for which Mitchell offered evidence at that hearing.

Mitchell does not argue that the circuit court violated Rule 32.9(d), Ala. R. Crim. P., nor does he rely on any case in which this Court has remanded a matter for findings of fact under Rule 32.9(d).[5] In his reply, Mitchell cites Wilson v. State, 911 So. 2d 40, 47 (Ala. Crim. App. 2005), for the proposition that he was "entitled to a thorough review of all of his properly pleaded claims ... and ... an opportunity to prove the allegations of those claims that are not due to be summarily dismissed." That decision, however, does not support Mitchell's position. The Rule 32 court gave Mitchell a chance to prove his guilt-phase claims. And, as noted, the court found that Mitchell, at the hearing on those claims, chose to "focus[] primarily on [his] claim that he was denied effective assistance of counsel during the penalty and sentencing phases of his trial." (C. 126.) The record supports the circuit court's finding in that regard.

Mitchell has not shown that he is due relief on his allegations of guilt-phase ineffective assistance of counsel.

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[5]After the circuit court denied his claims, Mitchell did not file a postjudgment motion challenging the findings of the circuit court for a lack of specificity under Rule 32.9(d), Ala. R. Crim. P.

II.

In Part V of his brief, Mitchell argues that the circuit court erred in denying relief on these claims:

> "(a) the State's use of inconsistent theories was unconstitutional under the due process clause of the United States Constitution (C.1675-76); (b) the sentencing order fails to show it was guided by a standard sufficient to ensure consistent imposition of the death penalty (C.1718-19);[6] (c) execution by lethal injection as applied by the State of Alabama results in the infliction of cruel and unusual punishment (C.1719-22);[7] and (d) two jurors committed juror misconduct by introducing incorrect evidence of [Mitchell's] parole eligibility during jury discussions in the penalty phase (C.1716).[8]
>
> "And the Rule 32 court made only passing reference to the following additional grounds for relief: (a) the State engaged in prosecutorial misconduct by knowingly utilizing false testimony by co-defendant Jonathan Floyd (C.1676-77); (b) the State withheld exculpatory evidence in violation of

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[6]This Court on direct appeal held that this claim lacked merit. Mitchell, 84 So. 3d at 991-92. The Alabama Supreme Court also rejected the claim. Ex parte Mitchell, 84 So. 3d at 1014-15.

[7]The Alabama Supreme Court and this Court have rejected this argument. See, e.g., Ex parte Belisle, 11 So. 3d 323 (Ala. 2008); Saunders v. State, 10 So. 3d 53 (Ala. Crim. App. 2007).

[8]The only evidence Mitchell tried to offer in support of this claim was an affidavit from juror S.P. The circuit court, however, did not admit that affidavit (R. 403), and Mitchell does not challenge that ruling.

> Brady v. Maryland, denying [Mitchell] his rights to due process and a fair trial (C.1677-80).[9]
>
> > "As set forth more fully in [Mitchell's] Rule 32 post-hearing brief, which [Mitchell] expressly incorporates by reference here, each of these grounds also entitle [Mitchell] to a new trial and/or sentencing hearing. The Rule 32 court erred by failing to grant relief on any of these additional grounds."

(Mitchell's brief, pp. 73-74.)

Like the arguments he made in Part III of his brief, these arguments do not comply with Rule 28(a)(10), Ala. R. App. P. See, e.g., Lewis, supra; George, supra; Taylor, supra. Thus, Mitchell has waived these claims, and he is due no relief.

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[9]The circuit court found:

> "[Mitchell's] claims of due process violation [are] procedurally barred from review as [they] could have been raised at trial and/or on appeal. Rule 32.2(a)(3), Ala. R. Crim. P.; Rule 32.2(a)(5), Ala. R. Crim. P. [Mitchell's] claims of prosecutorial misconduct are denied because these claims could have been raised at trial and/or on appeal. ... [Mitchell's] claim that the State withheld exculpatory evidence in violation of Brady v. Maryland is dismissed because [Mitchell] failed to establish that the alleged Brady violations are based on newly discovered evidence. ..."

(C. 156.)

III.

In Part II of his brief, Mitchell argues that "[t]he Rule 32 court erred in ruling that trial counsel was not constitutionally ineffective during the penalty phase." (Mitchell's brief, p. 42.) As to this claim, the circuit court found that "trial counsel did fail to investigate [Mitchell's] history of neglect and abuse. However, trial counsel did present some mitigation and did call witnesses to support this mitigating evidence. The jury deliberated immediately following the penalty phase, and returned a 10-2 verdict of life without [the possibility of] parole. The jury's 10-2 verdict ... suggests that trial counsel's performance during the penalty phase was constitutionally adequate, albeit barely. Therefore, [Mitchell's] requested relief ... is denied." (C. 138.)

First, we note:

> " 'When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.' Strickland v. Washington, 466 U.S. 668, 695, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). 'To assess that probability, [a court must] consider "the totality of the

> available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding"—and "reweig[h] it against the evidence in aggravation." ' Porter v. McCollum, 558 U.S. 30, 41, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009) (quoting Williams v. Taylor, 529 U.S. 362, 397-98, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)). '[T]he assessment should be based on an objective standard that presumes a reasonable decisionmaker,' Williams v. Allen, 542 F.3d 1326, 1345 (11th Cir. 2008), and, in an override case, necessarily includes considering whether the totality of the available mitigating evidence would have persuaded additional jurors to recommend a sentence of life imprisonment without the possibility of parole. See Ex parte Carroll, 852 So. 2d 833, 836 (Ala. 2002) ('[A] jury's recommendation of life imprisonment without the possibility of parole ... is to be treated as a mitigating circumstance. The weight to be given that mitigating circumstance should depend upon the number of jurors recommending a sentence of life imprisonment without parole, and also upon the strength of the factual basis for such a recommendation in the form of information known to the jury.'). Although a jury's recommendation of life imprisonment without the possibility of parole does not preclude a finding of prejudice under Strickland, it does weigh against such a finding. See, e.g., McMillan v. State, 258 So. 3d 1154 (Ala. Crim. App. 2017); Spencer v. State, 201 So. 3d 573, 613 (Ala. Crim. App. 2015); Jackson v. State, 133 So. 3d 420, 449 (Ala. Crim. App. 2009); Hooks v. State, 21 So. 3d 772, 791 (Ala. Crim. App. 2008); and Boyd v. State, 746 So. 2d 364, 389 (Ala. Crim. App. 1999)."

Woodward v. State, 276 So. 3d 713, 738-39 (Ala. Crim. App. 2018). See also Hooks v. State, 21 So. 3d 772, 791 (Ala. Crim. App. 2008) (" 'Appellant's contention that his trial counsel rendered ineffective

assistance of counsel during the penalty phase of the trial is repudiated by the fact that the jury recommended life in [his] case.' " (quoting Buford v. State, 492 So. 2d 355, 359 (Fla. 1986))).

Shores testified at the Rule 32 hearing that when he represented Mitchell, he had tried 12-15 capital cases. (R. 37-38.) He said that, since Mitchell's case, he had been involved in 20-25 more capital case. Shores and Thrasher were not the first attorneys to represent Mitchell. Shores said that, in Mitchell's case, he mostly "handled the guilt phase and [Thrasher] handled the mitigation portion." (R. 40.) Shores said he talked to witnesses, "went through the discovery a number of times," and talked with the attorneys representing Mitchell's codefendants. (R. 41.)

Shores said he did not hire an investigator because, based on the circumstances, he did not think one was needed. He said that at the time of Mitchell's trial it was "a judgment call as to whether or not" an investigator was necessary in a capital case. (R. 43.) He testified that later it became his practice to typically hire an investigator to help him prepare for a capital case. (R. 43.)

Shores said that the State's case against Mitchell was "exceptionally

strong" and that, of all the capital cases he had defended, Mitchell's case was "one of the very worst." (R. 80.) Shores testified that Mitchell's identity as one of the participants in the crime was not in question. (R. 78.) Video from a camera in the hotel lobby showed Mitchell trying to pull the camera off the wall. Mitchell's face was not covered, and the video showed "a complete face-full frame video." (R. 77.)

When asked why he and Thrasher presented no witnesses at the sentencing hearing before the trial judge after the jury had rendered its 10-2 recommendation for a sentence of life imprisonment without the possibility of parole, Shores testified:

> "A. Because we already had a recommendation from the jury that was a life verdict. And it was—you can screw that up. ... And we didn't want to screw that up.
>
> "Q. Given the presence of the—or at least the potential of a judicial override, did you think it was—did you think it was unnecessary to present additional mitigation evidence at the sentencing hearing?
>
> "A. I think it was—personally speaking, I think it was dangerous to admit them. In all candor, Judge Cole's override was very surprising. And we felt like the best thing to do is lean on the jury for the life without parole. Ten-to-two is considered a very strong recommendation to the Court.

"....

"Q. Mr. Shores, you stated that you were afraid it would be dangerous to present more mitigation evidence at the sentencing hearing. Can you kind of explain why that would be the case?

"A. What can happen. There's only one thing that can happen if we do that, and that is to goof up a life without parole.

"Q. So you thought the presentation of additional mitigating evidence would potentially cause—would sway the court's decision in an adverse way to your client?

"A. ... Yes. We had the best evidence already."

(R. 98-100.)

Shores also testified that he and Thrasher represented Mitchell in a later case, in which Mitchell pleaded guilty to capital murder for another shooting death ("the Brazzle case"). (R. 84.) Testing of a bullet recovered from the victim in that case showed that it was fired from a gun that was used to shoot one of the victims in the underlying case. (R. 85-86.) Shores testified that they hired a mitigation specialist, Lucia Penland, to assist with the Brazzle case. (R. 95-96.)

Shores testified that introducing records—such as Department of

Human Resources ("DHR") records, police records, school records, medical records—could "be a double-edged sword if" the records had information that harmed one's client. (R. 102-03.) He testified that, in his experience, records could "hurt as much as they ... help." (R. 103.)

Thrasher testified that when he got involved with Mitchell's case, other attorneys had been representing Mitchell. (R. 172.) Thrasher was responsible for the penalty phase of Mitchell's trial. Thrasher had handled "at least one" capital case before Mitchell's, and that case had settled. (R. 115-16.) He testified that he knew Mitchell's case would be a "tough one to defend": "[I]t was on television. It was high profile. It was a bad black eye for the city of Birmingham. It was a terrible murder of three people .... It was awful." (R. 136.) Mitchell's case was complicated even more because he had prior violent felonies.

After his appointment, Thrasher met with Mitchell at the jail and got information about his background. (R. 138.) He also met with "a few family members, his sisters, niece, and his brother Kelvin and a lady by the name of [Betty] Dickerson, who worked at the Bessemer Courthouse." (R. 127-28.) Thrasher took these notes about Mitchell:

> "Abandoned as a child by mother, father unknown; raised by grandparents, alleged to child abuse (not sexual) by grandparents & uncles; foster care in 1995 for 9 months, only real family; 6 siblings, all same mother, father same for 3; not close to fam[ily]."

(C. 5163.) Thrasher testified that he did not use records to support what he learned about Mitchell's background. He stated:

> "We ultimately got some records, but that was later on after this case was over with. And the records we got tended to substantiate what I had done as far as the mitigation in the first case. I didn't have the actual documents in the first case to be able to hand to the Court a piece of paper saying this is what happened.
>
> "But we were able to paint the picture for the jury through the testimony of his sister and then Dickerson and then ultimately his brother Kelvin."

(R. 128.) Thrasher testified, however, that records they got after his trial showed that the circumstances of Mitchell's life had been "a lot more dire than [they] knew." (R. 131.)

Three months after his appointment to Mitchell's case, Thrasher attended the Bryan R. Shechmeister Death Penalty College in Santa Clara, California, on a scholarship. (R. 119-20; C. 3782-3889.) When asked to "tell ... a little bit about what you did to prepare specifically for

the mitigation portion of this case," Thrasher testified:

> "[H]ad I not gone to Santa Clara, I'm not sure I would have known what to do, especially in such a short period of time. But I started out there. It was one of the best CLEs I've ever been to. And it was about five, six days of intense training from about 8:30 or nine o'clock in the morning until about 5:30, six, sometimes seven o'clock at night.
>
> "And you would be there and you would have a lecture by Mr. [Richard] Jaffe or somebody else, one of the other numerous people they had there that were nationally known people in the death penalty field. And you would listen to the lecture.
>
> "Then you would break up into your groups, which consisted of anywhere from six to seven people. And they had a capital case. You sent out there to them before you got there what the facts were in your case and different type things like that. And then you would go and you would talk about the lecture you just had and how to apply it to your case. And you would brainstorm with the other people.
>
> "And it was very helpful to have, you know, a set of five or six other eyeballs, sets of eyeballs looking at your case. And that was the program and how it worked. And then you would have certain things that you would have to do for the next day, like you would have to come up with, you know, what's your opening going to be, what's your closing going to be, what is your theme and theory. That was the main thing, was coming up with your theme and theory first and then to work on your opening and closing."

(R. 125-27.) Thrasher described the conference as a "war game session for

people who actually had pending capital cases." (R. 144-45.)

Thrasher testified that, while he was at the conference, he "came up with the theme and theory" to use in the penalty phase. That theme and theory was to give the jury a picture of the difficult circumstances of Mitchell's life, which included the State's taking Mitchell from his mother as a baby and passing him around to different homes, where he suffered extreme physical abuse and neglect. Thrasher said the plan was to show that Mitchell "was taken away by the State when he was, you know, eight months old and now we have this horrible crime, that basically the State has failed [Mitchell] and he never had any choices in what was going on, everybody was making choices for him and after all this time now the State[] comes back, they want to kill him." (R. 150.) He testified that his "group [at the conference] really liked the approach that [he] was taking and encouraged [him] to stick with that." (R. 127.)

Thrasher testified, however, that offering evidence of abuse carried a "danger" because "the prosecution is always going to say it's the abuse excuse." (R. 144.) He stated: "You have to approach it like no, this is how we got here today, folks. It's not an excuse for what has occurred. There's

no excuse for what occurs to three people that are innocently murdered, but it is telling you how we did get here today." (R. 144.)

After the conference, he said that preparing for Mitchell's case "became [his] whole focus and being and that's pretty much all [he] worked on." (R. 137-38.) Thrasher said he had about six months to get ready for the case. (R. 172.) Thrasher testified that it was hard to get a detailed history of Mitchell's life because his family was reluctant to speak about it. His sister Tammie[10] "didn't want to have anything to do with anything" (R. 129), and his brother Jermaine,[11] who was in prison then, offered nothing helpful.[12] Thrasher said that "the family was very reticent to talk about their mother. She was very highly thought of by the children." (R. 129.) The family also was "very hesitant to really talk about mental health issues or medical issues." (R. 130.)

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[10]Mitchell's sister's name is also spelled "Tammy" and "Tami" in the record.

[11]Mitchell's brother's name is also spelled "Germaine" in the record.

[12]Counsel spoke to Jermaine after Mitchell's trial, but Thrasher said that "[i]t didn't do any good" and that Jermaine "was of no help." (R. 133, 153.)

Thrasher testified that the defense team retained Dr. Kimberley Ackerson, a psychologist, to evaluate Mitchell. (R. 166; see also Trial C. 83-86, 97.) The trial court ordered that records be produced to Dr. Ackerson from facilities where Mitchell had been housed, but Dr. Ackerson, based on her work, found nothing helpful to Mitchell's case.[13] (R. 166.)

Thrasher testified that when he represented Mitchell in the Brazzle case, he retained Lucia Penland, a mitigation specialist. (R. 95-96.) Thrasher testified that, having seen Penland's findings in that case, he would not have changed his strategy in the underlying case. (R. 171.)

When asked about using records to support a mitigation case, Thrasher testified:

> "[I]t's been my experience that juries—first of all, getting a good one is a big part. The second is you want to be able to paint a picture, and you can't necessarily always paint a picture with just a bunch of documents. It depends on what the

[13]Mitchell argues that, "[b]ecause trial counsel did not hire a mitigation expert who could provide Dr. Ackerson with relevant information—including his institutional records—which trial counsel did not otherwise provide, Dr. Ackerson was unable to conduct a meaningful examination." (Mitchell's brief, p. 47.)

> documents are, how you get them, who gets them, and what you can use out of those documents."

(R. 167.) Thrasher also testified that, with records from DHR, "it was very difficult to find out exactly where these records were. The DHR records should be with DHR, but, you know, you find out there's—it's not like DHR keeps them all in one little location." (R. 154.) Thrasher testified:

> "Q. ... [F]or the second trial, the Brazzle trial, you were about to get some DHR records, right?
>
> "A. We got some, yes, but nothing like they have now.
>
> "Q. Would you have looked at those or reviewed those records for the Brazzle trial?
>
> "A. Yes, we certainly would have looked at them. And how it works is the DHR records are gotten. They are given to the judge. The judge looks at them in camera and then produces them to both the prosecution and the defense. That's not the way it's supposed to be done.
>
> "Q. So ... had you gotten these documents and certainly entered them into evidence, the State would have had the opportunity to look at them and go through them, too, correct?
>
> "A. Well, yes."

(R. 154-55.)

At the penalty phase, counsel called three witnesses to testify:

Mitchell's sister, Denise Maiden; his brother, Kelvin Mitchell; and a foster parent, Betty Dickerson. Thrasher stated: "In this case, we didn't really have any documents. I did have a story and theme that I had come up in Santa Clara, and that's what I focused on. And I focused on that and came up with Denise, Mrs. Dickerson, and Kelvin to paint that picture based on what [Mitchell] had told me." (R. 168.)

Denise testified that DHR took Mitchell and their siblings away from their mother when Mitchell was only a few months old. (Trial R. 1130-31.) She testified that Mitchell lived with their grandmother and then lived in several foster homes. Denise testified that their mother never regained custody of them and that she died about three years before Mitchell's trial. (Trial R. 1131-32.) She testified that Mitchell "didn't have a great life as a kid coming up, even much as an adult." (Trial R. 1133.)

Kelvin testified that DHR took him and his siblings from their mother when they were young. He lived in foster homes and with his grandmother. (Trial R. 1135.) When he turned 18, he stopped living with his grandmother because, he said, he and Mitchell were "getting whooped all the time." (Trial R. 1136.) Kelvin testified:

"Q. What kind of whippings would you get?

"A. We was – we was like getting strapped down in chairs and getting whooped.

"Q. What do you mean strapped down in chairs?

"A. My uncle, he'll use an extension cord or whatever to tie us up to a chair and just literally beat us.

"Q. How long would these beatings happen?

"A. Maybe an hour, two hours.

"Q. Would they beat each of you individually or would they beat you together?

"A. They whoop us like one by one."

(Trial R. 1137.) Kelvin said he had seen Mitchell tied up and beaten "regularly." (Trial R. 1138.) Kelvin also testified that he had been "hit in the head with a skillet" and that he was currently homeless. (Trial R. 1137.)

Dickerson testified that she worked in the tax assessor's office for the Jefferson County Commission. She was a foster parent to Mitchell for about a year and a half beginning when Mitchell was 13 years old. (Trial R. 1140-41.) She testified that she had no problems with him but that he

"kind of had a little problem in school." (Trial R. 1141.) She testified:

> "It was like, you know, with the kids in school. You know, when a child is a foster child, they don't like for kids to know that they are foster kids. And when kids know that, they use it. And for a lot of reasons when he hear those words, he kind of acts out a little bit. And it wasn't his grades. And he did act out. So he got put out of school maybe about four or five times."

(Trial R. 1141.)

Dickerson testified that she did not want DHR to take Mitchell out of her home and that she tried to stop it from happening. (Trial R. 1141-42.) Dickerson testified that she was concerned that if she tried too hard to keep Mitchell, DHR would not allow her to remain a foster parent. (Trial R. 1142.)

Dickerson testified that she "saw a lot of potential in [Mitchell]" and thought "he just needed ... somebody to care, somebody to love." (Trial R. 1142.) After Mitchell was removed from her home, she continued to visit him on weekends for almost three years at "the Wilderness,"[14] where

[14]The record identifies "the Wilderness" as "the Glenwood Wilderness Program" or the "Glenwood Mental Health Services in Lakewood," which provided services to children and adolescents. (C. 1874, 2681.) According to Mitchell's juvenile probation officer, John Wuska, it was called "the

Mitchell was placed after DHR took him from Dickerson's home. Mitchell stayed with her for two weeks at Christmas and stayed with her on July 4. She said she thought of Mitchell as family. (Trial R. 1144.) Thrasher introduced into evidence a picture of Dickerson and Mitchell.

After closing arguments from the State and Mitchell, the jury deliberated for about an hour and returned, by a vote of 10-2, a verdict recommending life in prison without the possibility of parole. (Trial R. 1197-1200.) Thrasher described his approach to the penalty phase before the jury:

> "I wanted to get in and get out. I didn't want to belabor anything. I wanted to have my witnesses get up there and lay the foundation, which is what Denise did about [Mitchell] being taken back when he was a child. And Mrs. Dickerson, the one hope that we thought he had with the State placing him with her and then the State taking him away from her. And she was even threatened and told if she didn't give up on [Mitchell], she'd never get another foster child again. It was very heavy-handed tactics.
>
> "And then Kelvin came in and explained the abuse that they had and why he was slow. And I think it worked. I can't tell you how it worked. I like women on a jury for a death penalty case because I think women are less likely to kill. And

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Wilderness" because it was "located in the woods." (C. 2681.)

> I—all I can say is the stars and the moon and everything lined up correctly, and we got a 10-2 verdict ...."

(R. 168.) Thrasher stated that he and Shores "were stunned and elated" at the jury's recommendation "because it was such a high profile case and ... such a horrible crime." (R. 170.)

In his petition, Mitchell alleged that trial counsel was ineffective at the penalty phase in several ways, including:

(1) "Trial counsel failed to adequately investigate Mitchell's familial and social background and present readily available mitigation evidence" (C. 1347);

(2) "Trial counsel failed to obtain crucial mitigation evidence regarding Mitchell's abusive childhood from readily identifiable family members and foster parents" (C. 1349);

(3) "Trial counsel failed to present any mitigation evidence of the sexual abuse Mitchell suffered as a child" (C. 1357);

(4) "Trial counsel failed to present any mitigation evidence of the abuse Mitchell suffered from his brother-in-law David Jones" (C. 1358);

(5) "Trial counsel failed to obtain needed expert assistance and testimony in support of Mitchell's mitigation case," including a social worker and a mitigation expert (C. 1359);

(6) "Trial counsel failed to present any evidence of Mitchell's drug use or symptoms of withdrawal in the days and weeks leading up to and including November 24, 2005" (C. 1360);

(7) "Trial counsel failed to request records to support the mitigation case" including records about his "background, family life, time in foster care, frequent moves, physical and sexual abuse, family history, mental health history, employment history, correctional and youth services history, school records, and life experiences" (C. 1361);

(8) "Trial counsel failed to adequately present available mitigation evidence" from the witnesses who testified in the penalty phase (C. 1364-65); and

(9) "Trial counsel failed to present evidence to reveal positive aspects of Mitchell's life and character" (C. 1365).

At the Rule 32 hearing, Dawn Jenkins testified on Mitchell's behalf. Jenkins is a mitigation specialist "hired by capital defense attorneys in the preparation of capital trials." (R. 180.) Mitchell's Rule 32 counsel hired Jenkins to assist with the claim that Mitchell's trial counsel had been ineffective at the penalty phase.

Jenkins spent more than 450 hours working on Mitchell's case, collecting records from 53 sources and speaking to more than 40 witnesses

out of the 80 whom she had identified as relevant.[15] (R. 187, 191.) She identified 28 mitigation "themes" that trial counsel could have used in Mitchell's case.[16]

(C. 3754; R. 223.)

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[15]Jenkins testified she had been paid more than $33,000 for her work on Mitchell's case. (R. 344.)

[16]Those themes were: "(1) fetal alcohol exposure"; (2) "lack of prenatal care"; (3) "failure of primary caregiver to attach and bond"; (4) "abandonment by mother and father"; (5) "mother and sibling's mental illness"; (6) "early childhood complex trauma—criminal neglect and abuse"; (7) "born underweight and with special healthcare needs (developmental delays and asthma)"; (8) "extremely poor ... and likely exposed to environmental lead toxins"; (9) "early exposure to alcohol and drugs by caretakers"; (10) "family criminality and violence"; (11) "community violence"; (12) "childhood sexual abuse in foster care"; (13) "childhood physical abuse in foster care"; (14) "childhood emotional abuse in foster care"; (15) "sibling abuse (bullying and recruiting into violence)"; (16) "lack of foster care permanency (30 foster care moves in 17 years)"; (17) "failure to bond with healthy adults as a result of failed permanency"; (18) "educational neglect (17 educational institutions in 17 years)"; (19) "mental health needs (emotional and behavioral)"; (20) "learning disability due to cultural deprivation and educational neglect"; (21) "failed special education accommodations"; (22) "wrongful and prohibited expulsions from school"; (23) "unlawful detention (abused and neglected child)"; (24) "unlawful and unsuitable foster homes"; (25) "placement in state homes and facilities where other children were sexually exploited"; (26) "failed continuum of mental health care treatment"; (27) "systemic failure to accommodate the transition from foster care to the community"; and (28) "strengths and an ability to conform his behavior." (C. 3754.)

Jenkins testified that based on her investigation, she "found that [Mitchell] was at risk of having been exposed to alcohol in utero." (R. 234.) She said that Mitchell's "mother [Doris Mitchell] did not follow through on DHR recommendations that they set in place in order for her to keep her children. She did not have well-care checkups [or] screenings that were required by DHR." (R. 236.) Jenkins testified that DHR records showed that "there was an open neglect case on [Doris] and her children." (R. 237.) Jenkins testified that the fetal alcohol exposure and lack of prenatal care "put [Mitchell] at a greater risk at birth and in his early years." (R. 238.) And she noted that, according to those same records, Mitchell was born underweight and had special health-care needs. (R. 238.)

Jenkins testified that Mitchell "did not know who his father was" and that his "mother's abandonment was the result of chronic and severe neglect." (R. 240.) Jenkins stated that Mitchell "lived in abject poverty with his mother" until he was six months old. (R. 250.) She testified that a neighbor, Lionel Nix, reported the neglect and abandonment of the children (R. 243) and that DHR records showed that, when Mitchell was

taken from his mother, "he had been in the home with an 11-year old [Mitchell's older sister] being the oldest person in the home along with four or five other children unattended. There was feces and urine in buckets ... that were found." (R. 242.) The home had no gas or water or windows, and Mitchell's "sister would cart wood from next door in, and they would build a fire in the middle of the room." (R. 242, 250.) Jenkins testified that Mitchell continued to live in "dire poverty" when he lived with his grandmother and a step-grandfather. (R. 251.)

Jenkins testified that, based on DHR records she obtained and a report from Steve Abbott,[17] a licensed professional counselor who evaluated Mitchell "when he was in between different State placements," Mitchell "was exposed to childhood complex trauma and severe neglect and abuse." (R. 254-55.) Jenkins testified that, based on her review of records, Mitchell "was placed in foster homes that were unlawful or unsuitable," including the home of "his grandmother, where he was

[17]The circuit court sustained the State's objection to the admission of Abbott's report, as well as to hearsay references to opinions based on his report. (R. 258.)

abused as a foster care child." (R. 283.) When he was placed in a home with his sister Tammie, "he was used as a tool to commit crimes." (R. 285.)

Jenkins also reviewed Mitchell's records from the Glenwood Wilderness Program; Gateway Inc. ("Gateway");[18] the Alabama Department of Youth Services; and Brookwood Medical Center, a hospital. (R. 263.) Jenkins testified that the records showed that Mitchell had placements in 30 homes. (R. 264.) She said that 30 placements were "extraordinarily excessive" and that she had "never seen as many placements." (R. 265.) Jenkins spoke with Dr. Teashia Adkins Goodwin, a clinical psychologist who was the director of Glenwood for the year and a half Mitchell was placed there. (R. 266.) She also talked with Jennifer Venable-Humphrey, a therapist at Gateway while Mitchell was there.[19]

Jenkins testified that Mitchell "spent four months in the Alabama

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[18]"Gateway is a short-term crisis center and a long-term therapeutic residential treatment center for adolescents between the ages twelve through ... eighteen with severe emotional problems. ... Gateway offered counseling, special education at Rushton School, therapeutic activities, and other programs ...." (C. 1990.)

[19]The circuit court admitted affidavits from Venable-Humphrey and, over the State's objection, from Goodwin.

Youth Home when he was approximately 15 or 16 years old. And during that period of time, one of the counselors in his cottage, a cottage of 14 boys, two boys to a room, would inappropriately and against their policies take kids out at night and on weekends and buy them things." (R. 286-87.) Jenkins testified that one of the counselors when Mitchell was there "sexually abused kids" and was in prison. (R. 287.) Mitchell did not offer evidence suggesting that he was sexually abused while he was there.

Jenkins testified that Mitchell had "fail[ed] to bond with primary caregivers because of his neglect and also as a result of all these different placements." (R. 277.) She said that this "didn't allow for him to build a healthy relationship with healthy adults in a healthy setting, which really played a role ... in his development and inability to transition into the community and be a normal healthy citizen following aging out of foster care." (R. 278.) Jenkins said that the DHR records showed that "when [Mitchell] was put in Mabel Walker's foster care home[20] that he didn't

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[20]The trial court's order, summarizing the DHR records, states:

> "[I]n June 1982, after being removed from his mother's custody, [Mitchell] was placed with a foster mother, Mable

want to be touched. ... It was also repeated in the DHR record at Glenwood that he didn't want to be touched." (R. 279-80.) The records showed that, although he started "to attach and bond" with Walker, "DHR removed him because of a family reunification policy .... So he was taken out of a healthy situation and again put back into a very unhealthy situation where there was abuse and neglect." (R. 280.)

The circuit court summarized the evidence about this time as follows:

> "1. Sixteen children at a time lived with Ms. Williams, along with multiple adults, in a three- or four-bedroom house. Interviews with family members described purported neglect by Ms. Williams;
>
> "2. Rodney Mitchell, [Mitchell's brother], reported that their grandmother, Ms. Williams, locked [Mitchell] and two of

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> Walker. [Mitchell] stayed with Ms. Walker until September 1984, when he was briefly placed with his relative Rosaline Bishop, and then in January 1985, Annie Williams, [Mitchell's] maternal grandmother, was granted custody of [Mitchell]. Except for a few brief periods in foster care, [Mitchell] remained in Ms. Williams's custody until September 1994. Extreme poverty, abuse, violence, and neglect are described in the records during this twelve-year period."

(C. 133.)

his brothers out of the house every night and forced them to sleep on the enclosed back porch, all three of them in one bed. The porch was not heated or air-conditioned, and it had no lighting, no electricity, and no ventilation; and

"3. Jermaine Mitchell testified that Ms. Williams kept a chain and padlock on the fridge, so that children could not eat. Reportedly Ms. Williams would punish the children if they needed food, clothing, or medical care.

"A summary of the interviews with [Mitchell's] family members suggests that [Mitchell] suffered physical abuse and violence at Ms. Williams's house in the following manner:

"1. Denise Maiden described her grandmother [as] a 'mean and abusive woman,' who would cuss at the children and strike them;

"2. Tammie Jones stated that Ms. Williams would beat her and her brothers with her hands and other objects, including a bat; and

"3. Rodney Mitchell remembered Ms. Williams hitting the children with her bare fists and various other objects like skillets, pipes, and broomsticks;

"4. According to these witnesses, Ms. Williams was not the only abuser in the home. Family members reported that Ms. Williams would call her sons—Gil Maiden and Clark Maiden ([Mitchell's] uncles)—over to her house to whip and beat the children;

"5. Ms. Williams's daughter Lisa Williams, [Mitchell's] aunt, also physically abused the children. [Mitchell's] family

members reported that [Mitchell] received the brunt of the abuse in Annie [Williams]'s home;

"6. Denise Maiden recalls seeing [Mitchell] beaten, whipped, slapped, and hit on the head for no reason by Ms. Williams and her sons, Gil and Clark, and her daughter, Lisa;

"7. Ms. Williams would wrap wire clothes hangers together and use them to beat [Mitchell];

"8. Jermaine Mitchell stated that Ms. Williams would have her son, Gil, come over to the house and beat him and [Mitchell] with extension cords that left marks on his body; Ms. Williams forced Jermaine to hold [Mitchell] down while she beat him.;

"9. Stephanie Maiden, [Mitchell's] niece and best friend, witnessed Ms. Williams swing a board at [Mitchell's] head, missing and hitting Kelvin Mitchell instead; and

"10. Ms. Maiden recalled how one uncle would hold [Mitchell] down while the other would punch him. Ms. Maiden also witnessed Clark Maiden punch [Mitchell], knocking him to the concrete, when [Mitchell] was five years old. Ms. Maiden remembers [Mitchell] wearing two pairs of clothes at a time to try to cushion the blows from the constant beatings he endured. According to this witness report, [Mitchell] missed a week and a half of school once because his Uncle Clark had beaten him so badly. Ms. Maiden, who was also his classmate, remembers that the bruises on his face were still visible, a week and half after the beating."

(C. 133-35.)

Jenkins testified about reviewing a deposition from John Wuska, who was Mitchell's "juvenile probation officer from the time he was 12 years old until he was 17. ... And he said that [Mitchell] was a good kid ...." (R. 282.)

Based on discussions with witnesses and a review of records, Jenkins said that Mitchell's caretakers exposed him "to alcohol and drugs." (R. 290.) Witnesses said Mitchell's step-grandfather "was a chronic alcoholic" and that Mitchell "drove the car for his grandfather when was intoxicated." (R. 292.) Mitchell "would also go to bars with him," and his step-grandfather "was drunk on a daily basis ... and ... was abusive." (R. 292.) Jenkins testified that "[t]he level of criminality in that home [was] chronic" and "probably the worst [she had] ever seen." (R. 292.) Mitchell "was in a community in which ... there was gangs and guns and bullets and killings. When he was in the first grade, he witnessed someone being shot." (R. 298.) Jenkins said that the DHR records showed that Mitchell's "brother Jermaine took [him] out when he was eight years old shooting guns" and that Mitchell "was also used as a lookout for his brother Tony when Tony was stealing cars." (R. 298-99.)

Jenkins testified that the records and statements from witnesses showed that Mitchell had been both exposed to sexual abuse and was the victim of sexual abuse.[21] (R. 309.)

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[21]The circuit court repeatedly sustained the State's objections to Jenkins relying on hearsay statements from witnesses, particularly about allegations of sexual abuse. See, e.g., R. 257, 277, 279, 290, 293, 297, 302, 303, 304, 309.

The circuit court included this summary in its order:

> "In his testimony, Jermaine Mitchell described the following sexual abuse experienced by [Mitchell] at a young age:
>
> "1. When [Mitchell] was approximately six or seven years old, Jermaine walked in on their Aunt, Lisa Williams, and her friend Charlotte Ford, sexually abusing [Mitchell];
>
> "2. Jermaine witnessed Lisa holding [Mitchell] down while Charlotte pulled his pants down and attempted to perform oral sex on [Mitchell];
>
> "3. Jermaine also later learned that Lisa was having sex with [Mitchell]; and
>
> "4. The DHR records contain a report that [Mitchell] had over one hundred sexual experiences with women by the time he was thirteen."

(C. 135-36.) Charlotte Ford Wilson testified at the evidentiary hearing

Finally, Jenkins testified that she reviewed Mitchell's records from the Birmingham City Schools and the Shelby County Schools. Those records showed that Mitchell was in 17 schools in 17 years and that he failed the 7th grade. (R. 312-13.)

On cross-examination, Jenkins testified that she was at that time licensed in the State of Kentucky as a clinical social worker. She was not licensed in Alabama. In 2006, when Mitchell was tried, Jenkins worked for the "statewide public defender's office in Kentucky .... the Department of Public Advocacy." (R. 350.) As a state employee in Kentucky, she was legally "barred from accepting outside employment without approval." (R. 351.) The State asked Jenkins whether she could have gotten approval to testify on Mitchell's behalf, but after an objection from Mitchell, Jenkins did not respond to the question, and the State did not ask again. (R. 353-56.)

On cross-examination, Jenkins admitted that the records she had reviewed showed:

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that she had never "any sexual contact with Brandon Mitchell." (R. 329.)

(1) That when Mitchell was two years old, a screening showed that he was "normal" in every way except "height and weight" and the screening showed no indication of abuse;

(2) That Mitchell had violent behavior, including: (a) "started fights at the gym"; (b) "ran after staff with a hatchet and had to be restrained"; (c) "[v]ery arrogant with adults"; (d) "beat a bird to death with a basketball ... and [then] bragged about and denied the incident"; (e) "threw a girl to the ground and felt her breasts";

(3) That there were no indications of undernourishment or neglect while Mitchell was in Annie Williams's home;

(4) That Mitchell, Jermaine, and Kelvin said they "were happy living in their grandmother's home" and that Mitchell said "he gets along well with his grandmother and the she is the person with whom he feels the closest"; and

(5) That Mitchell had times in which he did well in school.

(R. 359-65.)

In his brief to this Court, Mitchell criticizes trial counsel for calling only three witnesses at the penalty phase. Their testimony, he notes, took less than an hour. And that "meager testimony," according to Mitchell, showed "only that [Mitchell] went through 'several foster homes' because of 'issues with his mother' (Trial R. 1130-31), that he was 'beaten regularly' (Trial R. 1138), and that he had difficulty from his classmates

for being a foster child (Trial R. 1141)." (Mitchell's brief, p. 44.)

Mitchell contends that his trial counsel was ineffective because, he says, counsel elicited no testimony about

> "[Mitchell's] home environment, the reasons for his placement in State custody, the number of DHR placements, the number of schools he attended, the sexual and physical abuse he suffered, his traumatic experiences in foster care, or any information about his medical and mental-health history. Indeed, trial counsel could not present that evidence because they failed to investigate it."

(Mitchell's brief, p. 45.) Mitchell argues that counsel's failure to investigate was ineffective assistance under the circumstances. Mitchell also argues that trial counsel "did not show the jury and the trial court how such a neglected and abused life placed [Mitchell] at a high risk for developing mental, emotional, and behavioral problems." (Mitchell's brief, p. 46.) And, Mitchell argues, trial counsel failed to investigate and offer evidence of Mitchell's good character.[22] (Mitchell's brief, p. 48.)

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[22]For example, Mitchell contends that social workers and counselors testified at the Rule 32 hearing that Mitchell made progress while in treatment, but counsel contacted none of those witnesses. He cites Dr. Teashia Adkins Goodwin's statement in her affidavit that she saw him as a "benevolent child with a good heart," who got along well with his peers. (C. 2384.) He also cites Jennifer Venable-Humphrey's statements (1) that

> "'"[T]rial counsel's failure to investigate the possibility of mitigating evidence [at all] is, per se, deficient performance." Ex parte Land, 775 So. 2d 847, 853 (Ala. 2000), overruled on other grounds, State v. Martin, 69 So. 3d 94 (Ala. 2011). However, "counsel is not necessarily ineffective simply because he does not present all possible mitigating evidence." Pierce v. State, 851 So. 2d 558, 578 (Ala. Crim. App. 1999), rev'd on other grounds, 851 So. 2d 606 (Ala. 2000). When the record reflects that counsel presented mitigating evidence during the penalty phase of the trial, as here, the question becomes whether counsel's mitigation investigation and counsel's decisions regarding the presentation of mitigating evidence were reasonable.
>
> > "'"'[B]efore we can assess the reasonableness of counsel's investigatory efforts, we must first determine the nature and extent of the investigation that took place. ...' Lewis v. Horn, 581 F.3d 92, 115 (3d Cir. 2009). Thus, '[a]lthough [the] claim is that his trial counsel should have done something more, we [must] first look at what the lawyer did in fact.' Chandler v. United States, 218 F.3d 1305, 1320 (11th Cir. 2000)."
>
> "'Broadnax [v. State], 130 So. 3d [1232,] 1248 [(Ala. Crim. App. 2013)] ....'

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she thought that Mitchell was not beyond redemption, (2) that he needed long-term care, and (3) that his behavior and bonds improved over time.

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

"As this Court explained in Woodward v. State, 276 So. 3d 713 (Ala. Crim. App. 2018):

> " 'Whether trial counsel were ineffective for not adequately investigating and presenting mitigating evidence " 'turns upon various factors, including the reasonableness of counsel's investigation, the mitigation evidence that was actually presented, and the mitigation evidence that could have been presented.' " McMillan v. State, 258 So. 3d 1154, 1168 (Ala. Crim. App. 2017) (quoting Commonwealth v. Simpson, 620 Pa. 60, 100, 66 A.3d 253, 277 (2013)).
>
> > " ' " '[W]hen, as here, counsel has presented a meaningful concept of mitigation, the existence of alternate or additional mitigation theories does not establish ineffective assistance.' State v. Combs, 100 Ohio App. 3d 90, 105, 652 N.E.2d 205, 214 (1994). 'Most capital appeals include an allegation that additional witnesses could have been called. However, the standard of review on appeal is deficient performance plus prejudice.' Malone v. State, 168 P.3d 185, 234–35 (Okla. Crim. App. 2007)."
>
> " 'State v. Gissendanner, 288 So. 3d 923, 965 (Ala. Crim. App. 2015)[, rev'd, Ex parte Gissendanner, 288 So. 3d 1011 (Ala. 2019)]. "[C]ounsel does not necessarily render ineffective assistance simply because he does not present all possible mitigating

> evidence." Williams v. State, 783 So. 2d 108, 117 (Ala. Crim. App. 2000), overruled on other grounds by Ex parte Taylor, 10 So. 3d 1075 (Ala. 2005).' "

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

As outlined above, counsel's penalty-phase preparation included collaboration with other attorneys at a capital workshop, and counsel selected the witnesses they thought would most humanize Mitchell without opening the door to evidence that would have harmed Mitchell. The State's evidence against Mitchell at the guilt phase was overwhelming and highly aggravated. Shores testified that of the more than 30 capital cases he had worked on, Mitchell's was one of the worst, and the circuit court found that 5 aggravating circumstances existed. Cf. Harris v. State, 947 So. 2d 1079, 1130-32 (Ala. Crim. App. 2004) (finding ineffective assistance in the presentation of mitigating evidence where there was only one aggravating circumstance, testimony from the defendant's probation officer was the only mitigating evidence presented; the defendant's borderline IQ might have supported a finding of 2 statutory mitigating factors; and the jury recommended by a vote of 7-5

life imprisonment without the possibility of parole), overruled on other grounds, Ex parte Jenkins, 972 So. 2d 159 (Ala. 2005).

Shores and Thrasher hired a defense psychologist who, after evaluating Mitchell, said she could provide nothing helpful. (R. 166.) Although Mitchell insists that counsel should have investigated and discovered that he had been sexually abused, Thrasher said Mitchell denied that he had been sexually abused. And the family members whom Thrasher talked to were generally unhelpful or reluctant to talk to him. (R. 101, 129-30.)

Defense counsel's strategy at the penalty phase involved calling witnesses who offered a window into Mitchell's difficult childhood while keeping harmful evidence out of the jury's view. Thrasher testified that he "never had the results that [he] had in this case," even with a mitigation expert. (R. 174.) As the State brought out in its cross-examination of Jenkins, the records that Mitchell contends counsel should have investigated and discovered also included information that would have damaged Mitchell, portraying him as a violent person. Besides the evidence the State brought out on cross-examination, the records showed

other aspects of Mitchell's life that would have reflected negatively on him:

— When he was 11 or 12 years old, Mitchell was expelled from school for having a gun at the bus stop. (C. 3487.)

— When he was 14, within the first two months of his stay at Glenwood, he "had to be physically restrained approximately ten times as a result of initiating or participating in fistfights." (C. 3423.)

— A few months later, another report stated that Mitchell "chooses not to use" any of the techniques he learned in anger management. And he "lost some [homestay] visits due to unsafe, aggressive behaviors on campus." (C. 3435.)

— When Mitchell was 15, Dr. Peter Sims, his child psychiatrist at Gateway, wrote: "[Mitchell] is currently having more problems with irritability and antagonism toward others. He has been more oppositional and defiant toward adults and had more conflict with peers. He seems to seek out conflict at times. ... [Mitchell's] physical aggression must be contained appropriately so that he does not harm himself or others. If Gateway does not have the means to contain him safely, [Mitchell] should be transferred to a more secure treatment setting." (C. 3398.)

— A month later, Dr. Sims recorded the incidents about Mitchell pushing and groping a girl and beating a bird to death and bragging about it. Dr. Sims wrote: "He has threatened and pushed school staff. He has threatened and assaulted peers. ... [Mitchell] tends to blame others

> for his mistakes and accuses them of lying about him. He also threatens to harm them for these 'lies.' " (C. 3400.)

This information would have undermined the defense's approach to the penalty phase. This Court has repeatedly held that counsel is not ineffective for failing to present mitigation evidence that could also harm the defendant. See, e.g., Washington v. State, 95 So. 3d 26, 53 (Ala. Crim. App. 2012) (" 'An ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword.' Reed v. State, 875 So. 2d 415, 437 (Fla. 2004). 'Trial counsel will not be held to be deficient when she makes a reasonable strategic decision to not present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony.' Johnston v. State, 63 So.3d 730, 741 (Fla.2011)."); Davis v. State, 9 So. 3d 539, 566 (Ala. Crim. App. 2008) ("Evidence of childhood abuse has been described as a double-edged sword. See Johnson v. Cockrell, 306 F.3d 249, 253 (5th Cir. 2002) (evidence of brain injury, abusive childhood, and drug and alcohol abuse was 'double edged' because it would support a finding of future dangerousness).").

In his application for rehearing, Mitchell cites Andrus v. Texas, 590 U.S. ___, 140 S. Ct. 1875 (2020), in support of his contention that counsel was constitutionally ineffective in their investigation and preparation for the mitigation phase. He asserts: "[T]he U.S. Supreme Court has held that a defendant is deprived of the effective assistance of counsel if counsel fails to conduct a proper investigation, full stop." (Mitchell's brief, p. 36.) He then argues that this Court "essentially concluded that the Rule 32 court abused its discretion by following that binding precedent." (Id.) Not so.

Under Texas law, Andrus could not be sentenced to death unless the prosecution proved and the jury unanimously found that Andrus was a future danger to society. 590 U.S. at ___. Thus, at the penalty phase,

> "the State emphasized that Andrus had acted aggressively in TYC [Texas Youth Commission] facilities and in prison while awaiting trial. This evidence principally comprised verbal threats, but also included instances of Andrus' kicking, hitting, and throwing excrement at prison officials when they tried to control him. ... Had counsel genuinely investigated Andrus' experiences in TYC custody, counsel would have learned that Andrus' behavioral problems there were notably mild, and the harms he sustained severe. Or, with sufficient understanding of the violent environments Andrus inhabited his entire life, counsel could have provided a counternarrative of Andrus'

later episodes in prison. But instead, counsel left all of that aggravating evidence untouched at trial—even going so far as to inform the jury that the evidence made it 'probabl[e]' that Andrus was 'a violent kind of guy.'

"The State's case in aggravation also highlighted Andrus' alleged commission of a knifepoint robbery at a dry-cleaning business. At the time of the offense, 'all [that] the crime victim ... told the police ... was that he had been the victim of an assault by a black man.' Although Andrus stressed to counsel his innocence of the offense, and although the State had not proceeded with charges, Andrus' counsel did not attempt to exclude or rebut the State's evidence. That, too, is because Andrus' counsel concededly had not independently investigated the incident. In fact, at the habeas hearing, counsel did not even recall Andrus' denying responsibility for the offense. Had he looked, counsel would have discovered that the only evidence originally tying Andrus to the incident was a lone witness statement, later recanted by the witness, that led to the inclusion of Andrus' photograph in a belated photo array, which the police admitted gave rise to numerous reliability concerns. The dissent thus reinforces Andrus' claim of deficient performance by recounting and emphasizing the details of the dry-cleaning offense as if Andrus were undoubtedly the perpetrator. ... The very problem here is that the jury indeed heard that account, but not any of the significant evidence that would have cast doubt on Andrus' involvement in the offense at all: significant evidence that counsel concededly failed to investigate.

"That is hardly the work of reasonable counsel. In Texas, a jury cannot recommend a death sentence without unanimously finding that a defendant presents a future danger to society (i.e., that the State has made a sufficient showing of aggravation). Tex. Code Crim. Proc. Ann., Art.

> 37.071, § 2(b)(1). Only after a jury makes a finding of future dangerousness can it consider any mitigating evidence. Ibid. Thus, by failing to conduct even a marginally adequate investigation, counsel not only 'seriously compromis[ed his] opportunity to respond to a case for aggravation,' Rompilla, 545 U.S. at 385, 125 S.Ct. 2456, but also relinquished the first of only two procedural pathways for opposing the State's pursuit of the death penalty. There is no squaring that conduct, certainly when examined alongside counsel's other shortfalls, with objectively reasonable judgment."

Andrus, 590 U.S. at ___, 140 S. Ct. at 1884-85 (2020) (some citations omitted).

Unlike Texas, Alabama does not require the State to prove that a defendant presents a future danger to society. At the penalty phase here, the State presented brief testimony from only four witnesses, each a relative of one of the victims. Had defense counsel presented the evidence Mitchell now says they should have, that evidence would not have been one-sided in Mitchell's favor; the State would have emphasized the negative aspects of that evidence. Thus, the evidence was, as described above, a "double-edged sword." That counsel in Andrus was ineffective for not being prepared to respond to negative evidence does not mean that Mitchell's counsel was ineffective for not discovering and introducing

evidence that would have been, at best, both mitigating and aggravating for Mitchell.

Mitchell also argues that his trial counsel failed to adequately prepare the three witnesses who testified. (Mitchell's brief, p. 46.) Mitchell notes that, in her affidavit, Denise Maiden said that Mitchell's counsel met with her for only a few hours right before she testified, and she said she felt unprepared. (C. 1980.) Kelvin Mitchell, in his affidavit, said that he also felt unprepared and that he met with trial counsel only briefly before the trial. (C. 2091.) Betty Dickerson, in her affidavit, stated that she had only one telephone call with Mitchell's attorneys before the trial and a short meeting with them at the courthouse. (C. 1978.) Mitchell has not shown he is due relief based on these arguments. See, e.g., Walker v. State, 194 So. 3d 253 (Ala. Crim. App. 2015) (" 'A claim of failure to interview a witness may sound impressive in the abstract, but it cannot establish ineffective assistance when the person's account is otherwise fairly known to defense counsel.' United States v. Decoster, 624 F.2d 196, 209 (D.C. 1976). 'There is ... no per se rule that failure to interview witnesses constitutes ineffective assistance. Ineffective assistance cases

turn on their individual facts.' Sanders v. Trickey, 875 F.2d 205, 209 (8th Cir. 1989).").

Although Mitchell's trial counsel could have done more—and could have tried to present the "granular" details of Mitchell's life, as he now contends they should have—counsel's assistance at the penalty phase was not ineffective. Counsel presented generally the mitigation themes that Mitchell contends counsel should have presented more extensively.

> "As this Court explained in Brownfield v. State, 266 So. 3d 777 (Ala. Crim. App. 2017):
>
> > " ' " ' "[T]he 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 [witness] provided a more detailed account with regard to [mitigating evidence], 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).

> " ' " '[I]n order to establish prejudice, the new evidence that a habeas petitioner presents must differ in a substantial way—in strength and subject matter—from the evidence actually presented at sentencing.' Hill v. Mitchell, 400 F.3d 308, 319 (6th Cir.), cert. denied, 546 U.S. 1039, 126 S. Ct. 744, 163 L. Ed. 2d 582 (2005). In other cases, we have found prejudice because the new mitigating evidence is 'different from and much stronger than the evidence presented on direct appeal,' 'much more extensive, powerful, and corroborated,' and 'sufficiently different and weighty.' Goodwin v. Johnson, 632 F.3d 301, 328, 331 (6th Cir. 2011). We have also based our assessment on 'the volume and compelling nature of th[e new] evidence.' Morales v. Mitchell, 507 F.3d 916, 935 (6th Cir. 2007). If the testimony 'would have added nothing of value,' then its absence was not prejudicial. [Bobby v.] Van Hook, [558 U.S. 4, 12,] 130 S. Ct. at 19, 175 L. Ed. 2d 255 [(2009)]. In short, 'cumulative mitigation evidence' will not suffice. Landrum v. Mitchell, 625 F.3d 905, 930 (6th Cir. 2010), petition for cert. filed (Apr. 4, 2011) (10–9911)."

" 'Foust v. Houk, 655 F.3d 524, 539 (6th Cir. 2011).
" '[A] claim of ineffective assistance of counsel for

> failing to investigate and present mitigation evidence will not be sustained where the jury was aware of most aspects of the mitigation evidence that the defendant argues should have been presented.' " Walker v. State, 194 So. 3d 253, 288 (Ala. Crim. App. 2015) (quoting Frances v. State, 143 So. 3d 340, 356 (Fla. 2014)).'
>
> "266 So. 3d at 810."

Stanley, ___ So. 3d at ___.

The jury and the trial court were aware of the general themes of the mitigating evidence that Mitchell alleges should have been presented. Even if counsel were deficient in not presenting the evidence Mitchell now says counsel should have presented, that deficient performance did not prejudice Mitchell.[23]

> " ' "[T]he notion that the result could have been different if only [counsel] had put on more than the ... witnesses he did, or called expert witnesses to bolster his case, is fanciful." '

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[23]In Andrus, the United States Supreme Court did not address whether counsel's deficient performance prejudiced Andrus. The Court reasoned that "[i]t is unclear whether the [Texas] Court of Criminal Appeals considered Strickland prejudice at all." 590 U.S. at ___, 140 S. Ct. at 1886. To be clear, we hold (1) that Mitchell did not show that his counsel's performance at the penalty phase was deficient and (2) that, even if counsel's performance at the penalty phase was deficient, that deficient performance did not prejudice Mitchell.

> Stallworth v. State, 171 So. 3d 53, 80 (Ala. Crim. App. 2013) (quoting Wong v. Belmontes, 558 U.S. 15, 28, 130 S. Ct. 383, 175 L. Ed. 2d 328 (2009)). Moreover, the additional evidence [Mitchell cites] that was not presented at his trial was not so strong as to create a reasonable probability that the outcome of the trial would have been different had the evidence been presented. We have reweighed the evidence in aggravation against the totality of the evidence in mitigation, both that presented at trial and that pleaded in [Mitchell's] petition [and presented at the evidentiary hearing], and we have no trouble concluding that the additional mitigating evidence would not have altered the balance of aggravating circumstances and mitigating circumstances in this case. This is so even assuming that the additional mitigating evidence would have swayed more of, or even all, the jurors to vote for life imprisonment without the possibility of parole. In light of the strength of the [five] aggravating circumstances and the relative weakness of the totality of the mitigating evidence, the additional weight to be afforded a unanimous jury recommendation of life imprisonment without the possibility of parole would not have altered the balance of aggravating and mitigating circumstances. Therefore, trial counsel were not ineffective in this regard."

Stanley, ___ So. 3d at ___.

Mitchell has not shown that the circuit court erred in denying his claim that his counsel was ineffective at the penalty phase.[24]

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[24]Mitchell also makes a passing argument that his trial counsel was ineffective in other ways—e.g., in "failing to object to incomplete jury instructions about the weighing of aggravating and mitigating factors" and in "failing to object to unconstitutionally vague jury instructions

IV.

In Part IV of his brief, Mitchell raises several challenges to Alabama's capital-sentencing scheme. He argues:

— "Alabama's former judicial override scheme is unconstitutional under Hurst v. Florida," 577 U.S. 92 (2016). (Mitchell's brief, p. 56.)

— "The judicial override was unconstitutional as applied in this case because the trial court independently found (and weighed) facts not found by the jury." (Mitchell's brief, p. 61.)

— "The Alabama Supreme Court's decision in Ex parte Bohannon[, 222 So. 3d 525, 532 (Ala. 2016),] does not change the analysis." (Mitchell's brief, p. 64.)

— "Hurst applies retroactively to Mitchell's sentence." (Mitchell's brief, p. 68.)

— "Alabama's now-repealed judicial override statute deprived [Mitchell] of due process of law because it is subject to political whims." (Mitchell's brief, p. 70.)

These claims lack merit or are precluded.

The Alabama Supreme Court in Ex parte Bohannon, 222 So. 3d 525

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about the aggravating factor of 'especially heinous, atrocious, or cruel.' " (Mitchell's brief, pp. 50-51.) For the reasons stated in Parts I and II of this opinion, that part of Mitchell's brief does not comply with Rule 28(a)(10), Ala. R. App. P. See, e.g., George, supra.

(Ala. 2016), held that Alabama's override scheme remained constitutional after Hurst, and this Court has repeatedly held that Alabama's capital-sentencing scheme, including judicial override, remained constitutional after Hurst. See, e.g., Hicks v. State, [Ms. CR-15-0747, July 12, 2019] ___ So. 3d ___, ___ (Ala. Crim. App. 2019); Lindsay v. State, 326 So. 3d 1, 55 (Ala. Crim. App. 2019); Knight v. State, 300 So. 3d 76, 128-30 (Ala. Crim. App. 2018).

Mitchell's as-applied claim also lacks merit. The trial court found five aggravating circumstances: (1) Mitchell committed the offense while under a sentence of imprisonment—he was on probation for second-degree kidnapping, first-degree robbery, and discharging a firearm into an occupied vehicle; (2) Mitchell had a prior felony conviction involving the use or threat of violence; (3) Mitchell committed the capital offense during the commission of a robbery; (4) Mitchell killed two or more persons in one act or course of conduct; and (5) the capital offense was especially heinous, atrocious, or cruel when compared to other capital offenses. In its guilt-phase verdict, the jury found beyond a reasonable doubt that two of these circumstances—numbers (3) and (4)—existed. The findings about

Mitchell's criminal history—circumstances (1) and (2)—are excluded from the reach of Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), as facts that a jury must find beyond a reasonable doubt. See Stallworth v. State, 868 So. 2d 1128, 1185 (Ala. Crim. App. 2001) (opinion on return to second remand) ("Whether at the time of the murders Stallworth was under a sentence of imprisonment because he was on probation for his prior conviction for assault in the third degree was a question related to Stallworth's prior conviction—a question for the trial court to resolve."). As for circumstance (5)—that the capital offense was especially heinous, atrocious, or cruel—the Alabama Supreme Court and this Court have explained that, if a jury makes findings that expose a capital defendant to the death penalty, a death sentence is not improper if the sentencing judge finds that additional aggravating circumstances exist. See, e.g., State v. Billups, 223 So. 3d 954, 966 (Ala. Crim. App. 2016) ("Because Alabama law requires the existence of only one aggravating circumstance in § 13A-5-49 for imposition of the death penalty, once the jury finds the existence of one aggravating circumstance, a capital defendant is then exposed to, or eligible for, the death penalty, and the trial court's finding

of any additional aggravating circumstances 'has application only in weighing the mitigating and the aggravating circumstances' to determine the appropriate sentence. Ex parte Waldrop, 859 So. 2d [1181,] 1190 [(Ala. 2002)]"). See also Mitchell, 84 So. 3d at 990 ("Like the appellant in Waldrop, Mitchell became eligible for the death penalty when the jury convicted him of capital offenses that have corresponding aggravating circumstances. Consequently, the circuit court's consideration of additional facts 'implicated only in the process of weighing the aggravating and mitigating circumstances' did not violate Ring [v. Arizona, 536 U.S. 584 (2002)]. Ex parte Hodges, 856 So. 2d 936, 944 (Ala. 2003).").

This Court has rejected the argument that Hurst applies retroactively. Lee v. State, 244 So. 3d 998, 1003-04 (Ala. Crim. App. 2018).

Mitchell's challenge to the now repealed judicial-override statute because it allegedly was "subject to political whims" and violated due process is, as the circuit court found, precluded under Rules 32.2(a)(3) and 32.2(a)(5), Ala. R. Crim. P. (C. 156.) And the authorities Mitchell cites in

this part of his brief—a dissenting opinion by Justice Sotomayor in Woodward v. Alabama, 134 S. Ct. 405, 408 (2013), a law-review article by a former member of this Court, Judge William M. Bowen, Jr.,[25] authorities stating generally that juries and an independent judiciary are important to democracy and the justice system, and statistics from the Equal Justice Initiative—are not controlling and do not compel us to give him the relief he seeks.

V.

The State contends that the circuit court erred in finding that Mitchell's counsel was ineffective at the sentencing hearing before the trial court. The circuit court, addressing this claim, stated:

> "The sentencing hearing was held on January 17, 2007, two months after the trial. At the sentencing hearing, the State recalled three witnesses to testify to victim impact. Trial counsel did not present any witnesses or additional evidence. In announcing sentence, the trial court stated, 'And I'll tell everybody, I never really saw myself as being someone that would override a decision, especially a ten-two decision.' ... The trial court's emphasis on 'especially a ten-two decision' indicates that the trial court considered this verdict to be

[25]William M. Bowen, Jr., A Former Appellate Judge's Perspective on the Mitigation Function in Capital Cases, 36 Hofstra L. Rev. 805 (2008).

remarkable in favor of [Mitchell]. Nevertheless, the court sentenced [Mitchell] to death, overriding the jury's verdict.

"[Mitchell] was entitled to have some mitigating aspects of his background, family life, family history, medical history, mental health history, employment history, correctional and youth services history, school records, and life experiences presented to [the] trial court at [the] sentencing hearing. ' ... Trial counsel's failure to present any mitigating evidence to the trial court two months after the trial constitutes clear ineffectiveness and cannot be characterized as strategic. ...

"Individually and cumulatively, trial counsel's performance during the sentencing phase constituted ineffective assistance of counsel. Because of trial counsel's failures, the trial court was prevented from undertaking 'full consideration of evidence that mitigates against the death penalty.' ... The evidence contained in [Mitchell's] records is mitigating evidence. ...

"In Woodward v. State, [276 So. 3d 713, 782-83 (Ala. Crim. App. 2018)], the [Court of Criminal Appeals] considered a similar claim based on trial counsel's failure to present sufficient mitigation at the sentencing hearing. In finding that trial counsel was not ineffective, the appellate court held:

> " 'In its order, the circuit court found that, even had the additional mitigating evidence Woodward pleaded in his petition been presented at trial, it would not have altered the balance of aggravating and mitigating circumstances because it was "merely cumulative" to the mitigating evidence presented at trial. (C. 1360.) The court explained: "In the penalty phase, the Court heard at length allegations concerning the father's abuse, how he

sold drugs and was imprisoned for it, and how the mother had to flee to Detroit to protect herself and his children. The existence of more allegations of abuse and drugs in Detroit does not change the balance of the equation. (C. 1360-61.)" On appeal, Woodward argues that the circuit court's finding employs an "unacceptably broad" definition of cumulative evidence that fails to take into account "the depth and quality of the new evidence." (Woodward's brief, pp. 35-37.) Specifically, Woodward argues that he "was exposed to a far greater degree of verbal and physical abuse, and emotional trauma, than trial counsel presented at the penalty phase" (Woodward's brief, p. 69), and that "[a]lthough the new evidence relates to the theme that [he] suffered violence and abuse as a child, it is not 'merely' cumulative [because] it paints Woodward's life in a far grimmer light than was presented at trial." (Woodward's brief, p. 72.) Although we do not necessarily agree with the circuit court's finding that the additional mitigating evidence was "merely cumulative" to the evidence presented at trial, we nonetheless agree with the court's ultimate conclusion that the additional mitigating evidence would not have altered the balance of aggravating and mitigating circumstances in this case.

" 'We have carefully examined the evidence presented at trial, the evidence presented at the sentencing hearing, and the evidence pleaded in Woodward's petition. There were two strong aggravating circumstances in this case and the mitigating evidence presented at trial was, as the trial court found in its sentencing order, "not very

persuasive," especially in light of the additional evidence before the trial court at the sentencing hearing. (RDA, C. 1002.) The additional mitigating evidence pleaded in Woodward's petition was similar in kind to that presented at trial but was substantially more detailed and, as Woodward argues, painted Woodward's upbringing in a grimmer light. However, the additional mitigating evidence was confined to only two years in Woodward's life when he lived in Detroit and involved his experiences as a young child. At the time of the capital offense, Woodward was 33 years old. This Court has recognized that "[e]vidence of a difficult childhood has been characterized as a 'double-edged' sword," Davis v. State, 44 So. 3d 1118, 1141 (Ala. Crim. App. 2009), and that the "mitigation value" of a difficult childhood is highly questionable when the defendant is an adult. Washington v. State, 95 So.3d 26, 45 (Ala. Crim. App. 2012). Indeed, "[w]hen a defendant is several decades removed from the abuse being offered as mitigation evidence its value is minimal." Callahan v. Campbell, 427 F.3d 897, 937 (11th Cir. 2005). See also Bolender v. Singletary, 16 F.3d 1547, 1561 (11th Cir. 1994) ("Given the details of this case, including among other things the fact that Bolender was twenty-seven years old at the time of the murders, 'evidence of a deprived and abusive childhood is entitled to little, if any mitigating weight' when compared to the aggravating factors.").

"'We have reweighed the evidence in aggravation against the totality of the evidence in mitigation, both that presented at trial and that

> pleaded in Woodward's petition, and we have no trouble concluding that the additional mitigating evidence would not have altered the balance of aggravating circumstances and mitigating circumstances in this case. This is so even assuming that the additional mitigating evidence would have swayed more, or even all, of the jurors to vote for life imprisonment without the possibility of parole. In light of the strength of the two aggravating circumstances and the relative weakness of the totality of the mitigating evidence, the additional weight to be afforded a unanimous jury recommendation of life imprisonment without the possibility of parole would not have altered the balance of aggravating and mitigating circumstances.'

"Unlike the defendant in Woodward, trial counsel failed to present any mitigation at sentencing and only a constitutionally bare-boned presentation at trial. Unlike the defendant in Woodward, the trial court did not hear 'at length allegations concerning' abuse. Unlike Woodward, the circumstances contained in the DHR, school, and other records spanned [Mitchell's] entire life beginning prenatal. Unlike Woodward, [Mitchell] was significantly less than a decade removed from the abuses contained in the records. The abuse and neglect described in this instance cannot be reasonably considered a 'double-edged sword' for the purposes of a sentencing hearing. ... Unlike the defendant in Woodward, the [conscience-]shocking history of abuse and neglect that [Mitchell] experienced since birth would not be easily overlooked or dismissed as insignificant by a reasonable sentencer. While the astonishing circumstances surrounding [Mitchell's] life do not excuse the crimes that he has committed, these circumstances are undoubtedly mitigating

> details that with all reasonable probability may have altered the balance of aggravating and mitigating circumstances."

(C. 141-43.) The circuit court cited these comments by the trial court at the sentencing hearing:

> — "I know the appellate courts will reweigh this decision. And I hope that they do." (Trial R. 1255.)
>
> — "I'll tell everybody, I never really saw myself as being someone that would override a decision, especially a ten-two decision." (Trial R. 1256.)
>
> — "[A]nd they may do away with the override one day. And if they do, that won't hurt my feelings at all." (Trial R. 1256-57.)

(C. 144.)

The circuit court found that those comments show that the trial court had "uncertainty and hesitation" in overriding the jury's recommendation, and that the comments "highlight[] the importance of trial counsel presenting mitigating evidence at the sentencing hearing." (C. 144.) The circuit court stated:

> "The trial court's reluctance to override the jury verdict indicates a strong probability that the trial court, presumed to be reasonable, may have affirmed the jury's 10-2 recommendation of life without the possibility of parole had trial counsel investigated and presented the story of

> [Mitchell's] life to the trial court at the sentencing hearing.
>
> "....
>
> "Unlike the jury, the trial court made a sentencing decision remote in time to the actual trial. There is a reasonable probability that even a limited admission of [Mitchell's] records and witness testimony, assuming the evidence was admissible,[26] would have produced a different result for [Mitchell] at the sentencing hearing."

(C. 145-46.) The circuit court then vacated Mitchell's death sentence and ordered that he receive a new sentencing hearing. (C. 146.)

The State sets forth four primary arguments in support of its contention that the circuit court's findings and conclusions are wrong: (1) the circuit court erred in relying on the trial court's statement that it "hoped" this Court would reweigh its sentencing decision; (2) the circuit court erred in crediting Jenkins's testimony and relying on her research

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[26]Although we are reversing the circuit court's judgment for reasons other than this statement, a circuit court should not hold counsel ineffective for failing to present evidence without first determining if the omitted evidence would have been admissible. Cf. Yeomans v. State, 195 So. 3d 1018, 1034 (Ala. Crim. App. 2013) ("[B]ecause there is no merit to the legal theory underlying this claim of ineffective assistance, the claim was properly dismissed. See, e.g., Lee v. State, 44 So. 3d 1145, 1173 (Ala. Crim. App. 2009) (counsel cannot be ineffective for failing to raise a claim that has no merit).").

and opinions; (3) the circuit court erred in holding that counsel should have gotten and used the records that Mitchell introduced at the evidentiary hearing; and (4) counsel's decision not to offer more evidence at the sentencing hearing was a reasonable strategic decision. (State's brief, pp. 27-28.) We agree with the State.

Before turning to the arguments of the State, however, we note that, under Alabama's capital-sentencing scheme in effect at the time of Mitchell's trial and sentencing, this Court in Boyd v. State, 746 So. 2d 364, 398 (Ala. Crim. App. 1999), held: "Section 13A-5-47, Ala. Code 1975, does not provide for the presentation of additional mitigation evidence at sentencing by the trial court. Therefore, trial counsel did not err in failing to do so." (Emphasis added.) Although in Woodward v. State, 123 So. 3d 989, 1034 (Ala. Crim. App. 2011), this Court characterized that holding in Boyd as "obiter dictum," six months before the decision in Woodward (and five years after Mitchell's trial), this Court reaffirmed Boyd in Miller v. State, 99 So. 3d 349, 424 (Ala. Crim. App. 2011), quoting with approval the following from the trial court's order denying relief: " '[T]rial counsel could not be ineffective for failing to present additional mitigation

evidence during the sentencing hearing because [former] "Section 13A-5-47, Ala. Code 1975, does not provide for the presentation of additional mitigation evidence at sentencing by the trial court." Boyd v. State, 746 So. 2d 364, 398 (Ala. Crim. App. 1999).' " Simply put, it would not have been unreasonable for Mitchell's counsel to rely on this Court's holding in Boyd, and the circuit court thus erred in concluding that trial counsel was ineffective for not presenting additional mitigating evidence at the separate sentencing hearing before the trial court.[27] Cf. State v. Tarver, 629 So. 2d 14, 18-19 (Ala. Crim. App. 1993) ("Counsel's performance cannot be deemed ineffective for failing to forecast changes in the law.").

Turning to the State's first argument, we agree that the circuit court placed undue reliance on the trial court's statement that it "hoped" this

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[27]Mitchell cites Anderson v. Sirmons, 476 F.3d 1131, 1142 (10th Cir. 2007), for its statement that "[t]he sentencing stage is the most critical phase of a death penalty case. Any competent counsel knows the importance of thoroughly investigating and presenting mitigating evidence." (internal quotation marks omitted). Although it uses the word "sentencing," the court in Anderson is referring to the entire penalty-phase proceedings–not merely the unique sentencing hearing that follows the penalty-phase proceedings before the jury.

Court would reweigh its sentencing decision. In context, that remark happened in this statement by the trial court:

> "And then the final mitigating circumstance that I find in this circumstance is the one that weighs most heavily with me is the ten to two recommendation by the jury against the death penalty and for life without parole.
>
> "I'll tell everybody that I weighed this one very heavily in favor of the defendant. But after reviewing it -- and I've looked at the jurors. I've looked at what the jurors did, all their jobs. And they are fairly representative of the county and the state, a couple of professional people, other people that work at different types of jobs. And while I considered this I made a list of what they all did.
>
> "But after reviewing it, everything tells me that the jury really did not make the right decision. And I've weighed it heavily -- their decision heavily in favor of [Mitchell]. I know there's certain things that they can't see, that they can't really compare this to other offenses. And by no means do I want the district attorney's office to take me or anybody for granted in this type situation. I know the appellate courts will reweigh this decision. And I hope that they do.
>
> "But this is my sentence. Having considered the testimony and exhibits from the trial and from the penalty phase, all that was presented this morning including the presentence investigation report, and the remainder of what's been presented to me except the things that I expressly excluded, and weighing heavily the jury's recommendation by ten to two recommendation of life without parole, I find that the aggravating circumstances do outweigh the mitigating circumstances, with that recommendation being the heaviest

> of the mitigating circumstances. Therefore, it is the judgment and sentence of the Court that the defendant be sentenced to death by lethal injection."
>
> "....
>
> "MR. SHORES: Your Honor, with respect to your sentence, we object to the override of the life without parole sentence that the jury gave out under the Fourth, Fifth, Sixth, Eighth, and 14th Amendments to the Constitution.
>
> "THE COURT: That objection is noted. And I'll tell everybody, I never really saw myself as being someone that would override a decision, especially a ten-two decision. But looking at the aggravating circumstances -- and they may do away with the override one day. And if they do, that won't hurt my feelings at all. But I tried to look at it as closely as I can. And I note your objection and overrule your objection."

(Trial R. 1254-57.)

By stating that it hoped this Court would reweigh its decision, the trial court was merely stating what it knew this Court would do under § 13A-5-53(b)(2), Ala. Code 1975, which requires this Court to reweigh the aggravating and mitigating circumstances. Cf. Knight v. State, 252 So. 3d 1108, 1111 (Ala. Crim. App. 2017) ("[C]ircuit judges 'are presumed to know the law and to follow it in making their decisions.' Ex parte Slaton, 680 So. 2d 909, 924 (Ala. 1996)."). Placed in context, the trial court's

comments show that it was trying to give the jury's recommendation the required weight.[28]

The State's second argument is that the circuit court erred in crediting Jenkins's testimony and relying on her research and opinions. The State notes first that Mitchell's counsel had about 6 months to prepare but that Jenkins spent 450 hours over several years, including interviewing witnesses who had been unwilling to talk to trial counsel. Jenkins admitted that she could not have completed her work in less time. (R. 347.)

The State also notes that trial counsel got two of Mitchell's six siblings to testify but that Jenkins got five of them to submit affidavits, plus other members of Mitchell's family and others. As the State argues,

> " '[T]he mere fact that [the defendant] has submitted [numerous] exhibits of additional information does not prove ineffective assistance of counsel. "In reviewing counsel's performance, a court must avoid using the distorting effects of hindsight and must evaluate the reasonableness of counsel's

[28]In his application for rehearing, Mitchell asserts that "[t]he most reasonable explanation why" Judge Cole made this statement is because he "sought political cover." (Mitchell's brief in support of reh'g, p. 93.) We disagree.

> performance from counsel's perspective at the time." Chandler [v. United States], 218 F.3d [1305] at 1316 [(11th Cir. 2000)] (quotation marks and citation omitted). "[I]t 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." Strickland [v. Washington], 466 U.S. [668] at 689, 104 S. Ct. [2052] at 2065 [(1984)]. "It is common practice for petitioners attacking their death sentences to submit affidavits from witnesses who say they could have supplied additional mitigating circumstance evidence, had they been called, or ... had they been asked the right questions." Waters [v. Thomas], 46 F.3d [1506] at 1513-14 [(11th Cir. 1995)]. The existence of such mitigating affidavits, however, is of little significance because they usually establish "at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel." Id. at 1514. ["]The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel." Id. (quotation marks and citation omitted); see also Chandler, 218 F.3d at 1316 n.20. Thus, the presence of [numerous] largely cumulative affidavits in the Appendix ... lends little, if any, support to [the defendant's] ineffective assistance of counsel claim."

Daniel v. State, 86 So. 3d 405, 430-31 (Ala. Crim. App. 2011) (quoting Turner v. Crosby, 339 F.3d 1247, 1279 (11th Cir. 2003) (emphasis added)).

Although the circuit court did not expressly find whether Jenkins would have been available to testify at Mitchell's trial, it is questionable

that she could have done so. She was employed by the Commonwealth of Kentucky in 2006 and was prohibited from accepting outside employment without approval. (R. 351-53.)

Finally, although Jenkins presented a bleak picture of Mitchell's childhood and adolescence, even if the jury—and the trial court—heard that evidence, there is no reasonable probability that the outcome of Mitchell's penalty-phase proceedings would have been different. In addressing a similar claim of ineffective assistance of counsel for not investigating and presenting more extensive evidence in mitigation, the Supreme Court of Kentucky stated:

> "There is no doubt that Hodge, as a child, suffered a most severe and unimaginable level of physical and mental abuse. Perhaps this information may have offered insight for the jury, providing some explanation for the career criminal he later became. If it had been admitted, the PTSD diagnosis offered in mitigation might have explained Hodge's substance abuse, or perhaps even a crime committed in a fit of rage as a compulsive reaction. But it offers virtually no rationale for the premeditated, cold-blooded murder and attempted murder of two innocent victims who were complete strangers to Hodge. Many, if not most, malefactors committing terribly violent and cruel murders are the subjects of terrible childhoods. Even if the sentencing jury had this mitigation evidence before it, we do not believe, in light of the particularly depraved and brutal nature of these crimes, that it would have spared Hodge the

death penalty."

Hodge v. Commonwealth, (No. 2009-SC-000791-MR, Aug. 25, 2011) (Ky. 2011) (not reported in South Western Reporter) (emphasis added).

As this Court stated in Woodward, the "mitigation value" of a difficult childhood is highly questionable when the defendant is an adult. 276 So. 2d at 783. Mitchell was almost 24 on the date of the crimes in this case. Although Mitchell was not " 'decades removed from the abuse,' " id., Jenkins's "granular" picture of Mitchell's childhood and adolescence "offer[ed] ... no rationale for the premeditated, cold-blooded murder ... of [three] innocent victims who were complete strangers to [Mitchell]," Hodge, supra.

As stated above, we have independently reweighed the evidence in aggravation against all the evidence Mitchell offered in mitigation, both at his trial and in his Rule 32 submissions. Again,

> "we have no trouble concluding that the additional mitigating evidence would not have altered the balance of aggravating circumstances and mitigating circumstances in this case. This is so even assuming that the additional mitigating evidence would have swayed more of, or even all, the jurors to vote for life imprisonment without the possibility of parole. In light of the strength of the [five] aggravating circumstances and the

> relative weakness of the totality of the mitigating evidence, the additional weight to be afforded a unanimous jury recommendation of life imprisonment without the possibility of parole would not have altered the balance of aggravating and mitigating circumstances."

Stanley, ___ So. 3d at ___.

The circuit court abused its discretion in holding that Mitchell was due relief on his claim that his counsel was ineffective at the sentencing hearing.[29]

Conclusion

For these reasons, we reverse that part of the judgment granting Mitchell a new sentencing hearing; we affirm the remainder of the judgment; and we remand this matter to the circuit court to reinstate

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[29]As for the State's argument that the circuit court erred in holding that counsel should have gotten and used the records that Mitchell introduced at the evidentiary hearing, in Part III of our opinion we held that the records were "double-edged" and included much information that would have damaged Mitchell. Counsel thus was not ineffective for not obtaining and using those records.

And our holding above that, under the law at that time, counsel could not have offered more evidence at the sentencing hearing also recognizes the merit in the State's argument that counsel's decision not to offer more evidence at the sentencing hearing was a reasonable strategic decision.

Mitchell's death sentence.

APPLICATION OVERRULED; OPINION OF AUGUST 6, 2021, WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

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