

IN THE CIRCUIT COURT OF TALLADEGA COUNTY, ALABAMA

DANIEL SIEBERT,)
)
 PETITIONER,)
)
 V.)
)
 STATE OF ALABAMA,)
)
 RESPONDENT.)

Case No. CV-92-319

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 CLARENCE HAYNES
 CIRCUIT CLERK

MEMORANDUM OPINION

Based on the evidence presented at trial and the hearing on the Rule 32 petitions, the Court enters the following findings of fact and conclusion of law:

I. PROCEDURAL HISTORY

Siebert was indicted on two counts of capital murder. One indictment charged Siebert with the murders of Sherri Weathers, Joseph Weathers, and Chad Weathers. The other indictment charged Siebert with the death of Linda Jarman. Siebert was first tried in Talladega County (CC-86-300) under the indictment charging the capital murder of Linda Jarman. On March 19, 1987, Siebert was convicted of the capital murder of Linda Jarman. On March 20, 1987, the jury recommended a sentence of death. On April 17, 1987, this Court followed the jury's recommendation and sentenced Siebert to death.

Subsequently, Siebert was granted a change of venue for the indictment charging the capital murders of Sherri, Joseph, and Chad Weathers. Siebert's trial for the Weathers' murders was held in Lee County. (CC-87-371) This Court also presided over that case. Siebert was convicted for capital murder of the Weathers' family on June 18, 1987. On the same day, the jury recommended that Siebert be sentenced to death. On

August 19, 1987, this Court followed the jury's recommendation and sentenced Siebert to death.

After Siebert's Talladega and Lee County conviction and death sentence were affirmed on direct appeal, Siebert filed two Rule 32 petitions. The petition concerning the Linda Jarman case was filed on August 24, 1992, in the Talladega County Circuit Court. The petition concerning the Weathers' case was filed on June 26, 1992, in Lee County Circuit Court. Because this Court presided over both the Talladega and Lee County trial, this Court transferred the Lee County Rule 32 (CC-87-371) petition to Talladega County so that it could be considered simultaneously with the Talladega County Rule 32 petition. (CC-86-300) This Court consolidated both petitions into one action to determine if Siebert is entitled to relief from conviction or sentence of death. (CV-92-319)

II. SIEBERT'S PETITIONS ARE DUE TO BE DISMISSED AS UNTIMELY FILED PURSUANT TO RULE 32.2(C) OF THE ALABAMA RULES OF CRIMINAL PROCEDURE.

Rule 32.2(c) of the Alabama Rules of Criminal Procedure specifically states that "The court shall not entertain any petition for relief from a conviction or sentence on the grounds specified in Rule 32.1(a) and (f), unless the petition is filed: (1) In the case of a conviction appealed to the Court of Criminal Appeals, within two (2) years after the issuance of the certificate of judgment by the Court of Criminal Appeals under Rule 41, A.R.App.P." (emphasis added) The petition in former Talladega County case CC-86-300 was filed on or about August 24, 1992. The Alabama Court of Criminal Appeals in the former Talladega County case CC-86-300 issued the Certificate of Judgment on May 22, 1990. The petition in former Lee County case CC-87-371 was filed on or about June 25,

1992. The Alabama Court of Criminal Appeals in the former Lee County case CC-87-371 issued the Certificate of Judgment on January 30, 1990. Clearly, both petitions were filed outside the two-year statute of limitations.

Siebert asserts three grounds upon which this Court should hold that Siebert's petitions are not barred by the two-year statute of limitations: (1) The State waived the affirmative defense of the statute of limitations when it failed to raise it in its first responsive pleadings; (2) a direct appeal is not final until the United States Supreme Court denies certiorari; and, (3) any failure to timely file the petitions was the result of excusable neglect under Rule 1.3 (b), Ala.R.Crim.P. The Court will address each of these issues as follows:

A. The State Of Alabama Did Not Waive The Statute Of Limitations Defense By Failing To Raise It In Its First Responsive Pleading.

Siebert asserts that the State did not provide him notice of its intention to rely on the statute of limitations defense because the State failed to plead the defense in its initial response. After Siebert untimely filed both of his petitions, the State responded to the Talladega County petition on or about October 14, 1992. The State responded to the Lee County petition on or about July 27, 1992. The State did not assert a statute of limitations defense in either initial response. On or about March 28, 1998, Siebert filed an amendment to both of his Rule 32 petitions. Seven days later, on April 4, 1995, the State filed a response to both amended petitions asserting that the petitions were barred in their entirety by the two-year statute of limitations. The State's response placed Siebert on notice within seven days after Siebert filed his amended petitions. If Siebert can file amendments to his petition and have those amendments relate back to the original petition, the State can file an answer to those amendments and have it relate back to the

original answer (the initial responsive pleading). Siebert had timely notice of the State's intention to rely on the statute of limitations defense and the State did not waive the statute of limitations defense.

B. The Statute Of Limitations Began To Run When The Court Of Criminal Appeals Issued The Certificate Of Judgment.

Siebert asserts that his convictions were not final until the United States Supreme Court denied his petition for certiorari on his Talladega County conviction on November 5, 1990, and his petition for certiorari on his Lee County conviction on June 28, 1990. Siebert asserts the statute of limitations did not begin to run until the United States Supreme Court denied certiorari on both of his petitions. Rule 32.2 (c) of the Alabama Rules of Criminal Procedure specifically states that this Court shall not entertain a petition for relief from conviction or sentence unless it is filed within two (2) years after the issuance of the certificate of judgment by the Court of Criminal Appeals. Rule 41(b) of the Alabama Rules of Appellate Procedure specifically states:

The timely filing of a petition for certiorari in the supreme court shall stay the issuance of the certificate of judgment by the courts of appeals, which stay shall continue until the final disposition by the supreme court. Upon the filing of a copy of an order of the supreme court denying the petition for certiorari, the certificate of judgment of the courts of appeals shall issue immediately.

It is clear from Rule 32.2(c) of the Alabama Rules of Criminal Procedure and Rule 41(b) of the Alabama Rules of Appellate Procedure that Siebert's conviction was final on the date the Alabama Court of Criminal Appeals issued the certificate of judgment in both petitions. Therefore, this ground is without merit.

C. Siebert's Untimely Filing Of His Rule 32 Petitions Is Not The Result Of Excusable Neglect.

This Court holds that the untimely filing of Siebert's Rule 32 petitions is not the result of excusable neglect. This Court chooses not to entertain Siebert's Talladega County and Lee County Rule 32 petitions due to the untimely filing of both petitions.

Due to the untimely filing of both petitions, and the reasons stated above, Siebert's petitions are due to be dismissed as being untimely filed beyond the applicable statute of limitations and therefore insufficient to invoke the jurisdiction of this Court to hear the petitions on the merits. In the alternative, this Court finds Siebert's Talladega County and Lee County Rule 32 petitions do not support the relief he seeks because they are without merit.

III. THE TALLADEGA COUNTY RULE 32 PETITION (CC-86-300)

PROCEDURALLY BARRED CLAIMS

Rule 32.1 states that, subject to the limitations of Rule 32.2, "any defendant who has been convicted of a criminal offense may institute a proceeding in the court of original conviction to secure appropriate relief" on various grounds that are set out in Rule 32.1 (a)-(e). Rule 32.1 expressly states that relief under Rule 32 is limited to the extent that the claims raised by a Rule 32 petition may be procedurally defaulted from a circuit court's review. The Alabama Rules of Criminal Procedure, at Rule 32.2 (a), unambiguously states the type of claims that are procedurally defaulted from this Court's review. Rule 32.2 (a) states, as follows:

- (a) PRECLUSION OF GROUNDS. A petitioner will not be given relief under this rule based upon any ground:
 - (1) Which may still be raised on direct appeal under the Alabama Rules of Appellate Procedure or by post-trial motion under Rule 24; or
 - (2) Which was raised or addressed at trial; or

- (3) Which could have been but was not raised at trial, unless the ground for relief arises under Rule 32.1 (b); or
- (4) Which was raised or addressed on appeal or in any previous collateral proceeding; or
- (5) Which could have been but was not raised on appeal, unless the ground for relief arises under Rule 32.1 (b)

The rules of procedural default apply with equal force to all cases, including those in which the death penalty has been imposed. State v. Tarver, 629 So. 2d 14, 20 (Ala. Crim. App. 1993, cert. denied, 511 U.S. 1078, 114 S. Ct. 1664 (1994)).

At the onset of the discussion of the claims raised in Siebert's Rule 32 petition, this Court notes that allegations raising a specific claim of ineffective assistance have been recognized to be cognizable under Rule 32.1. Gholston v. Attorney General, 947 F.2d 908, 910 (11th Cir. 1991). This Court will only discuss the merits of those claims of ineffective assistance of counsel that have been properly raised according to the Alabama Rules of Criminal Procedure. The Court notes that Rule 32.1 (e) allows a Rule 32 petitioner to avoid a procedural default if the factual claim presented is based on newly discovered evidence. To be considered newly discovered evidence, the claim presented must meet the five criteria stated in Rule 32.1 (e) (1)-(5).

A. Claims Which Were Raised At Trial Are Barred From Review.

Five of the claims raised in Siebert's Rule 32 petitions are barred from review, at least in part, because they were raised at trial. These five claims are as follows:

Claim I.A.1. – The prosecutor argued to the penalty phase jury that Siebert's trial attorney had lied to and misled them.

Claim I.A.2. – The prosecutor argued that Siebert should be convicted because he would commit future illegal acts.

Claim I.A.5.¶24 – Throughout Siebert’s trial the prosecutor consistently and improperly referred to other crimes allegedly committed by Siebert which the prosecutor in no way connected to the crime charged.

Claim I.F. – The circumstances underlying a prior conviction was admitted into evidence.

Claim I.K. – Siebert’s motion to change venue was improperly denied.

Claims that were raised at trial are barred from further review in Rule 32 proceedings.

Rule 32.2 (a)(2), Alabama Rules of Criminal Procedure. See, e.g., Cochran v. State, 548 So. 2d 1062, 1068 (Ala. Crim. App.), cert. denied, 548 So. 2d 1062 (Ala. 1989); Dobard v. State, 455 So. 2d 281, 283 (Ala. Crim. App. 1984); Baldwin v. State, 539 So. 2d 1103, 1105 (Ala. Crim. App. 1988), cert. denied, 539 So. 2d 1103 (Ala. 1989), cert. denied, 493 U.S. 874 (1989); Bell v. State, 518 So. 2d 840 (Ala. Crim. App. 1987), cert. denied, 486 U.S. 1036 (1988); Richardson v. State, 419 So. 2d 189, 291 (Ala. Crim. App.), cert. denied, 419 So. 2d 289 (Ala. 1982), cert. denied, 460 U.S. 1017 (1983).

B. Claims Which Could Have Been But Were Not Raised At Trial Are Barred From Review.

Twenty-nine of Siebert’s claims in the Rule 32 petition are barred from review, at least in part, by his failure to raise them at trial. These six claims are as follows:

Claim I.A.3. – The prosecutors penalty phase summation was inflammatory, prejudicial, and violated Siebert’s right to a fair trial.

Claim I.A.4. – The prosecutor argued to the guilt phase jury that it is proper to infer that an actor intends the natural consequences of his acts.

Claim I.A.5.¶25-27 – Throughout Siebert’s trial, the prosecutor consistently and improperly referred to other crimes allegedly committed by Siebert which the prosecutor in no way connected to the crime charged.

Claim I.A.6. – The prosecutor elicited highly inflammatory testimony on matter wholly irrelevant to this case.

Claim I.A.7. – During guilt phase closing arguments, the prosecutor urged the jury that Siebert must be guilty since his charge resulted from the work of various law enforcement agencies and that he knew Siebert was guilty.

Claim I.A.8. – The prosecution relied on facts not in evidence in arguing to Siebert’s penalty phase jury that death was the appropriate sentence.

Claim I.A.9. – The prosecution argued to Siebert’s penalty phase jury that Siebert’s sentence should be decided on the basis of the underlying offense alone and to the exclusion of his moral culpability.

Claim I.A.10. - The prosecutor introduced numerous highly inflammatory photographs and inflammatory videotape.

Claim I.A.11. – The district attorney effectively testified for the State that Siebert’s arrest was legal and that his statement to the police was voluntary.

Claim I.B. – Siebert’s death sentence was obtained through reliance on evidence of the victim’s personal characteristics and victim impact evidence.

Claim I.C. – Siebert was denied the assistance of an independent defense psychiatrist.

Claim I.D.1. – Siebert’s jury was informed that only a portion of his statement to the police was presented because the remaining parts were legally inadmissible.

Claim I.D.2. – The court instructed and the prosecutor argued to Siebert’s penalty phase jury that it should presume death to be the appropriate sentence.

Claim I.D.3. – The trial court’s reasonable doubt charge reduced the degree of proof by which the State needed to prove the existence of aggravating circumstances.

Claim I.D.4. – The penalty phase jury instructions suggested that a mitigating circumstance could be considered only if the jury unanimously agreed that circumstance existed.

Claim I.D.5. – The penalty phase jury instructions were vague and therefore unconstitutional.

Claim I.D.6. – The sentencing phase jury was not instructed on how to determine when the factual existence of a mitigating circumstance is placed in dispute.

Claim I.E. – The existence of one of the aggravating circumstances used in sentencing Siebert to death was proved to exist exclusively by evidence of a constitutionally invalid prior conviction.

Claim I.I. – Siebert’s jury was separated without first ensuring that Siebert adequately understood his right to demand sequestration.

Claim I.J. – Siebert’s death sentence is uninformed by facts critical to a reasoned understanding of his character and background.

Claim I.L. – Siebert was tried by a jury that did not have the benefit of written jury instructions.

Claim I.M. – Siebert’s jury included individuals who should have been excused.

Claim III. – The prosecution’s failure to turn over to defense counsel statements made by its key witness Stephen Laney violated Siebert’s rights and requires granting a new trial.

Claim IV. – The prosecution’s failure to turn over to defense counsel evidence material to the imposition of punishment violated Siebert’s right to be free from cruel and unusual punishment and his right to due process and requires the reversal of his death sentence.

Claim VI.A. – Members of Siebert’s jury failed to reveal during voir dire that they believed death was the only appropriate punishment if a person is found guilty of murder.

Claim VI.B. – Members of Siebert’s jury failed to reveal during voir dire they had previously served on prior juries.

Claim VI.C. – Members of Siebert’s jury failed to reveal on voir dire they had heard or seen pre-trial publicity regarding the case.

Claim VI.D. – Members of Siebert’s jury failed to reveal on voir dire they believed that, if a defendant is innocent, the defendant would testify at trial.

Claim VI.E. – A member of Siebert’s jury failed to reveal on voir dire she had an underlying bias against homosexuals.

Claims that could have been but were not raised at trial are procedurally defaulted from this Court’s review. Rule 32.2 (a)(3), Alabama Rules of Criminal Procedure; Russ v. State, 640 So. 2d 21, 22 (Ala. Crim. App. 1994).

C. Claims Which Were Raised Or Addressed On Appeal Are Barred From Review.

Three of Siebert’s claims in the Rule 32 petition are barred from review, at least in part, because they were raised or addressed on direct appeal. These three claims are as follows:

Claim I.A.5.¶24-27 – Throughout Siebert’s trial the prosecutor consistently and improperly referred to other crimes allegedly committed by Siebert but which the prosecutor in no way connected to the crime charged.

Claim I.F. – The circumstances underlying a prior conviction were admitted into evidence.

Claim I.K. – Siebert’s motion to change venue was improperly denied.

Claims that were raised or addressed on direct appeal are barred from further review in Rule 32 proceedings. Rule 32.2 (a)(4), Alabama Rules of Criminal Procedure. See, e.g., Davis v. State, CR-96-1093, slip op. at 8, 12 (Ala. Crim. App. March 6, 1998); Jackson v. State, 612 So. 2d 1356, 1357 (Ala. Crim. App. 1992), cert. denied, 612 So. 2d 1356 (Ala. 1993).

D. Claims Which Could Have Been But Were Not Raised On Appeal Are Barred From Review.

Twenty-eight of Siebert’s claims in the Rule 32 petition are barred from review, at least in part, by his failure to raise them on direct appeal. These twenty-eight claims are as follow:

Claim I.A.1. – The prosecutor argued to the penalty phase jury that Siebert’s trial attorney had lied to and misled them.

Claim I.A.2. – The prosecutor argued that Siebert should be convicted because he would commit future illegal acts.

Claim I.A.3. – The prosecutor’s penalty phase summation was inflammatory, prejudicial, and violated Siebert’s right to a fair trial.

Claim I.A.4. – The prosecutor argued to the guilt phase jury that it is proper to infer that an actor intends the natural consequences of his acts.

Claim I.A.6. – The prosecutor elicited highly inflammatory testimony on matters wholly irrelevant to this case.

Claim I.A.7. – During guilt phase closing arguments the prosecutor urged the jury that Siebert must be guilty since his charge resulted from the work of various law enforcement agencies and that he knew Siebert was guilty.

Claim I.A.8. – The prosecution relied on facts not in evidence in arguing to Siebert’s penalty phase jury that death is the appropriate sentence.

Claim I.A.9. – The prosecutor argued to Siebert’s penalty phase jury that Siebert’s sentence should be decided on the basis of the underlying offense alone and to the exclusion of his moral culpability.

Claim I.A.10. – The prosecutor introduced numerous highly inflammatory photographs and inflammatory videotape.

Claim I.A.11 – The district attorney effectively testified for the State that Siebert's arrest was legal and that his statement to the police was voluntary.

Claim I.B. – Siebert's death sentence was obtained through reliance on evidence of the victim's personal characteristics and victim impact evidence.

Claim I.C. – Siebert was denied the assistance of an independent defense psychiatrist.

Claim I.D.1. – Siebert's jury was informed that only a portion of his statement to the police was presented because the remaining parts were legally inadmissible.

Claim I.D.2. – The court instructed and the prosecutor argued to Siebert's penalty phase jury that it should presume death to be the appropriate sentence.

Claim I.D.3. – The trial court's reasonable doubt charge reduced the degree of proof by which the State needed to prove the existence of aggravating circumstances.

Claim I.D.4. – The penalty phase jury instruction suggested that a mitigating circumstance could be considered only if the jury unanimously agreed that circumstance existed.

Claim I.D.5. – The penalty phase jury instructions were vague and therefore unconstitutional.

Claim I.D.6. – The sentencing phase jury was not instructed on how to determine when the factual existence of a mitigating circumstance is placed in dispute.

Claim I.E. – The existence of one of the aggravating circumstances used in sentencing Siebert to death was proved to exist exclusively by evidence of a constitutionally invalid prior conviction.

Claim I.G. – Siebert's death sentence rests on a presentence investigation report that includes various incriminating admissions by Siebert.

Claim I.H.1.-5. – The court's penalty phase orders demonstrate that Siebert's sentence of death is illegal and unconstitutional.

Claim I.I. – Siebert's jury was not separated without first ensuring that Siebert adequately understood his right to demand sequestration.

Claim I.J. – Siebert's death sentence is uninformed by facts critical to a reasoned understanding of his character and background.

Claim I.L. – Siebert was tried by a jury that did not have the benefit of written jury instructions.

Claim I.M. – Siebert’s jury included individuals who should have been excused.

Claim III. – The prosecution’s failure to turn over to defense counsel statements made by its key witness Stephen Laney violated Siebert’s rights and requires granting a new trial.

Claim IV. – The prosecution’s failure to turn over to defense counsel evidence material to the imposition of punishment violated Siebert’s right to be free from cruel and unusual punishment and his right to due process and requires the reversal of his death sentence.

Claim VI.A.-E. – Several members of Siebert’s jury failed to reveal crucial information during voir dire which deprived Siebert of his due process rights, his rights to a fair trial, and a reliable sentencing determination.

Claims that could have been but were not raised on appeal are procedurally defaulted from this Court’s review. Rule 32.2 (a)(5), Alabama Rules of Criminal Procedure; Jackson v. State, 612 So. 2d 1356, 1357 (Ala. Crim. App. 1992), cert. denied, 612 So. 2d 1356 (Ala. 1993).

BRADY VIOLATION CLAIMS

Siebert alleged the following in claim III of the amendment to his Rule 32 petition:

Mr. Siebert’s rights to discovery under former Rule 18, Alabama Rules of Criminal Procedure (temporary) and his right to confrontation and to due process under the Federal and State Constitution, as interpreted by the Supreme Court of Alabama in Ex [p]arte Monk, 557 So. 2d 832 (1989), were violated.

The crux of the defense in this case was the contention that Linda Jarman, [the victim,] was not killed in the course of a first degree robbery, [because Siebert had permission from the victim to use the victim’s vehicle before her death].

A critical aspect of the evidence adduced by the State on the issue of defendant’s intent to rob [the victim] of her car was Stephen Laney’s testimony.

Although this Court holds that this claim procedurally is barred, in the alternative, it will address the merits. Stephen Laney, a neighbor of Siebert's, who lived in the Porter building, testified that he saw Siebert on the night of the murder loading trash bags, filled with some of the victim's "stuff", into the victim's vehicle. (TR. 213)¹. Siebert informed Laney he had borrowed the victim's vehicle, he and the victim had a fight, and he was returning some of the victim's belongings to her. (TR. 213-14) The evidence Laney presented to the jury initially developed during a fourth interview conducted by the Talladega Police Department on April 25, 1986. Siebert contends that the State improperly withheld three sets of notes from previous interviews with Laney which were required to be disclosed under Brady v. Maryland, 373 U.S. 83 (1963) and Ex parte Monk, 557 So. 2d 832, 835 (Ala. 1989). Siebert contends the three sets of interview notes with Laney never mentioned the encounter Laney had with Siebert on the eve of the murder. Siebert contends that, "[w]ithout the [previous] statements, defense counsel could not follow-up his attack on Mr. Laney's credibility."

Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry v. State, 659 So. 2d 194 (Ala. Crim. App. 1994) cert. denied, 116 S. Ct. 137 (1995). Siebert presented no credible evidence in support of this claim at the evidentiary hearing. Therefore, this claim of the petition is due to be denied.

Siebert alleged the following in claim IV of the amendment to his Rule 32 petition:

¹ References to the record in this portion of the order are as follows: references to the Talladega trial transcript will appear as (TR. __), references to the Talladega trial clerk's record will appear as (CR. __), references to the April 3-5, 1998, Rule 32 evidentiary hearing transcript will appear as (R. __), and references to the September 26, 1995, Rule 32 evidentiary hearing transcript will appear as (R². __).

Mr. Siebert's right to present mitigating evidence pursuant to Ala. Code §§ 13A-5-51, 13A-5-52, and the Eighth and Fourteenth Amendments to the U.S. Constitution, and his right to due process under the U.S. and Alabama Constitutions, were violated because the prosecution failed to turn over evidence and other materials which could have been presented to the jury as mitigating factors at Mr. Siebert's sentencing phase of his trial as required under Brady v. Maryland, 373 U.S. 83 (1963)

Although this Court holds that this claim is procedurally barred, in the alternative, it will address the merits. Siebert claims the prosecution withheld evidence of Siebert's "drug use and physical abuse which would have corroborated the testimony of Dr. Otto Eisenhardt regarding the personal history communicated to him by Siebert." Eisenhardt testified that the only evidence he had of Siebert's drug use and physical abuse was that provided by Siebert himself. (TR. 774) Siebert contends that, if the withheld information had been provided, Eisenhardt's testimony would have been bolstered; creating a reasonable probability the jury would not have imposed the death penalty.

Rod Giddens; one of Siebert's defense attorneys, testified at the Rule 32 evidentiary hearing that Eisenhardt's report did contain information about Siebert's alcohol, physical, and sexual abuse. (R. 38) Giddens was aware of information concerning Siebert's sexual and physical abuse before obtaining Eisenhardt's report. (R. 77) Giddens felt there was nothing else to pursue for a mental health defense for the guilt or penalty phase. In addition, Giddens felt it was not a good idea to present evidence of Siebert's drug abuse as mitigation. (R. 101)

Siebert states in paragraph twenty-five of his amendment to his Rule 32 petition that "the prosecution failed to disclose to defense counsel documents material to Siebert's punishment phase of his trial." Siebert did not state in his petition or at the evidentiary

hearing what documents the prosecution failed to disclose. Giddens testified he had no knowledge of any information that was withheld by the district attorney during the discovery process. (R. 89) Likewise, George Sims, Siebert's other defense attorney, testified he did not remember asking for anything which the district attorney had which was not turned over. (R. 125) Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure. Siebert presented no credible evidence in support of this claim at the evidentiary hearing. This claim of the petition is therefore due to be denied.

INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

An evidentiary hearing was held from April 3-5, 1995, and on September 26, 1995, on Siebert's claim he was denied effective assistance of counsel at trial and on appeal. At the Rule 32 evidentiary hearing, Siebert was represented by counsel and presented evidence, in the form of testimony and exhibits, in support of this claim. Based on the evidence presented, including the court's observations and evaluation of the witnesses' demeanor, Siebert failed to prove that trial counsel rendered ineffective assistance.

Standard of Review

To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that he was prejudiced by that deficient performance. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). This Court must avoid using the benefit of hindsight and must evaluate counsel's conduct as of the time of trial. Ex parte Lawley, 512 So. 2d 1370 (Ala. 1987). When this Court is

reviewing a claim of ineffective assistance of counsel, it must indulge a strong presumption that counsel's conduct was appropriate and reasonable.

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

Strickland, 466 U.S. at 689, 104 S. Ct. at 2065 (citations omitted). “Counsel's conduct must be considered within the context of the facts of the particular case and as of the time of the alleged misconduct.” Ex parte Baldwin, 456 So. 2d 129, 134 (Ala. 1984), aff'd, 472 U.S. 373, 105 S. Ct. 2727 (1985).

Even if deficient performance is proved, a showing of prejudice is also required. A claimant must show that “but for” counsel's deficient performance the results of the proceeding would have been different. Howard v. State, 551 So. 2d 1155, 1158 (Ala. Crim. App. 1989). Prejudice is proved only when there “exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. [citations omitted] A reasonable probability is a probability sufficient to

undermine confidence in , the outcome of the trial.” Burnett v. State, 651 So. 2d 57, 58 (Ala. Crim. App. 1994), citing, Strickland, 466 U.S. at 694. To prove prejudice, the alleged errors of counsel must “so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” Kimmelman v. Morrison, 477 U.S. 365, 374 (1986), cited in, Lockhart v. Fretwell, 506 U.S. 364, 369 (1993).

Trial Counsel

At trial, and on direct appeal, Siebert’s lead counsel was the Honorable George Sims, now a District Court Judge for Talladega County. (R. 116) In addition, Rod Giddens was appointed to assist Sims at trial and on direct appeal.² (R. 25) Sims, at the time of Siebert’s trial, was a criminal defense lawyer of considerable experience and ability. (R. 115, 117)³ At the time of Siebert’s trial, Sims had actively practiced law for over ten years. Sims’ practice consisted of fifty to sixty percent criminal cases. (R. 115) Before Siebert’s trial, Sims had tried four to five capital cases. (R. 117) At the time of Siebert’s trial, Giddens had been in the active practice of law for approximately five years. (R. 24) Giddens’ practice consisted of approximately ninety percent criminal cases.⁴ (R. 24) Giddens worked with Sims on two capital cases before Siebert’s trial. Giddens consulted with other lawyers who had experience in death penalty cases. (R. 70)

Sims and Giddens met with Siebert a number of times before trial. The time spent with Siebert would vary from ten minutes to a couple of hours. (R. 74) During these

² William J. Willingham also assisted Sims and Giddens on Siebert’s direct appeal.

³ The Court knows from its personal knowledge that the Honorable George Sims is a criminal defense lawyer of considerable experience and ability.

⁴ The Court also knows from its personal knowledge that Ron Giddens is a criminal defense lawyer of considerable experience and ability.

meetings, Sims, Giddens, and Siebert conversed about Siebert testifying, potential mitigation, information concerning Siebert's childhood history of physical and sexual abuse, and possible witnesses. (R.75-76; 79) Siebert cooperated fully with Sims and Giddens before trial.

Sims and Giddens filed the following pretrial motions in this case: motion for change of venue (CR. 23); motion to produce (CR. 27); motion for psychiatric treatment (CR. 32); motion for funds for appointment of expert (CR. 42); motion to appoint psychiatrist to act as defendant's expert and approval of funds (CR. 44); request for production and disclosure (CR. 51); motion in limine (CR. 53); and motion for expenditures for travel, lodging and meal expense of witness (CR. 55).

Sims and Giddens conducted a thorough pretrial investigation. The purpose of their investigation was to obtain evidence to present at the penalty phase of Siebert's trial. (R. 120-121) This Court granted funds for Dr. Otto Eisenhardt, a psychiatrist, to conduct a psychiatric evaluation on Siebert. (CR. 47, 48) Giddens testified that, although an investigator would have been helpful, there was no information that was not available to the psychiatric expert due to the absence of an investigator. (R. 33, 81) Sims testified the psychiatric expert was provided with everything he asked for. (R. 123) Sims and Giddens made efforts to get witnesses for mitigating purposes. (R. 39-40) Siebert only gave defense counsel the name of his ex-girlfriend, Vickie Owens, and Damian Siebert, his son. (R. 54) Giddens testified there were attempts to get Vickie Owens to testify, but he was told by Siebert that Owens had a drug problem. (R. 80) Sims testified he felt Owens would have been a bad mitigating witness. (R. 143) In addition, Sims testified he wanted Owens to come to Talladega so he could make a determination about whether to

use her as a mitigation witness; however, he was leaning toward not using her as a mitigation witness. (R. 146) Giddens testified Siebert did not want his son, Damian, to be used as a mitigation witness. (R. 81)

Based on Sims' and Giddens' pre-trial investigation, they developed a trial strategy of attacking the State's evidence that this crime was not one of capital murder. (R. 27, 119) Giddens and Sims were limited in what they could present at the guilt stage of the trial by Siebert's own confession to the police about the murders.

Sims and Giddens called Dr. Otto Eisenhardt, a psychiatrist, as their only witness during the penalty phase of Siebert's trial. Dr. Eisenhardt testified he saw Siebert in the Talladega County Jail and performed a mental status examination on him. (TR. 760-61) Eisenhardt's opinion was that Siebert had no major illness. (TR. 760) Siebert had a substance abuse disorder that began in his early teens. He used various drugs excessively and at regular intervals. (TR. 761) Siebert conveyed to Eisenhardt that he used large quantities of phencyclidine, also known as PCP and Angel Dust. Individuals who use this type of drug can become unpredictable and physically violent for no apparent reason. (TR. 762-63) Eisenhardt testified that the longer one used the drug, the more disorganized the person would become and the more likely they would become involved in anti-social behavior. (TR. 764-65) Eisenhardt diagnosed Siebert with an anti-social personality disorder and stated the following:

A person who regularly uses anti-social behavior would be classified as having an anti-social personality. In other words, such a person does not think of the consequences of his actions before he acts. He responds to "I want what I want, when I want it" type principle.

. . . . I think a person like that would know that [their behavior] is morally wrong or legally wrong. He just wouldn't think that far ahead when he did it.
(TR. 768)

Eisenhardt testified Siebert conveyed to him that his father physically and sexually abused him. (TR. 770) Eisenhardt concluded that someone who used phencyclidine to the extent that Siebert did would exhibit erratic, and potentially violent, behavior which could develop on the spur of the moment for no apparent reason. (TR. 773)

Sims and Giddens prepared for both the guilt and penalty phases of trial. Sims' and Giddens' preparation is shown not only by their testimony at the Rule 32 evidentiary hearing, but also by the trial transcript, which shows them to have been prepared and knowledgeable about the State's case against Siebert and about Siebert's character and background. Sims and Giddens were both credible witnesses and this Court credits their account of their preparation and investigation.

A. Specific Claims of Ineffective Assistance of Counsel

- 1) Counsel failed to investigate mitigating circumstances and failed to present evidence of mitigating circumstances to the jury.

Siebert contends in paragraph seventy-nine of his Rule 32 petition that his attorneys failed to investigate his past and never learned of the abuse he suffered and the psychiatric and psychological abnormalities that resulted from that abuse. Siebert concludes in paragraph eighty-one of his Rule 32 petition the failure to investigate resulted in the penalty phase jury and this Court not being presented with the physical, psychological, and other abuse suffered by Siebert as a child, youth, and adult.

Giddens testified that efforts were made to get witnesses for mitigating purposes. (R. 39-40) Sims and Giddens considered whether to call Vickie Owens, Siebert's former girlfriend, and Damian Siebert, Siebert's son. (R. 120-121) Sims testified a conclusion was made that Vickie Owens would have been a bad mitigation witness. (R. 143) Giddens testified he did not know if Owens' testimony would have helped or hurt, but there was concern about using her as a mitigation witness due to her having a drug problem. (R. 80) Siebert informed Sims and Giddens he did not want his son, Damian, to testify at the penalty phase. (R. 81)

Giddens was aware of Siebert's physical and sexual abuse before obtaining the report of Dr. Eisenhardt. (R. 76) Giddens testified that, through Eisenhardt's testimony, the jury was presented with mitigation evidence of Siebert's mental health problems and his history of physical, sexual, and drug abuse. (R. 84, TR. 757-85) Giddens testified he considered presenting Siebert's artwork, drug abuse, and anti-personality disorder as additional mitigation, but felt the jury would not be receptive to this type of mitigation. (R. 85-86, 101, 109) Giddens also testified that they had no other mitigation evidence to pursue for the penalty phase. (R. 85)

Siebert's claim that his trial counsel failed to investigate and present mitigation evidence to the jury and to this Court is without merit. Siebert failed to prove at the Rule 32 evidentiary hearing that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for these instances of ineffective assistance, the outcome of his trial would have been different.

- 2) Counsel failed to request a continuance in order to produce crucial evidence regarding a change of venue motion.

Siebert contends in paragraphs 82-89 of his Rule 32 petition that trial counsel was ineffective by not asking for a continuance when this Court ruled on a change of venue motion without considering subpoenaed materials from the Birmingham News and Channel Six television news.

Trial counsel was not ineffective in failing to ask for a continuance in order to produce additional evidence regarding Siebert's change of venue motion. Siebert presented no evidence in support of this claim at the Rule 32 evidentiary hearing and, thus, did not prove that trial counsel's conduct was deficient. Siebert did not present any newspaper articles, transcripts, videotapes or other documentary evidence pertaining to publicity to support his claim. Further, Siebert has failed to establish prejudice. The Court of Criminal Appeals found that this Court properly denied Siebert's motion for change of venue. Siebert v. State, 562 So. 2d 586, 590 (Ala. Crim. App. 1989) Siebert failed to prove at the Rule 32 evidentiary hearing that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's actions concerning the motion for change of venue, the outcome of his trial would have been different.

- 3) Counsel was ineffective in investigating and developing a mental health defense.

Siebert asserts in paragraph 90 of the Rule 32 petition that trial counsel was ineffective "in a number of ways regarding the presentation of Siebert's psychiatric history and emotional state in the penalty phase of the trial."

In paragraph 91, Siebert asserts that trial counsel's inadequate investigation led to devastating impeachment of his psychiatric expert by the prosecution. Siebert asserts that trial counsel's inadequate investigation prejudiced him by not supplying Dr. Eisenhardt

information corroborating and elaborating on his description of his life history. In addition, in paragraph 94, Siebert claims that trial counsel failed to request assistance from a social worker, psychologist, or investigator to obtain evidence of Siebert's mental health history and other mitigation. Both claims are without merit. As this Court held in claim A.1., supra, Siebert's trial counsel did not conduct an inadequate investigation that prejudiced Siebert. This Court knows of no requirement that trial counsel has an obligation to seek information to corroborate the testimony of its expert witness. Siebert's attorneys filed a motion for funds to hire a psychiatric expert and that motion was granted. (CR. 42, 44, 47) Siebert's family history was presented to the penalty phase jury and the jury considered that mitigation evidence. At the Rule 32 evidentiary hearing, Siebert presented additional mitigation evidence that could have been presented to the penalty phase jury. Siebert presented this additional mitigation evidence through the testimony of Dr. William Bernet, a psychiatrist, Dr. Barbara J. Tarkin, a psychologist, and Vickie Cosby Jefferson. "The test for ineffectiveness is not whether counsel could have done more; perfection is not required." Waters v. Thomas, 46 F.3d 1506, 1518 (11th Cir. 1995). Siebert's trial counsel could have presented additional mitigation evidence about his family history at the penalty phase. However, Siebert's trial counsel was not ineffective for not presenting such additional evidence. Giddens testified that they had no other mitigation to pursue. (R. 85) Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to present additional mitigation evidence of his family history, the outcome of his trial would have been different.

In paragraphs 92-93, and paragraphs 95-98, Siebert claims that trial counsel was ineffective for not requesting that the trial court instruct Dr. Eisenhardt “that his report was confidential, privileged, and not to be disclosed to anyone other than defense counsel and the defendant.” In addition, Siebert claims that trial counsel was ineffective when he failed to request an appointment of another expert upon learning that Dr. Eisenhardt had supplied the prosecution with a copy of his report. Siebert’s claims are without merit. Dr. Eisenhardt’s report would have been discoverable evidence to the prosecution under the Alabama Rules of Criminal Procedure, Temporary Rule 18.2(c) [now Rule 16.2(c)]. In addition, Giddens testified at the Rule 32 evidentiary hearing that the decision to call Dr. Eisenhardt as a witness was not affected by Eisenhardt giving a copy of the report to the prosecution. (R. 72) Giddens testified that, even with the harmful material in Eisenhardt’s report, they still would have called him as a witness. (R. 73) Giddens also testified that he felt there was nothing else to pursue for a mental health defense for the guilt or penalty phase. (R. 91) Siebert failed to prove that his trial counsel was deficient. Siebert cannot prove prejudice from trial counsel’s failure for not requesting that this Court instruct Dr. Eisenhardt about his report or from trial counsel’s failure in not requesting an appointment of another expert. Siebert also failed to establish a reasonable probability that, but for trial counsel’s failure to request an instruction to Dr. Eisenhardt about his report and for trial counsel’s failure to request an appointment of another expert, the outcome of his trial would have been different.

4) Counsel failed to provide effective assistance of counsel in numerous additional areas.

(a) Counsel failed to challenge at trial and on direct appeal the admission of victim impact and victim characteristics evidence.

Siebert presented no evidence in support of this claim at the Rule 32 evidentiary hearing. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry v. State, 659 So. 2d 194 (Ala. Crim. App. 1994) cert. denied, 116 S. Ct. 137 (1995). Siebert did not question Sims or Giddens about not challenging the victim impact and victim characteristics evidence. Giddens testified that his tactic in objecting is to only object to sound issues in order to preserve them for appeal and he felt excessive objections hurt a case. (R. 93) Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for his attorneys' failure to challenge the victim impact and victim characteristics evidence, the outcome of his trial would have been different.

(b) Counsel failed to present critical evidence at the change of venue hearing.

Siebert presented no evidence in support of this claim at the Rule 32 evidentiary hearing. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert did not present any newspaper articles, transcripts, videotapes or other documentary evidence pertaining to publicity to support his claim. Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for his attorney's failure to present this evidence, the outcome of his trial would have been different.

(c) Counsel failed to challenge at trial and on direct appeal the State's improper and prejudicial guilt and penalty phase arguments.

Siebert presented no evidence in support of this claim at the Rule 32 evidentiary hearing. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert presented no evidence as to what arguments were allegedly improper and prejudicial during the guilt and penalty phase. Giddens testified that he did not feel that any portion of the prosecutor's closing argument during the guilt and penalty phase was objectionable. In addition, Giddens testified that he only objects to something that may get the case reversed. (R. 94) Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for his attorney's failure to present this evidence, the outcome of his trial would have been different.

(d) Counsel's failure to challenge at trial and on direct appeal the failure to strike for cause various prospective jurors and the seating of various jurors.

Siebert presented evidence of this claim through the testimony of three jurors who sat on Siebert's trial. Elton Fomby, who was jury foreman, testified he knew one of the prosecution witnesses, Barbara Cunningham. Fomby testified he would have acknowledged knowing Cunningham if this had been asked on voir dire. (R². 15) However, Fomby testified that knowing Cunningham did not affect him rendering a fair verdict. (R². 16) Fomby testified he based his verdict solely on the evidence presented at trial. (R². 17)

Kathy Curlee testified that her daughter attended school near the place where the crime occurred. (R². 20) Hearing about the murders did not cause her to have a fixed opinion on Siebert's guilt or innocence. (R². 23) Curlee rendered her verdict based

solely on the evidence presented at trial. (R². 26) Linda Darling testified that she always believes a person will take the stand if they are innocent. (R². 42) However, Darling testified that she was able to set all her personal beliefs aside and follow the court's instructions. (R². 40) Darling set aside her personal beliefs about the death penalty and followed the court's instructions. (R². 37) Darling based her verdict solely on the evidence presented at trial. (R². 40)

Siebert was to present evidence by deposition of former juror Glenda Chatman. (R². 46) This Court has not been presented with such evidence; therefore, Siebert has failed to present any evidence concerning this particular juror. Siebert also claims that trial counsel was ineffective for not challenging the seating of various jurors. Siebert presented no evidence as to this claim.

Siebert failed to prove prejudice from trial counsel's failure to challenge the jurors who testified at the Rule 32 evidentiary hearing. Siebert presented no evidence relating to other jurors or prospective jurors. Siebert presented no evidence as to the seating of various jurors. The only documentary evidence that Siebert presented that could relate to this claim was part of the district attorney's file entitled "Jury Selection." (R². 48) Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that a fair-minded, impartial jury did not try him. Siebert failed to establish a reasonable probability that, but for trial counsel's failure to strike jurors for cause and the seating of various jurors, the outcome of his trial would have been different.

- (e) Counsel failed to conduct adequate voir dire by failing to inquire into the potential jurors' knowledge of this case, the alleged crime committed and knowledge of various witnesses.

The Court's analysis of this claim is the same as that in claim A.4.(d) Siebert presented no evidence of what would have been adequate voir dire by his trial counsel. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to establish a reasonable probability that, but for trial counsel's failure to conduct adequate voir dire, the outcome of his trial would have been different.

- (f) Counsel failed to challenge at trial and on direct appeal the prosecution's severely prejudicial misconduct.

Siebert refers to the prosecutorial misconduct claims in paragraphs 5-36 of the Rule 32 petition. The only mention of any of these prosecutorial misconduct claims at the Rule 32 evidentiary hearing was the claim found in paragraphs twenty-four through twenty-seven of Siebert's Rule 32 petition (remarks about other crimes). (R. 95) Siebert presented no evidence as to any other prosecutorial misconduct claims. As to the prosecutorial misconduct claim concerning remarks about other crimes, Siebert's trial counsel did object to a number of the remarks that Siebert refers to in paragraphs twenty-four through twenty-seven of the Rule 32 petition. (TR. 164-165, 696, 195) This is the only evidence presented as to this claim. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to establish a reasonable probability that, but for trial counsel's failure to challenge these prejudicial remarks, the outcome of his trial would have been different.

(g) Counsel failed to challenge at trial and on direct appeal the trial court's inadequate and improper guilt and penalty phase instructions.

Siebert presented no evidence at the evidentiary hearing as to why this Court's guilt and penalty phase instructions were inadequate and improper. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Giddens testified he felt that this Court's charge to the jury was not objectionable. (R. 92) Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge this Court's guilt and penalty phase instructions, the outcome of his trial would have been different.

(h) Counsel failed to challenge at trial and on appeal the trial court's failure to provide the jury during its deliberations with a written copy of the jury instructions.

Siebert presented no evidence as to this claim at the evidentiary hearing. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to object to the Court's failure to provide a copy of the jury instructions, the outcome of his trial would have been different.

(i) Counsel failed to request various jury instructions and failed to request a jury charge conference at the guilt and penalty phases.

Siebert presented no evidence as to this claim at the evidentiary hearing. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at

the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to request jury instructions and a jury charge conference, the outcome of his trial would have been different.

(j) Counsel failed to challenge at trial or on direct appeal the prosecutor eliciting testimony of Siebert's prior bad acts.

In paragraph twenty-seven of his petition, Siebert refers to the prosecutor eliciting testimony of prior bad acts. The prosecutor's line of questioning relates specifically to Sherri Weathers, one of the victim's in the Lee County capital case Siebert was charged with. Siebert's trial counsel objected to this same line of questioning earlier in the trial and this Court overruled that objection. (TR. 164-65) Siebert presented no evidence at the evidentiary hearing relating to this claim. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge this line of questioning, the outcome of his trial would have been different.

(k) Counsel failed to challenge on appeal the admission of various inflammatory photographs and an inflammatory videotape.

Siebert presented no evidence at the evidentiary hearing relating to this claim. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. The Court of Criminal Appeals found

this Court properly allowed into evidence videotape of the crime scene. Siebert v. State, 562 So. 2d 586, 599 (Ala. Crim. App. 1989). Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge the admission of various photographs and videotape, the outcome of his trial would have been different.

(l) Counsel failed to challenge at trial or on direct appeal the prosecutor eliciting testimony regarding the victim's personal characteristics.

This claim was addressed in A.4.(a). For the same reasons, this claim is without merit. Siebert failed to show that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for his attorneys' failure to challenge this testimony, the outcome of his trial would have been different.

(m) Counsel failed to challenge at trial and on appeal introduction of evidence that Siebert was sexually perverted.

Siebert presented no evidence at the evidentiary hearing showing how he was prejudiced by trial counsel's failure to object to this evidence. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge the admission of evidence indicating he was sexually perverted, the outcome of his trial would have been different.

(n) Counsel failed to challenge at trial and on direct appeal the prosecution testifying through State's witnesses regarding Siebert's arrest and the voluntary nature of his statement.

Siebert presented no evidence at the evidentiary hearing showing how he was prejudiced by trial counsel's failure to object to the prosecution's remarks. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge the prosecutor's statements, the outcome of his trial would have been different.

(o) Counsel failed to challenge at trial and on direct appeal the admission into evidence of Siebert's Nevada conviction.

During the evidentiary hearing, Sims mentioned the Nevada conviction and how they were best able to negate the conviction. (R. 145) However, Siebert presented no evidence at the evidentiary hearing showing how he was prejudiced by trial counsel's failure to challenge the Nevada conviction. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge the Nevada conviction, the outcome of his trial would have been different.

(p) Counsel failed to object at trial and on direct appeal to evidence proving the aggravating circumstance that Siebert "was previously convicted of another capital felony or felony involving the use or threat of violence to the person."

This claim, which also concerns Siebert's Nevada conviction, was addressed in claim A.4.(o). For the same reasons, this claim is without merit. Siebert failed to prove

that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for his trial counsel's failure to challenge the evidence of the Nevada conviction, the outcome of his trial would have been different.

(q) Counsel failed to challenge at trial and on direct appeal the inclusion of various incriminating admissions in the presentence investigation report.

Siebert presented no evidence at the evidentiary hearing showing how he was prejudiced by trial counsel's failure to challenge the statements included in the presentence investigation report. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge the statements in the presentence investigation report, the outcome of his trial would have been different.

(r) Counsel failed to challenge at trial and on direct appeal the trial court's reliance on the presentence investigation report that allegedly included prejudicial and improper information.

Siebert presented no credible evidence at the evidentiary hearing that proved how he was prejudiced by trial counsel's failure to challenge the statements included in the presentence investigation report. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge the statements in the presentence investigation report, the outcome of his trial would have been different.

- (s) Counsel failed to challenge at trial and on direct appeal the trial court's sentencing Siebert to death exclusively as a matter of logic.

Siebert presented no evidence at the evidentiary hearing showing how he was prejudiced by trial counsel's failure to challenge this Court's conclusion reached in its sentencing order. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge the conclusion reached in this Court's sentencing order, the outcome of his trial would have been different.

- (t) Counsel failed to challenge at trial or on appeal the trial court's failure to determine if Siebert understood his rights to demand a sequestered jury.

Siebert presented no evidence at the evidentiary hearing showing how he was prejudiced by trial counsel's failure to challenge this Court's failure to ensure he understood his rights to a sequestered jury. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge this Court's failure to ensure Siebert understood his rights to a sequestered jury, the outcome of his trial would have been different.

- (u) Counsel failed to challenge at trial and on direct appeal the trial court's reliance on Siebert's Nevada conviction in determining Siebert's sentence of death.

Siebert presented no evidence at the evidentiary hearing showing how he was prejudiced by trial counsel's failure to challenge this Court's reliance on Siebert's Nevada conviction in determining sentence. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge this Court's reliance on the Nevada conviction in determining sentence, the outcome of his trial would have been different.

(v) Counsel failed to challenge at trial or on direct appeal the trial court's failure to find the existence of mitigating circumstances.

Siebert presented mitigating evidence at the evidentiary hearing through the testimony of Dr. William Bernet, a psychiatrist, Dr. Barbara J. Tarkin, a psychologist, and Vickie Cosby Jefferson, Siebert's former girlfriend. Siebert's evidence failed to prove a reasonable probability that, but for trial counsel's failure to challenge this Court's failure to find the existence of mitigating circumstances, the outcome of his trial would have been different. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. The Court of Criminal Appeals held that this Court's finding that mitigating circumstances were not present was proper. Siebert v. State, 562 So. 2d 586, 599 (Ala. Crim. App. 1989). Siebert failed to prove that his trial counsel was deficient and that he was prejudiced by trial counsel's failure to object.

(w) Counsel failed to challenge at trial and on direct appeal the trial court's process used in determining that Siebert be sentenced to death.

Siebert presented no credible evidence at the evidentiary hearing which proved how he was prejudiced by trial counsel's failure to challenge this Court's process used in determining Siebert's sentence of death. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge this Court's process in determining his sentence of death, the outcome of his trial would have been different.

(x) Counsel failed to challenge at trial and on direct appeal the trial court's consideration of non-statutory aggravating circumstances.

Siebert presented no credible evidence at the evidentiary hearing that proved how he was prejudiced by trial counsel's failure to challenge this Court's consideration of alleged non-aggravating circumstances. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. The Court of Criminal Appeals held that this Court's reliance on the aggravating circumstances used in its sentencing order was proper. Siebert v. State, 562 So. 2d 586, 599 (Ala. Crim. App. 1989). Siebert has failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge this Court's consideration of alleged non-aggravating circumstances, the outcome of his trial would have been different.

- (y) Counsel failed to challenge at trial and on direct appeal the basis of the presentence investigation report section concerning Siebert's statement regarding the case.

Siebert presented no credible evidence at the evidentiary hearing that proved how he was prejudiced by trial counsel's failure to challenge the statements included in the presentence investigation report. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge the statements in the presentence investigation report, the outcome of his trial would have been different.

- (z) Counsel failed to challenge at trial and on direct appeal the inclusion in the presentence investigation report of crimes charged but not disposed of.

Siebert presented no credible evidence at the evidentiary hearing that proved how he was prejudiced by trial counsel's failure to challenge the crimes specified in the presentence investigation report. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge the crimes specified in the presentence investigation report, the outcome of his trial would have been different.

- (aa) Counsel failed to challenge at trial and on direct appeal the statement in the presentence investigation report concerning the communities conclusion of no leniency for Siebert.

Siebert presented no evidence at the evidentiary hearing showing how he was prejudiced by trial counsel's failure to challenge this statement. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge this statement in the presentence investigation report, the outcome of his trial would have been different.

- (bb) Counsel failed to challenge at trial and on direct appeal to the portion of the presentence investigation report which suggested that Siebert killed people in other states and the recommendation that Siebert be sentenced to death.

Siebert presented no evidence at the evidentiary hearing showing how he was prejudiced by trial counsel's failure to challenge this portion of the presentence investigation report. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to establish a reasonable probability that, but for trial counsel's failure to challenge this portion of the presentence investigation report, the outcome of his trial would have been different.

- (cc) Counsel failed to challenge at trial and on direct appeal the trial court's failure to properly consider the weight of the aggravating circumstances.

Siebert presented no evidence at the evidentiary hearing showing how he was prejudiced by trial counsel's failure to challenge this Court's weighing of the aggravating circumstances. Siebert had the burden of pleading and proving this claim by a

preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge this weighing of the aggravating circumstances, the outcome of his trial would have been different.

(dd) Counsel failed to raise on appeal numerous meritorious issues raised in this petition.

Siebert has not specified the meritorious issues that he raises in this claim. Siebert presented no evidence at the evidentiary hearing showing how he was prejudiced by trial counsel's failure to challenge other meritorious issues. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge other meritorious issues, the outcome of his trial would have been different.

5) Counsel's failure to present Vickie Owens' testimony at the penalty phase of Siebert's trial constituted a denial of his right to a fair trial.

This claim is raised in claim V of Siebert's amendment to his Rule 32 petition and this Court will treat this claim as an ineffective assistance of counsel claim. At the evidentiary hearing, Siebert called Vickie Cosby Jefferson, formerly Vickie Owens, as a witness. (R. 351) Jefferson testified that she was wired \$100.00 by Siebert's trial counsel, packed up her car and left for Talladega. (R. 365) Jefferson testified that she ran out of money when she arrived in Meridian, Mississippi. (R. 366) Jefferson testified that when she called Sims' office, she got the impression from Sims' secretary that she

was no longer needed and she went back to El Paso, Texas. (R. 367) Jefferson did testify that no one specifically told her not to come to Talladega, but additional funds were not provided to her. (R. 374)

Giddens testified he did not know if Jefferson's testimony would have helped or hurt, but knew that she had a drug problem. (R. 80) Sims testified that Siebert stated to him to be careful about giving Jefferson any money because of her drug habit. (R. 138) Sims also testified that Jefferson would have been a bad mitigating witness. (R. 143) Sims testified that it was his intention to talk to Jefferson and make a decision about using her, but was leaning toward not using her as a mitigation witness. (R. 146)

Sims and Giddens made a strategic decision not to call Jefferson (Owens) as a mitigation witness. Siebert presented no credible evidence at the evidentiary hearing that proved how he was prejudiced by trial counsel's failure to call Vickie Owens Jefferson as a mitigation witness. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to call Vickie Owens Jefferson as a mitigation witness, the outcome of his trial would have been different.

JUROR MISCONDUCT CLAIMS

Siebert alleges in claim VI of his amendment to his Rule 32 petition that several members of his jury failed to reveal during voir dire crucial information, depriving him of his due process rights, his right to a fair trial, and his right to a reliable sentencing

determination. Although this Court has held that this claim is procedurally barred, in the alternative, it will address the merits.

- A. Members of Siebert's jury failed to reveal on voir dire that they believed death was the only appropriate punishment if a person is found guilty of murder.

At the evidentiary hearing, Siebert presented evidence of this claim through the testimony of Kathy Curlee and Linda Darling. Curlee testified that the death penalty is not necessarily the appropriate punishment when someone kills another person. (R². 21) Curlee did not believe that the death penalty should be automatic for the killing of another; but in this case she felt it was appropriate based solely on the evidence. (R². 27) Darling testified she felt the death penalty is appropriate for an intentional killing. (R². 33) Darling testified that she would not automatically impose the death penalty in a case. (R². 37) Darling was able to set her personal feelings about the death penalty aside and follow the court's instructions. (R². 37, 40) Darling gave Siebert a presumption of innocence and followed this Court's instructions when rendering the verdict. (R². 39) Darling followed this Court's instructions on the State's burden of proving Siebert guilty and went by the evidence presented at trial in determining her verdict. (R². 40) Siebert has failed to show how he was prejudiced by this claim and how he was denied his due process rights, his rights to a fair trial, and a reliable sentencing determination. Thus, this claim is without merit.

- B. Members of Siebert's jury failed to reveal during voir dire that they had previously served on prior juries.

At the evidentiary hearing, Siebert presented evidence of this claim through the testimony of Elton Fomby. Fomby testified that serving on a prior jury did not cause a fixed opinion on Siebert's guilt or innocence. (R². 17) Fomby also testified he was able

to render a verdict based on the evidence presented at trial. (R². 17) Siebert failed to show how he was prejudiced and denied his due process rights, his rights to a fair trial, and a reliable sentencing determination. Thus, this claim is without merit.

C. Members of Siebert's jury failed to reveal on voir dire that they had heard or seen pre-trial publicity regarding the case.

At the evidentiary hearing, Siebert presented evidence of this claim through the testimony of Kathy Curlee. Curlee testified that hearing about the murders did not cause her to have a fixed opinion as to Siebert's guilt or innocence. (R². 23) Curlee rendered her verdict based solely on the evidence presented at trial. (R². 26) Curlee followed this Court's instruction on Siebert's presumption of innocence. (R². 28) Siebert failed to show how he was prejudiced and denied his due process rights, his rights to a fair trial, and a reliable sentencing determination. Thus, this claim is without merit.

D. Members of Siebert's jury failed to reveal on voir dire that they believed that if a defendant is innocent the defendant would testify at trial

At the evidentiary hearing, Siebert presented evidence of this claim through the testimony of Kathy Curlee and Linda Darling. Curlee testified that because a person does not take the stand does not mean that they are guilty. (R². 21, 28) Curlee did not hold it against Siebert for not testifying at trial. (R². 29) Curlee rendered her verdict based solely on the evidence presented at trial. (R². 26) Darling testified she feels that a defendant who does not testify gives an indication that he is not innocent. (R². 35) However, Darling testified she would not automatically impose the death penalty in a case. (R². 37) Darling was able to set her personal feelings about the death penalty aside and follow the court's instructions. (R². 37, 40) Darling gave Siebert a presumption of innocence and followed this Court's instructions when rendering the verdict. (R². 39)

Darling followed this Court's instructions on the State's burden of proving Siebert guilty and went by the evidence presented at trial in determining her verdict. (R². 40) Siebert failed to show how he was prejudiced and denied his due process rights, his rights to a fair trial, and a reliable sentencing determination. Thus, this claim is without merit.

E. A member of Siebert's jury failed to reveal on voir dire that she had an underlying bias against homosexuals.

At the evidentiary hearing, Siebert presented evidence of this claim through the testimony of Kathy Curlee. Curlee testified that she did not approve of homosexuality but her verdict of Siebert's guilt or innocence would not have been swayed by her opinion. (R². 22-23) During trial, Curlee did not know anything about Siebert's homosexuality; therefore, homosexuality did not have a bearing on her verdict. (R². 29) Curlee followed this Court's instructions on Siebert's presumption of innocence and she rendered a verdict based solely on the evidence presented at trial. (R². 29, 26) Siebert failed to show how he was prejudiced and denied his due process rights, his rights to a fair trial, and a reliable sentencing determination. Thus, this claim is without merit.

CONCLUSION

For the reasons stated above, Siebert is not entitled to relief on any of his claims. Siebert was represented at trial and on direct appeal by extremely able and experienced counsel who at all times acted competently and professionally on his behalf. Siebert was convicted and sentenced to death because of the overwhelming evidence against him and the brutality of this crime and not because of any act or omission of his attorneys. Therefore, Siebert is not entitled to any relief on his Talladega County (CC-86-300) Petition for Relief from Conviction and Sentence of Death.

IV. THE LEE COUNTY RULE 32 PETITION (CC-87-371)

PROCEDURALLY BARRED CLAIMS

Rule 32.1 states that, subject to the limitations of Rule 32.2, “any defendant who has been convicted of a criminal offense may institute a proceeding in the court of original conviction to secure appropriate relief” on various grounds that are set out in Rule 32.1 (a)-(e). Rule 32.1 expressly states that relief under Rule 32 is limited to the extent that the claims raised by a Rule 32 petition may be procedurally defaulted from a circuit court’s review. The Alabama Rules of Criminal Procedure, at Rule 32.2 (a), unambiguously states the type of claims that are procedurally defaulted from this Court’s review. Rule 32.2 (a) states, as follows:

- (b) PRECLUSION OF GROUNDS. A petitioner will not be given relief under this rule based upon any ground:
- (1) Which may still be raised on direct appeal under the Alabama Rules of Appellate Procedure or by post-trial motion under Rule 24; or
 - (2) Which was raised or addressed at trial; or
 - (3) Which could have been but was not raised at trial, unless the ground for relief arises under Rule 32.1 (b); or
 - (4) Which was raised or addressed on appeal or in any previous collateral proceeding; or
 - (5) Which could have been but was not raised on appeal, unless the ground for relief arises under Rule 32.1 (b)

The rules of procedural default apply with equal force to all cases, including those in which the death penalty has been imposed. State v. Tarver, 629 So. 2d 14, 20 (Ala. Crim. App. 1993, cert. denied, 511 U.S. 1078, 114 S. Ct. 1664 (1994)).

At the onset of the discussion of the claims raised in Siebert’s Rule 32 petition, this Court notes that allegations raising a specific claim of ineffective assistance have

been recognized to be cognizable under Rule 32.1. Gholston v. Attorney General, 947 F.2d 908, 910 (11th Cir. 1991). This Court will only discuss on the merits those claims of ineffective assistance of counsel that have been properly raised according to the Alabama Rules of Criminal Procedure. The Court notes that Rule 32.1 (e) allows a Rule 32 petitioner to avoid a procedural default if the factual claim presented is based on newly discovered evidence. To be considered newly discovered evidence, the claim presented must meet the five criteria stated in Rule 32.1 (e) (1)-(5).

A. Claims Which Could Have Been But Were Not Raised At Trial Or On Direct Appeal Are Barred From Review.

Thirteen of Siebert's claims, including their respective sub-claims, are barred from review by his failure to raise them at trial and then on direct appeal. These thirteen claims, including their respective sub-claims, are as follows:

Claim A: Seibert's Sentence Is Not A Reasoned Moral Response To His Background, Character, And Crime.

Claim B: Trial Court's Jury Instructions Violated State And Federal Law And Undermined The Reliability Of Siebert's Conviction And Sentence Of Death.

- 1) Trial Court Instructed And Prosecution Argued During Penalty Phase That Death Must Be Presumed Appropriate Sentence.
- 2) Trial Court Instructed Siebert's Guilt Phase Jury That It Must Reconcile All The Testimony.
- 3) Trial Court's Reasonable Doubt Charge Reduced The Degree Of Proof By Which The State Needed To Prove The Existence Of Aggravating Circumstances.
- 4) The Penalty Phase Jury Instruction Failed to Inform The Jury That It Could Find The Existence Of Mitigating Circumstances Without A Unanimous Vote.
- 5) The Guilt Phase Jury Was Not Instructed On The Meaning Of A Critical Element Of Siebert's Charge.
- 6) The Jury Was Informed That Only A Portion Of His Statement To The Police Was Presented Because The Remaining Parts Were Legally Inadmissible.

Claim C: Siebert's Conviction And Sentence Of Death Rest On Egregious Prosecutorial Misconduct.

- 1) The Prosecution Argued To The Guilt Phase Jury That It Is Proper To Infer That An Actor Intends The Natural Consequences Of His Acts.
- 2) The Prosecution Referred To Other Crimes Allegedly Committed By Siebert But Which The Prosecution In No Way Connected To The Crime Charged.
- 3) The Prosecution Improperly Suggested To The Empanelled Jurors That Two Of Their Number Were Alternates.
- 4) The Prosecution Elicited Inadmissible Direct Examination Testimony In An Effort To Enhance Its Key Witness' Credibility.
- 5) The State Introduced Numerous Highly Inflammatory Photographs And An Inflammatory Videotape.
- 6) Siebert's Constitutional Rights Were Violated By The Prosecution Eliciting Testimony Regarding The Victims' Personal Characteristics.
- 7) The State Argued To The Guilt Phase Jury That Siebert Should Be Convicted Based On The Characteristics And Worth Of The Victims.
- 8) The State Elicited Highly Inflammatory Testimony On Matters Wholly Irrelevant.
- 9) The District Attorney Effectively Testified For The State That Siebert's Arrest Was Legal And That His Statement To The Police Was Voluntary (This Claim Was Originally Raised In Petitioner's Original Petition; However, Was Excluded From The Amended Petition).
- 10) The Prosecution Improperly Commented On Siebert's Failure To Testify.
- 11) During Guilt Phase Closing Arguments, The District Attorney Urged The Jury That Siebert Must Be Guilty Since His Charge Resulted From The Work Of Various Law Enforcement Agencies And That He Knew Siebert Was Guilty.
- 12) The Prosecution Improperly Vouched For A Witness' Credibility.
- 13) The Prosecution Argued To Siebert's Penalty Phase Jury That It Should Presume Death To Be The Appropriate Sentence.
- 14) The Prosecution Relied On Facts Not In Evidence In Arguing To The Penalty Phase Jury That Death Is The Appropriate Sentence.
- 15) Prosecution's Argument That Siebert Should Be Sentenced To Death Because The Offense Was Heinous, Atrocious Or Cruel

Despite The Jury Not Being Instructed On That Aggravating Circumstance.

- 16) Prosecution's Argument That Siebert Should Be Sentenced To Death Because Of The Offense's Impact On The Victims' Families.
- 17) The Prosecution Argued To The Penalty Phase Jury That Siebert's Sentence Should Be Decided On The Basis Of The Underlying Offense Alone And To The Exclusion Of His Moral Culpability.

Claim D: Siebert's Death Sentence Rests On Improperly Admitted Penalty Phase Evidence.

- 1) Constitutionally Invalid Prior Convictions Were Used To Prove The Aggravating Circumstance That Siebert "Was Previously Convicted Of Another Capital Felony Or A Felony Involving The Use Or Threat Of Violence To The Person."
- 2) Evidence Of Siebert's Prior Ten Year Prison Term And Prior Death Sentence Were Improperly Admitted Into Evidence During The Penalty Phase.
- 3) Siebert's Death Sentence Rests On A Presentence Investigation Report Improperly Including Various Incriminating Admissions By Siebert.

Claim E: The Court's Penalty Phase Orders Demonstrate That Siebert's Sentence Of Death Is Illegal And Unconstitutional.

- 1) In Sentencing Siebert To Death, The Trial Court Failed To Find Various Undisputed Mitigating Circumstances.
- 2) The Trial Court's Weighing Of Aggravating And Mitigating Circumstances Was Infected By Other Evidence.
- 3) Siebert's Death Sentence Rests On Non-Statutory Aggravating Circumstances.
- 4) The Trial Court Double Counted A Single Aggravating Circumstance In Violation Of Siebert's Rights.

Claim F: Siebert's Conviction And Death Sentence Cannot Stand Because They Are Based On A Duplicitous Indictment.

Claim G: Siebert's Trial Was Conducted With Improper Security Measurements And Was Poisoned By Emotional Outbursts.

- 1) Siebert Was Tried In A Courtroom With Unprecedented Security Measures.
- 2) Siebert's Conviction And Death Sentence Were Obtained From A Trial Whose Impartiality Was Poisoned By Emotional Outbursts From Members Of The Victims' Family.

Claim H: Siebert's Rights Were Violated By The Trial Court's Reliance On The Presentence Investigation Report Admitted Into Evidence During Sentencing.

Claim I: The Trial Court's Sentencing Siebert To Death As A Matter Of Logic Violated His Rights.

Claim J: The Trial Court's Failure To Instruct The Mental Health Expert Appointed To Assist The Defense That The Expert's Report Was Not To Be Disclosed To Anyone But The Defense Team Violated Siebert's Rights.

Claim K: Separating The Jury Without First Ensuring That Siebert Adequately Understood His Rights To Demand Sequestration Violated Siebert's Rights.

Claim L: Failure To Instruct The Penalty Phase Jury On How To Determine When The Factual Existence Of A Mitigating Circumstance Is Placed In Dispute Violated Siebert's Rights.

Claim M: Siebert's Rights To Due Process And A Fair Trial Were Violated By The State's Withholding Of Exculpatory And Mitigating Material.

Claims that could have been but were not raised at trial or on direct appeal are barred from further review. Rule 32.2 (a)(3), (5), Alabama Rules of Criminal Procedure. Ex parte Singleton, 548 So. 2d 167, 169-171 (Ala. 1989); Jackson v. State, 501 So. 2d 542, 544 (Ala. Crim. App. 1986), cert. denied, 501 So. 2d 542 (1987); Coulter v. State, 494 So. 2d 895, 898, 907-908 (Ala. Crim. App.), cert. denied, 494 So. 2d 895 (Ala. 1986); Summers v. State, 366 So. 2d 336, 340 (Ala. Crim. App. 1987) cert. denied, 366 So. 2d 346 (Ala. 1989); Ex parte Ellison, 410 So. 2d 130, 132 (Ala. 1982). Therefore, this Court holds that Claims A through M, including their respective sub-claims, are barred from review.

BRADY VIOLATION CLAIM

Siebert alleged the following in claim M of his amended Rule 32 petition:

The district attorney and other state officials did not make the prosecution file available to the defense in this case, opting to provide selected materials to the defense.

Consequently, exculpatory material, impeachment material and critical mitigating evidence such as witness statements were withheld in violation of the Alabama Rules of Criminal Procedure and Brady v. Maryland, 373 U.S. 83 (1963). The withholding of this evidence denied Mr. Siebert his rights to due process, a fair trial, and a reliable sentencing hearing in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the laws and Constitution of Alabama.

Although this Court holds this claim procedurally barred, in the alternative, it will address the merits. This Court granted all of Siebert's discovery request during trial. (TR. 15, 23)⁵. Siebert's defense attorneys stated at the Rule 32 evidentiary hearing an open file discovery process did not exist at the time of trial. (R. 46, 125) However, George Sims, Siebert's lead counsel at trial, did state at the evidentiary hearing "I don't remember asking for anything we didn't get that [the State] had." (R. 125) This Court gives credibility to the order granting all requested discovery to Siebert and to the testimony of Sims. (R.23) Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. However, Siebert presented no credible evidence in support of this claim at the evidentiary hearing. Therefore, this claim of the petition is due to be denied.

INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

An evidentiary hearing was held from April 3-5, 1995, on Siebert's claim he was denied effective assistance of counsel at trial and on appeal. At the Rule 32 hearing, Siebert was represented by counsel and presented evidence, in the form of testimony and

⁵ References to the record in this portion of the order are as follows: references to the Lee County trial transcript will appear as (TR. ___), references to the Lee County trial clerk's record will appear as (CR. ___), references to the April 3-5, 1998, Rule 32 evidentiary hearing transcript will appear as (R. ___), and references to the September 26, 1995, Rule 32 evidentiary hearing transcript will appear as (R.² ___).

exhibits, in support of this claim. Based on the evidence presented, including the court's observations and evaluation of the witnesses' demeanor, Siebert failed to prove trial counsel rendered ineffective assistance.

Standard of Review

To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that he was prejudiced by that deficient performance. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). This Court must avoid using the benefit of hindsight and must evaluate counsel's conduct as of the time of trial. Ex parte Lawley, 512 So. 2d 1370 (Ala. 1987). When the Court is reviewing a claim of ineffective assistance of counsel, it must indulge a strong presumption that counsel's conduct was appropriate and reasonable.

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

Strickland, 466 U.S. at 689, 104 S. Ct. at 2065 (citations omitted). "Counsel's conduct must be considered within the context of the facts of the particular case and as of the time of the alleged misconduct." Ex parte Baldwin, 456 So. 2d 129, 134 (Ala. 1984), aff'd, 472 U.S. 373, 105 S. Ct. 2727 (1985).

Even if deficient performance is proved, a showing of prejudice is also required. A claimant must show that "but for" counsel's deficient performance the results of the proceeding would have been different. Howard v. State, 551 So. 2d 1155, 1158 (Ala. Crim. App. 1989). Prejudice is proved only when there "exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. [citations omitted] A reasonable probability is a probability sufficient to undermine confidence in , the outcome of the trial." Burnett v. State, 651 So. 2d 57, 58 (Ala. Crim. App. 1994), citing, Strickland, 466 U.S. at 694. To prove prejudice, the alleged errors of counsel must "so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." Kimmelman v. Morrison, 477 U.S. 365, 374 (1986), cited in, Lockhart v. Fretwell, 506 U.S. 364, 369 (1993).

Trial Counsel

At trial, and on direct appeal, Siebert's lead counsel was the Honorable George Sims, now District Court Judge for Talladega County. (R. 116) In addition, Rod Giddens was appointed to assist Sims at trial and on direct appeal.⁶ (R. 25) Sims, at the time of Siebert's trial, was a criminal defense lawyer of considerable experience and

⁶ Ron Giddens withdrew as Siebert's appellant attorney on October 14, 1987, due to him accepting a position as Assistant District Attorney with the Talladega County District Attorney's Office. William J. Willingham was appointed to represent Siebert on appeal, along with George Sims.

ability. (R. 115, 117)⁷ At the time of Siebert's trial, Sims had actively practiced law for over ten years. Sims' practice consisted of fifty to sixty percent criminal cases. (R. 115) Before Siebert's trial, Sims had tried four to five capital cases. (R. 117) Giddens had been in the active practice of law for approximately five years. (R. 24) At the time of Siebert's trial, Giddens' practice consisted of approximately ninety percent criminal cases.⁸ (R. 24) Giddens worked with Sims on two capital cases before Siebert's trial. Giddens consulted with other lawyers who had experience in death penalty cases. (R. 70)

Sims and Giddens met with Siebert a number of times before trial. The time spent with Siebert would vary from ten minutes to a couple of hours. (R. 74) During these meetings, Sims, Giddens, and Siebert conversed about Siebert testifying, potential mitigation, information concerning Siebert's childhood history of physical and sexual abuse, and possible witnesses. (R.75-76; 79) Siebert cooperated fully with Sims and Giddens before trial.

Sims and Giddens filed the following pretrial motions in this case: motion for change of venue (CR. 9); motion for psychiatric evaluation (CR. 13); motion to produce (CR. 15); motion for appointment of jury polling expert (CR. 24); motion for additional funds for defense attorneys (CR. 31); and motion to transfer sentencing to Lee County (CR. 35).

Sims and Giddens conducted a thorough pretrial investigation. The purpose of their investigation was to obtain evidence to present at the penalty phase of Siebert's trial. This Court granted funds for Dr. Otto Eisenhardt, a psychiatrist, to conduct a psychiatric

⁷ The Court knows from its personal knowledge that the Honorable George Sims is a criminal defense lawyer of considerable experience and ability.

⁸ The Court also knows from its personal knowledge that Ron Giddens is a criminal defense lawyer of considerable experience and ability.

evaluation on Siebert. (CR. 47, 48) Even though an investigator was not appointed, Giddens testified there was no information that was not available to the psychiatric expert due to the absence of an investigator. (R. 33, 81) Sims testified the psychiatric expert was provided with everything that he asked for. (R. 123) Sims and Giddens made efforts to get witnesses for mitigating purposes. (R. 39-40) Siebert only gave defense counsel the name of his ex-girlfriend, Vickie Owens, and Damian Siebert, his son. (R. 54) Due to the same reasons in Siebert's Talladega County trial, Sims and Giddens decided not to use Owens and Damian in the Lee County trial. Giddens testified there were attempts to get Vickie Owens to testify but Siebert informed counsel that Owens had a drug problem. (R. 80) Sims testified that Owens would have been a bad mitigating witness. (R. 143) Sims testified he wanted Owens to come to Talladega so he could make a determination on whether to use her as a mitigation witness. However, Sims testified that he was leaning toward not using her as a mitigation witness. (R. 146) Giddens also testified that Siebert did not want his son, Damian, to be used as a mitigation witness. (R. 81)

Based on Sims' and Giddens' pre-trial investigation, they developed a trial strategy focusing on Siebert's mental state. (R. 28) Giddens and Sims were limited in what they could present at the guilt stage of the trial by Siebert's own confession to the police about the murder. Giddens testified that an insanity defense was going to be pursued; however, Dr. Eisenhardt's report did not support an insanity defense. (R. 107)

Sims and Giddens called Dr. Otto Eisenhardt, a psychiatrist, as their only witness during the penalty phase of Siebert's trial. Dr. Eisenhardt testified he saw Siebert in the Talladega County jail and performed a mental status examination on him. (TR. 760-61) Eisenhardt's opinion was that Siebert had no major illness. (TR. 760) Siebert had a

substance abuse disorder that began in his early teens. He used various drugs excessively and at regular intervals. (TR. 761) Siebert conveyed to Eisenhardt that he used large quantities of phencyclidine, also known as PCP and Angel Dust. Individuals who use this type of drug can become unpredictable and physically violent for no apparent reason. (TR. 762-63) Eisenhardt testified that the longer one used the drug the more disorganized the person would become and the more likely they would be involved in anti-social behavior. (TR. 764-65) Eisenhardt diagnosed Siebert with an anti-social personality disorder and stated the following:

A person who regularly uses anti-social behavior would be classified as having an anti-social personality. In other words, such a person does not think of the consequences of his actions before he acts. He responds to "I want what I want, when I want it" type principle.

. . . . I think a person like that would know that [their behavior] is morally wrong or legally wrong. He just wouldn't think that far ahead when he did it.
(TR. 768)

Siebert conveyed to Eisenhardt that Siebert's father physically and sexually abused him. (TR. 770) Eisenhardt concluded that someone, who used phencyclidine to the extent that Siebert did, would exhibit erratic and potentially violent, behavior that could develop on the spur of the moment for no apparent reason. (TR. 773)

Sims and Giddens prepared for both the guilt and penalty phases of trial. Sims' and Giddens' preparation is shown not only by their testimony at the Rule 32 evidentiary hearing, but also by the trial transcript, which shows them to have been prepared and knowledgeable about the State's case against Siebert and about Siebert's character and

background. Sims and Giddens were both credible witnesses and this Court credits their account of their preparation and investigation.

A. Specific Claims of Ineffective Assistance of Counsel

- 1) Counsel failed to develop a mental health defense at the guilt and sentencing phase.

Siebert asserts in claim N.1. of his amended Rule 32 petition that trial counsel was ineffective in numerous ways in developing a mental health defense at the guilt and sentencing phase:

- a) Counsel failed to conduct adequate investigation into Siebert's mental health history.

For the same reasons set out in claims A.1., and A.3. in the ineffective assistance of counsel section of Siebert's Talladega County petition, *supra*, this claim is without merit. Siebert failed to prove that his trial counsel was deficient. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to conduct adequate investigation into his mental health history, the outcome of his trial would have been different.

- b) Counsel failed to request at trial a jury instruction on insanity.

Siebert presented no evidence at the evidentiary hearing showing how he was prejudiced by trial counsel's failure to request a jury instruction on insanity. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure

to request a jury instruction on insanity, the outcome of his trial would have been different.

- c) Counsel failed to challenge at trial and on appeal the omission of an insanity instruction from the guilt phase jury charge.

Siebert presented no evidence at the evidentiary hearing showing how he was prejudiced by trial counsel's failure to challenge at trial and on appeal the omission of an insanity instruction from the guilt phase jury charge. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge the omission of an insanity instruction, the outcome of his trial would have been different.

- d) Counsel failed to make an ex parte request for expert psychiatric assistance in preparing Siebert's defense.

Siebert presented no evidence at the evidentiary hearing showing how he was prejudiced by trial counsel's failure to make an ex parte request for expert psychiatric assistance. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. This Court granted funds for Dr. Otto Eisenhardt, a psychiatrist, to conduct a psychiatric evaluation on Siebert. (CR. 24, 26) Even though Giddens testified that an investigator would have been helpful, there was no information that was unavailable to the psychiatric expert due to the absence of an investigator. (R. 33, 81) Sims testified the psychiatric expert was provided with everything he asked for. Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure

to make an ex parte request for expert psychiatric assistance, the outcome of his trial would have been different.

- e) Counsel failed to obtain assistance of an independent mental health professional to evaluate Siebert.

Siebert presented no credible evidence at the evidentiary hearing showing how he was prejudiced by trial counsel's failure to obtain the assistance of an independent mental health professional. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert's attorneys filed a motion for funds to hire a psychiatric expert and that motion was granted. (CR. 24, 26) Siebert's family history was presented to the penalty phase jury and the jury considered that mitigation evidence. (R. 632-655) At the Rule 32 evidentiary hearing, Siebert presented additional mitigation evidence that could have been presented to the penalty phase jury. Siebert presented this additional mitigation evidence through the testimony of Dr. William Bernet, a psychiatrist, Dr. Barbara J. Tarkin, a psychologist, and Vickie Cosby Jefferson. "The test for ineffectiveness is not whether counsel could have done more; perfection is not required." Waters v. Thomas, 46 F.3d 1506, 1518 (11th Cir. 1995). Siebert's trial counsel could have presented additional mitigation evidence about his family history at the penalty phase. However, Siebert's trial counsel was not ineffective for not presenting such additional evidence. Giddens testified they had no other mitigation to pursue. (R. 85) Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to obtain the assistance of an independent mental health professional, the outcome of his trial would have been different.

- f) Counsel failed to challenge at trial and on direct appeal the court's failure to instruct the appointed psychiatrist that he was a member of the defense team and to share his results only with the defense.

For the same reasons set out in claims A.3. in the ineffective assistance of counsel section of Siebert's Talladega County petition, supra, this claim is without merit. Siebert failed to prove prejudice from trial counsel's failure to raise the issue of this Court's failure to instruct Dr. Eisenhardt that he was a member of the defense team and to share his results only with the defense. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to instruct Dr. Eisenhardt about his status and the sharing of his results, the outcome of his trial would have been different.

- g) Counsel failed to challenge at trial and on direct appeal the psychiatrist providing copies of the report to the district attorney's office.

For the same reasons set out in claims A.3. in the ineffective assistance of counsel section of Siebert's Talladega County petition, supra, this claim is without merit. Siebert failed to prove prejudice from trial counsel's failure to challenge Dr. Eisenhardt providing copies of his report to the district attorney's office. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge

Dr. Eisenhardt providing copies of his report to the district attorney's office, the outcome of his trial would have been different.

h) Counsel failed to adequately consult with and seek the assistance of the appointed psychiatric expert.

Siebert presented no credible evidence at the evidentiary hearing showing how he was prejudiced by trial counsel's failure to adequately consult with and seek the assistance of Dr. Otto Eisenhardt. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. The trial transcript, clerk's record, and evidence from the evidentiary hearing show that Sims and Giddens diligently pursued the presentation of mitigation evidence through Dr. Eisenhardt. Siebert's attorneys filed a motion for funds to hire a psychiatric expert and that motion was granted. (CR. 24, 26) Siebert's family history was presented to the penalty phase jury and the jury considered that mitigation evidence. (R. 632-655) At the Rule 32 evidentiary hearing, Siebert presented additional mitigation evidence that could have been presented to the penalty phase jury. Siebert presented this additional mitigation evidence through the testimony of Dr. William Bernet, a psychiatrist, Dr. Barbara J. Tarkin, a psychologist, and Vickie Cosby Jefferson, Siebert's former girlfriend. "The test for ineffectiveness is not whether counsel could have done more; perfection is not required." Waters v. Thomas, 46 F.3d 1506, 1518 (11th Cir. 1995). Siebert's trial counsel could have presented additional mitigation evidence about his family history at the penalty phase. However, Siebert's trial counsel was not ineffective for not presenting such additional evidence. Giddens testified that they had no other mitigation to pursue. (R. 85) Siebert was not prejudiced by trial counsel's failure to

adequately consult with and seek the assistance of Dr. Otto Eisenhardt. Siebert's failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to adequately consult with and seek the assistance of Dr. Otto Eisenhardt, the outcome of his trial would have been different.

i) Counsel failed to provide the psychiatrist with available information corroborating and elaborating on Siebert's description of his life history.

For the same reasons set out in claims A.3. in the ineffective assistance of counsel section of Siebert's Talladega County petition, supra, this claim is without merit. Siebert failed to prove prejudice from trial counsel's failure to provide Dr. Eisenhardt with additional information to corroborate and elaborate Siebert's description of his life history. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to provide Dr. Eisenhardt with additional information to corroborate and elaborate Siebert's description of his life history, the outcome of his trial would have been different.

j) Counsel failed to present live expert testimony regarding Siebert's mental health.

At the evidentiary hearing, Siebert presented evidence of this claim through the testimony of Dr. William Bernet, a psychiatrist, and Dr. Barbara J. Tarkin. Considering the evidence presented by Siebert at the evidentiary hearing, Siebert failed to prove how he was prejudiced by trial counsel's failure to present live expert testimony regarding his mental health. Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to present

live expert testimony regarding his mental health, the outcome of his trial would have been different.

- k) Counsel failed to obtain independent assistance from a social worker, a psychologist, and an investigator to obtain evidence of Siebert's mental health history and other mitigation evidence.

For the same reasons set out in claims A.1. and A.3. in the ineffective assistance of counsel section of Siebert's Talladega County petition, supra, this claim is without merit. Siebert failed to prove prejudice from trial counsel's failure to obtain additional expert assistance and an investigator to obtain evidence of his mental health history and other mitigation evidence. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to provide additional expert assistance and an investigator, the outcome of his trial would have been different.

- l) Counsel failed to provide the Taylor Hardin Secure Medical Facility evaluation team with information of Siebert's mental health history.

Siebert presented no credible evidence at the evidentiary hearing showing how he was prejudiced by trial counsel's failure to provide Taylor Hardin with information of his mental health history. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to provide Taylor Hardin with information of his mental health history, the outcome of his trial would have been different.

- m) Counsel failed to utilize the two months between the end of the jury penalty phase trial and the court's sentencing hearing to gather available evidence mitigating against a death sentence.

Siebert presented no credible evidence at the evidentiary hearing showing how he was prejudiced by trial counsel's failure to utilize this time. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove how he was prejudiced by trial counsel's failure to utilize the two months between the end of the jury penalty phase trial and this Court's sentencing hearing to gather available mitigation evidence. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to utilize the two months between the end of the jury penalty phase trial and this Court's sentencing hearing to gather available mitigation evidence, the outcome of his trial would have been different.

- 2) Counsel failed to request jury instructions, failed to challenge prejudicial jury instructions, failed to challenge the jury's improper separation, failed to challenge the incomplete set of verdict forms provided the guilt-phase jury, and failed to challenge improper jury instructions.
- a) Counsel failed to challenge at trial or on direct appeal the trial court's failure to determine if Siebert adequately understood that he was entitled to demand that his jury be sequestered.

Siebert presented no evidence at the evidentiary hearing showing how he was prejudiced by trial counsel's failure to challenge this Court's failure to ensure Siebert understood his rights to a sequestered jury. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove

prejudice from trial counsel's failure to challenge this Court's failure to ensure Siebert understood his rights to a sequestered jury. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge this Court's failure to ensure Siebert understood his rights to a sequestered jury, the outcome of his trial would have been different.

- b) Counsel failed to challenge at trial and on direct appeal the trial court's failure to give instructions on when the factual existence of a mitigating circumstance is in dispute.

Siebert presented no credible evidence at the evidentiary hearing showing how he was prejudiced by trial counsel's failure to challenge this Court's failure to instruct on when the factual existence of a mitigating circumstance is in dispute. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge this Court's failure to give such an instruction. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge this Court's failure to instruct on when the factual existence of a mitigating circumstance is in dispute, the outcome of his trial would have been different.

- c) Counsel failed to challenge at trial and on direct appeal the prosecution arguing to the jury and the trial court instructing the jury that it should presume death is the appropriate punishment.

Siebert presented no credible evidence at the evidentiary hearing which proved how he was prejudiced by trial counsel's failure to challenge the prosecution arguing to the jury and this Court instructing the jury on the presumption and the appropriateness of the death penalty. Siebert had the burden of pleading and proving this claim by a

preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge the prosecution arguing to the jury and this Court instructing the jury on the presumption and the appropriateness of the death penalty. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge the prosecution arguing to the jury and this Court instructing the jury on the presumption and the appropriateness of the death penalty, the outcome of his trial would have been different.

d) Counsel failed to challenge at trial and on direct appeal the trial court's charge that the jury should reconcile all testimony.

Siebert presented no credible evidence at the evidentiary hearing that proved how he was prejudiced by trial counsel's failure to challenge this Court's instruction that the jury should reconcile all testimony. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge this Court's instruction that the jury should reconcile all testimony. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge this Court's instruction that the jury should reconcile all testimony, the outcome of his trial would have been different.

e) Counsel failed to challenge at trial and on direct appeal the trial court's charge to the jury on the meaning of reasonable doubt.

Siebert presented no credible evidence at the evidentiary hearing that proved how he was prejudiced by trial counsel's failure to challenge this Court's charge to the jury on

the meaning of reasonable doubt. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge this Court's charge to the jury on the meaning of reasonable doubt. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge this Court's charge to the jury on the meaning of reasonable doubt, the outcome of his trial would have been different.

- f) Counsel failed to request at trial and challenge on appeal the failure to give a penalty phase jury instruction that whether a particular mitigating circumstance exists is a question to be answered by each individual juror.

Siebert presented no evidence at the evidentiary hearing as to why this Court's penalty phase instructions were inadequate and improper. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Giddens testified he felt that this Court's charge to the jury was not objectionable. (R. 92) Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to object to this Court's penalty phase jury instructions. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge this Court's penalty phase jury instructions, the outcome of his trial would have been different.

- g) Counsel failed to challenge at trial and on direct appeal the omission from the jury charge of an instruction on the meaning of "by one act or pursuant to one scheme or course of conduct."

Siebert presented no credible evidence at the evidentiary hearing that proved how he was prejudiced by trial counsel's failure to challenge the omission from the jury

charge an instruction giving the meaning of “by one act or pursuant to one scheme or course of conduct.” Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel’s failure to challenge the omission from the jury charge of an instruction giving the meaning of “by one act or pursuant to one scheme or course of conduct.” Siebert also failed to establish a reasonable probability that, but for trial counsel’s failure to challenge the omission from the jury charge an instruction giving the meaning of “by one act or pursuant to one scheme or course of conduct,” the outcome of his trial would have been different.

- h) Counsel failed to challenge at trial and on appeal the trial court’s failure to provide the jury during its deliberations with a written copy of the jury instructions.

Siebert presented no evidence as to this claim at the evidentiary hearing. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel’s failure to challenge this Court’s failure to provide a copy of the jury instructions. Siebert also failed to establish a reasonable probability that, but for trial counsel’s failure to object to the Court’s failure to provide a copy of the jury instructions, the outcome of his trial would have been different.

- i) Counsel failed to challenge at trial and on direct appeal the trial court’s informing the jury that only a portion of Siebert’s statement to the police

was being presented to them because the remaining parts were legally inadmissible.

Siebert presented no credible evidence at the evidentiary hearing that proved how he was prejudiced by trial counsel's failure to challenge this Court giving such an instruction concerning Siebert's statement to the police. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge this Court giving such an instruction concerning Siebert's statement to the police. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge this Court's failure to give such an instruction concerning Siebert's statement to the police, the outcome of his trial would have been different.

j) Counsel failed to request various jury instructions and failed to request a jury charge conference at the guilt and penalty phase.

Siebert presented no evidence as to this claim at the evidentiary hearing. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to request jury instructions and a jury charge conference. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to request jury instructions and a jury charge conference, the outcome of his trial would have been different.

k) Counsel failed to challenge at trial and on direct appeal the prosecution arguing to the jury that it could infer Siebert's intent from the natural consequences of his acts.

Siebert presented no credible evidence at the evidentiary hearing which proved how he was prejudiced by trial counsel's failure to challenge the prosecution arguing to the jury that it could infer his intent from the natural consequences of his acts. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge the prosecution's argument to the jury. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge the prosecution arguing to the jury that it could infer his intent from the natural consequences of his acts, the outcome of his trial would have been different.

- 1) Counsel failed to challenge at trial and on direct appeal the prosecution's consistent and outrageously inflammatory references throughout the trial to other crimes committed by Siebert.

Siebert presented no credible evidence at the evidentiary hearing that proved how he was prejudiced by trial counsel's failure to challenge the prosecution's references to other crimes committed by Siebert. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge the prosecution's references to other crimes committed by Siebert. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge the prosecution's references to other crimes committed by Siebert, the outcome of his trial would have been different.

m) Counsel failed to challenge at trial and on direct appeal the prosecution eliciting testimony of Siebert's prior bad acts.

Siebert presented no credible evidence at the evidentiary hearing relating to this claim. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge at trial and on direct appeal this line of questioning by the prosecution. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge this line of questioning, the outcome of his trial would have been different.

n) Counsel failed to challenge at trial and on direct appeal the prosecution informing the jury during guilt phase opening statements that two members of the jury were alternates.

Siebert presented no credible evidence at the evidentiary hearing that proved how he was prejudiced by trial counsel's failure to challenge the prosecution informing the jury that two members of the jury panel were alternates. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge the prosecution's reference about two members of the jury being alternates. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge the prosecution informing the jury that two members of the jury panel were alternates, the outcome of his trial would have been different.

o) Counsel failed to challenge at trial and on direct appeal testimony reflecting the level of intelligence of the State's key witness and testimony bolstering the State's key witness.

Siebert presented no credible evidence at the evidentiary hearing which proved how he was prejudiced by trial counsel's failure to challenge the testimony of the State's key witness and the bolstering of that witness' testimony. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert also failed to prove prejudice from trial counsel's failure to challenge this testimony. Siebert failed to establish a reasonable probability that, but for trial counsel's failure to challenge the testimony of the State's key witness and the bolstering of that witness' testimony, the outcome of his trial would have been different.

p) Counsel failed to challenge on direct appeal the admission of various highly inflammatory photographs and an inflammatory videotape.

Siebert presented no evidence at the evidentiary hearing relating to this claim. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. The Alabama Supreme Court found that this Court properly allowed into evidence videotape of the crime scene. Siebert v. State, 555 So. 2d 780, 784 (Ala. 1989). Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge on appeal the admission of various photographs and videotape. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge the admission of various photographs and videotape, the outcome of his trial would have been different.

q) Counsel failed to challenge at trial and on direct appeal the State eliciting testimony regarding the victims' personal characteristics.

This claim was addressed in A.4.(a) of Siebert's Talladega County petition, *supra*. For the same reasons, this claim is due to be denied. Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for his attorneys' failure to challenge this testimony, the outcome of his trial would have been different.

r) Counsel failed to challenge at trial and on direct appeal the introduction of highly inflammatory evidence suggesting Siebert was sexually perverted.

Siebert presented no evidence at the evidentiary hearing showing how he was prejudiced by trial counsel's failure to object to this evidence. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; *see also*, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge this evidence. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge the admission of sexually perverted evidence, the outcome of his trial would have been different.

s) Counsel failed to challenge at trial and on direct appeal the prosecution commenting on Siebert choosing not to testify.

Siebert presented no credible evidence at the evidentiary hearing that proved how he was prejudiced by trial counsel's failure to challenge the prosecution commenting on his failure to testify. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; *see also*, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge the prosecution commenting on Siebert's failure to testify. Siebert

also failed to establish a reasonable probability that, but for trial counsel's failure to challenge the prosecution commenting on Siebert's failure to testify, the outcome of his trial would have been different.

- t) Counsel failed to challenge at trial and on direct appeal the prosecution effectively testifying regarding Siebert's arrest and the voluntary nature of his statement.

Siebert presented no evidence at the evidentiary hearing showing how he was prejudiced by trial counsel's failure to object to the prosecution's remarks. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge the prosecutor's statements. Siebert failed to establish a reasonable probability that, but for trial counsel's failure to challenge the prosecutor's statements, the outcome of his trial would have been different.

- u) Counsel failed to challenge at trial and on direct appeal the prosecution inferring that Siebert was guilty due to the excellent work of law enforcement agencies.

Siebert presented no credible evidence at the evidentiary hearing which proved how he was prejudiced by trial counsel's failure to challenge the prosecution inferring that he was guilty due to the excellent work of law enforcement agencies. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge the prosecution inferring that he was guilty due to the excellent work of law enforcement agencies.

Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge the prosecution inferring that he was guilty due to the excellent work of law enforcement agencies, the outcome of his trial would have been different.

- v) Counsel failed to challenge at trial and on direct appeal the prosecution vouching for the truthfulness of the testimony of its key witness.

Siebert presented no credible evidence at the evidentiary hearing that proved how he was prejudiced by trial counsel's failure to challenge the prosecution vouching for the truthfulness of the testimony of its key witness. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge the prosecution vouching for the truthfulness of the testimony of its key witness. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge the prosecution vouching for the truthfulness of the testimony of its key witness, the outcome of his trial would have been different.

- w) Counsel failed to challenge at trial and on direct appeal the prosecution arguing to the jury that it must presume that the appropriate sentence is death.

Siebert presented no credible evidence at the evidentiary hearing that proved how he was prejudiced by trial counsel's failure to challenge the prosecution arguing to the jury that it must presume that the appropriate sentence is death. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge the prosecution arguing to the

jury that it must presume that the appropriate sentence is death. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge the prosecution arguing to the jury that it must presume that the appropriate sentence is death, the outcome of his trial would have been different.

x) Counsel failed to challenge at trial and on direct appeal the prosecution arguing facts to the jury not in evidence.

Siebert presented no credible evidence at the evidentiary hearing that proved how he was prejudiced by trial counsel's failure to challenge the prosecution arguing facts to the jury not in evidence. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge the prosecution arguing facts to the jury not in evidence. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge the prosecution arguing facts to the jury not in evidence, the outcome of his trial would have been different.

y) Counsel failed to challenge at trial and on direct appeal the admission of guilt phase evidence regarding the details of Siebert's movement after the commission of the underlying felony.

Siebert presented no credible evidence at the evidentiary hearing which proved how he was prejudiced by trial counsel's failure to challenge the admission of evidence regarding details of Siebert's movement after the commission of the underlying felony. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to

challenge the admission of evidence regarding details of Siebert's movement after the commission of the underlying felony. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge the admission of evidence regarding details of Siebert's movement after the commission of the underlying felony, the outcome of his trial would have been different.

- z) Counsel failed to challenge at trial and on direct appeal the prosecution arguing to the penalty phase jury that it should sentence Siebert to death because the underlying offense was heinous, atrocious or cruel.

Siebert presented no credible evidence at the evidentiary hearing which proved how he was prejudiced by trial counsel's failure to challenge the prosecution arguing to the penalty phase jury that Siebert should be sentenced to death because the underlying offense was heinous, atrocious or cruel. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge the prosecution arguing to the penalty phase jury that Siebert should be sentenced to death because the underlying offense was heinous, atrocious or cruel. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge the prosecution arguing to the penalty phase jury that Siebert should be sentenced to death because the underlying offense was heinous, atrocious or cruel, the outcome of his trial would have been different.

- aa) Counsel failed to challenge at trial and on direct appeal the prosecution's penalty phase argument that Siebert should be sentenced to death because of the impact on the victims' families.

Siebert presented no credible evidence at the evidentiary hearing which proved how he was prejudiced by trial counsel's failure to challenge the prosecution arguing to

the penalty phase jury that Siebert should be sentenced to death because of the impact on the victims' families. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge the prosecution arguing to the penalty phase jury that Siebert should be sentenced to death because of the impact on the victims' families. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge the prosecution arguing to the penalty phase jury that Siebert should be sentenced to death because of the impact on the victims' families, the outcome of his trial would have been different.

bb) Counsel failed to object to the prosecution's penalty phase argument that Siebert should be sentenced to death solely on the basis of the underlying offense and to the exclusion of Siebert's moral culpability.

Siebert presented no credible evidence at the evidentiary hearing which proved how he was prejudiced by trial counsel's failure to challenge the prosecution's argument to the penalty phase jury that he should be sentenced to death on the basis of the underlying offense and to the exclusion of his moral culpability. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge this argument by the prosecution during the penalty phase. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge the prosecution's argument to the penalty phase jury that he should be sentenced to death on the basis of the underlying

offense and to the exclusion of his moral culpability, the outcome of his trial would have been different.

cc) Counsel failed to object to the use of two constitutionally invalid prior convictions as evidence of aggravating circumstances.

In this claim, this Court assumes Siebert is referring to his voluntary manslaughter conviction, for which Siebert was sentenced to ten years imprisonment, and his Talladega County capital murder conviction for which Siebert was sentenced to death by electrocution. Siebert presented no credible evidence at the evidentiary hearing that proved how he was prejudiced by trial counsel's failure to challenge the use of these two convictions as evidence of aggravating circumstances. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. The Court of Criminal Appeals held that this Court properly considered the two convictions as evidence of aggravating circumstances. Siebert v. State, 555 So. 2d 772, 779 (Ala. Crim. App. 1989). Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge the use of these two convictions as evidence of aggravating circumstances. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge the use of these two convictions as evidence of aggravating circumstances, the outcome of his trial would have been different.

dd) Counsel failed to challenge at trial and on appeal the use of Siebert's Talladega capital murder conviction.

Siebert presented no credible evidence at the evidentiary hearing that proved how he was prejudiced by trial counsel's failure to challenge the use of his Talladega County capital murder conviction. Siebert had the burden of pleading and proving this claim by a

preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge the use of his Talladega County capital murder conviction. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge the use of his Talladega County capital murder conviction, the outcome of his trial would have been different.

ee) Counsel failed to challenge at trial and on direct appeal the admission into evidence of a minute entry from Siebert's Talladega County capital conviction.

Siebert presented no credible evidence at the evidentiary hearing which proved how he was prejudiced by trial counsel's failure to challenge the admission of a minute entry from his Talladega County capital murder conviction. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. The Court of Criminal Appeals held that this Court properly admitted the minute entry. Siebert v. State, 555 So. 2d 772, 778 (Ala. Crim. App. 1989), aff'd, 555 So. 2d 780, 784 (Ala. 1989). Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge the admission of a minute entry from his Talladega County capital murder conviction. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge the admission of a minute entry from his Talladega County capital murder conviction, the outcome of his trial would have been different.

ff) Counsel failed to challenge at trial and on direct appeal the inclusion in the presentence investigation report various incriminating admissions by Siebert.

Siebert presented no evidence at the evidentiary hearing showing how he was prejudiced by trial counsel's failure to challenge the statements included in the presentence investigation report. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge the statements. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge the statements in the presentence investigation report, the outcome of his trial would have been different.

gg) Counsel failed to challenge at trial and on appeal the trial court's reliance on Siebert's sentences for his Talladega County capital conviction and Nevada conviction.

Siebert presented no evidence at the evidentiary hearing showing how he was prejudiced by trial counsel's failure to challenge this Court's reliance on Siebert's Nevada and Talladega County convictions in determining sentence. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge this Court's use of the Nevada conviction and the Talladega County capital murder conviction in determining sentence. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge this Court's reliance on the Nevada conviction and the Talladega County capital murder conviction in determining sentence, the outcome of his trial would have been different.

hh) Counsel failed to challenge at trial or on direct appeal the trial court's failure to find the existence of mitigating circumstances.

Siebert presented mitigating evidence at the evidentiary hearing through the testimony of Dr. William Bernet, a psychiatrist, Dr. Barbara J. Tarkin, a psychologist, and Vickie Cosby Jefferson, Siebert's former girlfriend. Considering the evidence presented by Siebert, he has failed to prove prejudice from trial counsel's failure to challenge this Court's failure to find the existence of mitigating circumstances. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. The Court of Criminal Appeals held this Court's finding that mitigating circumstances were not present was proper. Siebert v. State, 555 So. 2d 772, 779 (Ala. Crim. App. 1989). Siebert failed to prove that his trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge this Court's failure to find the existence of mitigating circumstance, the outcome of his trial would have been different.

ii) Counsel failed to challenge at trial and on direct appeal the trial court's determination that Siebert be sentenced to death.

Siebert presented no credible evidence at the evidentiary hearing that proved how he was prejudiced by trial counsel's failure to challenge this Court's determination that Siebert's sentence of death. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge this Court's determination that Siebert be sentence to death. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure

to challenge this Court's determination that Siebert be sentence to death, the outcome of his trial would have been different.

jj) Counsel failed to challenge at trial and on direct appeal the trial court's consideration of improper aggravating circumstances in sentencing Siebert to death.

Siebert presented no credible evidence at the evidentiary hearing that proved how he was prejudiced by trial counsel's failure to challenge this Court's consideration of improper aggravating circumstances. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge this Court's consideration of improper aggravating circumstances. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge this Court's consideration of improper aggravating circumstances, the outcome of his trial would have been different.

kk) Counsel failed to challenge at trial and on direct appeal the trial court double counting the single aggravating factor it found to exist.

Siebert presented no credible evidence at the evidentiary hearing that proved how he was prejudiced by trial counsel's failure to challenge this Court's double counting of a single aggravating factor. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. The Court of Criminal Appeals held that this Court properly found the existence of one aggravating circumstance that was supported by Siebert's voluntary manslaughter conviction and capital murder conviction. Siebert v. State, 555 So. 2d 772, 779 (Ala. Crim. App. 1989). Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove

prejudice from trial counsel's failure to challenge this Court's double counting of a single aggravating factor. Siebert failed to establish a reasonable probability that, but for trial counsel's failure to challenge this Court's double counting of a single aggravating factor, the outcome of his trial would have been different.

ll) Counsel failed to challenge at trial and on direct appeal the trial court's findings in its "Considerations And Findings Of The Court In Determination Of Sentence."

Siebert presented no credible evidence at the evidentiary hearing that proved how he was prejudiced by trial counsel's failure to challenge this Court's considerations and findings in determining his sentence. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge this Court's considerations and findings in determining his sentence. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge this Court's considerations and findings in determining his sentence, the outcome of his trial would have been different.

mm) Counsel failed to challenge at trial and on appeal the defective indictment serving as the basis for Siebert's conviction and death sentence.

Siebert presented no credible evidence at the evidentiary hearing that proved how he was prejudiced by trial counsel's failure to challenge his indictment. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge his indictment.

Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge his indictment, the outcome of his trial would have been different.

nn) Counsel failed to challenge at trial and on direct appeal the courtroom security.

The only evidence Siebert presented at the evidentiary hearing concerning this claim was the testimony of Giddens. Giddens testified that security did not seem out of the ordinary for either the Talladega or Lee County trials. (R. 98) Giddens also testified he felt that the security was not objectionable. (R. 99) Considering the evidence presented by Siebert as to this claim, Siebert failed to prove prejudice from trial counsel's failure to challenge courtroom security. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that trial counsel was deficient. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge courtroom security, the outcome of his trial would have been different.

oo) Counsel failed to challenge at trial and on direct appeal the manifest grieving of the victims' family members in the courtroom.

Siebert presented no credible evidence at the evidentiary hearing that proved how he was prejudiced by trial counsel's failure to challenge the grieving of the victims' family members in the courtroom. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge the grieving of the victims' family members in the courtroom. Siebert also failed to establish a reasonable probability that, but for trial

counsel's failure to challenge the grieving of the victims' family members in the courtroom, the outcome of his trial would have been different.

pp) Counsel failed to challenge at trial and on appeal the basis of the presentence investigation report section concerning Siebert's statement regarding this case.

Siebert presented no credible evidence at the evidentiary hearing that proved how he was prejudiced by trial counsel's failure to challenge the statements included in the presentence investigation report. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge the statements. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge the statements in the presentence investigation report, the outcome of his trial would have been different.

qq) Counsel failed to challenge at trial and on appeal the inclusion in the presentence investigation report of crimes charged but not disposed of.

Siebert presented no credible evidence at the evidentiary hearing that proved how he was prejudiced by trial counsel's failure to challenge the crimes specified in the presentence investigation report. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge the specified crimes. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge the crimes specified in the presentence investigation report, the outcome of his trial would have been different.

- π) Counsel failed to challenge at trial and on direct appeal the inclusion in the presentence investigation report concerning the communities conclusion of no leniency for Siebert.

Siebert presented no evidence at the evidentiary hearing showing how he was prejudiced by trial counsel's failure to challenge this statement. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge this statement in the presentence investigation report. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge this statement in the presentence investigation report, the outcome of his trial would have been different.

- ss) Counsel failed to challenge at trial and on direct appeal to the portion of the presentence investigation report which suggested that Siebert killed people in other states and the recommendation that Siebert be sentenced to death.

Siebert presented no evidence at the evidentiary hearing showing how he was prejudiced by trial counsel's failure to challenge this portion of the presentence investigation report. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge this portion of the presentence investigation report. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge this portion of the presentence investigation report, the outcome of his trial would have been different.

tt) Counsel failed to challenge at trial and on direct appeal the trial court's failure to properly consider the weight of the aggravating circumstances.

Siebert presented no evidence at the evidentiary hearing showing how he was prejudiced by trial counsel's failure to challenge this Court's weighing of the aggravating circumstances. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to challenge this Court's weighing of the aggravating circumstances. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to challenge this weighing of the aggravating circumstances, the outcome of his trial would have been different.

uu) Counsel failed to raise on direct appeal numerous meritorious issues raised in this petition.

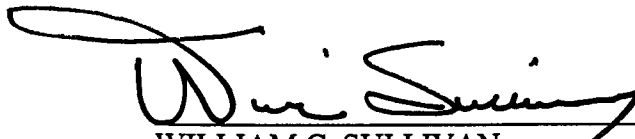
Siebert has not specified the meritorious issues that he raises in this claim. Siebert presented no evidence at the evidentiary hearing showing how he was prejudiced by trial counsel's failure to raise other meritorious issues on appeal. Siebert had the burden of pleading and proving this claim by a preponderance of the evidence at the evidentiary hearing. See, Rule 32.3, Alabama Rules of Criminal Procedure; see also, Fortenberry, 659 So. 2d 194. Siebert failed to prove that his trial counsel was deficient. Siebert failed to prove prejudice from trial counsel's failure to raise other meritorious issues on appeal. Siebert also failed to establish a reasonable probability that, but for trial counsel's failure to raise other meritorious issues on appeal, the outcome of his trial would have been different.

CONCLUSION

For the reasons stated above, Siebert is not entitled to relief on any of his claims. Siebert was represented at trial and on direct appeal by extremely able and experienced counsel who, at all times, acted competently and professionally on his behalf. Siebert was convicted and sentenced to death because of the overwhelming evidence against him and the brutality of this crime and not because of any act or omission by his attorneys. Therefore, Siebert is not entitled to any relief on his Lee County (CC-87-371) Petition for Relief from Conviction and Sentence of Death.

It is therefore ORDERED, ADJUDGED, and DECREED that the Talladega County (CC-86-300) and the Lee County (CC-87-371) petitions for relief from conviction or sentence, as amended, which were consolidated into one action (CV-92-319), are DENIED.

DONE this the 29 day of December, 1998.



WILLIAM C. SULLIVAN
TALLADEGA COUNTY CIRCUIT JUDGE

98 DEC 30 PM 2:28
CLARENCE HAYNES
CIRCUIT CLERK

IN THE CIRCUIT COURT OF TALLADEGA COUNTY, ALABAMA

DANIEL SIEBERT,)
)
 PETITIONER,)
)
 V.)
)
 STATE OF ALABAMA,)
)
 RESPONDENT.)

Case No. CV-92-319

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 CLARENCE HAYNES
 CIRCUIT CLERK

FINAL JUDGMENT

This Court has read and considered each allegation or ground of each petition, as amended, filed by the petitioner. This Court has read and considered each answer, responses or traverse to these allegations filed in the respondent's answer for each petition. This Court has considered all of the evidence presented relating to the issues raised, and this Court has considered all of the briefs and arguments presented by the parties.

This Court has independently assessed the petitioner's claims and has independently assessed and weighed the evidence produced. This Court has reviewed the evidence for itself and has independently evaluated each claim in light of the evidence presented and the applicable law.

This Court has reviewed the proposed opinion filed by the State. This Court has considered the findings and conclusions as presented in the proposed order, and each allegation and argument and proposed findings presented by the petitioner. This Court has considered all of the evidence presented in making its determination. This Court hereby adopts the proposed memorandum opinion filed by the State as the final judgment

of this Court. The adoption of the State's proposed memorandum opinion is based on this Court's own evaluation of the evidence and law in the case.

It is therefore ORDERED, ADJUDGED, and DECREED that the Talladega County (CC-86-300) and the Lee County (CC-87-371) petitions for relief from conviction or sentence, as amended, which were consolidated into one action (CV-92-319), are DENIED.

DONE this the 29th day of December, 1998.


WILLIAM C. SULLIVAN
TALLADEGA COUNTY CIRCUIT JUDGE

98 DEC 30 PM 2:28
CLARENCE HAYNES
CIRCUIT CLERK