Rel: August 18, 2023

Alabama Court of Criminal Appeals

OCTOBER TERM, 2022-2023

CR-21-0148

Jerry Dwayne Bohannon

v.

State of Alabama

Appeal from Mobile Circuit Court
(CC-11-2989.60)

McCOOL, Judge.

Jerry Dwayne Bohannon appeals the Mobile Circuit Court's summary dismissal of his Rule 32, Ala. R. Crim. P., petition for postconviction relief. That petition challenged Bohannon's conviction for

capital murder, see § 13A-5-40, Ala. Code 1975, and his resulting sentence of death.

Facts and Procedural History

In 2013, Bohannon was convicted of two counts of capital murder for killing Jerry DuBoise and Anthony Harvey pursuant to one scheme or course of conduct. See § 13A-5-40(a)(10), Ala. Code 1975. In reviewing Bohannon's convictions and death sentence on direct appeal, this Court set forth the following statement of facts:

> "On December 11, 2010, police were dispatched to the Paradise Lounge nightclub in Mobile in response to an emergency 911 telephone call informing the dispatcher that a shooting was in progress. Officer John Deputy, a former officer with the Prichard Police Department, testified that when he arrived at the lounge he saw Bohannon standing in the parking lot with a weapon in his hand and his arm down at his side. A woman, later identified as Bohannon's wife, was standing in front of him and yelled: 'Don't shoot.' Officer Deputy testified that two bodies were on the ground in the parking lot and that two guns, a .22 caliber derringer pistol and a .32 caliber semiautomatic pistol, were near the bodies. One victim, he said, had a gunshot wound to his chest and multiple gunshot wounds to his head. The second victim had what appeared to be a single gunshot wound to his chest and what appeared to be 'footprints on his face.' Dr. John Krolikowski, a forensic pathologist, testified that Harvey died from a combination of a single gunshot wound to his chest and blunt-head trauma from multiple injuries and that DuBoise died from three gunshot wounds.

"The owner of the lounge, William Graves, testified that there was an extensive security system in the lounge and that 8 cameras recorded the outside of the lounge and its parking lot and 14 or 15 cameras recorded the inside of the lounge. A customer sitting at the bar could watch a live video of the parking lot. Three recordings of the shootings from three different angles were introduced into evidence and played for the jury. Transcripts of several 911 emergency telephone calls, as the shootings were in progress, were also introduced and played to the jury.

"The circuit court in its sentencing order gave the following account of the shootings as observed from the three videotapes:

> "'At around 7:30 a.m., according to one of the waitresses, a text came in to either DuBoise or Harvey stating that one of their girlfriends needed the car so the girlfriend could go to work. DuBoise packed up his pool cue into a carrying case and began to leave the Lounge. Bohannon's friend, Wade Brown, had gone outside to use his cell phone and came back into the Lounge to get his things because everyone was beginning to leave. DuBoise and Harvey came out into the parking lot in front of the Lounge and Harvey went over to their car and began examining the tire well. Bohannon, dressed in a plaid shirt and cowboy hat, came out into the parking lot and had a conversation with DuBoise. All of this was captured on video without audio. There were a total of three cameras that picked up the altercation.
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> "'After a short conversation between Bohannon and DuBoise, DuBoise moved away from Bohannon and pushed him slightly, while gesturing to him to leave. Harvey left the car over

by the side of the Lounge and walked back toward Bohannon and DuBoise and there was some additional conversation. DuBoise and Harvey turned to leave and had walked several feet away when Bohannon reached under his shirt to his back and produced a .357 Ruger revolver pistol. To fire the Ruger pistol the user must manually cock the hammer each time before pulling the trigger. After walking away several steps, both DuBoise and Harvey turned suddenly to look at Bohannon. Apparently, the hammer had been cocked. Both men then began running and Bohannon began running after them. There were no shots fired at this time. Both men ran around the corner of the Lounge to an area that was fenced in by an 8 foot privacy fence. There was a cutout in the building and both men wedged into that cutout. DuBoise and Harvey produced guns. One of the deceased had a .32 automatic and the other a 2-shot .22 caliber derringer. Both of these guns were later found to have been fired and there was at least one misfire of the .22 derringer and one unfired cartridge from the .32 which had been ejected.

"'A gunfight ensued with Bohannon firing and hitting the concrete block building and at or near the same time a shot being fired toward Bohannon. Harvey ran from the hiding place and received a single gunshot wound to the upper left chest and there was skull trauma including what appeared to be a shoe print on Harvey's face. DuBoise also ran from the hiding place and received multiple gunshot wounds. One bullet entered the anterior chest striking his liver; one bullet entered in the ribs striking the stomach and the kidney, the entry being from the posterior lower back close to the kidney and the spleen; and another entered on the left side which involved the

> lung and the heart. Forensics could not determine the sequence of bullets entering, but the video of DuBoise would indicate that the posterior back entry was first and that Bohannon was over DuBoise when the next two bullets entered. The police investigation team collected spent cartridges around the deceased and they were later confirmed to have been fired from a .357 Ruger which caused the deaths of DuBoise and Harvey. Spent cartridges from the other two guns were recovered as well.
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> "'Additional crime scene collections included two small bags of methamphetamine found on DuBoise inside a magnetic key holder such as could be placed in the tire well of a car. In addition to DuBoise having been shot 3 times, according to witnesses, Bohannon then pistol whipped DuBoise with the butt-end of the Ruger, which ultimately broke. DuBoise's teeth were dislodged from his mouth and he suffered a skull fracture ....
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> "'After Bohannon had killed DuBoise and Harvey, Bohannon removed his own cowboy hat and put on a baseball cap belonging to one of the victims.'

"Wade Brown, a friend and employee of Bohannon's, testified that on the evening of December 10, 2010, he, Bohannon, and Bohannon's wife, Donna, went out for the evening. They went to the lounge early in the evening and played pool and left and went to several other bars, drank alcohol, and played pool. In the early morning hours of December 11, 2010, the three returned to the lounge. Brown did not know what happened until after the first shots had been fired, and he did not see Bohannon have any altercation with either Harvey or DuBoise before the first shots were fired.

"Robert Hoss, a regular at the lounge, testified that he was at the lounge when the shootings occurred. He said that the victims had been in the lounge playing pool before the shootings and that around 7:00 a.m. he heard a 'big bang' and went to the door of the lounge to see what was happening. He testified that he saw DuBoise lying on the ground, that he telephoned emergency 911, that he saw Harvey running and saw Bohannon shoot Harvey, that Bohannon went to the victims and started beating one of them with his pistol and kicking him, and that Bohannon then searched DuBoise's pockets and took money from his pockets. A transcript of Hoss's 911 telephone call was introduced during his testimony and played to the jury. During the emergency call, Hoss screamed: 'He's just shooting people like they were nothing.'

"Melissa Weaver testified that she had worked at the lounge off and on for 10 years, that she was a bartender, that DuBoise and Harvey were regulars at the lounge, that they played pool, that on the morning of the shootings she started work at 12:00 a.m., that Bohannon and two others came in the lounge around 12:00 a.m. [and] left and came back around 2:00 a.m. or 3:00 a.m., that when Bohannon came back he asked her for 'an ounce of meth,' that she told Bohannon that she could not get him any methamphetamine, that she did not observe any altercation between Bohannon and the victims, that after the first shots were fired she locked the door to the lounge, and that she and the other patrons watched what was happening on the video monitors. Weaver said that sometime before the shootings, Bohannon had called her over and said to her: '[I]f something happens in here tonight, I want you to know that it's not your fault.'

"Sharon Thompson testified that she had worked at the lounge for six years and was at the Lounge on the morning of the shootings but was not working. Thompson said that she came to the lounge with Harvey and DuBoise and that the three of them shot pool all night. When the shooting started

> she looked out the door and saw DuBoise on the ground. Someone pulled her back into the lounge. Thompson testified that, before the shootings, Weaver asked her to watch the bar while she went to the restroom. At that time, she said, Bohannon approached her and asked her if she could get him some 'meth.' She told Bohannon no and walked off.
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> "Officer Victor Myles of the Prichard Police Department testified that Bohannon made a spontaneous statement as another officer placed Bohannon in his patrol car after Bohannon had been read his Miranda[v. Arizona, 384 U.S. 436 (1966),] rights. Bohannon said: 'It should be self-defense, because he owed me money.'
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> "Bohannon's defense was that he acted in self-defense. He presented three witnesses who testified that he had a good reputation and that he did not use drugs."

Bohannon v. State, 222 So. 3d 457, 468-71 (Ala. Crim. App. 2015) (citations to record and footnote omitted).

On original submission of Bohannon's direct appeal, this Court remanded the case for the trial court to vacate one of his convictions because allowing both convictions to stand would have violated the Double Jeopardy Clause of both the United States Constitution and the Alabama Constitution. See U.S. Const., Amend. V, and Ala. Const., Art. I, § 9. The trial court complied with this Court's instructions, and, on return to remand, this Court affirmed Bohannon's remaining capital-murder conviction and death sentence. The Alabama Supreme Court

affirmed this Court's decision, see Ex parte Bohannon, 222 So. 3d 525 (Ala. 2016), and the United States Supreme Court denied certiorari review.

In 2017, Bohannon filed a Rule 32 petition in which he raised multiple ineffective-assistance-of-counsel claims, and he amended the petition in 2018 and again in 2020. The State filed a motion to dismiss Bohannon's petition, and, on October 12, 2021, the circuit court summarily dismissed the petition on the grounds that the claims therein were either insufficiently pleaded, without merit, or both. Bohannon subsequently filed a timely notice of appeal.

Discussion

On appeal, Bohannon argues that the circuit court erred by summarily dismissing some, though not all, of his ineffective-assistance-of-counsel claims. Those claims that Bohannon raised in his petition but has not argued were improperly dismissed are deemed to be abandoned.[1] Travis v. State, [Ms. CR-18-0973, March 24, 2023] ___ So. 3d ___, ___ n.3

[1]That includes Bohannon's claim that the State withheld exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963), which was the only claim Bohannon raised that was not an ineffective-assistance-of-counsel claim.

(Ala. Crim. App. 2023). Our review of the circuit court's ruling is de novo because the court based its ruling on a "'cold trial record,'" Harris v. State, [Ms. CR-19-0231, July 9, 2021] ___ So. 3d ___, ___ (Ala. Crim. App. 2021) (quoting Ex parte Hinton, 172 So. 3d 348, 352 (Ala. 2012)), and our determination of whether summary dismissal was proper is guided by the following well-settled principles:

> "To prevail on a claim of ineffective assistance of counsel, the petitioner must meet the standard articulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The petitioner must show: (1) that counsel's performance was deficient, and (2) that the petitioner was prejudiced by his counsel's deficient performance. 466 U.S. at 687, 104 S. Ct. 2052. 'To meet the first prong of the test, the petitioner must show that his counsel's representation fell below an objective standard of reasonableness. The performance inquiry must be whether counsel's assistance was reasonable, considering all the circumstances.' Ex parte Lawley, 512 So. 2d 1370, 1372 (Ala. 1987). '"This court must avoid using 'hindsight' to evaluate the performance of counsel. We must evaluate all the circumstances surrounding the case at the time of counsel's actions before determining whether counsel rendered ineffective assistance."' Lawhorn v. State, 756 So. 2d 971, 979 (Ala. Crim. App. 1999) (quoting Hallford v. State, 629 So. 2d 6, 9 (Ala. Crim. App. 1992)). 'A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' Strickland, 466 U.S. at 689, 104 S. Ct. 2052. As the United States Supreme Court explained:
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> > "'Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting

> for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the 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. 2052 (citations omitted). To meet the second prong of the test, the petitioner 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' 466 U.S. at 694, 104 S. Ct. 2052. 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' Id. 'It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.' Id. at 693, 104 S. Ct. 2052. 'The likelihood of a different result must be substantial, not just conceivable.' Harrington v. Richter, 562 U.S. 86, 112, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

"Rule 32.3, Ala. R. Crim. P., provides that '[t]he petitioner shall have the burden of pleading ... the facts

necessary to entitle the petitioner to relief.' Rule 32.6(b), Ala. R. Crim. P., requires that the petition 'contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings.' As this Court noted in Boyd v. State, 913 So. 2d 1113 (Ala. Crim. App. 2003):

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

"913 So. 2d at 1125.

> "'The burden of pleading under Rule 32.3 and Rule 32.6(b) is a heavy one. Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b). The full factual basis for the claim must be included in the petition itself. If, assuming every factual allegation in a Rule 32 petition to be true, a court cannot determine whether the petitioner is entitled to relief, the petitioner has not satisfied the burden of pleading under Rule 32.3 and Rule 32.6(b). See Bracknell v. State, 883 So. 2d 724 (Ala. Crim. App. 2003). [Thus,] [t]o sufficiently plead an allegation of ineffective assistance of

> counsel, a Rule 32 petitioner not only must "identify the [specific] acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment," Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), but also must plead specific facts indicating that he or she was prejudiced by the acts or omissions, i.e., facts indicating "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694, 104 S. Ct. 2052. A bare allegation that prejudice occurred without specific facts indicating how the petitioner was prejudiced is not sufficient.'
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> "Hyde v. State, 950 So. 2d 344, 356 (Ala. Crim. App. 2006)."

Stanley v. State, 335 So. 3d 1, 22-24 (Ala. Crim. App. 2020).

> "Rule 32.7(d), Ala. R. Crim. P., authorizes the circuit court to summarily dismiss a petitioner's Rule 32 petition
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> > "'[i]f the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings ...'
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> "See also Hannon v. State, 861 So. 2d 426, 427 (Ala. Crim. App. 2003); Cogman v. State, 852 So. 2d 191, 193 (Ala. Crim. App. 2002); Tatum v. State, 607 So. 2d 383, 384 (Ala. Crim. App. 1992). In addition, '"'[w]here a simple reading of the petition for post-conviction relief shows that, assuming every allegation of the petition to be true, it is obviously without merit or is precluded, the circuit court [may] summarily dismiss that petition.'"' Bryant v. State, 181 So. 3d 1087, 1102 (Ala. Crim. App. 2011) (quoting Bishop v. State, 608 So.

> 2d 345, 347-48 (Ala. 1992) (quoting in turn Bishop v. State, 592 So. 2d 664, 667 (Ala. Crim. App. 1991) (Bowen, J., dissenting))). Summary disposition is also appropriate where the record directly refutes a Rule 32 petitioner's claim."

Shaw v. State, 148 So. 3d 745, 764-65 (Ala. Crim. App. 2013).

I.

Bohannon argues that the circuit court erred by dismissing his "interrelated claims regarding counsel's failure at trial connected to the presentation of a self-defense theory." (Bohannon's brief, p. 9.) We address the circuit court's dismissal of Bohannon's self-defense-related claims in turn, though not in the order he has raised them.

1.

Bohannon argues that the circuit court erred by dismissing his claim that his counsel failed to "fully educate [him] about pursuing a self-defense theory." (C. 646.) In support of that claim, Bohannon alleged that his counsel assured him "the [security-system] video was going to exonerate [him]" by "prov[ing] that '[DuBoise and Harvey] shot first' " but failed to explain that "pursuing a theory of self-defense necessarily meant showing that (1) he reasonably feared death or serious bodily injury when he acted, (2) he didn't provoke the use of force, and (3) he wasn't the initial aggressor." (C. 648.) Bohannon also alleged that his counsel

"compounded this problem by insisting that [he] not testify in his own defense," without explaining "how his testimony would be crucial in presenting a fully formed case of self-defense." (C. 649.) Citing McCoy v. Louisiana, 584 U.S. ___, 138 S. Ct. 1500 (2018), Bohannon argued that his counsel's alleged failure to "fully educate" him constituted structural error, i.e., error that does not require a showing of prejudice, because, he said, it violated his "right to the autonomy to choose how to defend himself." (C. 654.) See Smith v. State, 213 So. 3d 327, 338 (Ala. Crim. App. 2011) (noting that "structural error … does not require a showing of prejudice" (citing Ex parte Easterwood, 980 So. 2d 367, 374 (Ala. 2007))).

In McCoy, the United States Supreme Court held that defense counsel may not concede his client's guilt over the client's express objection, even if doing so is objectively reasonable under the circumstances, because "[s]uch an admission blocks the defendant's right to make the fundamental choices about his own defense." McCoy, 584 U.S. at ___, 138 S. Ct. at 1511. In other words, what was at issue in McCoy was "[the] client's autonomy, not counsel's competence." Id. at ___, 1510. Thus, the Court did "not apply [its] ineffective-assistance-of-counsel jurisprudence," id. at ___, 1511, i.e., the two-prong test set forth

in Strickland v. Washington, 466 U.S. 668 (1984), but, instead, held that defense counsel's usurpation of a fundamental choice about the defense was a structural error that required a new trial without a showing of prejudice. Other fundamental choices that are "reserved for the client" – and thus may not be made by defense counsel over the client's express objection – include "whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." McCoy, 584 U.S. at ___, 138 S. Ct. at 1508.

Bohannon argues on appeal that there "is little difference between what happened [in] McCoy and what happened to him" (Bohannon's brief, p. 36), but there is actually a significant difference. In McCoy, defense counsel usurped his client's right to make a fundamental choice about the defense. Here, Bohannon alleged that his counsel failed to "fully educate" him regarding the self-defense claim and the importance of his testimony, but he did not allege that his counsel pursued the self-defense claim over his objection or that his counsel prohibited him from testifying. To the contrary, Bohannon expressly conceded in his petition that he was the one who ultimately made the decision to pursue the self-defense claim and the decision not to testify. (C. 649.) Thus, McCoy is

inapplicable here because Bohannon did not allege that his counsel usurped his right to make a fundamental choice, or even any choice, about the defense.[2] If Bohannon was not adequately informed when he made those decisions, that fact might provide a basis for finding that his counsel performed deficiently, but, pursuant to Strickland, Bohannon was required to plead facts demonstrating that he was prejudiced by the deficient performance. See United States v. Trujillo, 960 F.3d 1196, 1206 (10th Cir. 2020) (distinguishing McCoy on the basis that an uninformed decision by the defendant "does not transform the defendant's decision … from his own choice to that of his counsel"); Shaw v. State, 949 So. 2d 184 (Ala. Crim. App. 2006) (applying the Strickland test to the defendant's claim that his counsel failed to adequately inform him); and Shannon v. Hepp, 27 F.4th 1258, 1267 (7th Cir. 2022) (applying the Strickland test to the defendant's claim that his counsel "unreasonably advised him not to testify while at the same time failing to advise [him] that his testimony

[2]We do not suggest that the issue of whether to raise a self-defense claim is a fundamental choice. See Morgan v. State, 334 So. 3d 516, 526 (Ala. Crim. App. 2020) ("[W]e need not decide today whether self-defense is 'tantamount to a concession of guilt' so that defense counsel violates McCoy if he or she argues self-defense to the jury over the defendant's objection."). For purposes of this case, we may assume, without deciding, that it is.

was essential if the claim of self-defense was to have any chance of success").

We turn, then, to Bohannon's attempt to establish that he was prejudiced by his counsel's alleged failure to "fully educate" him regarding the self-defense claim.[3]

First, Bohannon claimed that his lack of knowledge regarding the self-defense claim "prevented him from making a reasoned decision to go to trial instead of pleading guilty." (C. 685.) According to Bohannon, had he "known of the nearly impossible task of proving that he acted in self-defense" (C. 686), he "would have accepted a plea deal that avoided life-

[3]By addressing the prejudice prong of the Strickland test first, we do not mean to imply that Bohannon carried his burden of pleading facts demonstrating that his counsel performed deficiently. As this Court has previously noted:

> "'[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. … If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.'"

Hutcherson v. State, 243 So. 3d 855, 864 (Ala. Crim. App. 2017) (quoting Strickland, 466 U.S. at 697).

without-parole or a death sentence," rather than "blindly push[ing] ahead to a trial on nothing more than a hope and a prayer." (C. 687.)

In Lafler v. Cooper, 566 U.S. 156 (2012), the United States Supreme Court considered "how to apply Strickland's prejudice test where ineffective assistance results in a rejection of [a] plea offer and the defendant is convicted at the ensuing trial." Lafler, 566 U.S. at 163. In such circumstances, the Court explained,

> "a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed."

Id. at 164. The Court went on to note, however, that, "[i]f no plea offer is made," then the issue of whether the defendant was denied "effective assistance of counsel in considering whether to accept it" "simply does not arise." Id. at 168. In other words, when a defendant alleges that his counsel's faulty advice led him to proceed to trial instead of accepting a plea offer, the absence of any plea offer that could have been accepted, or at least some evidence indicating that the State was willing to enter into

a plea agreement, is fatal to the claim. See Wayne v. State, 860 N.W.2d 702, 705, 706 (Minn. 2015) (noting that Lafler applies "only if [the defendant] establishe[s] that a plea offer was actually made" and holding that, "[b]ecause the record offers no suggestion that there was a plea offer, it is apparent without argument that [the defendant's] claim of ineffective assistance of counsel lacks an objective basis in fact"); and Rise v. Glebe, 679 F. App'x 610, 611 (9th Cir. 2017) (not selected for publication in the Federal Reporter) (rejecting the defendant's claim that, but for his counsel's faulty advice, "he would have sought and accepted a plea deal" because "[n]o evidence was presented … that the state prosecutor made or was willing to make a plea offer; that is, there was no plea agreement to lose" (citing Lafler)).

In this case, Bohannon conceded in his petition, and concedes again on appeal, that the State did not present him with a plea offer (C. 686; Bohannon's brief, p. 51), so "there was no plea agreement to lose." Rise, 679 F. App'x at 611. Bohannon alleged, though, that he "would have earnestly sought a plea bargain" had he "known the odds against" prevailing on a self-defense claim. (C. 687 (emphasis added).) However, the State was under no obligation to engage in plea negotiations, Ex parte

Johnson, 669 So. 2d 205, 206 (Ala. 1995), and Bohannon did not plead any facts demonstrating, nor did he even suggest, that the State had indicated that it was willing to do so, no matter how earnestly he might have sought a plea offer. Thus, Bohannon's suggestion that he might have been able to obtain a plea offer from the State was purely speculative, and "[s]peculation is not sufficient to satisfy a Rule 32 petitioner's burden of pleading." Mashburn v. State, 148 So. 3d 1094, 1125 (Ala. Crim. App. 2013). See also Rise, 679 F. App'x at 611 (holding that, "even assuming bad advice [from defense counsel]," the defendant could not demonstrate a reasonable probability that the result of the proceeding would have been different because "[n]o evidence was presented … that the state prosecutor … was willing to make a plea offer").

In short, then, it is undisputed that the State never presented Bohannon with a plea offer, and Bohannon merely speculated that the State might have been willing to engage in plea negotiations. Thus, Bohannon failed to plead facts demonstrating that there was "a reasonable probability that … the result of the proceeding would have been different," i.e., that the proceeding would have concluded with a

guilty plea, if only his counsel had "fully educate[d]" him regarding the difficulty of establishing a viable self-defense claim.[4] Stanley, 335 So. 3d at 23 (citations omitted).

Second, Bohannon alleged that his decision not to testify was the result of his counsel's alleged failure to "fully educate" him regarding the self-defense claim. However, as the circuit court explained, Bohannon "fail[ed] to explain what he would have said during his testimony" (C. 1162) – a finding Bohannon has not challenged on appeal. Thus, in the absence of any indication as to what his testimony would have been, Bohannon could not satisfy his burden of demonstrating that he was prejudiced by his allegedly uninformed decision not to testify. See Woodward v. State, 276 So. 3d 713, 780 (Ala. Crim. App. 2018) (noting

[4]We note that Bohannon alleged in his petition that his lack of knowledge regarding the self-defense claim rendered him unable to make a "well-reasoned decision" whether to "fall on the mercy of the court and enter a blind plea to the charges he faced." (C. 652.) However, Bohannon has not raised that argument on appeal. Moreover, Bohannon did not allege in his petition that he would have in fact entered a blind plea if he had been "fully educate[d]" regarding the self-defense claim, and he made no attempt to explain how a blind plea would have resulted in a less severe sentence than the one he received. See Lafler, 566 U.S. at 164 (noting that, to demonstrate prejudice from the lost opportunity to plead guilty, the defendant must show that "the conviction or sentence, or both, … would have been less severe than under the judgment and sentence that in fact were imposed").

that, to sufficiently plead an ineffective-assistance-of-counsel claim alleging the loss of potential testimony, the defendant must plead "specific facts regarding what that testimony would have been").

Third, Bohannon alleged that, had he been aware of the difficulty of establishing a viable self-defense claim, he could have "accepted responsibility for the shooting deaths without arguing about self-defense," and, according to him, had he "sacrificed fighting at the guilt phase," he would have "hopefully avoid[ed] the death penalty in the penalty phase." (C. 688.) However, the prejudice prong of the Strickland test requires more than the mere hope or possibility of a different result; it requires facts, which Bohannon did not provide, establishing "'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Stanley, 335 So. 3d at 23 (quoting Strickland, 466 U.S. at 694) (emphasis added). See also Borden v. Allen, 646 F.3d 785, 823 (11th Cir. 2011) (noting that "our inquiry into Strickland prejudice requires that we find more than a possibility" of a different result); and Lyons v. McCotter, 770 F.2d 529, 532 (5th Cir. 1985) ("The prejudice required by the second part of the Strickland test is something considerably more than the possibility that

an unreasonable error by counsel might have had some effect on the trial." (emphasis added)).

In sum, even if Bohannon's counsel performed deficiently by failing to "fully educate" him regarding the self-defense claim – and we do not suggest counsel did – Bohannon did not plead facts sufficient to demonstrate that he was prejudiced by the deficient performance. Thus, summary dismissal of this claim was proper. See Bryant v. State, 181 So. 3d 1087, 1165 (Ala. Crim. App. 2011) (holding that summary dismissal was proper because, regardless of whether defense counsel performed deficiently, the defendant had not demonstrated that he suffered any prejudice).

We note that, in arguing this claim on appeal, Bohannon also points to his allegation that his counsel "denied him the opportunity to present the best possible self-defense case that might have led the jury to reject some of the capital charges in favor of acquittal or a lesser-included offense." (Bohannon's brief, p. 50.) However, in his petition, Bohannon raised that allegation in conjunction with his claim that his counsel failed to properly investigate the case in preparation for the guilt phase of trial. (C. 687.) Thus, we have not considered that argument in determining

whether the circuit court properly dismissed Bohannon's failure-to-educate claim, although we do note that Bohannon fails to explain how his enhanced knowledge of the self-defense claim would have resulted in "the best possible self-defense case." We also will not consider whether the circuit court properly dismissed Bohannon's guilt-phase failure-to-investigate claim because he has not expressly argued that claim on appeal.[5] See Dobyne v. State, 805 So. 2d 733, 753 (Ala. Crim. App. 2000) ("[A]llegations ... not expressly argued on ... appeal ... are deemed by us to be abandoned. This is true even in an appeal from the denial of a Rule 32 petition in a death-penalty case." (citations omitted)); and Travis, ___ So. 3d at ___ n.3 ("'Claims presented in a Rule 32 petition but not pursued on appeal are deemed to be abandoned.'" (quoting Boyd v. State, 913 So. 2d 1113, 1145 (Ala. Crim. App. 2003))).

2.

Bohannon argues that the circuit court erred by dismissing his claim that his counsel failed to subject the State's case to "meaningful adversarial testing." (C. 641.) In setting forth that claim, Bohannon

[5]We address the dismissal of Bohannon's penalty-phase failure-to-investigate claim in Part II.2, infra.

conceded that his counsel raised a self-defense claim by "repeatedly paint[ing] [DuBoise and Harvey] as the aggressors" because, counsel argued, they were "the first ones to fire a weapon." (C. 640.) Bohannon alleged, however, that his counsel presented no evidence to support the self-defense claim and did "nothing to address the full story that unfolded on the [security-system] video" (C. 635), and he alleged that the State "pounced on and highlighted this massive gap in the defense's case." (C. 636.) Specifically, Bohannon referenced the State's argument to the jury that he was "the initial aggressor by pulling his gun and chasing DuBoise and Harvey" and that his "actions from the outset – drawing his gun and chasing DuBoise and Harvey – were not those of a … person who reasonably believed he was in fear of great bodily harm or death." (C. 639.) And, according to Bohannon, his counsel "fail[ed] to address or respond to the holes in the self-defense theory pointed out by the State" and "had no answer for" the State's arguments. (C. 642.) In addition, Bohannon alleged that his counsel "effectively sealed [his] fate by conceding essential elements of the self-defense theory" (C. 641) – namely, that "DuBoise's pushing … didn't justify the use of deadly physical force." (C. 639.) Citing United States v. Cronic, 466 U.S. 648

(1984), Bohannon argued that he was not required to demonstrate how he was prejudiced by his counsel's allegedly deficient performance but, instead, was entitled to a presumption of prejudice.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant not only the right to counsel but the right to the effective assistance of counsel. Wilkerson v. State, 70 So. 3d 442, 453 (Ala. 2011). In Strickland, supra, the United States Supreme Court held that, to prevail on an ineffective-assistance-of-counsel claim, the defendant must demonstrate both a "deficienc[y] in counsel's performance" and that the deficient performance was "prejudicial to the defense." Id. at 692. However, in Cronic, which was released the same day as Strickland, the Court held that there are some limited exceptions to this rule, including when defense counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing."[6] Cronic, 466 U.S. at 659. In such cases, defense counsel's failure to provide any meaningful

[6]The other Cronic exceptions arise in those cases in which there is a "complete denial of counsel … at a critical stage of [the defendant's] trial," id. at 659, and in which "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Id. at 659-60.

adversarial testing of the State's case constitutes per se ineffective assistance that does not require a showing of prejudice. See Wright v. Van Patten, 552 U.S. 120, 124 (2008) ("Cronic held that a Sixth Amendment violation may be found 'without inquiring into counsel's actual performance or requiring the defendant to show the effect it had on the trial.'" (quoting Bell v. Cone, 535 U.S. 685, 695 (2002))); and Garza v. Idaho, 586 U.S. ___, ___, 139 S. Ct. 738, 744 (2019) ("[P]rejudice is presumed 'if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.'" (quoting Cronic, 466 U.S. at 659)).

However, this specific Cronic exception is "extremely rare and limited," Martin v. State, 62 So. 3d 1050, 1066 (Ala. Crim. App. 2010), and, as the United States Supreme Court has explained, applies only in those cases in which defense counsel completely fails to subject the State's case to "the crucible of meaningful adversarial testing," Cronic, 466 U.S. at 656:

> "When we spoke in Cronic of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete. We said 'if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.' Cronic, supra, at 659, 104 S. Ct. 2039 (emphasis added). Here, respondent's argument is not that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a

> whole, but that his counsel failed to do so at specific points. For purposes of distinguishing between the rule of Strickland and that of Cronic, this difference is not of degree but of kind."

Bell, 535 U.S. at 696-97 (some emphasis added). Thus, Cronic is not applicable in those cases in which defense counsel provides the defendant with some meaningful assistance that is adversarial to the State, "even if defense counsel may have made demonstrable errors" in doing so. Cronic, 466 U.S. at 656. See Hunt v. State, 940 So. 2d 1041, 1056 (Ala. Crim. App. 2005) ("Cronic is reserved only for those extreme cases in which counsel fails to present any defense." (quoting Branch v. State, 882 So. 2d 36, 65-66 (Miss. 2004)) (emphasis added)); State v. Lewis, [Ms. CR-20-0372, May 6, 2022] ___ So. 3d ___, ___ (Ala. Crim. App. 2022) (noting that Cronic "'has been held inapplicable to cases involving "bad lawyering, regardless of how bad"'" (quoting United States v. Theodore, 468 F.3d 52, 56 (1st Cir. 2006), quoting in turn Scarpa v. Dubois, 38 F.3d 1, 13 (1st Cir. 1994))); Moss v. Hofbauer, 286 F.3d 851, 861 (6th Cir. 2002) ("[T]he distinction between Cronic's per se rule and Strickland's requirement of deficient performance and prejudice [turns on] whether defense counsel provided no representation at all versus bad, even deplorable assistance."); and Childress v. Johnson, 103 F.3d 1221, 1229

(5th Cir. 1997) (noting that, in distinguishing between Strickland and Cronic, "we have consistently distinguished shoddy representation from no defense at all").

In concluding that Cronic was inapplicable in this case, the circuit court found that, throughout the trial, Bohannon's counsel "vigorously argued self-defense as best they could in light of the unfavorable facts." (C. 1133.) Specifically, the circuit court noted that Bohannon's counsel told the jurors during the opening statement to "keep in mind that [DuBoise and Harvey] shot first" and to "remember that" even if they "[did not] remember anything else," that his counsel repeatedly pointed to the security-system video and cross-examined the State's witnesses in an attempt to demonstrate that DuBoise and Harvey "shot first," and that his counsel "played the videotape again" during the closing argument and "argued self-defense." (C. 1133-34.) As to Bohannon's allegation that his counsel presented no additional evidence to support the self-defense claim and had "no answer" for some of the State's arguments, the circuit court found that he failed to "specifically plead any evidence that counsel could have offered or argument that counsel could have made." (C. 1136.) In addition, the circuit court noted that, by

raising a self-defense claim, Bohannon's counsel imposed an additional burden on the State, requiring it to prove beyond a reasonable doubt that Bohannon did not kill DuBoise and Harvey in self-defense. See Smith v. State, 279 So. 3d 1199, 1205 (Ala. Crim. App. 2018) ("When a defendant raises a claim of self-defense, the burden is on the State to prove beyond a reasonable doubt that the defendant did not act in self-defense."). Thus, the circuit court concluded, the record "clearly shows that Bohannon's counsel did not completely abandon their duty to test the State's case," and "Bohannon's claim is that specific aspects of the self-defense argument were faulty, not that his counsel failed to make any argument or completely failed to oppose the prosecution throughout the guilt phase." (C. 1133 (emphasis added).)

On appeal, Bohannon argues that the circuit court erred by concluding that Cronic is inapplicable in this case. However, Bohannon has not challenged the circuit court's factual findings, and those findings demonstrate that his counsel clearly subjected the State's case to "meaningful adversarial testing," Cronic, 466 U.S. at 659, by "vigorously" attempting to convince the jury that he killed DuBoise and Harvey in self-defense. Indeed, Bohannon conceded as much in his petition,

acknowledging that his counsel "doggedly pursued a theory of self-defense." (C. 672.) Thus, the circuit court correctly found that Bohannon's argument was not that his counsel "failed to oppose the prosecution throughout the … proceeding as a whole, but that his counsel failed to do so at specific points," and, as the United States Supreme Court has explained, "[f]or purposes of distinguishing between the rule of Strickland and that of Cronic, this difference is not of degree but of kind." Bell, 535 U.S. at 697. The fact that the State might have "thoroughly dismantled" the self-defense claim (C. 641) – as Bohannon alleged it did – demonstrates only that Bohannon's counsel was unsuccessful in asserting that defense, not that his counsel failed to act as the State's adversary; as the circuit court aptly put it: "A failed argument is not the same as no argument at all." (C. 1135.) In that adversarial role, it is of course possible that Bohannon's counsel committed "demonstrable errors," Cronic, 466 U.S. at 656 – though we do not suggest counsel did – but that is not enough to invoke Cronic's presumption of prejudice. See Walker v. State, 194 So. 3d 253, 282 (Ala. Crim. App. 2015) ("'"[W]hen the defendant receives at least some meaningful assistance, he must prove prejudice in order to obtain relief

for ineffective assistance of counsel."'" (quoting Haynes v. Cain, 298 F.3d 375, 381 (5th Cir. 2002), quoting in turn Gochicoa v. Johnson, 238 F.3d 278, 285 (5th Cir. 2000))).

Bohannon's reliance on United States v. Swanson, 943 F.2d 1070 (9th Cir. 1991), as a basis for applying Cronic is unavailing. In Swanson, defense counsel conceded his client's guilt during the closing argument. In reversing the defendant's conviction, the United States Court of Appeals for the Ninth Circuit stated: "We cannot envision a situation more damaging to an accused than to have his own attorney tell the jury that there is no reasonable doubt that his client was the person who committed the conduct that constituted the crime charged in the indictment." Id. at 1075. Thus, citing Cronic, the Court held that prejudice was to be presumed from defense counsel's concession because, in making that concession, counsel had "utterly failed" to "function as the Government's adversary" and had in fact "shouldered part of the Government's burden of persuasion" by conceding that "no reasonable doubt existed regarding the only factual issues in dispute." Swanson, 943 F.2d at 1074, 1075. That is not what occurred here, where Bohannon's

counsel did not concede his guilt but, instead, "vigorously" and "doggedly" argued that he killed DuBoise and Harvey in self-defense.

Bohannon argues that Swanson is still applicable, though, because his counsel conceded what, he says, was a crucial fact – namely, that DuBoise's act of "push[ing] him slightly" did not justify the use of deadly physical force. Bohannon, 222 So. 3d at 469. It is true that Bohannon's counsel conceded during the closing argument that "a pushing or a shoving … was [not] grounds to use deadly force" (CR-13-0498, R. 1479), after the State argued that it was not, but that concession did not constitute an admission of Bohannon's guilt. Instead, after making that concession, Bohannon's counsel immediately argued that Bohannon was nevertheless justified in using deadly physical force because DuBoise "shot first." (Id., R. 1480.) It appears, then, that Bohannon's counsel conceded that DuBoise's push did not justify Bohannon's use of deadly physical force because counsel wanted the jury to focus not on that aspect of DuBoise's conduct, which was what the State had highlighted, but on the argument that DuBoise was the first person to fire a gun. Thus, even with that concession, Bohannon's counsel continued to act as the State's

adversary and certainly did not concede his guilt. As this Court has previously explained:

> "'"[W]hen counsel fails to oppose the prosecution's case at specific points or concedes certain elements of a case to focus on others, he has made a tactical decision. By making such choices, defense counsel has not abandoned his or her client by entirely failing to challenge the prosecution's case."'"

Hunt, 940 So. 2d at 1056 (quoting Branch, 882 So. 2d at 65, quoting in turn Haynes, 298 F.3d at 381) (internal citation omitted)). Indeed, the Swanson Court also noted that there might be circumstances in which defense counsel might find it advantageous to make certain concessions, provided that the concessions do not include his client's guilt. See Swanson, 943 F.2d at 1076 (noting that defense counsel might make "a tactical admission of certain facts in order to persuade the jury to focus on" other aspects of the case).

In short, the record demonstrates that Bohannon's counsel did not fail to subject the State's case to "meaningful adversarial testing." Cronic, 466 U.S. at 659. In fact, this case does not come close to falling within the "extremely rare and limited" category of cases in which Cronic is applicable, Martin, 62 So. 3d at 1066, and, as a result, summary dismissal of this claim was proper. Bohannon's claim that his counsel

could have performed better in that adversarial role was "plainly of the same ilk as other specific attorney errors [that are] subject to Strickland's performance and prejudice prongs." Bell, 535 U.S. at 697-98. With that conclusion in mind, we turn to Bohannon's claim that his counsel provided ineffective assistance in pursuing the self-defense claim.

3.

In his petition, Bohannon alleged that his counsel's pursuit of the self-defense claim was riddled with errors that permeated the trial. First, Bohannon alleged that his counsel "promised the jury [during the opening statement] that it would hear how … Bohannon act[ed] in self-defense" and then "entirely failed to follow through with that promise – presenting no evidence and only the most vague and basic claims of self-defense." (C. 657.) In support of that allegation, Bohannon cited State v. Petric, 333 So. 3d 1063 (Ala. Crim. App. 2020), in which this Court held that "'[t]he failure to produce evidence promised in opening statement can be'" – though is not always – "'an unreasonable and prejudicial decision that denies a defendant effective assistance of counsel.'" Id. at 1083 (quoting Conley v. State, 433 S.W.3d 234, 240 (Ark. 2014)). Bohannon also alleged, as already noted, that his counsel had "no

answer" for some of the State's arguments, specifically the State's arguments that he was the initial aggressor and that "drawing his gun and chasing DuBoise and Harvey … [was] not [the act] of a … person who reasonably believed he was in fear of great bodily harm or death." In addition, Bohannon alleged that his counsel's self-defense claim, which hinged on the argument that DuBoise and Harvey "shot first," was "simply not supported by the evidence" and was "refuted" by Alabama law because Bohannon conceded that the security-system video demonstrated that he was the initial aggressor. (C. 663, 664.) Thus, Bohannon argued, his counsel's self-defense claim was "absurd." (C. 667.) According to Bohannon, his counsel "destroyed" both his and counsel's "credibility with the jury" by failing to follow through on promises made in the opening statement, failing to present any evidence to support the self-defense claim, failing to provide an answer to some of the State's arguments, and pursuing an "absurd" self-defense claim. (C. 663.)

As to Bohannon's allegation that his counsel failed to follow through on promises made in the opening statement, the circuit court correctly concluded that this case is distinguishable from Petric. In Petric, defense counsel's opening statement "outline[d] a trial strategy of focusing on

[another suspect] as the actual perpetrator," and counsel "promis[ed] the jury evidence linking [that suspect] to [the crime]." Petric, 333 So. 3d at 1078. However, defense counsel was later "forced to abandon the defense [he] set out in opening argument" because he had failed to conduct a pre-trial investigation that would have revealed that the defense did not have merit. Id. at 1083. That is not what occurred here. Nowhere in the opening statement did Bohannon's counsel promise the jury evidence or a theory that counsel then failed to present. (CR-13-0498, R. 1072-77.) Instead, Bohannon's counsel argued that Bohannon acted in self-defense because DuBoise and Harvey "shot first" (id., R. 1077), and counsel then proceeded during the trial to attempt to convince the jury to accept that argument by pointing to the security-system video and cross-examining the State's witnesses. Thus, unlike defense counsel in Petric, Bohannon's counsel did not "prime[ ] the jury to hear a different version of the events from what [counsel] ultimately present[ed]." Petric, 333 So. 3d at 1084 (quoting McAleese v. Mazurkiewicz, 1 F.3d 159, 166-67 (3d Cir. 1993)). The fact that the jury ultimately rejected the theory that Bohannon's counsel outlined in the opening statement is not evidence that his counsel failed to follow through with that theory at trial.

As to Bohannon's allegation that his counsel failed to present any evidence to support the self-defense claim, the circuit court found that Bohannon failed to identify the evidence that his counsel should have presented. See Mashburn, 148 So. 3d at 1159 (holding that summary dismissal was proper because, although the defendant alleged that his counsel should have presented additional evidence, "he failed to specifically identify what evidence he believed should have been presented"). On appeal, Bohannon argues that "[t]he circuit court's conclusions regarding [his] purported pleading failures … are disingenuous" (Bohannon's brief, p. 54), but he does not point to any part of his petition that did identify the evidence his counsel should have presented. In fact, Bohannon argues on appeal that the security-system video "clearly demonstrates [he] was the aggressor who wasn't legally provoked into using deadly physical force" and "effectively precludes an argument that other witnesses or evidence could make the requisite showings sufficient to make a viable claim of self-defense"; thus, he argues, it is "beyond obvious" that any attempt to demonstrate what his counsel "should have shown differently" would have been "at best, futile, and, at worst, disingenuous." (Id. at 56-57.) In other words, Bohannon

alleged in his petition that his counsel failed to present any evidence to support the self-defense claim, but he essentially concedes on appeal that there was no evidence his counsel could have presented that would have countered the security-system video. At the risk of stating the obvious, "[d]efense counsel cannot be found to be ineffective by failing to present or proffer evidence that does not exist," State v. Graham, 136 N.E.3d 959, 965 (Ohio Ct. App. 2019) (citation omitted), nor can counsel be deemed ineffective for failing to present evidence that "would not have made any difference." McWhorter v. State, 142 So. 3d 1195, 1249 (Ala. Crim. App. 2011). Nevertheless, Bohannon's counsel did attempt to elicit testimony that supported the self-defense claim by cross-examining the State's witnesses regarding who "shot first," which was clearly a tactic designed to create reasonable doubt in the jurors' minds as to whether Bohannon acted in self-defense.

As to Bohannon's allegation that his counsel failed to respond to some of the State's arguments, we have already noted the circuit court's finding that Bohannon failed to identify "any argument that counsel could have made." That finding is correct because nowhere in Bohannon's lengthy petition did he identify the arguments his counsel

should have made to counter the State's arguments. See Van Pelt v. State, 202 So. 3d 707, 735 (Ala. Crim. App. 2015) (holding that the defendant had not sufficiently pleaded his claim that his counsel "failed to present a cohesive theory of the case" because he had "fail[ed] to allege with any specificity what counsel should have argued"). Moreover, as we have just noted, Bohannon concedes on appeal that the security-system video "effectively precludes" an argument that he acted in self-defense.

Finally, as to the alleged absurdity of his counsel's self-defense claim, Bohannon did not explain in his petition how his counsel could have presented a more believable self-defense claim. Instead, Bohannon alleged that a self-defense claim "was contradicted by the evidence presented at trial and lacked any legal basis" (C. 660) and that his counsel nevertheless "doggedly pursued a theory of self-defense" – "a course of action" that, according to Bohannon, "was entirely unreasonable." (C. 672.) Thus, Bohannon appears to have alleged that he would have been better served had his counsel not raised a self-defense claim at all. The circuit court found, however, that Bohannon's counsel simply "made the best case they could for self-defense" in light of the "overwhelming evidence" of his guilt and that the jury's rejection of

the self-defense claim did not mean that his counsel performed deficiently by raising it. (C. 1147.) The circuit court's conclusion is correct. This Court has already noted on direct appeal that "the State's evidence against Bohannon was overwhelming," Bohannon, 222 So. 3d at 487, and Bohannon's counsel did not perform deficiently by lofting a "long-shot" defense against highly unfavorable facts. As one court has observed: "There are times when even the most adroit advocate cannot extricate a criminal defendant from a pit," Scarpa, 38 F.3d at 11, but attempting to do so certainly does not constitute ineffective assistance. See Ex parte Duren, 590 So. 2d 369, 373 (Ala. 1991) (holding that defense counsel did not perform deficiently by raising a defense that he knew "was not a legally valid defense" because "the prosecution's case was overwhelming," and counsel was "trying to make the most of a bad situation for his client"); and McGahee v. State, 885 So. 2d 191, 209 (Ala. Crim. App. 2003) (affirming the circuit court's denial of a claim that defense counsel "was ineffective for pursuing a defense that … was legally unsupported" because, given the overwhelming evidence of guilt, the decision was not unreasonable).

Based on the foregoing, the facts in Bohannon's petition, even if true, do not demonstrate that his counsel performed deficiently in attempting to show that he acted in self-defense when he killed DuBoise and Harvey. Rather, it is clear that Bohannon was simply disappointed that the jury did not accept his self-defense claim and faulted his counsel for not doing more to obtain an acquittal on that basis, while at the same time acknowledging the almost insurmountable odds of prevailing on that defense and failing to identify what his counsel could have done better. Accordingly, summary dismissal of this claim was proper.[7] See Jones v. State, 322 So. 3d 979, 1005 (Ala. Crim. App. 2019) (holding that summary dismissal was proper because the facts in the defendant's

[7]We note Bohannon's argument that this Court's decision on direct appeal "effectively held that [his] counsel presented a legally deficient self-defense theory." (Bohannon's brief, p. 10.) In support of that argument, Bohannon points to the Court's conclusion that the evidence did not support a jury instruction on heat-of-passion manslaughter because there was no evidence indicating that DuBoise or Harvey committed legal provocation. Bohannon, 222 So. 3d at 510. According to Bohannon, that conclusion also demonstrates "the lack of evidence in the record supporting a self-defense showing" (Bohannon's brief, p. 12) and thus demonstrates that his counsel presented a "legally deficient self-defense theory." Contrary to Bohannon's belief, nothing in this Court's opinion on direct appeal should be interpreted as a negative commentary on his counsel's performance.

petition, even if true, did not establish that his counsel performed deficiently).

II.

Bohannon argues that the circuit court erred by dismissing other ineffective-assistance-of-counsel claims that did not involve the self-defense claim. We address each of those arguments in turn.

1.

Bohannon argues that the circuit court erred by dismissing his claim that his counsel "hardly met with [him] or his family." (C. 689.) More specifically, Bohannon alleged that his counsel "visit[ed] him just two times in the two years leading up to trial" and "[n]ever interviewed members of [his] family," including his wife, two brothers, and sister-in-law, all of whom allegedly had "information that they thought could be helpful" in the guilt phase of trial. (Id.)

"'[B]revity of consultation time between a defendant and his counsel, alone,'" or the decision not to interview the defendant's family, alone, "'cannot support a claim of ineffective assistance of counsel.'" Davis v. State, 44 So. 3d 1118, 1130 (Ala. Crim. App. 2009) (quoting Murray v. Maggio, 736 F.2d 279, 282 (5th Cir. 1984)). Instead, a Rule 32

petitioner who asserts such a claim must identify the information that he and his family would have shared with his counsel and how that information would have helped his defense. However, Bohannon made no attempt whatsoever to meet that pleading burden. (C. 689-90.) Thus, the circuit court correctly found that this claim was insufficiently pleaded and that summary dismissal of the claim was therefore proper. See Daniel v. State, 86 So. 3d 405, 418 (Ala. Crim. App. 2009) (holding that summary dismissal was proper with respect to the defendant's claim that his counsel did not adequately meet with him because, even if that allegation were true, the defendant failed to "plead what evidence or help he could have provided to his attorneys or how he was prejudiced by their failure to consult with him"); and Jackson v. State, 133 So. 3d 420, 460 (Ala. Crim. App. 2009) (holding that the defendant had failed to sufficiently plead his claim that his counsel "fail[ed] to meet with his family " because he had identified "no facts … his trial counsel could have discovered from his family").

2.

Bohannon argues that the circuit court erred by dismissing his claim that his counsel "fail[ed] to investigate and present testimony from

members of [his] family and community" during the penalty phase of trial. (C. 708.) In support of that claim, Bohannon identified eight people he believed his counsel should have called to testify, and he alleged that those eight people would have generally testified that he was a good husband, father, and step-father; that he had sought to help both his family and others in his community in various ways; and that he did not use illegal drugs. (C. 710-11.) According to Bohannon, such testimony would have provided "powerful mitigation evidence from a variety of sources that would have rendered the death penalty inappropriate for [him]." (C. 710.)

In dismissing this claim, the circuit court found that the testimony Bohannon's counsel allegedly should have presented would have been cumulative of other evidence that his counsel did present. Notably, Bohannon has not challenged that finding on appeal. (Bohannon's brief, pp. 61-63.) Moreover, we have reviewed the circuit court's recitation of the evidence that Bohannon's counsel did present (C. 1185-88), and we agree that the evidence Bohannon alleged his counsel should have presented from his family and community would have been cumulative of that evidence. Thus, summary dismissal of this claim was proper. See

Stallworth v. State, 171 So. 3d 53, 80 (Ala. Crim. App. 2013) (holding that summary dismissal was proper because the evidence the defendant alleged his counsel should have presented would have been cumulative of other evidence).

We note that, in this part of his brief, Bohannon argues that his counsel's alleged failure to investigate also prevented counsel from discovering "critical evidence concerning his mental health, his recent brain injury, his level of intoxication at the time of the incident, his prior traumatic experience of being violently robbed multiple times, and his propensity against violence." (Bohannon's brief, p. 63.) Bohannon raised those allegations in his petition, but he raised them as claims separate and distinct from the claim he has argued was improperly dismissed. (C. 713, 714, 716, 718, 719.) Indeed, Bohannon makes a point of noting in his brief to this Court that the claim he is expressly arguing was improperly dismissed is "claim I(C)(5)(a)" (Bohannon's brief, p. 61), which is the claim we have addressed (C. 708-12), and the only reference Bohannon makes to the other failure-to-investigate claims is the single sentence we have quoted at the beginning of this paragraph. Thus, we will not consider those failure-to-investigate claims that Bohannon has

not expressly argued were improperly dismissed. Dobyne, supra; Travis, supra. Moreover, even if we were to consider those claims, the circuit court found that the claims were either insufficiently pleaded, facially without merit, or both (C. 1191-97, 1200-03), and Bohannon has made no attempt to demonstrate that the claims were sufficiently pleaded and did have merit; in fact, he has not even acknowledged the court's finding that four of those five claims were facially without merit. (Bohannon's brief, pp. 61-63.) Therefore, even if Bohannon's brief can be interpreted as expressly raising those claims, he is not entitled to relief.

3.

Bohannon argues that the circuit court erred by dismissing his claim that his counsel did not object to evidence indicating that he "requested [methamphetamine] on the night of the crime," did not object to "the lack of notice of such evidence," and did not "ask for a limiting instruction regarding such evidence." (C. 733.) In support of that claim, Bohannon cited Rule 404(b), Ala. R. Evid., which, with limited exceptions, prohibits evidence of a defendant's "other crimes, wrongs, or acts" and, when such evidence is admissible, requires the State to provide the defendant with notice of its intent to introduce the evidence.

On direct appeal, this Court held that the evidence of Bohannon's attempt to purchase methamphetamine on the night of the murders "was part of the sequence of events leading to the murders and was admissible to establish the complete story surrounding the murders," that "no notice was required … because the evidence was admissible as part of the res gestae," and that "'a limiting instruction is not required when evidence of other crimes or prior bad acts is properly admitted as part of the res gestae of the crime with which the defendant is charged.'" Bohannon, 222 So. 3d at 492-93 (quoting Johnson v. State, 120 So. 3d 1119, 1129 (Ala. 2006)). In other words, this Court has already held that there was no merit to the issues Bohannon alleged his counsel should have raised, and it is well settled that "'[c]ounsel cannot be held ineffective for failing to raise an issue that has no merit.'" James v. State, 61 So. 3d 357, 380 (Ala. Crim. App. 2010) (quoting Smith v. State, 71 So. 3d 12, 23 (Ala. Crim. App. 2008)). Thus, summary dismissal of this claim was proper. See Jackson, 133 So. 3d at 446 ("'[O]n direct appeal this Court specifically addressed the substantive issue underlying this claim and found no error. … Counsel cannot be held ineffective for failing to raise an issue that has no merit.'" (quoting Smith, 71 So. 3d at 23)); and Bush v. State, 92 So. 3d

121, 142 (Ala. Crim. App. 2009) ("The underlying substantive issue had no merit; thus, the circuit court did not err in dismissing this [ineffective-assistance-of-counsel] claim.").

4.

Bohannon argues that the circuit court erred by dismissing his claim that his counsel "failed to challenge or attempt to correct the trial court's instructions and verdict forms that confused and misled the jury." (C. 739.) In his petition, Bohannon alleged that he "had different interactions with DuBoise and Harvey" and that, as a result, "the jury reasonably could have reached different conclusions regarding self-defense and provoked heat of passion as to each decedent." (C. 740.) Bohannon alleged, however, that the trial court "never explained that, if [he] acted in self-defense or was provoked with regard to one of the decedents but not the other, then he could not be found guilty of capital murder," and he further alleged that it was "unclear how the jury would complete the [verdict] forms" if they reached that conclusion. (Id.) Thus, according to Bohannon, his counsel should have objected to the fact that the trial court's instructions and the verdict forms "failed to allow for the

possibility of a split verdict." (Id.) We hold, however, that Bohannon has waived this claim for appellate review.

In Wimbley v. State, [Ms. CR-20-0201, Dec. 16, 2022] ___ So. 3d ___ (Ala. Crim. App. 2022), the defendant argued on appeal that the circuit court erred by summarily dismissing the claims in his Rule 32 petition. This Court noted, however, that the defendant had repeatedly done nothing more in his appellate brief than "cop[y] verbatim the allegations and authority that he raised in his … Rule 32 petition" and had "ma[de] no argument on appeal … as to why the circuit court's summary dismissal of th[e] claim[s] was incorrect." Id. at ___. The Court then went on to note that it "has held that similar failures of argument do not comply with Rule 28(a)(10), Ala. R. App. P., and constitute a waiver of the underlying postconviction claim." Id.

In this part of his brief, Bohannon likewise does nothing more than copy verbatim the claim he raised in his petition, followed by a concluding paragraph in which he argues that the circuit court erred by finding that the claim was insufficiently pleaded. (Compare Bohannon's brief, pp. 69-72 with C. 739-41.) However, the circuit court did not dismiss this claim on the basis that it was insufficiently pleaded but, instead, dismissed the

claim as facially meritless. (C. 1217-18.) Thus, in addition to the fact that Bohannon has merely copied the claim from his petition, he has not even acknowledged, much less challenged, the circuit court's basis for dismissing the claim, despite the fact that it is the court's ruling that he has argued was erroneous. As this Court has previously explained under similar circumstances:

> "[Bohannon's] obligation as the appellant was to present an argument in support of his position on appeal, and his argument on appeal is that the circuit court erred when it dismissed the claims of ineffective assistance of counsel. … The mere repetition of the claims alleged in the Rule 32 petition does not provide any analysis of the circuit court's judgment of dismissal; obviously there was no judgment of dismissal until after the petition was filed. Therefore, [Bohannon] has waived th[is] … claim[ ] of error, and we will not address [it]."

Morris v. State, 261 So. 3d 1181, 1194-95 (Ala. Crim. App. 2016).

Wimbley and Morris are not the only times this Court has applied Rule 28(a)(10) to "arguments" like the one Bohannon has raised here, so it should be obvious by now that the practice of merely copying a Rule 32 claim into an appellate brief is not an argument that complies with Rule 28(a)(10). Yet, for whatever reason, that practice persists, so we take this opportunity to expressly provide the following warning to Rule 32 petitioners and their appellate counsel: Merely copying a Rule 32 claim

into an appellate brief, without explaining why the dismissal of the claim was improper, does not comply with Rule 28(a)(10), and such "arguments" provide this Court with a basis for holding that the claim has been waived and need not be considered on appeal.

5.

Bohannon argues that the circuit court erred by dismissing his claim that his counsel "allowed the jury to consider the absence of mitigating circumstances as aggravation." (C. 741.) Specifically, Bohannon alleged that "[t]he State's argument and the trial court's instructions" – to which his counsel raised no objection – "likely led the jury to consider the absence of certain statutory mitigating circumstances as an aggravating circumstance." (Id.)

Bohannon raised this same argument on direct appeal, which this Court reviewed for plain error:

> "Bohannon argues that the [trial] court's instructions and the prosecutor's argument encouraged the jury to consider the absence of statutory mitigation circumstances as an aggravating circumstance. Specifically, he argues that the court did not instruct the jury not to consider any other aggravating circumstance.
>
> "However, the [trial] court did give the following instruction:

> "'[I]f, after a full and fair consideration of all of the evidence, you are not convinced beyond a reasonable doubt that at least one aggravating circumstance exists – and here the aggravating circumstance has already been proved by a reasonable doubt – or that that one aggravating circumstance does not outweigh the mitigating circumstances ....'
>
> "(R. 1666) (emphasis added).
>
> "The jury was clearly instructed to consider only one aggravating circumstance – that two or more people were killed during one act or course of conduct. There was no plain error in the [trial] court's instructions on the aggravating circumstance that applied in this case."

Bohannon, 222 So. 3d at 522-23.

"[A] determination on direct appeal that there has been no plain error does not automatically foreclose a determination of the existence of the prejudice required under Strickland to sustain a claim of ineffective assistance of counsel." Ex parte Taylor, 10 So. 3d 1075, 1078 (Ala. 2005). However, it is "the rare case in which the application of the plain-error test and the prejudice prong of the Strickland test will result in different outcomes," Ex parte Taylor, 10 So. 3d at 1078, and this is not such a case. As this Court noted on direct appeal, the jury was "clearly instructed to consider only one aggravating circumstance – that two or more people were killed during one act or course of conduct," Bohannon, 222 So. 3d at

523 (emphasis added) – and we presume the jury followed the trial court's instructions. Knight v. State, 300 So. 3d 76, 92 (Ala. Crim. App. 2018). Thus, there is no basis for concluding that the jury considered the absence of certain statutory mitigating circumstances as an additional aggravating circumstance. Accordingly, summary dismissal of this claim was proper. See Shaw, 148 So. 3d at 764 (noting that a circuit court may summarily dismiss a Rule 32 claim that is obviously without merit).

6.

Bohannon argues that the circuit court erred by dismissing his claims that his counsel did not object to (1) the admission of victim-impact evidence at the guilt phase of trial and (2) the admission of "highly prejudicial 911 calls." (C. 748.) However, on direct appeal, this Court addressed the substantive claims underlying those ineffective-assistance-of-counsel claims and held (1) that there was "no reversible error" in the admission of the victim-impact evidence and (2) that "[t]he 911 telephone calls were correctly admitted into evidence because their probative value outweighed any prejudice to Bohannon." Bohannon, 222 So. 3d at 499, 500. In other words, this Court has already held that there is no merit to the objections Bohannon alleged his counsel should have

raised, and, as we have already explained, "[c]ounsel cannot be held ineffective for failing to raise an issue that has no merit." James, 61 So. 3d at 380 (citation omitted). Thus, summary dismissal of these claims was proper. See Jackson, 133 So. 3d at 446 ("[O]n direct appeal this Court specifically addressed the substantive issue underlying this claim and found no error. … Counsel cannot be held ineffective for failing to raise an issue that has no merit."(citation omitted)); and Bush, 92 So. 3d at 142 ("The underlying substantive issue had no merit; thus, the circuit court did not err in dismissing this [ineffective-assistance-of-counsel] claim.").

7.

Finally, Bohannon argues that the circuit court erred by dismissing his claim that the "cumulative effect of counsel's deficient performance at the culpability phase prejudiced [him]." (C. 706.) However, "'Alabama does not recognize a "cumulative effect" analysis for ineffective-assistance-of-counsel claims,'" and this Court has "repeatedly declined similar requests from petitioners to do so." Lewis v. State, 333 So. 3d 970, 1016 (Ala. Crim. App. 2020) (quoting Carruth v. State, 165 So. 3d

627, 651 (Ala. Crim. App. 2014)). Thus, summary dismissal of this claim was proper.

Conclusion

Bohannon has failed to demonstrate that the circuit court erred by summarily dismissing his Rule 32 petition. Thus, the judgment of the circuit court is affirmed.

AFFIRMED.

Windom, P.J., and Kellum, Cole, and Minor, JJ., concur.