Rel: June 23, 2023

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Alabama Court of Criminal Appeals

OCTOBER TERM, 2022-2023

CR-19-1040

Willie R. Burgess, Jr.

v.

State of Alabama

Appeal from Morgan Circuit Court
(CC-93-421.60)

MINOR, Judge.

This appeal asks whether the Morgan Circuit Court erred in summarily dismissing a petition for relief under Rule 32, Ala. R. Crim. P., in which Willie R. Burgess, Jr., challenged his 1994 conviction for murder, made capital because Burgess committed it during a first-degree robbery, and his resulting death sentence. We hold that the circuit court

did not, and we affirm.

On appeal, Burgess argues (1) that the circuit court erred in denying his motion for leave to amend his petition; (2) that he sufficiently pleaded the claims in his petition and that he did not have to plead the names of the experts he contends his counsel should have used to assist in his defense; (3) that, for many reasons, his trial counsel and appellate counsel were constitutionally ineffective; (4) that one of his trial attorneys had an actual conflict of interest; (5) that Alabama's compensation scheme for appointed attorneys in a capital case is unconstitutional; (6) that his conviction violates international law; (7) that juror misconduct occurred in his case; (8) that the State withheld exculpatory evidence; (9) that the prosecutor presented false testimony; (10) that his death sentence is unconstitutional; (11) that Alabama's death-penalty statute is unconstitutional; (12) that the circuit court should have disqualified the Attorney General and all attorneys in the District Attorney's Office for the Eighth Judicial Circuit; (13) that the circuit court erred in denying his requests for discovery; and (14) that "the cumulative effect of the errors" in his case deprived him of a fair trial.

FACTS AND PROCEDURAL HISTORY

On direct appeal in 1998, this Court summarized the relevant facts from Burgess's trial:

> "The State's evidence tends to show the following, as set out in the trial court's sentencing order:
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> > "'[O]n the morning of January 26, 1993, [Burgess] rode his bicycle to the Decatur Bait [and Tackle] Shop located at 214 Sixth Avenue, S.E., Decatur, Alabama, with the intention of committing a theft. He entered the shop and had a dialogue with the owner, Mrs. Louise Crow. The defendant then left the shop, returned home, changed clothes and walked back to the shop. The defendant again entered the shop, pulled out a .25 caliber semi-automatic pistol, demanded money from the cash drawer and ordered the owner to enter the shop's bathroom. Once the victim had entered the bathroom, the defendant shot her in the face at close range, killing her. He then stole the victim's car, picked up his girlfriend and her child and headed toward Huntsville, Alabama. The defendant was arrested in route to Huntsville, and at the time of arrest he was in possession of the victim's car, a .25 caliber semi-automatic pistol and a quantity of currency.'
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> "After being returned to the custody of the Decatur police, Burgess made an admission to police detectives. Then, as he was walked through the parking lots between the Decatur City Hall and the Morgan County Jail, Burgess, while being videotaped by a cameraman for a local television station, made another admission in response to questions from reporters in which he admitted killing Mrs. Crow."

Burgess v. State, 827 So. 2d 134, 145-46 (Ala. Crim. App. 1998). The jury convicted Burgess of capital murder for killing Crow. See § 13A-5-40(a)(2), Ala. Code 1975 (making murder committed during a robbery a capital offense).

At the penalty phase of the trial, the defense presented testimony from four witnesses: Burgess's mother, Maggie Burgess; Burgess's third-grade teacher, Maxine Ellison; Burgess's father, Willie Burgess, Sr.; and Burgess's former girlfriend, Danielle Douglas. At the end of the penalty phase, the jury recommended, by an 11-1 vote, a death sentence. The trial court followed the jury's recommendation and sentenced Burgess to death. The trial court found that one aggravating circumstance existed: that Burgess had committed the murder during a robbery, § 13A-5-49(4), Ala. Code 1975. (Trial C. 45.)[1] The trial court found that two statutory mitigating circumstances existed: that Burgess did not have a significant criminal history, § 13A-5-51(1), Ala. Code 1975, and that Burgess was 18

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

years old when he committed the crime, § 13A-5-51(7), Ala. Code 1975. (Trial C. 46-47.) The trial court found that three nonstatutory mitigating circumstances existed: that evidence about Burgess's character was "only slightly mitigating"; that evidence about Burgess's family history showed that he had dropped out of school in the ninth grade, that his "home life was not ideal, in that he lacked the presence of a father figure," and that his "home life could best be characterized as one of neglect, at least as his father was concerned"; and that Burgess "was diagnosed as having an antisocial personality disorder by the court's appointed psychiatrist." (Trial C. 47-48.)

This Court affirmed Burgess's conviction and sentence. Burgess, 827 So. 2d 134. The Alabama Supreme Court affirmed this Court's judgment. Ex parte Burgess, 827 So. 2d 193 (Ala. 2000), cert. denied, Burgess v. Alabama, 537 U.S. 976 (2002). This Court issued a certificate of judgment on February 26, 2002, making Burgess's conviction and sentence final.

In July 2003, Burgess timely filed a postconviction petition under

Rule 32, Ala. R. Crim. P., challenging his conviction and sentence.[2] (C. 9.) After the State filed responsive pleadings, the circuit court granted Burgess leave to amend his petition, and Burgess added short amendments to the more than 300-page petition in October 2004 and December 2006. (C. 410, 421, 550, 596, 613, 690.) The amendments expanded on claims that Burgess had raised in his first petition. In May 2007, the circuit court ordered that it would allow no more amendments. (C. 699.)

In August 2008, Burgess moved for leave to file an amended petition. (C. 720.) The circuit court did not rule on this motion and took no action in the case for more than eight years.

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[2]Burgess paid the filing fee. (C. 338.) See Rule 32.6(a), Ala. R. Crim. P. ("A proceeding under this rule is commenced by filing a petition, verified by the petitioner or the petitioner's attorney, with the clerk of the court. ... [The petition] shall also be accompanied by the filing fee prescribed by law or rule in civil cases in the circuit court unless the petitioner applies for and is given leave to prosecute the petition in forma pauperis."). His petition was timely filed under the Alabama Supreme Court's March 22, 2002, order amending Rule 32.2, Ala. R. Crim. P., which provided "that defendants in cases in which the Court of Criminal Appeals issued its certificate of judgment ... during the period between August 1, 2001, and August 1, 2002, ... have one year from August 1, 2002, within which to file a postconviction petition under Rule 32, Ala. R. Crim. P."

In September 2016, the State moved the circuit court for a scheduling order. (C. 730.) In its motion, the State conceded that Burgess should have a chance to amend his petition,[3] and it noted that the parties had agreed that Burgess should have 60 days to file an amended petition. The circuit court set aside the prohibition on amendments in its May 2007 order, and in November 2016 Burgess filed a second amended Rule 32 petition.[4] (C. 736.)

In his petition, Burgess asserted these claims: (1) that his trial counsel were ineffective in their investigation of the crime (C. 745-94); (2) that his trial counsel were ineffective in their investigation, preparation, and presentation at the penalty phase of the trial (C. 794-873); (3) that

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[3]In May 2009, the State moved for more time to respond to the proposed amended petition that Burgess had submitted in August 2008. In that motion, after stating that the circuit court had not granted Burgess leave to amend, the State noted that it "hereby stipulates and will answer." (C. 727.) The circuit court did not rule on this motion, and the record does not include an answer from the State to the August 2008 proposed amended petition.

[4]Burgess's second amended petition replaced his prior petition as amended. See, e.g., Smith v. State, 160 So. 3d 40, 48 (Ala. Crim. App. 2010) (an amended Rule 32 petition supersedes the previously filed petition and becomes the operative pleading if the amended petition "was clearly intended to replace the original petition"). Unless otherwise stated, references in this opinion to Burgess's petition refer to the second amended petition that Burgess filed in November 2016.

his trial counsel were ineffective in their pretrial preparation and litigation (C. 873-945); (4) that his trial counsel were ineffective at the guilt phase of the trial (C. 946-63); (5) that his trial counsel were ineffective at the penalty phase of the trial (C. 964-73); (6) that his trial counsel were ineffective at the sentencing hearing (C. 973-83); (7) that one of his trial counsel, Gregory Biggs, had an actual conflict of interest, which, Burgess said, violated his right to counsel and his right to a fair trial (C. 983-85); (8) that "Alabama's statute for appointment and compensation and the trial court's related rulings violated Mr. Burgess's right to effective counsel and his right to a fair trial" (C. 985-89); (9) that trial counsel were ineffective for not objecting to Burgess's conviction and sentence on the basis of "international law" (C. 990-95); (10) that his appellate counsel were ineffective (C. 996-1007); (11) that "jurors were exposed to and considered extrinsic evidence in violation of their duty to reach guilt and penalty phase verdicts based solely on the evidence presented at trial" (C. 1007-11); (12) that "the State both withheld and belatedly disclosed exculpatory evidence in violation of Mr. Burgess's right to a fair trial and a reliable determination of guilt and sentence" (C. 1011-13); (13) that "the State presented false and misleading testimony

that deprived Mr. Burgess of a fair trial and a reliable determination of guilt and penalty" (C. 1013-15); (14) that imposing the death penalty on Burgess is unconstitutional because Burgess was 18 years old at the time of the crime (C. 1015-26); (15) that Alabama's death-penalty scheme is unconstitutional (C. 1026-33); (16) that "Mr. Burgess was convicted and sentenced in violation of international law, applicable in the United States" (C. 1033-34); and (17) that "the cumulative effect of the errors deprived Mr. Burgess of a fundamentally fair trial" and his constitutional rights (C. 1034).

In June 2017, the State answered the second amended petition and moved the circuit court to summarily dismiss it. (C. 1060-1162.) Burgess replied to the State's answer, and the State responded to Burgess's reply. (C. 1164-1288.)

In September 2017, the circuit court held a status hearing. After the hearing, the circuit court entered an order stating it would allow no more amendments. (C. 1292.) The circuit court denied Burgess's October 2017 motion for reconsideration and motion for leave to amend the second amended petition. (C. 1294, 1344.)

In July 2020, the circuit court entered a detailed order summarily

dismissing Burgess's petition. (C. 1349-1525.) After the circuit court did not rule on Burgess's motion for reconsideration, Burgess timely appealed.[5] (C. 1526, 1585.)

STANDARD OF REVIEW

> "'[Burgess] has the burden of pleading and proving his claims. As Rule 32.3, Ala. R. Crim. P., provides:
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> > "'"The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief. The state shall have the burden of pleading any ground of preclusion, but once a ground of preclusion has been pleaded, the petitioner shall have the burden of disproving its existence by a preponderance of the evidence."
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> "'"The standard of review this Court uses in evaluating the rulings made by the trial court [in a postconviction proceeding] is whether the trial court abused its discretion." Hunt v. State, 940 So. 2d 1041, 1049 (Ala. Crim. App. 2005). However, "when the facts are undisputed and an appellate court is presented with pure questions of law, [our] review in a Rule 32 proceeding is de novo." Ex parte White, 792 So. 2d 1097, 1098 (Ala. 2001).

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[5]The circuit court did not rule on the motion for reconsideration before it lost jurisdiction over the case. Thus, the motion was denied by operation of law. Matthews v. State, [Ms. CR-20-0462, Oct. 8, 2021] ___ So. 3d ___, ___ (Ala. Crim. App. 2021).

"[W]e may affirm a circuit court's ruling on a postconviction petition if it is correct for any reason." Smith v. State, [122] So. 3d [224], [227] (Ala. Crim. App. 2011).

"'As stated above, [some] of the claims raised by [Burgess] were summarily dismissed based on defects in the pleadings and the application of the procedural bars in Rule 32.2, Ala. R. Crim. P. When discussing the pleading requirements for postconviction petitions, we have stated:

> "'"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)."

"'Hyde v. State, 950 So. 2d 344, 356 (Ala. Crim. App. 2006).

> "'"'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)[, overruled on other grounds by Robey v. State, 950 So. 2d 1235 (Ala. Crim. App. 2006)]. 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."

"'Boyd v. State, 913 So. 2d 1113, 1125 (Ala. Crim. App. 2003). "[T]he procedural bars of Rule 32[.2, Ala. R. Crim. P.,] apply with equal force to all cases, including those in which the death penalty has been imposed." Burgess v. State, 962 So. 2d 272, 277 (Ala. Crim. App. 2005).

"'Some of [Burgess's] claims were also dismissed based on his failure to comply with Rule 32.7(d), Ala. R. Crim. P. In discussing the application of this rule we have stated:

> "'"[A] circuit court may, in some circumstances, summarily dismiss a postconviction petition based on the merits of the claims raised therein. Rule 32.7(d), Ala. R. Crim. P., provides:
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> > "'"'If 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, the court may either dismiss the petition or grant leave to file an amended petition. Leave to amend shall be freely granted. Otherwise, the court shall direct that the proceedings continue and set a date for hearing.'
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> > "'"'"Where 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."' Bishop v. State, 608 So. 2d 345, 347-48 (Ala. 1992) (emphasis added) (quoting Bishop v. State, 592 So. 2d 664, 667 (Ala. Crim. App. 1991) (Bowen, J., dissenting)). See also Hodges v. State, 147 So. 3d 916, 934 (Ala. Crim. App. 2007) (a postconviction claim is 'due to be summarily dismissed [when] it is meritless on its face')[, rev'd on other grounds, Ex parte Hodges, 147 So. 3d 973 (Ala. 2011)]."
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> "'Bryant v. State, 181 So. 3d 1087, 1102 (Ala. Crim. App. 2011).'

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

> "....
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> "Finally, '[a]lthough on direct appeal we reviewed [Burgess's] capital-murder conviction for plain error, the plain-error standard of review does not apply when an appellate court is reviewing the denial of a postconviction petition attacking a death sentence.'[6] James v. State, 61 So. 3d 357, 362 (Ala. Crim. App. 2010) (citing Ex parte Dobyne, 805 So. 2d 763 (Ala. 2001)). With these principles in mind, we review the claims raised by [Burgess] on appeal."

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

DISCUSSION

On appeal, Burgess argues that the circuit court erred in summarily dismissing his petition. We address his claims in turn.

I. DENIAL OF MOTION FOR LEAVE TO AMEND

Burgess first challenges the circuit court's October 2017 denial of Burgess's motion for leave to amend the second amended petition. In September 2017, the circuit court held a status hearing and ordered that it would allow no more amendments. (C. 1292.) Burgess then moved for reconsideration of that ruling and for leave to amend and included a proposed amendment. The State opposed Burgess's motion for leave to

[6]Effective January 12, 2023, Rule 45, Ala. R. App. P., no longer requires this Court to conduct plain-error review in cases involving the death penalty.

amend, arguing that the amendment would cause undue delay and would prejudice the State. The State also argued in the alternative that, even if the court considered Burgess's proposed amendment, his claims were insufficiently pleaded. (C. 1310.) The circuit court denied Burgess's October 2017 motion for reconsideration and motion for leave to amend the second amended petition. (C. 1294, 1344.)

On appeal, the State no longer argues that the amendment would have caused undue delay. The State argues instead only that the amendment would have prejudiced the State and that, even if the court erred in refusing to grant Burgess leave to amend, that error was harmless because, even with the amendment, Burgess's claims were insufficiently pleaded. We agree with the latter point—any error in the circuit court's refusal to permit the amendment was harmless.

Underlying Burgess's proposed amendment were many claims alleging that his trial counsel were ineffective for not consulting and presenting "certain expert witnesses whose testimony would have supported Mr. Burgess's case either pre-trial, at the guilt phase, or at the penalty phase of his trial." (C. 1294.) In response to those claims, the State asserted that Burgess had to plead the names of those experts that

trial counsel allegedly should have consulted and presented at trial. Burgess, however, refused to do so, insisting—incorrectly—that "Alabama law does not require him to plead the names of the experts ... so long as he pleads the contents of the experts' anticipated testimony." (C. 1295.)

In the proposed amendment, Burgess provided the names of experts—but not the names of the experts he alleged that his trial counsel should have used for Burgess's 1994 trial. Instead, he named the "experts with whom counsel consulted in the preparation of the Second Amendment Petition." (C. 1296.) Burgess insisted, however, that he had to provide no names.

Burgess asserts that the State would require a petitioner to "name experts who both could have testified at the time of trial <u>and</u> are guaranteed to be available to testify if the court grants an evidentiary hearing in the case." (Burgess's reply brief, p. 12.) Burgess's assertion mischaracterizes the State's position.[7] Burgess also misstates the

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[7]Burgess asserts that the State "had previously conceded that Rule 32.6(b) would be satisfied if Mr. Burgess alleged that the named expert 'or another expert' [were] able to testify at trial." (Burgess's reply, p. 10.) The State made no such concession. Rather, the State pointed out that, in his allegations, Burgess had not named an expert—because he had

pleading requirements of Rule 32 when he argues that his ineffectiveness claims do "not turn on whether counsel failed to call a specific expert witness from among those who could have testified at trial years ago." (Burgess's reply brief, p. 14.) Burgess's ineffectiveness claims indeed turn on that issue. If a petitioner alleges that his or her trial counsel were ineffective for failing to consult and call an expert to testify at the petitioner's trial, the petitioner must, among other things, plead the name of that specific expert.

> "It is well settled that, to properly plead a claim that counsel were ineffective for failing to hire an expert witness, the petitioner must, among other things, identify by name the expert witness his counsel should have hired, set out the testimony that the named expert would have given, and plead that the named expert was both willing and available to testify at trial. In Yeomans v. State, 195 So. 3d 1018, 1043 (Ala. Crim. App. 2013), this Court held that Yeomans's claim of ineffective assistance of counsel was insufficiently pleaded because, 'although the petition alleges that trial counsel should have sought the assistance of an expert to testify, for

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not. (See, e.g., C. 1076 ("Burgess fails to identify a firearms expert by name in his petition."); 1078 ("Burgess fails to identify a forensic pathologist by name in his petition.").)

In any event, the State lacks authority to change the pleading and specificity requirements of Rule 32.3 and Rule 32.6(b), Ala. R. Crim. P., and the State has no obligation to advise Burgess how to plead his claims. The circuit court and this Court have authority to sua sponte apply the pleading requirements of Rule 32.6(b). McNabb v. State, 991 So. 2d 313, 335 (Ala. Crim. App. 2007).

> example, that "one's initial IQ score ... is regarded as most accurate," the petition did not identify, by name, any expert who could have presented that specific testimony—or even testified at all—at Yeomans's trial.' If a petitioner properly pleads such a claim, the petitioner is then entitled to prove that claim at an evidentiary hearing. See, e.g., McAnally v. State, 295 So. 3d 149, 152 (Ala. Crim. App. 2019) (recognizing that a Rule 32 petitioner is entitled to an evidentiary hearing only when the claim is meritorious on its face, which requires that the claim (1) is sufficiently pleaded, (2) is not subject to the grounds of preclusion, and (3) includes factual allegations that, if true, entitle the petitioner to relief). In other words, to obtain relief on a claim that counsel were ineffective for failing to hire an expert witness, the petitioner must first plead the name of that expert, the substance of that expert's testimony, and that the expert is willing and available to testify at the petitioner's trial; then the petitioner must prove each of those allegations at an evidentiary hearing."

Brooks v. State, 340 So. 3d 410, 437 (Ala. Crim. App. 2020).

Burgess's pleading the names of "experts with whom counsel consulted in the preparation of the Second Amendment Petition" did not meet the requirement, as stated in Brooks, that he "identify by name the expert witness his counsel should have hired, set out the testimony that the named expert would have given, and plead that the named expert was both willing and available to testify at trial." See also Lockhart v. State, 354 So. 3d 1039, 1055 (Ala. Crim. App. 2021) ("Lockhart bore the burden of pleading and proving the nature of the evidence trial counsel should have offered as well as the name of any expert—an expert who

was willing and able to testify—needed to offer an opinion on that evidence."), cert. denied (No. 1200719, Nov. 19, 2021); Thompson v. State, 310 So. 3d 850, 870 (Ala. Crim. App. 2018) ("Thompson failed to plead that Dr. Oral was available and that she could have testified as an expert witness in Alabama in 2005. Thus, Thompson failed to plead the 'full facts' in regard to this claim. See Rule 32.6(b), Ala. R. Crim. P.").[8] Thus, even with the facts as alleged in the proposed amendment, Burgess's claims alleging that his trial counsel were ineffective for failing to consult and present testimony from experts do not meet the specificity and full-factual-pleading requirements in Rule 32.6(b), Ala. R. Crim. P., and any error in the circuit court's refusal to grant Burgess leave to amend his

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[8]In his reply brief, Burgess tries to distinguish Thompson, Brooks, and Lockhart, arguing that all three decisions were issued after he sought to amend his petition in 2017 and that the petitioners in Brooks and Lockhart had an evidentiary hearing on the claims at issue. (Burgess's reply brief, p. 17.) We find this argument unavailing. Brooks relied on this Court's decision in Yeomans v. State, 195 So. 3d 1018, 1043 (Ala. Crim. App. 2013)—issued four years before Burgess sought to amend his petition—in which this Court held that Yeomans's claim of ineffective assistance of counsel was insufficiently pleaded because, "although the petition alleges that trial counsel should have sought the assistance of an expert to testify, for example, that 'one's initial IQ score ... is regarded as most accurate,' the petition did not identify, by name, any expert who could have presented that specific testimony—or even testified at all—at Yeomans's trial."

petition was harmless. See, e.g., Wynn v. State, 246 So. 3d 163, 171 (Ala. Crim. App. 2016) ("This Court has held that the denial of a motion to amend a postconviction petition may be harmless depending on the issue or issues raised in the proposed amendment. See Wilson v. State, 911 So. 2d 40, 46 (Ala. Crim. App. 2005) ('Although the trial court erred when it denied the motion to file the third amended petition, that error was harmless. ... [E]ven if the trial court had granted the motion to amend, Wilson would not have been entitled to any relief.')."). Burgess is due no relief on this issue.

II. SUMMARY DISMISSAL OF THE PETITION

In Part II of his brief, Burgess asserts generally that the circuit court erred in summarily dismissing his petition because, he says, he sufficiently pleaded his claims. Burgess asserts that he provided "extraordinary detail" to support the 17 claims and "numerous subclaims" he pleaded in his petition. (Burgess's brief, p. 15.) He cites Ingram v. State, 959 So. 2d 1151 (Ala. Crim. App. 2006), as a case in which a petitioner received an evidentiary hearing on "claims pleaded with far less specificity" than he says he used for his claims. (Burgess's brief, p. 17.) Burgess also argues that the circuit court "improperly raised

the burden of pleading by requiring that Mr. Burgess prove his claims." (Burgess's brief, p. 18.) Finally, Burgess reasserts his argument, which we rejected in Part I, that he did not have to plead the names of experts that he contends his counsel were ineffective for not hiring or consulting. (Burgess's brief, p. 19.)

To the point that Burgess thinks the inclusion of "extraordinary detail" in support of a claim automatically gives him a right to a hearing, it does not. See, e.g., Johnson v. State, [Ms. CR-05-1805, Sept. 28, 2007] ___ So. 3d ___, ___ (Ala. 2007) ("Johnson contends that many of his arguments should not have been dismissed under Rule 32.6(b), because they were 'lengthy' claims; however, this does not necessarily mean that they were sufficiently specific to warrant further proceedings. In this case, they were not."), vacated on other grounds, 137 S. Ct. 2292 (2017). The length of the allegations in support of a claim does not dictate whether the petitioner has a right to relief on that claim. The examples of lengthy claims that Burgess cites in this section of his brief are insufficiently pleaded because Burgess did not name the experts that his trial counsel allegedly should have used in 1994.

And Burgess's reliance on Ingram is unpersuasive. In Ingram,

"[t]he State concede[d] that Ingram met his burden of pleading with regard to his ineffective-assistance-of-counsel claims and, thus, that the case [was] due to be remanded for the circuit court to make specific findings of fact as to [those] claims." 959 So. 2d at 1157. The State has made no such concession here, and, regardless, as we discuss below, the circuit court did not err in summarily dismissing Burgess's claims.

Finally, as our analysis below shows, the circuit court did not require Burgess to "prove his claims." Rather, the circuit court's summary dismissal of Burgess's petition was proper. See Rule 32.7(d), Ala. R. Crim. P.

III. TRIAL COUNSEL'S INVESTIGATION OF THE CRIME

Burgess argues that the circuit court erred in summarily dismissing his claim alleging that his trial counsel were ineffective in their investigation of the crime. (Burgess's brief, p. 21.) Burgess asserts that his trial counsel's "unreasonable failure to investigate the crime prejudiced him because it deprived him of the presentation of evidence in support of an unintentional-shooting defense." (Burgess's brief, pp. 21-22.)

In reviewing a claim alleging that counsel was ineffective, we use

these principles:

> "'To prevail on a claim of ineffective assistance of counsel, the petitioner must show (1) that counsel's performance was deficient and (2) that the petitioner was prejudiced by the deficient performance. See Strickland v. Washington, 466 U.S. 668 (1984).
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> > "'"Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' There are countless ways to provide effective assistance in any given case. Even the best criminal

> defense attorneys would not defend a particular client in the same way."

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

> "'"[T]he purpose of ineffectiveness review is not to grade counsel's performance. See Strickland [v. Washington], [466 U.S. 668,] 104 S. Ct. [2052] at 2065 [(1984)]; see also White v. Singletary, 972 F.2d 1218, 1221 (11th Cir. 1992) ('We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.'). We recognize that '[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.' Strickland, 104 S. Ct. at 2067. Different lawyers have different gifts; this fact, as well as differing circumstances from case to case, means the range of what might be a reasonable approach at trial must be broad. To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.' Burger v. Kemp, 483 U.S. 776, 107 S. Ct. 3114, 3126, 97 L. Ed. 2d 638 (1987)."

"'Chandler v. United States, 218 F.3d 1305, 1313-14 (11th Cir. 2000) (footnotes omitted).

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

Marshall, 182 So. 3d at 582-83. We also keep in mind the pleading requirements we have stated. See Brooks, 340 So. 3d at 437.

The circuit court thoroughly addressed this ineffective-assistance-of-counsel claim, itemizing each subpart and listing the paragraphs of Burgess's petition that included Burgess's allegations in support of the claim. (C. 1355-82.) Citing "[w]ord limitations," Burgess does not address

each subpart of the circuit court's order.[9] (Burgess's brief, p. 26.) Instead, he lists these claims, which he asserts he sufficiently pleaded:

1. Trial counsel's alleged "failure to investigate the State's firearms evidence (C. 759-61)";

2. Trial counsel's alleged "failure to investigate the autopsy findings (C. 762)";

3. Trial counsel's alleged "failure to adequately investigate the crime scene, including failure to consult with an expert regarding the broken toilet, a key piece of the physical evidence (C. 766-71)";

4. Trial counsel's alleged "failure to investigate the gunshot wound (C. 771-72)";

5. Trial counsel's alleged "failure to consult with a lethal force expert (C. 773-75)";

6. Trial counsel's alleged "failure to investigate and present evidence

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[9]Burgess asserts that "[t]he circuit court erroneously found that Mr. Burgess's claims relied solely on the 2003 [American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases,] which it ruled were not a relevant authority by which to assess trial counsel's performance. (C. 1354, 1398.)" (Burgess's brief, p. 24 (emphasis added).)

Burgess simply misrepresents what the circuit court found when it stated: "Burgess, in many of his extensive ineffective assistance claims that condemn the reasonableness of his trial counsel's guilt and penalty phase investigations and presentations, relies on the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases that were published in 2003." (C. 1354.) Although the court stated it would not consider the 2003 Guidelines, the circuit court did not find that his claims "relied solely on the 2003 Guidelines."

that the police department mishandled the firearms evidence and engaged in conduct that compromised its integrity (C. 775-83)";

7. Trial counsel's alleged "failure to investigate the police department's mishandling of the crime scene (C. 783-91)."

(Burgess's brief, p. 26.) Burgess also asserts that he sufficiently pleaded his claims "that trial counsel failed to investigate the crime and his theory of defense (C. 746), failed to present a single witness or introduce a single exhibit (C. 746), and did not effectively engage an investigator (C. 754)." (Id.) Finally, Burgess asserts that his claims are like those made by the petitioners in State v. Petric, 333 So. 3d 1063 (Ala. Crim. App. 2020), and Hinton v. Alabama, 571 U.S. 263 (2014). (Burgess's brief, pp. 26-27.)

Merely listing claims and asserting that the circuit court erred does not comply with Rule 28(a)(10), Ala. R. App. P. As this Court has stated, "[t]he mere repetition of the claims alleged in the Rule 32 petition does not provide any analysis of the circuit court's judgment of dismissal." Morris v. State, 261 So. 3d 1181, 1194 (Ala. Crim. App. 2016). See also State v. Mitchell, [Ms. CR-18-0739, Feb. 11, 2022] ___ So. 3d ___, ___ (Ala. Crim. App. 2022) ("[A] 'laundry-list approach'—and trying to incorporate arguments by reference—does not comply with Rule 28(a)(10), Ala. R.

App. P., which requires an argument to include 'the contentions of the appellant/petitioner with respect to the issues presented, and the reasons therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on.' "). Nor does a mere assertion that a claim is "like" the claim in another case necessarily mean that an appellant's brief complies with Rule 28(a)(10).

Even if this part of Burgess's brief satisfied Rule 28(a)(10) and we addressed the merits of the claims, he would be due no relief. We have reviewed the allegations in this part of Burgess's petition (C. 745-94), and we conclude that summary dismissal of those claims was proper under Rule 32.7(d). Morris, 261 So. 3d at 1195. The claims in this section of Burgess's petition involve repeated allegations that his counsel should have consulted or presented testimony from experts. But as we have noted, Burgess did not plead the name of a single expert that trial counsel should have consulted or used at trial. Thus, the claims are insufficiently pleaded. Brooks, supra. And as the State points out, Burgess's failure to identify experts by name was only one reason that the circuit court dismissed the claims. The circuit court also held that much of the evidence Burgess alleged his counsel should have presented would have

been inadmissible at trial. See, e.g., C. 1360, 1363, 1365, 1367, 1371, 1376, 1381.

Burgess is due no relief on this claim. See Rule 32.7(d), Ala. R. Crim. P.

IV. TRIAL COUNSEL'S PREPARATION FOR AND PRESENTATION AT THE PENALTY PHASE

In Part II of his petition, Burgess alleged that his "trial counsel were ineffective in their investigation, preparation, and presentation at the penalty phase of the trial." (C. 794.) The circuit court summarily dismissed this claim. In Part IV of his brief on appeal, Burgess argues that the circuit court erred in dismissing this claim. He contends that he sufficiently pleaded the claim and that the allegations, if proven, warrant relief.

Burgess asserts that he "alleged ... multiple ways in which counsel were deficient by failing to conduct an investigation into potential mitigating evidence, far exceeding Rule 32.6(b)'s pleading requirement. (C. 794-873.)" (Burgess's brief, p. 28.) He asserts that "counsel obtained almost no social history records" and that "[t]he few records trial counsel had—school and medical records—should have alerted them to the existence and availability of compelling mitigation documents and

witnesses." (Id.) He contends that counsel did not "investigate any of these leads or … interview available social history witnesses, including Mr. Burgess's family, neighbors, physicians, teachers, friends, and social workers. (C. 795.)" (Id.) And, he says, he "named specific individuals who were available to testify to the compelling circumstances of his upbringing. (C. 800-01.)" (Id.) Finally, he asserts that "[t]he trial record itself contains counsel's repeated representations that they were unprepared for the penalty phase" and that, "[a]s of the day before the penalty phase began, counsel had failed to even begin a mitigation investigation." (Burgess's brief, p. 29.) He contends that counsel's alleged failure to prepare led counsel to call only four witnesses during the penalty phase and to "present[] affirmative misstatements about Mr. Burgess's childhood that either minimized or altogether omitted the trauma he experienced." (Id.)

The circuit court thoroughly addressed this claim in its final order. (C. 1382-95.) The circuit court analyzed the claim in subparts, as Burgess had pleaded them. Cf. White v. State, 343 So. 3d 1150, 1165 (Ala. Crim. App. 2019) ("'"[T]he claim of ineffective assistance of counsel is a general allegation that often consists of numerous specific subcategories. Each

subcategory is an independent claim that must be sufficiently pleaded." Coral v. State, 900 So. 2d 1274, 1284 (Ala. Crim. App. 2004), overruled on other grounds, Ex parte Jenkins, 972 So. 2d 159 (Ala. 2005).' Jackson v. State, 133 So. 3d 420, 451 (Ala. Crim. App. 2009).").

First, the court addressed Burgess's allegation that his "trial counsel unreasonably failed to investigate Mr. Burgess's social history and to present reasonably available and compelling mitigating evidence." (C. 1382.) The circuit court found that the record refuted Burgess's allegation that trial counsel had waited until the trial to start preparing for mitigation. The circuit court found:

> "Trial counsel on the day when the trial was scheduled to begin made their second motion to continue, arguing that they felt they were not prepared to proceed with a penalty phase if it became necessary. One of his trial counsel emphasized that Burgess had told them about sentencing witnesses, including some family members, but his investigator had not been able to locate some of those potential witnesses or could not convince them to come forward and cooperate. See Burgess v. State, 827 So. 2d at 177-78.[10] It is clear that [trial] counsel had undertaken the investigation and preparation of a sentencing defense that included family or social history; they simply needed more time to overcome what defense attorneys routinely encounter when witnesses cannot be found, refuse to cooperate, hide from the service of subpoenas or ultimately

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[10]As discussed below in Part V.A., this Court on direct appeal rejected Burgess's argument that the trial court had erred in denying his requests for continuances.

have no relevant or material mitigating testimony to present."

(C. 1383.)

The circuit court correctly noted that Burgess's trial counsel

> "had no constitutional duty to uncover every fact and circumstance about [Burgess's] family and social history that might have been considered mitigating. See Wiggins v. [Smith], 539 U.S. 510, 533 (2003) ('Strickland [v. Washington, 466 U.S. 668 (1984),] does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing.')."

(C. 1383-84.) And the circuit court correctly noted that "[t]he principles contained in guidelines and trial manuals cited by Burgess are not binding and do not have the force or effect of law." (C. 1384.) See, e.g., McWhorter v. State, 142 So. 3d 1195, 1238 (Ala. Crim. App. 2011) ("[W]hether McWhorter's trial attorneys' investigation into potential mitigating evidence adhered to the ABA Guidelines is not dispositive of whether counsel's investigation was reasonable."). See also Bobby v. Van Hook, 558 U.S. 4, 8 (2009) ("Strickland [v. Washington, 466 U.S. 668 (1984),] stressed ... that 'American Bar Association standards and the like' are 'only guides' to what reasonableness means, not its definition."); Ray v. State, 80 So. 3d 965, 983 (Ala. Crim. App. 2011) ("'[W]e will not find that capital counsel was per se ineffective simply because counsel's

representation differed from current capital practice customs, even where the differences are significant.'" (quoting Torres v. State, 120 P.3d 1184, 1189 (Okla. Crim. App. 2005))).

Next, the circuit court rejected Burgess's allegation that his counsel should have called more witnesses at the penalty phase. The circuit court found that, although Burgess listed "a multitude of people in Paragraph 128 of his Second Amendment" that, he said, "were readily available and willing to testify," because Burgess had not pleaded specifically what admissible testimony each of those witnesses would have provided, he had not adequately pleaded this claim. (C. 1384.) The circuit court was correct in this finding. As this Court held in Mashburn v. State, 148 So. 3d 1094, 1150-51 (Ala. Crim. App. 2013):

> "Mashburn alleged in his petition that trial counsel reduced the number of mitigation witnesses from 40 to 13 and, thus, did not call 27 available mitigation witnesses. However, within this claim Mashburn identified by name only 15 witnesses he said were not called, not 27. In addition, although he made a general assertion that the witnesses would have testified 'about their relationship[s] with Mr. Mashburn, the life experiences of Mr. Mashburn, the environment in which Mr. Mashburn was raised [and] ... about Mr. Mashburn's conduct prior to drug abuse,' he failed to specifically allege what each witness would have testified to had they been called to testify on his behalf. He did not allege what they would have said regarding their relationships with Mashburn, what they would have said

about Mashburn's 'life experiences,' or how they would have described Mashburn's conduct before his drug abuse.

"At various points in his initial and reply briefs on appeal, Mashburn contends that he was not required to plead in his petition what a witness would have testified to, or even to identify a witness by name. He argues that the pleading requirements in Rule 32 do not require a petitioner 'to identify particular witnesses or proffer their testimony.' (Mashburn's brief, p. 67.) This argument is incorrect. It is well settled that '[a] claim of failure to call witnesses is deficient if it does not show what the witnesses would have testified to and how that testimony might have changed the outcome.' Thomas v. State, 766 So. 2d 860, 893 (Ala. Crim. App. 1998), aff'd, 766 So. 2d 860 (Ala. 2000), overruled on other grounds by Ex parte Taylor, 10 So. 3d 1075 (Ala. 2005). To sufficiently plead a claim that counsel was ineffective for not calling witnesses, a Rule 32 petitioner is required to identify the names of the witnesses, to plead with specificity what admissible testimony those witnesses would have provided had they been called to testify, and to allege facts indicating that had the witnesses testified there is a reasonable probability that the outcome of the proceeding would have been different. See, e.g., Daniel v. State, 86 So. 3d 405, 430 (Ala. Crim. App. 2011); Beckworth v. State, 190 So. 3d 527, 555 (Ala. Crim. App. 2009), rev'd on other grounds, 190 So. 3d 571 (Ala. 2013); Lee v. State, 44 So. 3d 1145, 1153 (Ala. Crim. App. 2009); Smith v. State, 71 So. 3d 12, 25 (Ala. Crim. App. 2008). Mashburn failed to satisfy that burden."

(Emphasis added.) See also White, 343 So. 3d at 1168 ("Although White listed many individuals he said could have provided mitigation testimony, he failed to plead what each of those individuals could have presented. White also failed to specifically identify all [the] witnesses by

name and instead identified them by their title, i.e., former coaches, teachers, or peers. 'Specificity in pleading requires that the petitioner state both the name and the evidence that was in the witness's possession that counsel should have discovered, but for counsel's ineffectiveness.' Daniel v. State, 86 So. 3d 405, 422 (Ala. Crim. App. 2011). 'Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b). The full factual basis must be included in the petition itself.' Hyde v. State, 950 So. 2d [344,] 356 [Ala. Crim. App. 2006)].").[11]

The circuit court rejected as insufficiently pleaded Burgess's claim that his trial counsel should have had him examined by medical or mental-health experts and should have called those experts to testify. (C. 1384-85.) As noted above, the circuit court was correct in this finding because Burgess did not identify those experts by name and plead that

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[11]Burgess suggests the State cannot rely on White because it "was decided after Mr. Burgess submitted his amended petition." (Burgess's reply brief, p. 28.) The full-factual-pleading requirements applied in White, however, were well developed when Burgess filed his second amended petition. And Mashburn v. State, 148 So. 3d 1094 (Ala. Crim. App. 2013), which White relied on and which the circuit court cited in its final order, was decided well before Burgess filed his second amended petition.

they were available to assist at the time of Burgess's trial.

The circuit court also noted that the record showed

> "that Burgess underwent a forensic mental evaluation in July 1993, about seven months after the crime. According to the evaluation report ..., which was prepared by Dr. Lawrence R. Maier, a certified forensic psychologist, Burgess gave no history of having a mental illness, brain tumor, or brain cancer. Upon completing his evaluation, Dr. Maier found that Burgess demonstrated no symptoms of a mental illness. Dr. Maier concluded that he was competent to stand trial and that he was suffering from no major mental illness at the time of the crime. Nothing in the report suggested that Burgess needed a further independent medical or mental health evaluation. His trial counsel would have had access to Dr. Maier's mental evaluation report and were entitled to rely on his opinions. McMillan v. State, 258 So. 3d 1154, 1177 (Ala. Crim. App. 2017) (holding that defense counsel is entitled to rely on the evaluation conducted by a qualified mental health expert, even if in retrospect the evaluation may not have been as complete as others may desire).
>
> "None of the findings and opinions provided by Dr. Maier would have been beneficial to Burgess had they been presented to the jury. His trial counsel were not obliged to shop around for a mental health diagnosis that was more favorable than the diagnosis given by Dr. Maier. White v. State, [343 So. 3d 1150, 1175-76 (Ala. Crim. App. 2019)]. As a matter [of] trial strategy, his trial counsel decided to abandon a defense of not guilty by reason of mental disease or mental defect. The Court cannot say that under the circumstances faced by his trial counsel, they pursued an unreasonable strategy by not obtaining and presenting independent mental health or medical evaluations. This subclaim fails to allege specific facts that satisfy the pleading requirements of Rule 32.6(b), fails to allege facts that, if true, would entitle Burgess to relief and is facially devoid of merit."

(C. 1385-86.) The circuit court did not err in this finding.

The circuit court rejected as insufficiently pleaded Burgess's claim that his trial counsel should have obtained medical records from his family physician, records from social-service agencies, and records about his life history. (C. 1386.) The circuit court's rejection of this claim was correct. As that court found, Burgess did "not plead specific beneficial facts that would have been shown by such records and that would have served to mitigate his sentence." (C. 1386.)

As for Burgess's claim that his trial counsel's inadequate preparation led to a presentation that, he says, was "inadequate, inaccurate, and damaging to him," the circuit court found that the trial record showed that the witnesses trial counsel presented in the penalty phase

> "effectively portrayed Burgess as a kindhearted and good person; a child who was neglected by his father; a child who lived in a crowded one-parent home; a young man who shortly before the crime was living on the streets from place to place; a person who was not violent or cruel toward others; a teenager who was eager to please and was planning on getting a job, taking care of his children, going back to school and getting his GED; a student who was quiet, didn't cause problems at school and did his assignments; and an accused who admitted the wrong that he had committed. The mitigating evidence presented by his trial counsel tended to

> show that the crime was not indicative of Burgess's character; that he was not a vicious, cold-blooded killer; and that he had the disposition and potential to help others. '[W]hen, as here, counsel has presented a meaningful concept of mitigation, the existence of alternate or additional mitigation theories does not establish ineffective assistance.' ... Daniel v. State, 86 So. 3d [405,] 437 [(Ala. Crim. App. 2011)]."

(C. 1387-88.) Noting that Burgess failed to specifically plead what each additional witness would have allegedly testified to, the circuit court found that "it is reasonably inferable that much or all of the testimony would have been cumulative to the testimony provided by the four witnesses who did testify. Burgess's trial counsel cannot be deemed ineffective for failing to present cumulative evidence." (C. 1388.) See White v. State, 343 So. 3d at 1169 ("'Any testimony the additional witnesses would have provided would have been cumulative to that provided by the witnesses at resentencing. As discussed above, trial counsel are not ineffective for failing to present cumulative evidence. See Marquard v. State, 850 So. 2d 417, 429-30 (Fla. 2002) ("[C]ounsel is not required to present cumulative evidence."). Moreover, the cumulative mitigation testimony would not have outweighed the State's evidence in aggravation. See, e.g., Bell v. State, 965 So. 2d 48 (Fla. 2007) (finding that the defendant did not demonstrate the prejudice prong because the

unpresented penalty phase testimony could not have countered the quantity and quality of the aggravating evidence); see also Gaskin v. State, 737 So. 2d 509, 516 n.14 (Fla. 1999) ("Prejudice, in the context of penalty phase errors, is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or the deficiencies substantially impair confidence in the outcome of the proceedings."). The additional testimony would only have added to the mitigation already found.'" (quoting Rhodes v. State, 986 So. 2d 501, 512-13 (Fla. 2008))). The circuit court noted that the trial court had found the following:

> "'• A mitigating circumstance DOES EXIST with regard to the defendant's character based on evidence that described him as having a quiet, compliant and kind disposition; that indicated he had concern for his children; that indicated ... his desire to learn more about God; that [indicated] he had not engaged in any violent behavior in the past; and that [indicated] the defendant had said that he was sorry that the victim had died.
>
> "'• A mitigating circumstance DOES EXIST with regard to the defendant's home life based on family history testimony that his home life was not ideal; that he lacked the presence of a father figure; and that while there was no evidence of physical abuse, there was evidence of neglect.
>
> "'• A mitigating circumstance DOES EXIST based on the antisocial personality disorder with which the defendant was diagnosed in the court-ordered mental evaluation and

> testimony presented during the penalty phase trial that would not be inconsistent with that diagnosis.'"

(C. 1389 (quoting Trial C. 46-48).) The circuit court noted that, even though the trial court had imposed a death sentence,

> "its findings about the statutory and non-statutory mitigating circumstances refute Burgess's contentions that his trial counsel's penalty phase investigation and investigation were inadequate and damaging because they did not present more witnesses and evidence. Also, given the nature and extent of the aggravating evidence in this case, Burgess's factual allegations, even if true, fail to establish a reasonable probability that the outcome [of] his sentencing hearings would have been different had trial counsel presented additional penalty phase witnesses and evidence."

(C. 1389.)

The circuit court correctly rejected this claim as insufficiently pleaded and lacking merit. Most crucially, although Burgess pleaded the names of witnesses, he did not plead what each of those witnesses would have testified to. <u>Mashburn</u>, <u>supra</u>; <u>White</u>, <u>supra</u>. The circuit court's description of Burgess's "narrative" shows why it did not comply with the pleading requirements of Rule 32:

> "Burgess in paragraphs 157 through 318 covering 45 pages of his Second Amended Petition presents a lengthy third person narrative without identifying the narrator or the persons or other sources of the purported facts stated therein. This narrative begins with a discussion of the remote histories of ancestors with whom Burgess would have had little or no

contact. It then moves to a discussion of Burgess's parents, Bill Burgess Sr. and Maggie Burgess, both of whom testified as mitigation witnesses in the penalty phase, and their children. Much of this discussion is cumulative of the actual testimony presented in mitigation, while other portions, had they been presented to the jury, would have impeached some of the favorable testimony given by the four mitigation witnesses who testified.

"The narrative then proceeds with the assertions that Maggie Burgess suffered from alleged mental illness and cognitive deficiencies, but does not identify any mental health professional who diagnosed and would testify to such medical diagnoses. Rather, much of this part of the narrative consists of the mental operations, feelings and thoughts of unnamed persons who may or may not have had firsthand knowledge about Maggie's parenting qualities. The narrator then presents an extended series of opinions that generally condemn the environment, housing, economy and school system in Decatur and Morgan County where Burgess grew up. Many of the allegations of poverty and deprivation would have applied to entire communities, not just Burgess and his immediate family. The narrator makes irrelevant and immaterial allegations about some of Burgess's siblings and how they behaved or performed in school.

"Much of the narrative about Burgess's childhood education, his demeanor, his character and his behavior confirms the testimony of Maxine Ellison, one of the actual mitigation witnesses who testified during the penalty phase. The narrator also discusses Burgess's dropping out of school in the ninth grade and his period of homelessness before the commission of the crime. Burgess's counsel actually knew about these facts and brought them to the jury's attention through the testimony of Maggie Burgess, Maxine Ellison and Danielle Douglas.

"The narrative continues with a description of head

injuries allegedly suffered by Burgess as a child and his contention that he continued to suffer from severe headaches until the time of the crime. As the jury heard during the guilt phase trial, Burgess apparently believed, but never received a diagnosis, that he had brain cancer or a brain tumor. This is not new information that was unknown to his trial counsel; it simply was a belief that Burgess chose not to confirm and share with Dr. Maier while undergoing his mental evaluation. The narrative then concludes with much of the same information that Burgess had discussed with Maxine Ellison and that she testified to during the penalty phase.

"The long narrative set out in Paragraphs 157 through 318 of Burgess's Second Amended Petition consists of factual allegations, conclusions and opinions that are not attributed to any identified person or persons, Burgess pleads no specific facts showing that the unnamed person or persons based these allegations, conclusions and opinions on personal knowledge. Each claim or ground for relief in a Rule 32 petition must include the full disclosure of the supporting facts. The burden of pleading under Rule 32.6(b), Ala. R. Crim. P., is a heavy one. The full factual basis for each claim or ground of relief must be included in the petition itself. By presenting this particular subpart of his Claim II as a third party narrative without specifying the particular persons or other sources providing the purported facts, Burgess fails to satisfy the pleading specificity and full disclosure required by Rules 32.3 and 32.6(b), Ala. R. Crim. P.

"Likewise, Burgess's long narrative is interlaced with opinions about mental illness, cognitive deficits, housing and environmental toxicity, education system deficiencies, social agency failures and physical health problems and their causes. Most, if not all, of these opinions would have to be provided by expert witnesses, but Burgess fails [to] identify any expert by name or to plead with specificity the underlying factual basis for the expert opinions. The specificity requirements of 32.6(b) are not satisfied when a petitioner

> alleges the opinions of experts, but does not identify them by name or plead the contents of their expected testimony. See Smith v. State, 71 So. 3d [12,] 33 [(Ala. Crim. App. 2008)]."

(C. 1390-92.)

In sum, Burgess has not shown that the circuit court erred in summarily dismissing Burgess's claim that his trial counsel were ineffective in their preparation for and presentation at the penalty phase. He is due no relief on this claim. See Rule 32.7(d), Ala. R. Crim. P.

V. TRIAL COUNSEL'S PRETRIAL PREPARATION AND LITIGATION

Burgess argues that "[t]he circuit court erred in summarily denying [his] claims that trial counsel were ineffective in their pretrial preparation for and litigation of [his] case." (Burgess's brief, p. 35.) Burgess argues that he sufficiently pleaded these claims, and, citing Ex parte Taylor, 10 So. 3d 1075 (Ala. 2005), he criticizes the circuit court's reliance on this Court's rulings on direct appeal, asserting that those rulings "did not foreclose claims that trial counsel ineffectively litigated [his] trial and insufficiently preserved issues for review on direct appeal." (Id.)

This Court has held that, "[e]ven if a claim of ineffective assistance of counsel is sufficiently pleaded, ... counsel is not ineffective for failing

to raise a meritless claim." Brooks, 340 So. 3d at 442. See also Carruth v. State, 165 So. 3d 627, 641 (Ala. Crim. App. 2014) (stating that counsel is not ineffective for failing to raise a meritless objection); Yeomans v. State, 195 So. 3d 1018, 1034 (Ala. Crim. App. 2013) ("[B]ecause there is no merit to the legal theory underlying this claim of ineffective assistance, the claim was properly dismissed.").

And, although

> "[i]n Ex parte Taylor[] the Alabama Supreme Court held that '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 [v. Washington, 466 U.S. 668 (1984),] to sustain a claim of ineffective assistance of counsel[,]' 10 So. 3d at 1078, ... Ex parte Taylor applies only to the prejudice prong of Strickland, not to the deficient-performance prong."

Woodward v. State, 276 So. 3d 713, 769 (Ala. Crim. App. 2018). If "this Court's holding on direct appeal establishes that counsel's performance was not deficient, Ex parte Taylor is inapplicable." Id.

Burgess's claims in this part of his petition are composed of many subcategories that Burgess raises on appeal. Cf. White, 343 So. 3d at 1165. We address each in turn.

A. MOTIONS TO CONTINUE

Burgess argues that his trial counsel were ineffective for not

making it clear to the trial court that they "were wholly unprepared for trial." (Burgess's brief, p. 36.) He asserts that the circuit court could not properly rule as to whether "counsel 'were not wholly prepared to try Burgess's case'" without an evidentiary hearing. We disagree.

The circuit court rejected this claim as a "conclusory allegation … based solely on speculation, as Burgess … specified no facts indicating that the trial court would have backed off from its clear determination to prevent the trial from being delayed." (C. 1398.)

On direct appeal, this Court rejected Burgess's claim that the trial court had erred in denying his motions to continue:

> "Counsel averred that although they felt that they were not adequately prepared to proceed with a penalty phase at that time, … they could proceed in this case because, as one counsel stated, 'I've tried so many of them. I guess I could do an adequate job.' Counsel reiterated that he did not feel comfortable proceeding with the trial, especially because his investigator was having trouble getting some sentencing witnesses Burgess had told them about, as well as some family members, to cooperate.
>
> "In denying the second motion for continuance, the trial judge noted that in January 1994[] he had granted a speedy trial motion filed by Burgess and had said at that time in open court that he anticipated trying the case in March 1994. Then, when the trial judge held hearings on the change-of-venue motion in February 1994, the trial judge advised counsel that he expected the case to be docketed for trial in April or May 1994. The trial judge then noted that after he ruled on the

change-of-venue motion on April 14, 1994, the case was docketed for June. The trial judge then denied the request for continuance because he believed trial counsel had been given adequate notice of the trial date, and because of the speedy trial request made by Burgess in January. The trial court stated:

> "'[W][e] have to recognize that not only is the defendant entitled to a speedy trial, but the State or the people of the State are entitled to a speedy trial or a trial as quickly as can be accomplished .... I think that the Court owes an obligation to move as quickly and as rapidly as it reasonably can do so to get to the trial of the case, giving reasonable notice to everybody to get ready. And I think that further delay is unreasonable to the State and to the defendant, and I suspect that there's always something toward the end of the preparation stage that the State finds that it could have done ... and the defense finds [that] "there's something else I wish I could do." ... I'm satisfied that Mr. Burgess and his counselors have had ample opportunity to prepare. I'm also satisfied that he has very trained and competent and diligent lawyers.'
>
> "....

"... Burgess never indicated a specific relevant witness or any specific relevant evidence that would have been available to him if a continuance was granted. Counsel's belief that they would have been better prepared with more time is a belief shared by every trial judge and lawyer who has ever been involved in a trial."

Burgess, 827 So. 2d at 177-78 (quoting Trial R. 35-36).

"Trial counsel is not ineffective for having an objection overruled or

a motion denied." Boyd v. State, 746 So. 2d 364, 402 (Ala. Crim. App. 1999). Burgess has not shown that the circuit court erred in summarily dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

B. ALLEGED FAILURE "TO ASSEMBLE A CONSTITUTIONALLY ADEQUATE DEFENSE TEAM"

Burgess makes a conclusory argument that he sufficiently pleaded his claim alleging "that trial counsel were deficient in failing to assemble an adequate defense team, in contravention of the ABA Guidelines establishing constitutionally adequate capital defense." (Burgess's brief, p. 36.) The only assertion he makes in support of this claim is that the circuit court found the claim insufficiently pleaded even though the State had not argued that Burgess had failed to sufficiently plead the claim.

As noted above, the circuit court and this Court have authority to sua sponte apply the pleading requirements of Rule 32.6(b). McNabb v. State, 991 So. 2d 313, 335 (Ala. Crim. App. 2007). Thus, Burgess is due no relief on his argument that the circuit court sua sponte found this claim insufficiently pleaded.

In any event, Burgess's claim was, as the circuit court found,

> "based in part on suggested guidelines that were published in 2003 by the American Bar Association. Suffice it to say, guidelines that were published nine years after Burgess's trial

> have no application to the 1994 performance of his trial counsel and will not be relied upon by the undersigned in deciding whether his counsel's performance was reasonable."

(C. 1398.) As noted above, the circuit court's finding about the ABA Guidelines was not erroneous. See, e.g., McWhorter, 142 So. 3d at 1238. The circuit court further found that Burgess's allegation that the investigator trial counsel had hired "did little work on the case" was "supported neither by any identified witness who would have personal knowledge about what the investigator did or did not do, nor by other specific facts." (C. 1356.)

Burgess is due no relief on this claim. See Rule 32.7(d), Ala. R. Crim. P.

C. FAILURE TO WITHDRAW BEFORE TRIAL BURGESS'S PLEA OF NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT

Burgess argues that the circuit court erred in summarily dismissing his claim alleging "that trial counsel's failure to withdraw his dual plea of not guilty and not guilty by reason of mental disease or defect prior to trial was an unreasonable decision and resulted in unmet expectations on the part of the jury." (Burgess's brief, p. 37.) He asserts that the circuit court's ruling "ignored" his allegation "that the prosecutor made it clear it was Mr. Burgess's burden to prove his mental state

defense and that the jury's expectation that he would rely on an affirmative defense undermined his actual defense." (Id.) He also asserts that, "to the extent it was disputed whether the trial court's instruction cured the prejudice Mr. Burgess suffered, this should be resolved at an evidentiary hearing." (Id.)

In rejecting this claim, the circuit court noted that Burgess had pleaded

> "no specific facts that support his conclusions about what the jury expected to hear, what impressions they formed, and how he knows that his actual defense theory was undermined in the minds of the jurors. ... His conclusions about the jurors' expectations, impressions, and disregard of his actual defense at trial are not supported by specifically pleaded facts."

(C. 1400-01.) The circuit court also found that Burgess had not pleaded facts showing prejudice because he had not pleaded facts showing that the jury did not comply with

> "the trial court's instructions to the jury that he had properly withdrawn his mental state plea at the appropriate time, that he had decided to proceed solely on his plea of not guilty, and that the jurors were not to hold Burgess's withdrawal of his mental state plea against him."

(C. 1401.) The circuit court also noted that Burgess had disregarded this Court's holding on direct appeal:

> "After considering the trial court's oral charge in its

> entirety, we conclude that it correctly instructed the jury that, although Burgess had entered a plea of not guilty by reason of mental disease or defect, he had properly withdrawn that plea and that the decision to withdraw the plea was not to be held against him. It is apparent from the record that, because of the court's opening instructions and because of the extensive questioning concerning the plea during voir dire, the jury was aware of the plea, and was actively questioning what it was supposed to do in regard to the plea. We commend the court for fashioning an instruction that answered the jury's concerns about the 'insanity plea,' yet reminded the jury that Burgess's decision to withdraw his plea was proper and could not be held against him. Burgess's arguments that the instruction was an improper comment on his failure to prove a sanity defense, that it destroyed the presumption of innocence because it suggested a consciousness of guilt, that it was incomplete because it omitted the fact that the court had denied Burgess the opportunity to present an insanity defense, and that it left the jury with the impression that normally a jury may hold the withdrawal of an insanity defense against a defendant are wholly without merit."

Burgess, 827 So. 2d at 153. Burgess has not shown that the circuit court erred in summarily dismissing this claim, and he is due no relief. See Rule 32.7(d), Ala. R. Crim. P.

D. MOTION FOR A CHANGE OF VENUE

Burgess argues that the circuit court erred in dismissing his claim alleging "that trial counsel's presentation of the change of venue motion was constitutionally deficient and prejudicial." (Burgess's brief, p. 38.) This claim includes several categories. We address each in turn.

As background for this claim, we provide that part of this Court's opinion on direct appeal rejecting Burgess's argument that the trial court had erred in denying his motion for a change of venue:

> "[Burgess] argues that pervasive pretrial publicity and the prevailing community attitudes prevented him from receiving a fair trial in Morgan County.
>
> "Before denying the change-of-venue motion, the trial court heard evidence on the extent of the publicity surrounding the murder. Burgess presented evidence from the three major radio stations in the Morgan County area, all of which aired news stories from January 26, 1993, through January 29, 1993, related to the murder and Burgess's arrest and his subsequent admission to reporters. None of the radio stations carried stories on the murder after January 29, 1993, until the change of venue hearing in February 1994. The trial court also considered testimony from the three television stations in the Morgan County area. All of the television stations broadcast news stories in January 1993 concerning the murder and Burgess's arrest. These newscasts included the televised admission of Burgess made to reporters as he was escorted from the Decatur City Hall to the Morgan County jail. The trial court also heard testimony from the news editor of the local newspaper, The Decatur Daily. During January 1993, the Decatur Daily contained news stories about the murder and Burgess's arrest and admission. After January it contained sporadic stories which mentioned the murder during the spring and summer of 1993, and then published a letter to the editor about a possible change of venue in January 1994. There was also evidence of news stories published in the Huntsville Times newspaper in January and February 1993, with sporadic articles that mentioned Burgess printed throughout 1993, up until the change-of-venue hearing.

"On March 9, 1994, the trial court convened a sample jury from the venire of another court session, and conducted a voir dire of that jury to ascertain the juror's ability to impartially hear the case. The results of the court's questioning of this sample jury indicated that all 12 jurors had heard about the murder from some source. Eight of those jurors had seen Burgess's televised admission. Seven of the jurors indicated that they had formed some opinion about the murder, but only one juror felt that she had been so influenced by what she knew about the murder that she could not follow her juror's oath. Eleven jurors told the trial court that they could set their opinions aside, listen to the evidence, follow the instructions of the court, and return a fair and impartial verdict based only on the evidence and the law. When the trial court asked this sample jury, 'Do you think he is guilty now without hearing of the evidence?' none of the jurors responded.

"On April 14, 1994, after reviewing all the evidence presented by both parties, and after taking the extraordinary measure of empaneling a sample jury randomly selected from individuals summoned for jury duty, the trial court made the following ruling:

> "'After careful consideration of the testimony presented by both movant and respondent and the responses given by sample jurors, the Court has determined that movant has failed to meet his burden of showing, to the reasonable satisfaction of the Court, that a fair and impartial trial cannot be had and an unbiased verdict cannot reasonably be expected. In reaching its decision, the Court has considered the substance, scope and breadth of media coverage surrounding this case. The Court has also considered the effect that the passage of time has had on pretrial publicity. In addition, the Court has considered the responses given by sample jurors together with all of the other

> testimony presented by the parties and has determined that, while it may not be possible to find a jury panel which is totally ignorant of the facts and issues in this case, it has not been demonstrated that the constitutional standard for a fair and impartial jury would be violated. It cannot be said, weighing all of the evidence received by the Court together, that the community was so saturated by prejudicial publicity that the defendant could not be given a fair trial.'

"(C.R. 36-37.)

"'The right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors.' Irvin v. Dowd, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961). 'A defendant is entitled to a change of venue if he can demonstrate to the trial court that he cannot receive a fair and impartial trial in the county where he is to be tried.' § 15-2-20, Ala. Code 1975; Nelson v. State, 440 So. 2d 1130, 1131[] (Ala. Cr. App. 1983).

> "'"'There are two situations in which a change of venue is mandated. The first is when the defendant can show that prejudicial pretrial publicity "has so saturated the community as to have a probable impact on the prospective jurors" and thus renders the trial setting "inherently suspect." McWilliams v. United States, 394 F.2d 41 (8th Cir. 1968); Dobbert v. Florida, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977). In this situation, a "pattern of deep and bitter prejudice" must exist in the community. Irvin v. Dowd, 366 U.S. at 727, 81 S. Ct. 1639.[]
>
> "'"'The second situation occurs when the defendant shows "a connection between the

> publicity generated by the news articles, radio and television broadcasts and the existence of actual jury prejudice." McWilliams v. United States, supra.'"'

"Hyde v. State, 778 So. 2d 199, 231 (Ala. Cr. App. 1998), quoting Holladay v. State, 549 So. 2d 122, 125-26 (Ala. Cr. App. 1988). It is the former situation that Burgess argues rendered Morgan County 'inherently suspect' as a venue and thus, unable to render a fair trial.

> "'Prejudice is presumed from pretrial publicity when pretrial publicity is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the community where the trials were held. ... The presumed prejudice principle is "rare[ly]" applicable, and is reserved for an "extreme situation."'

"Coleman v. Kemp, 778 F.2d 1487, 1490 (11th Cir. 1985) (citation omitted).

"In determining whether Burgess has shown inherent prejudice, we are satisfied that Burgess has met the 'saturation of the community' prong. The evidence showed that the radio, television, and newspapers that had reported the murder and confession in the Morgan County area reached a substantial number of the citizens in the community. It is clear from the answers of the sample jury that almost everyone had heard about the murder, and that most had either witnessed Burgess's admission on television, or had heard about it in some way.

"However, we do not believe Burgess has proved that the pretrial publicity was 'prejudicial and inflammatory.' Burgess compares his pretrial publicity with the 'extreme situation' described in Rideau v. Louisiana, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963). Rideau, like this case, involved a

televised confession that was repeatedly rebroadcast of a robbery and murder and that saturated the community in which the trial of the offenses was held. However, the confession in Rideau was described by an indignant United States Supreme Court as a televised 'kangaroo court' presided over by the sheriff, in which the accused, flanked by two state troopers, confessed in response to the sheriff's leading questions. The Supreme Court implied that law enforcement had staged the production for dissemination to the public prior to trial. Unlike Rideau, there is no evidence in this case that the admission to reporters was contrived by law enforcement or that it resulted from a conspiracy between the police and the media. The videotape of Burgess's admission, which was the basis for all of the pretrial publicity, shows a sober, relaxed Burgess walking across the courthouse parking lot, escorted by two police investigators,[3] as he responded in a composed, thoughtful, and articulate manner to questions posed by news reporters. In fact, it was the nature of Burgess's admission, as much as the admission itself, that filled the news reports on television, radio, and newspapers during January and February 1993. Burgess's admission to reporters, as the television cameras rolled, was publicity of his own making. And it was Burgess's conversation with the media that sensationalized what was otherwise a straightforward, purely factual reporting of a murder investigation and subsequent arrest. However, because that televised admission was subsequently admitted into evidence, any prejudice from the publicity resulting from that admission was negligible. Henderson v. Dugger, 925 F.2d 1309, 1314 (11th Cir. 1991). Apart from the news stories describing and showing Burgess's televised conversation with the media, the pretrial reporting was factual, and did not contain inflammatory or prejudicial commentary. Pretrial publicity that is purely factual in nature is acceptable and will not support a change of venue. Heath v. Jones, 941 F.2d 1126, 1135 (11th Cir. 1991).

"We also agree with the trial court that the period

between the murder and trial served as a 'cooling off period' that lessened the impact of any potentially inflammatory pretrial publicity. Heath v. Jones, supra; Patton v. Yount, 467 U.S. 1025, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984). The murder and Burgess's arrest and subsequent admission to the television cameras all occurred on January 26, 1993. Almost all of the media attention and news reporting concerning Burgess and his admission to the media took place during the weeks after the murder. After that, Burgess 'basically drifted away from major consciousness.' (R. 110.) There were no more headline stories, radio news reports, or television reports until Burgess's change-of-venue hearing in February 1994. His trial did not start until June 1994. The lack of media attention between February 1993, and June 1994, dimmed memories and negated much of the sensationalism of Burgess's admission to the media in January 1993.

"Based on the foregoing, we hold that Burgess was unable to show that the pretrial publicity, much of it of his own making, marred his trial sufficiently for us to conclude that this is one of those extremely rare cases in which we should find inherent prejudice. Heath v. Jones, 941 F.2d at 1136.

"________________

"[3]The police investigators were present only in the capacity of Burgess's escorts to the jail. The only words ever spoken by either officer was when one officer turned to the person who let them in the jailhouse door and told him to 'close the door,' thus ending Burgess's interview with the press."

Burgess, 827 So. 2d at 158-61.

1. EVIDENCE ABOUT PREJUDICE

Burgess argues that his "trial counsel unreasonably failed to

present the prejudicial nature of the pretrial publicity in his case and altogether failed to present an analysis of the content of the press coverage sufficient to establish prejudice." (Burgess's brief, p. 38.) The circuit court denied this claim, finding:

> "In support of this ineffective assistance claim, Burgess does not allege or identify the specific items of relevant and reasonably available pretrial publicity that he contends his trial counsel failed to obtain and present to the trial court. In paragraphs 373 through 382 and 384 through 388, he merely provides conclusory statements or opinions about alleged inflammatory and prejudicial media coverage without specifying who broadcast or published the coverage, when it was broadcast or published and how or why it was substantially different from the testimony and evidence presented by his trial counsel in the hearing on the motion for change of venue.
>
> "Moreover, other than his bare conclusion that the trial court would have granted the motion and the outcome of the guilt and penalty phases of his trial probably would have been different had his trial counsel ... obtained and presented unspecified radio or television broadcasts, newspaper articles or stories or other media, Burgess pleads no specific facts establishing that he was prejudiced by his counsel's alleged deficient performance. Conclusions in a Rule 32 petition, if unsupported by specific facts, will not satisfy the requirements for post-conviction relief."

(C. 1403.) Burgess argues that the circuit court "disregarded the petition's content analysis, which established in detail the prejudicial nature of the media coverage of his case. (C. 880-81, 887-91.)" (Burgess's

brief, p. 39.) Burgess also asserts that he pleaded sufficient allegations to "refute[] this Court's assessment of the trial record on direct appeal, which the circuit court adopted, that the pretrial reporting was 'of his own making' and 'factual, and did not contain inflammatory or prejudicial commentary.'" (Burgess's brief, p. 40.)

The circuit court did not err in its analysis and its application of the pleading requirements. Burgess "merely provide[d] conclusory statements or opinions about alleged inflammatory prejudicial media coverage." (C. 1403.) And Burgess's "disagreement with [this Court's] holding [on direct appeal] does not invalidate it." Lewis v. State, 333 So. 3d 970, 1012 (Ala. Crim. App. 2018) (opinion on return to remand).

Burgess is due no relief on this claim. See Rule 32.7(d), Ala. R. Crim. P.

2. SOCIAL-SCIENCE EXPERT

Burgess alleged that his trial counsel were ineffective for not retaining a social-science expert "to analyze the content of the pretrial publicity and conduct a public opinion survey." (C. 886.) He argues on appeal that the circuit court "disregarded the substance of the social scientist's testimony detailed in the petition." (Burgess's brief, p. 40.) And

he reiterates his argument, which we have rejected, that he need not plead the name of an expert he asserts that his trial counsel should have retained.

For the reasons we have stated about Burgess's other claims alleging ineffectiveness based on a failure to consult experts, Burgess did not sufficiently plead this claim, and it merits no further discussion. See Rule 32.7(d), Ala. R. Crim. P.

3. PUBLIC-OPINION POLL

Burgess alleged that his trial counsel were ineffective for "unreasonably fail[ing] to conduct a public opinion poll," which, he says, "would have supported his claim that the pretrial publicity 'saturated Morgan County, causing residents' to believe he was guilty. (C. 892.)" (Burgess's brief, p. 41.)

In dismissing this claim, the circuit court stated:

> "The Alabama Court of Criminal Appeals in its opinion on Burgess's direct appeal found that he had met the 'saturation of the community' standard required for a showing of inherent prejudice. Burgess, 827 So. 2d at 160. A finding of pretrial publicity saturation is not sufficient, standing alone, to warrant the granting of a motion to change venue. The accused bears the additional burden of showing that a pattern of deep and bitter prejudice exists against him in the community. Irvin v. Dowd, 366 U.S. 717, 727 (1961); Nelson v. State, 440 So. 2d 1130 (Ala. Crim. App. 1983). While

Burgess alleges the bald conclusion that Morgan County residents had universally formed the opinion that he committed capital murder, he does not plead specific facts showing a pattern of deep and bitter prejudice that existed against him in Morgan County and that prompted its residents to rally against him.

"Similarly, Burgess concludes that, had his counsel conducted a public opinion poll or survey, it would have shown that he could not receive a fair trial in Morgan County. He does not allege that he has conducted an opinion poll or survey that supports his conclusion. Burgess further fails to plead specific facts that show a number or percentage of Morgan County residents who had formed the opinion that he was guilty of capital when his motion to change venue was heard in February 1994; that reflects whether their opinions were fixed and immovable; that shows whether they could lay aside the opinions about his guilt that were based on what they had seen, read or heard; or that discloses whether they could render a fair and impartial verdict based on the evidence presented in court and the court's instructions about the applicable law. See Ex parte Fowler, 574 So. 2d 745, 749 (Ala. 1991).

"Additionally, his claim that he was prejudiced by his trial counsel's failure to conduct an opinion poll or survey is without merit. Even if a poll or survey showed that all residents in Morgan County had formed the opinion that he was guilty based on pretrial publicity, that result would not have mandated a change of venue. Burgess's speculation and conclusions are based on the incorrect legal premise that, because prospective jurors have read, seen or heard something about a case and have formed impressions or opinions about a defendant's guilt, then actual prejudice exists that is sufficient to move the case to another venue. It has long been recognized that jurors do not have to be totally ignorant about the facts and issues involved in a particular case in order to reach an unbiased verdict. Nelson v. State,

440 So. 2d at 1131. Many years ago, the United States Supreme Court reasoned:

> "'In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. [...] To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.'

"Irvin v. Dowd, 366 U.S. at 722-23.

"Had Burgess's trial counsel obtained a public opinion poll or survey as he suggests, the results of such poll or survey, in and of itself, would not have established whether the trial should have been moved from Morgan County. The usual method for establishing the existence of inflammatory publicity and actual juror prejudice is through an extensive and thorough voir dire examination of prospective jurors. Hart v. State, 612 So. 2d 520 (Ala. Crim. App. 1992). To show that he was prejudiced, Burgess must establish a reasonable probability that the results of such poll or survey would have caused the trial court to change venue and would have caused the outcomes of his trial to have been different. He fails to do so by pleading specific supporting facts that, if true, would entitle him to relief."

(C. 1407-09.)

Burgess argues that the "circuit court misstated this aspect of the venue claim as pertaining solely to 'actual prejudice' (C. 1408), when it was the very definition of inherent prejudice. See Nelson v. State, 440 So. 2d 1130, 1131-31 (Ala. Crim. App. 1983)." (Burgess's brief, p. 41.) He argues that the circuit court "improperly circumscribed the prejudice test by concluding that 'even if a poll or survey showed that all residents in Morgan County had formed the opinion that he was guilty based on the pretrial publicity, that result would not have mandated a change of venue.' C. 1408." (Id.) Finally, he asserts that he did not allege "that a poll, standing alone, would have satisfied the test for inherent prejudice" and that he alleged that there were "flaws" in a survey the State had conducted.[12] (Burgess's brief, pp. 41-42.)

Burgess has not shown that the circuit court erred in its analysis. At a minimum, he failed to sufficiently plead the claim because he did not plead facts showing that an opinion poll had been conducted that supported the conclusion he asserted. See, e.g., Boyd, 746 So. 2d at 406 ("Rule 32.6(b) requires that the petition itself disclose the facts relied

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[12]As the State points out, the trial court excluded the affidavits the State offered in support of its survey at the hearing on the motion for a change of venue.

upon in seeking relief.").

Burgess is due no relief on this claim. See Rule 32.7(d), Ala. R. Crim. P.

4. SAMPLE JURY PROCEEDING

Burgess argues that the circuit court erred by dismissing his claim that his trial counsel were ineffective in the sample jury proceeding that the trial court conducted. (Burgess's brief, p. 42.) He asserts that "[t]rial counsel failed to advocate on Mr. Burgess's behalf before or during the sample jury proceeding," instead "ceding all responsibility for the proceeding to the trial judge." (Id.) In support of this claim, Burgess alleged that his counsel should have consulted an unnamed expert. (C. 895-96.)

In dismissing this claim, the circuit court found:

> "While Burgess claims that his trial counsel should have participated in the trial court's voir dire of the sample jury by asking questions, offering comments, making arguments and submitting briefs, he cites no specific 'case law and literature' (Paragraph 420 at pages 158-59 of the Second Amended Petition) that required reasonably competent counsel to participate in the trial court's information gathering proceeding. His claim also ignores the trial court's question to his trial counsel about whether they had 'any other written notes for him to look at.' The clear import of this question is that Burgess's trial counsel had submitted written notes or questions that the trial court had weaved into its extensive

instructions and questions to the sample jury.

> "Moreover, Burgess does not specifically plead the questions, instructions, comments and arguments that he contends his legal counsel should have injected into the sample jury proceeding. Nor does he allege what the sample jurors' responses would have been, how those responses would have differed from the responses that were actually elicited through the trial court's extensive examination and how the sample jurors' responses to his counsel's questions, arguments or comments would have caused a different ruling on the change of venue issue. Burgess fails to satisfy his burden of pleading and showing by a preponderance of the evidence the facts necessary to establish that his trial counsel rendered constitutionally inadequate assistance in the sample jury proceeding. His conclusions, which are not based on specifically pleaded facts, do not satisfy the requirements of Rule 32.6(b), Ala. R. Crim. P.
>
> "Although Burgess claims he was prejudiced because his trial counsel's failure 'to effectively litigate the issues with respect to the sample jury' resulted in the denial of his motion for change of venue, he does not plead specific facts indicating why, had his trial counsel done something more, the trial court would have been required to grant the change of venue and why it is reasonably probable that the outcomes of his guilt and penalty phases would have been different The likelihood of a different result must be substantial, not just conceivable. Harrington v. Richter, 562 U.S. [86,] 112 [(2011)]. The facts pleaded by Burgess, even if true, would not establish prejudice at an evidentiary hearing."

(C. 1410-11.) Burgess has not shown that circuit court erred. That counsel did not participate during the sample jury proceeding in the manner that Burgess now thinks they should have does not show that

counsel were ineffective. See, e.g., Woodward, 276 So. 3d at 784-85.

Burgess is due no relief on this claim. See Rule 32.7(d), Ala. R. Crim. P.

5. "ACTUAL" PREJUDICE

In paragraphs 424 through 428 of his petition, Burgess alleged that "[a]s a separate, additional basis for the motion for change of venue, counsel unreasonably failed to argue that the results of the sample jury showed 'actual prejudice' under Irvin v. Dowd, 366 U.S. 717, 723-28 (1961)." (C. 896.) The circuit court rejected this claim because the record showed that trial counsel had raised "actual prejudice" as a ground in the motion for a change of venue. (C. 1412 (citing Trial C. 116-18).) The circuit court also found no merit in Burgess's argument "that the results of the trial court's sample jury proceeding showed 'actual prejudice' that required his trial counsel to renew the motion for change of venue." (C. 1412 (emphasis added).) The circuit court stated that, rather than moving for a change of venue after the sample jury proceeding, "[t]he generally accepted method to establish the existence of actual jury prejudice is through voir dire examination of the prospective jurors who are summoned to try the case." (C. 1412.) The circuit court found that

"[t]he sample jurors did not constitute part of the actual jury venire that was summoned for the trial of Burgess's case; therefore, since they were not actual prospective jurors, the sample jurors' impressions and opinions were merely informational and not an infringement of Burgess's due process rights." (C. 1413.)

On appeal, Burgess argues that paragraph 424 of his petition included a typographical error—the paragraph "mistakenly included the word 'sample,'" but Burgess was actually "describing voir dire of the jury venire, not the sample jury." (Burgess's brief, p. 43.) Burgess then argues that trial counsel should have argued after voir dire "that the prejudice exhibited by prospective jurors was connected to the pretrial publicity and the sample jury, all of which, under the 'totality of the circumstances' test supported a change of venue." (Burgess's brief, p. 44.) We agree with the State that the circuit court should not be put in error for addressing the claim as Burgess pleaded it.

Burgess is due no relief on this claim. See Rule 32.7(d), Ala. R. Crim. P.

6. VOIR DIRE

In paragraphs 429 through 435 of his petition, Burgess alleged that

his "trial counsel unreasonably failed to conduct an adequate voir dire regarding the pretrial publicity and to renew the change of venue motion prior to and during jury selection." (C. 897.) He alleged that "[t]he results of the sample jury provided a basis for renewal of the motion based upon a showing of both 'inherent' and 'actual' prejudice" and that "the responses of the prospective jurors demonstrated 'actual' prejudice." (C. 897.)

The circuit court thoroughly addressed this claim:

> "The jury selection record (Trial Transcript 121-604) reflects that 54 prospective jurors were randomly selected from a larger venire to be questioned for the trial of Burgess's case. For the purposes of voir dire, they were divided into four panels containing 12 prospective jurors and one panel of six. In Haney v. State, 603 So. 2d 368, 402 (Ala. Crim. App. 1991), aff'd, 603 So. 2d 412 (Ala. 1992), cert. denied, 507 U.S. 925 (1993), the Alabama Court of Criminal Appeals recognized that questioning prospective jurors in panels satisfied due process requirements and assured the discovery of any prejudice on the part of the jurors. Burgess's counsel participated in questioning prospective jurors on all five of the panels and challenged nine for cause due to bias arising from what they had read, seen, or heard about the case. The trial court granted seven of those nine challenges.
>
> "Burgess argues that 'with few exceptions,' his trial counsel did not question prospective jurors who had read, seen, or heard pretrial publicity about the sources of their information, the frequency of their exposure or the content of what they learned. His argument, however, is not supported by almost 500 transcript pages. In many instances the

prosecutor's questions to prospective jurors about their exposure to pretrial publicity eliminated the need for Burgess's trial counsel to go back over the same subject matter. His counsel did, in fact, ask many, many questions of the prospective jurors about their exposure to various types of pretrial publicity; how they were affected by what they read, heard, or saw; opinions they had formed; whether they would require Burgess to prove his innocence; whether they could decide the issues solely on the evidence presented at trial and the law; and many other probing questions dictated by the prospective jurors' individual responses.

"Burgess fails to specifically plead facts that identify particular prospective jurors who were not sufficiently examined by his counsel, that explain what additional questions his trial counsel should have asked the identified prospective jurors, and that shows what beneficial information would have [been] revealed had the questions been asked. To sufficiently plead an ineffective assistance claim, Burgess must identify the specific omissions of counsel that were not reasonable. When it appears, as it does here, that trial counsel's questioning of the prospective jurors was reasonable under the circumstances—not through the use of hindsight—ineffective assistance has not been shown and is without merit.

"Moreover, in deciding what questions to ask the prospective jurors, Burgess's trial counsel had to make tactical and strategic decisions about how intense and prying they should be lest they become adversarial and appear to be attacking the veracity of members of the venire who may become actual jurors. Lead counsel Lavender discussed his dilemma in the context of pretrial publicity while arguing his motion to quash the entire venire, stating in part:

> "'Your Honor, we had earlier in this trial filed a motion for change of venue based on pretrial publicity, and this is always the type thing we

> worry about, people who are possessed of too many facts .... I'm put in the position now of three potential jurors that I would have favored on the jury, have now been talked to by somebody else and been examined by me again and been put through an extra procedure. I don't care what they say. I'm sure one of them was extremely nervous. We know that. I've asked a few questions this morning, as you allowed me to do that, but as I started to do that, I can only think that I can get in an adversarial position with this jury and really examine them about what they've seen or heard or whether or not they've talked to [prospective juror J.O.] or somebody else, and then have the luxury of trying to strike a jury and try to come up with some people that maybe I said, I don't really believe you, you know ... I think this is the perfect example of why highly publicized cases should be transferred, but at any rate, I think that this whole entire venire has been tainted.'

"(Trial Transcript 717-20). To the extent that Burgess claims his counsel did not ask sufficient questions, he must allege specific facts to overcome the presumption that the challenged omissions might be considered sound trial strategy. Strickland [v. Washington], 466 U.S. [688,] 689 [(1984)]. He has failed to do so and this claim does not satisfy the specific pleading and full disclosure requirements of Rule 32.6(b), Ala. R. Crim. P.

"Burgess further contends that his trial counsel performed deficiently by failing to renew the motion for change of venue during or after voir dire of the venire. In this contention [he] ignores the long standing principle that jurors do not have to be totally ignorant about the facts and issues involved in a particular case in order to reach an unbiased verdict. Nelson v. State, 440 So. 2d [1130,] 1131 [(Ala. Crim. App. 1983)]; Snyder v. State, 893 So. 2d 488, 511 (Ala. Crim.

> App. 2003). Also, that some of the prospective jurors had preconceived impressions or opinions about his guilt based on pretrial publicity, without more, does not rebut the presumption of the prospective jurors' impartiality. A change in venue is not warranted if the jurors put aside their impressions or opinions and render a verdict based on the evidence presented in court. Id. Burgess's trial counsel removed for cause the prospective jurors who had fixed opinions about his guilt. He fails to identify one or more specific jurors who were biased against him and were not removed from the jury by his counsel. He also does not plead specific facts showing either actual prejudice that tainted the entire venire or a reasonable probability that the trial court would have granted a renewed motion for change of venue. This portion of his claim is insufficiently pleaded under Rule 32.6(b) and also lacks facial merit.
>
> "Accordingly, Burgess's III.D.vi. ineffective assistance claim is due to be dismissed. Rule 32(d), Ala. R. Crim. P."

(C. 1413-16.) See also Burgess, 827 So. 2d at 155 ("Our review of the voir dire indicates that the method of examination and the empaneling of the jury 'provided reasonable assurance that prejudice would have been discovered if present.'" (citation omitted)).

On appeal, Burgess asserts that "the circuit court disregarded [his] allegations that specifically identified jurors trial counsel should have questioned and detailed the questions counsel should have asked. (C. 898-99.)" (Burgess's brief, p. 45.) We have reviewed this part of Burgess's petition, and the circuit court did not err in rejecting this claim as

insufficiently pleaded and lacking merit.

Burgess asserts that the circuit court erred in finding "that the prosecutor's questioning 'eliminated the need' for counsel to do so"; in finding "that trial counsel asked 'many, many questions' "; and in quoting Burgess's trial counsel and "implying that he was arguing 'in the context of pretrial publicity.' " (Burgess's brief, p. 45.) In those brief assertions, Burgess does not show that the circuit court erred.

Finally, Burgess argues that

> "the [circuit] court erred in ruling that trial counsel adequately 'removed for cause the prospective jurors who had fixed opinions about [Mr. Burgess's] guilt.' (C. 1415.) Mr. Burgess specifically alleged that Juror 'P.,' who was ultimately seated, expressed an opinion about Mr. Burgess's guilt that he would have been unable to set aside, and thus met the definition of 'actual prejudice.' "

(Burgess's brief, p. 46.)

The circuit court addressed Burgess's allegations about Juror "P" in a later part of the court's order addressing a different claim. We address the allegations underlying that claim below in part V.E.3. of this opinion. That analysis refutes Burgess's arguments in this part of his brief about Juror "P."

Burgess is due no relief on this claim. See Rule 32.7(d), Ala. R.

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E. ALLEGED INEFFECTIVENESS DURING JURY SELECTION

Burgess argues that the circuit court erred in summarily dismissing several claims alleging that his trial counsel were ineffective during jury selection.

1. ALLEGED SYSTEMATIC EXCLUSION OF BLACK JURORS

Burgess contends that the circuit court erred in dismissing his claim that trial counsel "failed to properly challenge the systematic exclusion of African Americans from Morgan County juries." (Burgess's brief, p. 46.) The circuit court found that, "[a]ssuming ... that the percentages he alleges in this claim are correct," Burgess had pleaded no more than "'the percentage disparity between the population of blacks in [Morgan] County and the number of blacks on the jury venire.'" (C. 1417 (quoting Burgess, 827 So. 2d at 185).) The circuit court also found that Burgess had pleaded "no facts indicating that African Americans were underrepresented 'due to systematic exclusion of the group in the jury-selection process'" (quoting Duren v. Missouri, 439 U.S. 357, 364 (1979)), and had pleaded no facts alleging "what documents or witnesses [his trial counsel] should have obtained and presented and what particular facts

the documents and witnesses would have provided to prove the systematic exclusion of African Americans in the Morgan County jury selection process." (C. 1418.)

Burgess's bare assertion that the circuit court erred gives him no right to relief. See, e.g., Stanley v. State, 335 So. 3d 1, 27 (Ala. Crim. App. 2020) ("[A] claim is meritless if a court can determine based on the pleadings that, even if every factual allegation in a Rule 32 petition is true, the petitioner is not entitled to relief.").

2. RIGHT TO BE PRESENT DURING THE REDUCTION OF THE NUMBER OF PROSPECTIVE JURORS

Burgess argues that the circuit court erred in summarily dismissing his claim alleging

> "that his trial counsel provided ineffective assistance by failing to object when the trial court directed the Clerk of the Morgan County jury commission to randomly select 54 prospective jurors from the 84-member jury pool that remained after the court excused 15 who had various problems with being sequestered for the capital trial."

(C. 1418.) Burgess asserts that the "selection process outside his presence … denied his right to be present during all critical stages of his trial." (C. 1418.)

This Court on direct appeal rejected the claim underlying this

ineffectiveness claim, holding that Burgess had no right to be present during the random reduction of the venire. Burgess, 827 So. 2d at 186 ("Burgess had no more right to be present at the random selection of veniremembers by the clerk of the county jury commission than he did to be present when the Administrative Office[] of Court[s] drew up the master jury lists. The trial court did not err in allowing the random selection to be conducted out of Burgess's presence."). Burgess's trial counsel cannot have been ineffective for failing to raise a meritless claim. See, e.g., Brooks, 340 So. 3d at 442; Carruth, 165 So. 3d at 641; Yeomans, 195 So. 3d at 1034.

Burgess is due on relief on this claim. See Rule 32.7(d), Ala. R. Crim. P.

3. FAILURE TO CHALLENGE CERTAIN JURORS FOR CAUSE

Burgess contends that he "sufficiently alleged that trial counsel were ineffective for unreasonably failing to challenge Juror 'P.' and Juror 'Ch.' for cause, despite their prejudgments about the case." (Burgess's brief, p. 48.) He asserts that the circuit court "utilized an incorrect standard when it found that neither prospective juror demonstrated 'absolute prejudice or bias' against Mr. Burgess." (Burgess's brief, p. 48.)

The circuit court accurately addressed this claim:

"The trial record reflects that during the prosecutor's voir dire of the fourth panel of 12 prospective jurors, Juror P responded that he was acquainted with defense counsel Lavender and did not respond 'yes' when the panel was asked if any member could not give Burgess a fair trial because of what they had heard on the television or read in the newspaper about the ease. Similarly, Juror P did not respond 'yes' when the prosecutor asked if any member of the panel felt that he could not base his verdict solely on the evidence presented at trial and the law. (Trial Transcript at 442-43 and 463-64). When Burgess's lead counsel Lavender asked the panel members if they had seen, read, or heard about the case, Juror P answered affirmatively and explained that he had seen Burgess's confession on TV. When Lavender asked him directly 'do you think he's guilty right now,' Juror P responded that 'I can't honestly say he's guilty' and further stated that he might not be able to forget about what Burgess said and it could possibly play some part in his deliberation. (Trial Transcript at 507).

"In response to the prosecutor's voir dire of panel three, Juror Ch disclosed that he worked with the sister and sister-in-law of lead counsel Lavender. (Trial Transcript at 345). He did not know any of the State's potential witnesses and had not been a crime victim. Juror Ch did not respond 'yes' when the prosecutor asked the panel members if anyone could not serve as a juror and base their verdicts on the evidence presented in the trial. When the prosecutor questioned the panel members if anyone felt that their minds were already made up about guilt or innocence based on what they had read in the newspaper or had seen on television concerning the case, Juror Ch did not respond 'yes.' (Trial Transcript at 362-65).

"Burgess's lead counsel Lavender directly asked Juror Ch if he knew anything about the case. Juror Ch responded

that he knew only what he had read in the newspaper. Lavender then asked Juror Ch whether he had formed an opinion as to guilt or innocence based on the newspaper or televisions reports. Juror Ch answered, 'Today, no.' Counsel Lavender then said, 'You don't have any opinion at all?' Juror Ch said, 'I could hear the evidence, just based on the evidence.' (Trial Transcript 413-414).

"Having examined the responses, failures to respond and statements of Jurors P and Ch in the context of all the questions asked and explanations given by both the prosecutor and Burgess's trial counsel during their voir dire of panels three and four, the Court finds that neither of the prospective jurors demonstrated absolute prejudice or bias against Burgess. While both of them had read or seen information pertaining to his case, Juror P could not honestly say that Burgess was guilty, and Juror Ch said he had formed no opinion as to Burgess's guilt or innocence. By their failures to respond to certain of the prosecutor's questions, both prospective jurors indicated that they could give Burgess a fair trial and base their verdicts solely on the evidence presented at trial irrespective of the pretrial publicity they had read or seen. Prospective jurors who demonstrate by their answers and demeanor that they can render a verdict based on the evidence presented in court are not subject to challenge for cause. Daily v. State, 828 So. 2d [340,] 343 [(Ala. Crim. App. 2000)]; Marshall v. State, 598 So. 2d 14, 16 (Ala. Crim. App. 1992). If counsel cannot be found to be ineffective for failing to make an objection or motion for which there is no legal basis, Boyd v. State, 746 So. 2d 364 (Ala. Crim. App. 1999), then logic dictates that counsel does not render ineffective assistance by failing to make challenges for cause for which no legal basis exists.

"Moreover, Burgess has failed to plead specific facts establishing a reasonable probability that the trial court would have granted challenges for cause directed by his trial counsel at Jurors P and Ch or that, if the trial court had

> granted the challenges, the outcome of his trial probably would have been different. Given the 'overwhelming' evidence that Burgess robbed and shot Mrs. Crow, Burgess, 827 So. 2d at 171, the likelihood of a different outcome resulting from a change in the composition of the jury was not substantial.
>
> "Accordingly, Burgess's III.E.iii. ineffective assistance claim fails to satisfy the specific factual pleading and full disclosure requirements of Rule 32.6(b), is meritless on its face, and is due to be dismissed. Rule 32.7(d), Ala. R. Crim. P."

(C. 1421-23.)

"'Ultimately, the test to be applied is whether the juror can set aside her opinions and try the case fairly and impartially, according to the law and the evidence.'" Marshall v. State, 598 So. 2d 14, 16 (Ala. Crim. App. 1991) (citations omitted). The circuit court found that "[w]hile both of them had read or seen information pertaining to his case, Juror P could not honestly say that Burgess was guilty, and Juror Ch said he had formed no opinion as to Burgess's guilt or innocence." (C. 1422.)

Burgess has not shown that the circuit court erred, and he is due no relief. See Rule 32.7(d), Ala. R. Crim. P.

4. FAILURE TO OBJECT TO THE STATE'S ALLEGEDLY GENDER-BASED PEREMPTORY CHALLENGES

Burgess argues that the circuit court erred in summarily dismissing his claim that "his trial attorneys unreasonably failed to

object under J.E.B. v. Alabama, 511 U.S. 127 (1994), to the prosecutor's peremptory challenges against women. (C. 905-20.)" (Burgess's brief, p. 48.)

On direct appeal, this Court reviewed for plain error whether the State had used its peremptory challenges in violation of Batson v. Kentucky, 476 U.S. 79 (1986), and J.E.B. v. Alabama, 511 U.S. 127 (1994). This Court concluded there was no plain error, holding:

> "We have reviewed the record submitted on appeal in light of the factors set out in Ex parte Branch, 526 So. 2d 609 (Ala. 1987). We do not find sufficient evidence that the female veniremembers who were struck shared only the characteristics of gender. Nor do we find anything in the type and manner of the prosecutor's statements or questions during the extensive voir dire examination that indicated an intent to discriminate against female jurors. We do not find a lack of meaningful voir dire directed at the female jurors or that female jurors and male jurors were treated differently. There is no evidence that the prosecutor had a history of misusing peremptory challenges so as to discriminate against women. We find only that the prosecutor used many of his strikes to remove women from the venire. 'Without more, we do not find that the number of strikes this prosecutor used to remove women from the venire is sufficient to establish a prima facie case of gender discrimination.' Ex parte Trawick, 698 So. 2d 162, 168 (Ala. 1997), cert. denied, 522 U.S. 1000, 118 S. Ct. 568, 139 L. Ed. 2d 408 (1997)."

Burgess, 827 So. 2d at 150.

The circuit court noted that, on direct appeal, "Burgess pointed to

the same facts that he highlights in his current ineffective assistance claim: that the State used 11 of its 15 peremptory strikes to remove 11 of 21 women from the venire, resulting in a jury composed of [8] men and [4] women."[13] (C. 1423.) The circuit court cited this Court's rejection of Burgess's claim as well as this Court's statement in Williams v. State, 783 So. 2d 108, 133 (Ala. Crim. App. 2000): "Because we determined that the remarks did not constitute plain error even if objectionable, appellant cannot relitigate the issue under the guise of ineffective assistance of counsel in a post-conviction proceeding." (C. 1425-26.) Citing decisions of this Court holding that the failure to make an objection—and specifically the failure to raise a Batson objection in a capital case—is not per se deficient performance, the circuit court held that Burgess had insufficiently pleaded the claim because he did not "plead specific facts indicating that his trial counsel's failure to make a J.E.B. motion or objection was not a sound strategic or tactical decision based on their satisfaction with the selected jury or their feelings that they had seated

[13]Burgess also pleaded that the State had used all three of its challenges for cause against women and that, in capital trials in the 10 years before Burgess's trial, "the odds of a prospective female juror being struck [by District Attorney Burrell] versus not being struck were 1.53 times those of a prospective male juror." (C. 918-19.)

a jury that would favor their client." (C. 1424-25 (citing Carruth, 165 So. 3d at 639 ("Because Carruth failed to even allege that counsels' decision was not the result of sound trial strategy, his petition failed to meet the specificity requirement of Rule 32.6(b), Ala. R. Crim. P."), and Woodward, 276 So. 3d at 751 ("[W]e cannot say that counsel's strategic decision [to forgo a Batson objection because they believed they had seated a jury favorable to their client given the circumstances of the case] was unreasonable.").).

In Woodward, this Court stated:

> "Generally, '"the failure by counsel in a capital case to raise any particular claim or claims does not per se fall below an objective standard of reasonableness."' Horsley v. State, 527 So. 2d 1355, 1359 (Ala. Crim. App. 1988) (quoting Lindsey v. Smith, 820 F.2d 1137, 1144 (11th Cir. 1987)). In Yelder v. State, 575 So. 2d 137, 139 (Ala. 1991), the Alabama Supreme Court held that 'the failure of trial counsel to make a timely Batson objection to a prima facie case of purposeful discrimination by the State in the jury selection process through its use of peremptory challenges is presumptively prejudicial to a defendant.' However, the 'holding in Yelder does not relieve the defendant of his burden of meeting the first prong of the Strickland [v. Washington, 466 U.S. 668 (1984),] test—a showing of deficient performance by counsel,' Ex parte Frazier, 758 So. 2d 611, 615 (Ala. 1999), and this Court has recognized that the decision whether to make a Batson objection may be a strategic one. In Carruth v. State, 165 So. 3d 627 (Ala. Crim. App. 2014), this Court held that a Rule 32 petitioner had failed to plead sufficient facts in his petition to indicate that counsel had been ineffective for not

> raising a Batson objection because the petitioner had failed to plead facts indicating that there was a prima facie case of discrimination and had failed to allege that counsel's decision not to make a Batson objection was not sound trial strategy. In doing so, this Court noted that '[c]ounsel could have been completely satisfied with the jury that was selected and not wished to potentially disturb its composition by making a Batson challenge.' Carruth, 165 So. 3d at 639.
>
> "Other jurisdictions have similarly recognized that it is not per se deficient performance for counsel not to make a Batson objection even when there is a prima facie case of discrimination. See, e.g., Flanagan v. State, 712 N.W.2d 602, 609-10 (N.D. 2006); Davis v. State, 123 P.3d 243, 246-47 (Ok. Crim. App. 2005); and Randolph v. Delo, 952 F.2d 243, 246 (8th Cir. 1991). Generally, 'the decision to make or not make a Batson challenge falls within trial counsel's trial strategy and the wide latitude given him, to which appellate courts must defer.' Hall v. State, 735 So. 2d 1124, 1128 (Miss. Ct. App. 1999). We agree, and we hold that counsel's failure to make a Batson objection when there is a prima facie case of discrimination is not per se deficient performance."

Woodward, 276 So. 3d at 751.

Burgess raises several objections to the circuit court's dismissal of this claim. He argues that the court erred in relying on Williams, 783 So. 2d 108, and he cites Ex parte Taylor, supra, as having overruled Williams. But as noted above, "Ex parte Taylor applies only to the prejudice prong of Strickland [v. Washington, 466 U.S. 668 (1984)], not to the deficient-performance prong." Woodward, 276 So. 3d at 769. The circuit court did not err in finding that Burgess had not pleaded facts

showing deficient performance.

The circuit court correctly recognized that a failure to make a J.E.B. motion is not per se deficient performance. Woodward, supra. And the circuit court did not err in holding that, under the circumstances of this case, Burgess had to plead specific facts showing that his counsel's decision was not a strategic one. Carruth, supra. As the circuit court found:

> "Burgess's counsel were dealing with a case in which there had been extensive pretrial publicity, their client had made statements and admissions against his interests in a televised interview with media reporter, they were facing strong evidence that he had robbed and shot the victim, they hoped to convince jurors that the shooting was accidental and as a last resort, if their client was found guilty of the capital offense, they had jurors who would be more inclined to vote for a life sentence rather than death. In the face of a multitude of concerns and considerations, counsel's choice to not make a J.E.B. motion or objection and to go to trial with the selected jury was not per se unreasonable assistance."

(C. 1425.) And as the circuit court also found, "before Burgess's trial counsel may be determined to have acted unreasonably, they must have had a valid legal basis for making a J.E.B. motion or objection." (C. 1425.) Burgess has not pleaded facts showing a valid legal basis for such an objection.

Burgess is due no relief on this claim. See Rule 32.7(d), Ala. R.

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F. SELECTION OF GRAND-JURY FOREPERSON

Burgess contends that the circuit court erred in dismissing his claim that his "trial counsel unreasonably failed to move to quash the indictment based on discrimination against African Americans in the selection of grand jury forepersons." (Burgess's brief, p. 56.) He asserts that he presented detailed allegations showing "the extent to which African Americans were historically excluded from serving as forepersons on Morgan County grand juries." (Burgess's brief, pp. 56-57.)

The circuit court did not err in dismissing this claim as insufficiently pleaded. Among other pleading deficiencies, the circuit court found:

> "Although he concludes that his grand jury was unlawfully constituted, Burgess does not plead specific facts showing the total number of persons on the venire from which the grand jury was chosen, the racial composition of the venire, the process by which the grand jurors were selected, the racial composition of the grand jury that indicted him and the race or gender of the grand jury foreperson. He makes the bare assertion that the master jury list from which his grand jury was drawn excluded age-eligible African Americans, but pleads no specific fact showing the discriminatory and systematic exclusion of age-eligible African Americans or identifying witnesses who would give testimony concerning … the process that was used to create Morgan County's 1993 master jury lists. Rather, he merely alludes to percentages

> taken from 'the United States Census Bureau' without specifying the applicable year of the census and without authenticating through a Census Bureau representative the racial demographics of Morgan County in March 1993 and the comparative percentages he quotes in Paragraph 472."

(C. 1427.)

In Pace v. State, 714 So. 2d 332, 337 (Ala. 1997), the Alabama Supreme Court held: "Because the role of an Alabama grand jury foreperson is almost entirely ministerial, we conclude that discrimination in the selection of the foreperson of the otherwise properly constituted grand jury that indicted Pace did not deprive him of a fundamentally fair grand jury hearing or of a subsequent fair trial." As noted, Burgess did not plead facts showing that the grand jury itself was improperly constituted. Thus, under Pace, any allegation of discrimination in the selection of the foreperson would have given him no right to relief.

Further, as the circuit court found in that part of its order addressing Burgess's claim that his appellate counsel were ineffective for not raising this claim, see infra Part XII.B., the Alabama Supreme Court in Ex parte Drinkard, 777 So. 2d 295, 304 (Ala. 2000), noted:

> "Morgan County has recently changed its method of selecting grand-jury forepersons. Before 1993, the trial court appointed grand-jury forepersons, based on the recommendation of the prosecutor. Since that time, grand-jury forepersons have been

> selected by the members of the grand jury itself. As we noted in Pace, the 'new procedure [in which the grand-jury members themselves choose the grand-jury foreperson] should limit any appearance of discrimination in the judicial process.' 714 So. 2d at 338, n.6."

The circuit court did not err in summarily dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

G. MOTION TO SUPPRESS

Burgess argues that the circuit court erred in summarily dismissing his claims that trial counsel were ineffective in failing to "investigate and properly litigate the motion to suppress" his statements to the police and to the media. (Burgess's brief, p. 58.) He argues that "[t]he circuit court erroneously relied on trial counsel's original unsuccessful suppression motion to hold that [his] current allegations could not prevail." (Burgess's brief, p. 59.) He asserts that, "[a]mong other allegations, [he] pleaded that trial counsel failed to present reasonably available evidence that the officers' engaging [him] in 'small talk' was part of a well-established-interrogation technique and was not permissible after invocation of the right to counsel." (Burgess's brief, pp. 58-59.)

On direct appeal, this Court held:

"The question here is whether the continued conversation between Burgess and investigator Long amounted to the functional equivalent of an interrogation. We think not. There is no evidence in the record to suggest that Long's 'small talk' with Burgess was a psychological ploy that Long should have realized would result in an incriminating response by Burgess. As Justice Powell noted in his concurring opinion in Edwards [v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)], there is a difference between 'custodial interrogation' and 'custodial conversation':

> " 'Communications between police and a suspect in custody are common-place. It is useful to contrast the circumstances of this case with typical, and permissible, custodial communications between police and a suspect who has asked for counsel. For example, police do not impermissibly "initiate" renewed interrogation by engaging in routine conversations with suspects about unrelated matters.'

"451 U.S. at 490, 101 S. Ct. 1880. The United States Supreme Court held in Arizona v. Mauro, 481 U.S. 520, 107 S. Ct. 1931, 95 L. Ed. 2d 458 (1987), that in the absence of 'compelling influences, psychological ploys, or direct questioning,' the 'possibility' that an accused will incriminate himself, even the subjective 'hope' on the part of the police that he will do so, is not the functional equivalent of interrogation. 481 U.S. at 528-29, 107 S. Ct. 1931.

"We find that Burgess initiated further conversation about the murder/robbery investigation when he asked Long about the charges against him and the possible punishment. We do not find that Long's straightforward answers to those questions were a 'compulsion, ploy, or artifice' to prompt an incriminating response from Burgess. Indeed, Long cut off Burgess's questions by reminding him that he had asked for a lawyer and that he was not free to discuss the matter with

> Burgess. Burgess's subsequent decision to make an incriminating statement was not the result of continued interrogation, but a voluntary initiation of the discussion of the murder/robbery.[5] If there was a subsequent reinterrogation by the police when Long brought in another investigator to take down Burgess's written statement, it is clear from the signed and [initialed] form on which the statement was written that Burgess was again readvised of, and waived, his Miranda [v. Arizona, 384 U.S. 436 (1966),] rights after he initiated the conversation. See Oregon v. Bradshaw, 462 U.S. [1039,] 1044, 103 S. Ct. 2830 [(1983)]. The trial court did not err, therefore, in admitting into evidence Burgess's voluntary statement to police.
>
> "_______________
>
> "[5]It is obvious from viewing the videotape of Burgess's statement to the press that Burgess was in full control of his faculties and was in a 'talkative' mood shortly after the police recorded his statement."

Burgess, 827 So. 2d at 175-76.

The circuit court relied on this Court's finding on direct appeal "that the 'small talk' that continued between the investigator and [Burgess] did not amount to 'the functional equivalent of an interrogation' and then concluded that 'Burgess initiated further conversation about the murder/robbery investigation.'" (C. 1430-31.) Other than asserting that the circuit court erred, Burgess does not explain how.

Burgess next argues that his trial counsel were ineffective in "fail[ing] to investigate and adequately litigate the motion to suppress

[his] statements to the media." (Burgess's brief, p. 59.) He contends that counsel "failed to present reasonably available evidence establishing that police officers contacted members of the media, waited for them to gather, and intentionally paraded Mr. Burgess before them with the intent that he make incriminating statements. (C. 929-30.)" (Burgess's brief, p. 59.) He alleges that counsel should have "introduce[d] detailed evidence establishing that there were two alternative, secure routes to bring Mr. Burgess to the county jail that would not have exposed him to the media." (Id.)

The circuit court found this claim to be insufficiently pleaded. Burgess did not name any witness who would have testified that there was a conspiracy to expose Burgess to the media in the hope that he would make incriminating statements.

The circuit court also found meritless Burgess's claim about counsel's alleged failure to offer evidence of "alternative, secure routes." The circuit court noted that "Burgess testified during the suppression hearing that after his arrest, the investigators transported him to the Decatur Police Department by driving into an underground garage, a route that never exposed him to the public." (C. 1433.) The circuit court

also noted that "the trial judge's office and courtroom for many years before January 1993 were located on the third-floor hallway of the Morgan County Courthouse that connected to a secure walkway leading from the courthouse to the county jail." (Id.) The circuit court found no merit in "Burgess's conclusions that the trial court did not know about the two other possible transfer routes, despite Burgess's own testimony about one during the suppression hearing and the court's judicial knowledge of the other." (Id.) Burgess has not shown that these findings were in error. Cf. Sheats v. State, 556 So. 2d 1094, 1095 (Ala. Crim. App. 1989) (A circuit court may summarily dismiss a Rule 32 petition without an evidentiary hearing if the judge who rules on the petition has "personal knowledge of the actual facts underlying the allegations in the petition" and "states the reasons for the denial in a written order.").

Burgess is due no relief on this claim. See Rule 32.7(d), Ala. R. Crim. P.

H. FAILURE TO CHALLENGE ALLEGEDLY UNCONSTITUTIONAL AND IMPROPER RACE-BASED PRACTICES

Burgess alleged that his trial counsel were ineffective for not "challeng[ing] unconstitutional and improper race-based practices" that, he said, cause the death penalty to be "sought, prosecuted, and imposed

in Morgan County and in Alabama in an arbitrary and capricious fashion pursuant to a racially discriminatory pattern. (C. 933.)" (Burgess's brief, p. 60.) He asserts that the circuit court "ignored [his] detailed allegations of racial disparities in Morgan County and Alabama capital proceedings when he was tried." (Burgess's brief, pp. 60-61.) He also contends the circuit court erred in finding that Burgess had to name "the statistical expert whom ... trial counsel should have consulted." (Burgess's brief, p. 61.)

The circuit court did not err in finding that Burgess had to name the expert he alleges his trial counsel should have consulted. Brooks, supra. And the circuit court did not err in finding that Burgess offered only conclusory assertions in support of this claim.

Burgess is due no relief on this claim. See Rule 32.7(d), Ala. R. Crim. P.

I. FAILURE TO CHALLENGE ALABAMA'S "ADVISORY JURY SYSTEM"

Burgess next argues that his trial counsel were ineffective for not "challeng[ing] Alabama's capital sentencing scheme as unconstitutional because it did not require that the jury make, unanimously and by proof beyond a reasonable doubt, all of the findings necessary to impose the

death penalty." (Burgess's brief, p. 61.) As the circuit court correctly found, this claim "has no factual or legal merit and fails to create a material issue of law or fact that would entitle him to relief." (C. 1438.) By its guilt-phase verdict, the jury unanimously found beyond a reasonable doubt that the State had proven that Burgess committed a murder during a robbery and thus that the State had proven one aggravating circumstance—that Burgess murdered the victim during a first-degree robbery. This was the only aggravating circumstance considered by the trial court and all that was necessary to expose Burgess to the death penalty. See, e.g., Ex parte Waldrop, 859 So. 2d 1181, 1190 (Ala. 2002) ("Alabama law requires the existence of only one aggravating circumstance in order for a defendant to be sentenced to death. Ala. Code 1975, § 13A-5-45(f). The jury in this case found the existence of that one aggravating circumstance: that the murders were committed while Waldrop was engaged in the commission of a robbery. At that point, Waldrop became 'exposed' to, or eligible for, the death penalty.").

Burgess also contends that the circuit court erred in dismissing his claim that his trial counsel were ineffective for not objecting to his being tried before an elected judge. (Burgess's brief, pp. 61-62.) The circuit court

correctly held that "[b]ecause it is the jury rather than the trial court that makes the critical finding which exposes a defendant to the imposition of the death penalty, Alabama's capital-sentencing scheme is constitutional." (C. 1440.) And this Court has repeatedly rejected the issue underlying this claim. See, e.g., Barbour v. State, 673 So. 2d 461, 470 (Ala. Crim. App. 1994). Summary dismissal of this claim was proper. See Rule 32.7(d), Ala. R. Crim. P.

J. ALLEGEDLY DEFECTIVE INDICTMENT

Burgess contends that the circuit court erred by dismissing his claim that his trial counsel were ineffective for not objecting to his indictment because, he says, the indictment "neither alleged all the elements of the capital offense nor provided him with fair notice of the capital charge." (Burgess's brief, p. 62.)

Although the indictment does not include the word "robbery," the language of the indictment charging Burgess with capital murder tracks the language of Alabama's statute defining first-degree robbery, see § 13A-8-41, Ala. Code 1975, and the circuit court correctly held that "the indictment adequately charged Burgess with committing a murder that occurred during a robbery in the first degree. This was the aggravating

circumstance that made the crime a capital offense. His contention that the indictment failed to allege an aggravating circumstance is without merit." (C. 1444.)

Burgess's conclusory argument on appeal does not show that the circuit court erred. He is due no relief on this claim. See Rule 32.7(d), Ala. R. Crim. P.

K. FAILURE TO MOVE TO WITHDRAW

Burgess alleges that his trial counsel were ineffective for not withdrawing "from the case when the court denied their motion to continue the trial, and they were unprepared to go forward." (Burgess's brief, p. 62.) But as the circuit court correctly found, "Burgess has not pleaded specifically what his trial counsel could have said or done within ethical bounds that would have required the trial court to grant their withdrawal from the case." (C. 1447.)

The circuit court did not err in summarily dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

VI. CLAIMS ALLEGING THAT COUNSEL WERE INEFFECTIVE DURING THE GUILT PHASE

A. BURGESS'S STATEMENTS TO THE MEDIA

Burgess argues that the circuit court erred in dismissing his claim

that his trial counsel were ineffective

> "because they failed to get State's Exhibit 101, the edited videotape of the statements [Burgess] made in response to news media questions after his arrest, excluded in its entirety from the jury's consideration; failed to seek the exclusion of allegedly inadmissible portions of State's Exhibit 101; and failed to assure that State's Exhibit 101 was properly edited before it was shown to the jury."

(C. 1448.) On direct appeal, this Court held that the trial court had properly admitted the statement that Burgess gave to the media:

> "[E]ven if Burgess had not initiated his discussion with police investigators about the murder/robbery and then waived his rights and made a statement, we would not find his subsequent interview with the press to be a violation of those rights. Having reviewed the record and the videotape of Burgess's statement to the media, we find no evidence of police complicity with the press or of some coercion on the part of the police which persuaded Burgess to speak to the press. The videotape does not portray a 'media circus' or a 'highly charged and provocative atmosphere.' When Burgess and his police escort stepped out of the doors of the police station to walk to the county jail, they were met by a group of reporters and at least one television videographer. A reporter asked Burgess if he had anything to say, and in response, Burgess very calmly and articulately talked and answered reporters' questions nonstop until the door closed behind him at the jail. There is not a shred of evidence that he was overcome by the situation, or that he was compelled to speak to the press. Neither police escort asked him any questions, nor did they propose any questions for the press to ask. ...
>
> "Miranda applies in situations involving a police interrogation and custody. Miranda v. Arizona, [384 U.S. 436 (1966)]. There is simply no evidence here that the police

> manipulated either Burgess or the media in such a way as would result in the 'functional equivalent of interrogation.' Nor was there any evidence that the Decatur police were avoiding their duty under Miranda by attempting to have the press act as their agent in order to bypass the Miranda requirements. There must be some evidence of an agency relationship between the media and the police in order to conclude that the media, in a case such as this one, was acting as an agent for the police. Sears v. State, 668 N.E.2d 662, 668-69 (Ind. 1996)[, overruled on other grounds by Scisney v. State, 701 N.E. 2d 847, 848-49 (Ind. 1998)].
>
> "We conclude that the trial court properly admitted into evidence the videotaped statement Burgess gave to the news media."

Burgess, 827 So. 2d at 177.

Counsel moved to suppress the videotaped statement, and the trial court excluded parts of the video. The circuit court found that Burgess had not pleaded facts showing that his counsel's performance was deficient in litigating the motion to suppress. (C. 1449.)

On appeal, Burgess summarily raises three alleged issues about this claim: (1) that "trial counsel unreasonably failed to move to exclude inflammatory, inadmissible, and irrelevant statements contained in the redacted video detailed at C. 947-48"; (2) that "trial counsel failed to monitor the editing to ensure that it complied with the judge's order and that the redacted tape would not be misleading"; and (3) that "the

redacted videotape erroneously excluded an admissible portion of Mr. Burgess's statement that supported his defense that the shooting was accidental." (Burgess's brief, p. 64.)

As for the first issue, Burgess identifies only one specific statement: "Mr. Burgess's repeated use of the word "n*****." (Burgess's brief, p. 64 n.5.) Cf. Morris, 261 So. 3d at 1194 ("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."); State v. Mitchell, ___ So. 3d at ___ ("[A] 'laundry-list approach'—and trying to incorporate arguments by reference—does not comply with Rule 28(a)(10), Ala. R. App. P., which requires an argument to include 'the contentions of the appellant/petitioner with respect to the issues presented, and the reasons therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on.'"). The circuit court found that the words "'black nigger' .... appear[ed] to flow seamlessly from Burgess's earlier written statement to the investigators in which he quoted the victim as calling him ... a 'damn nigger' and a 'poor ass nigger.'" (C. 1449.) The circuit court found:

> "In the context of all evidence presented in the case, it would not have been unreasonable for Burgess's trial counsel to

> believe that their client's repeated use of the word 'nigger' demonstrated his insecurity and lack of self-esteem that the jurors might accept as mitigating against a death sentence. Given that counsel's decisions are 'replete with uncertainties and judgment calls,' and require a highly deferential level of judicial scrutiny, the Court cannot say that Burgess's trial counsel provided deficient performance by failing to seek the exclusion from State's Exhibit 101 of their client's description of himself. See Chandler v. United States, 218 F.3d [1305,] 1314 [(11th Cir. 2000)]."

(C. 1449.) In his conclusory disagreement with the circuit court on this point, Burgess has not shown that the circuit court erred.

Burgess makes no argument about issue (2)—that trial counsel "failed to monitor the editing." Thus, Burgess has not shown that the circuit court erred on that point.

As for issue (3), Burgess argues that "the redacted videotape erroneously excluded an admissible portion of Mr. Burgess's statement that supported his defense that the shooting was accidental." Addressing Burgess's assertion that the words "it went off" should have been admitted, the circuit court found that any error would have been harmless based on other admitted statements that Burgess made suggesting that the shooting was unintentional. (C. 1450.) Burgess does not address this holding on appeal, and he thus is due no relief. See Jackson v. State, 127 So. 3d 1251, 1256 (Ala. Crim. App. 2010) ("Because

Jackson has failed to challenge one of the circuit court's holdings, he has waived review of this issue.").

Burgess has not shown that the circuit court erred in summarily dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

B. FAILURE TO OBJECT TO ALLEGED PROSECUTORIAL MISCONDUCT IN THE GUILT-PHASE ARGUMENT

Burgess next challenges the circuit court's summary dismissal of his claim alleging that his "trial counsel unreasonably failed to object to numerous acts of misconduct during the guilt phase of trial, prejudicing him. (C. 955-59.)" (Burgess's brief, p. 65.) He asserts that the circuit court's rejection of this claim was improper because "the prosecutor may not misstate testimony by couching the argument as an opinion." (Id.) In his brief, Burgess lists these as examples of alleged prosecutorial misconduct: the prosecutor made statements about the gun that Burgess says were "false or improper"; "[t]he prosecutor improperly appealed to emotion and impugned Mr. Burgess's character"; the prosecutor "misrepresented expert testimony"; the prosecutor "argued his personal beliefs"; and "the prosecutor misstated the law on critical points." (Burgess's brief, pp. 65-66.)

The circuit court thoroughly addressed this claim and all its

subparts. (C. 1451-58.) The circuit court reviewed each of the instances of alleged misconduct and found that the prosecutor had made the challenged statements in response to Burgess's statement, his trial counsel's arguments, or the theory of defense or that the prosecutor's statements were proper based on this Court's ruling on direct appeal.[14] Burgess's mere listing of alleged errors and his conclusory argument that the circuit court was wrong do not give him a right to relief. See Morris, 261 So. 3d at 1194; State v. Mitchell, ___ So. 3d at ___.

Burgess has not shown that the circuit court erred in summarily dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

C. NOT CHALLENGING ALLEGED VICTIM-IMPACT EVIDENCE

Burgess argues that the circuit erred in summarily dismissing his claim alleging that his "trial counsel failed to challenge impermissible victim impact evidence." (Burgess's brief, p. 66.) He asserts that the circuit court erred in relying on Payne v. Tennessee, 501 U.S. 808, 825 (1991), because, Burgess says, "the evidence Mr. Burgess alleges should have been challenged is inadmissible under Payne, which allows victim impact evidence to be introduced at the penalty phase." (Burgess's brief,

[14]See Burgess, 827 So. 2d at 163-68.

p. 67.)

The circuit court thoroughly addressed this claim. (C. 1458-60.) The court noted that most of what Burgess challenged was photographic evidence of the victim and the crime scene, and the court correctly noted that such evidence is generally admissible. (C. 1459.) The circuit court cited Payne generally and found that the evidence Burgess challenged was not victim-impact evidence under Payne. (C. 1459-60.) The circuit court did not, as Burgess implies, find that Payne allows victim-impact evidence during the guilt phase.

Burgess's cursory assertions that the circuit court erred give him no right to relief. See Rule 32.7(d), Ala. R. Crim. P.

D. NOT SUBMITTING JURY INSTRUCTIONS

Burgess argues that his trial counsel "unreasonably failed to submit jury instructions at the guilt phase that were necessary to ensure Mr. Burgess received a fair trial." (Burgess's brief, p. 67.) Burgess offers only three more sentences about this claim, including a conclusory assertion that the circuit court erred in dismissing the claim. (Burgess's brief, pp. 67-68.)

The circuit court correctly addressed this claim. (C. 1460-62.) The

court found that it was not sufficiently pleaded and lacked merit. The circuit court also quoted this Court's holding on direct appeal: "The trial court fairly instructed the jury on the consideration of evidence and the elements necessary to convict Burgess of capital murder or felony murder. The jury was therefore properly informed as to how to consider the defense theory of the case in its deliberations." Burgess, 827 So. 2d at 190.

Burgess has not shown that the circuit court erred in its dismissal of this claim, and he is due no relief. See Rule 32.7(d), Ala. R. Crim. P.

VII. CLAIMS ALLEGING THAT COUNSEL WERE INEFFECTIVE DURING THE PENALTY PHASE

A. NOT OBJECTING TO INSTANCES OF ALLEGED PROSECUTORIAL MISCONDUCT

Burgess argues that the circuit court erred in summarily dismissing his claim alleging that his "trial counsel failed to object to the prosecutor's numerous acts of misconduct during the penalty phase of his trial, prejudicing him. (C. 964-66.)." (Burgess's brief, p. 68.) Burgess asserts that the circuit court erroneously "require[d]" him to cite legal authority and "prematurely ruled on the merits." (Burgess's brief, pp. 68-69.) Burgess contends that the "prosecutor … misstate[d] the law" and

that the circuit court erroneously found that no statement from the prosecutor during the penalty-phase closing argument "misled the jury." (Burgess's brief, p. 69.)

The circuit court thoroughly addressed this claim. (C. 1462-68.) It did not, as Burgess suggests, dismiss the claim only because Burgess did not plead legal authority in support of it. Burgess omits the phrase "specific facts or" from this sentence he quotes from the circuit court's order: "For example, Burgess does not plead specific facts or legal authority establishing how or why this statement constituted misconduct or improper argument." (C. 1463 (quoted in Burgess's brief, p. 68.) The circuit court also correctly found: "[Burgess] does not address the entire remarks made by the prosecutor and the context in which those remarks were made when the alleged misconduct occurred." (C. 1463.) See, e.g., Phillips v. State, 65 So. 3d 971, 1033 (Ala. Crim. App. 2010) ("A prosecutor's statement must be viewed in the context of all of the evidence presented and in the context of the complete closing arguments to the jury." (citations and some quotation marks omitted); DeBruce v. State, 651 So. 2d 599, 609 (Ala. Crim. App. 1993) ("A prosecutor has a right based on fundamental fairness to reply in kind to the argument of

defense counsel."). The circuit court found:

> "The trial court correctly instructed the jurors that they were allowed to consider only one aggravating circumstance—murder committed during a first-degree robbery—and that it was their responsibility to weigh that aggravating circumstance against the mitigating circumstances in deciding the appropriate sentence to recommend. When viewed in the context of his entire penalty phase rebuttal argument, the prosecutor's statements that Mrs. Crow was shot once and how she must have felt with the gun pointed at her face and during the minutes she continued to live after the shooting clearly were intended to rebut defense counsel's arguments that a one-shot killing was not the same as a killing accompanied by many wounds or torture and did not justify the death penalty."

(C. 1467.) Finally, the circuit court noted that this Court on direct appeal had rejected Burgess's claims alleging prosecutorial misconduct during the penalty phase of the trial. (C. 1465 (citing Burgess, 827 So. 2d at 162, 164).)

Burgess's short argument does not show that the circuit court erred in dismissing this claim, and he is due no relief. See Rule 32.7(d), Ala. R. Crim. P.

B. NOT CHALLENGING ALLEGED VICTIM-IMPACT EVIDENCE

Burgess argues that his trial counsel were ineffective for not "object[ing] to the prosecutor's constitutionally impermissible arguments, prejudicing him." (Burgess's brief, p. 69.) In support of this

claim, he asserts: "As detailed in the petition, the prosecutor argued victim impact that was either made up or unsupported by the testimony. (C. 967.)" (Burgess's brief, p. 69.) He contends that "[t]he circuit court prematurely ruled on the merits of this claim," and he disagrees with the circuit court's finding that the meaning of the prosecutor's statements was "ambiguous at best" and "did not characterize Burgess as having no right to ask that his life be spared." (Burgess's brief, p. 70.) Finally, he disagrees with the circuit court's conclusion that, in one of the statements Burgess challenged, the prosecutor "was merely reminding the jury of the impact" on Crow's family members. (Id.)

The circuit court addressed Burgess's claim and all subparts, finding that they were insufficiently pleaded and lacked merit. (C. 1468-70.) The circuit court also noted that this Court on direct appeal "quoted a lengthy portion of the prosecutor's penalty phase closing argument that Burgess challenges herein as improper" and stated that this Court "rejected Burgess's contention that the prosecutor was arguing facts not in evidence." (C. 1470.) See Burgess, 827 So. 2d at 187-89. The circuit court correctly held that the challenged statements, when placed in context, "were not improper." (C. 1469.) See, e.g., Phillips, 65 So. 3d at

1033 ("A prosecutor's statement must be viewed in the context of all of the evidence presented and in the context of the complete closing arguments to the jury." (citations and some quotation marks omitted); DeBruce, 651 So. 2d at 609 ("A prosecutor has a right based on fundamental fairness to reply in kind to the argument of defense counsel."). Burgess's trial counsel cannot have been ineffective for failing to raise a meritless claim. See, e.g., Brooks, 340 So. 3d at 442; Carruth, 165 So. 3d at 641; Yeomans, 195 So. 3d at 1034.

Burgess's short argument does not show that the circuit court erred in summarily dismissing this claim. He is due no relief. See Rule 32.7(d), Ala. R. Crim. P.

C. NOT OBJECTING TO JURY INSTRUCTIONS

Burgess argues that his trial counsel "unreasonably failed to object to" instructions during the penalty phase that, he says, "virtually mirror the instructions found to be plainly erroneous in Ex parte Bryant, 951 So. 2d 724, 730 (Ala. 2002)." (Burgess's brief, p. 70.) He asserts that the trial court did not "instruct the jury on what to do if the mitigating circumstances weighed equally with the aggravating circumstances." (Burgess's brief, pp. 70-71.)

The circuit court correctly rejected this claim as lacking merit. As the circuit court found, the instructions here "were the same as or substantially identical to" the instructions that the Alabama Supreme Court approved in Ex parte McNabb, 887 So. 2d 998, 1001 (Ala. 2004), and Ex parte Mills, 62 So. 3d 574, 599 (Ala. 2010). (C. 1472.) Burgess does not address those decisions or explain why the circuit court was wrong to rely on them.

Burgess also argues that his "[t]rial counsel unreasonably failed to request that the court instruct the jury to consider Mr. Burgess's age at the time of the offense as a mitigating circumstance, prejudicing him. (C. 971-73.)" (Burgess's brief, p. 71.) Burgess acknowledges that trial counsel argued for the jury to consider Burgess's age as a mitigating circumstance, but he argues that counsel should have requested an instruction telling the jury that it must consider Burgess's age as a mitigating circumstance. (Burgess's brief, p. 72.) Burgess argues that because counsel did not request such an instruction, "[t]he prosecutor exploited this unreasonable omission by encouraging the jury to discount age as a mitigating circumstance, arguing that Mr. Burgess was twenty years old at the time of trial and should be held responsible for his

actions." (Burgess's brief, p. 72.)

The circuit court correctly rejected this claim as lacking merit:

> "Regardless what the prosecutor may have argued about Burgess's age at the time of the trial, both his trial counsel's closing comments and the trial court's penalty phase final instructions clearly informed the jury that it was Burgess's age at the time of the crime, not at the time of the trial, that mattered in determining whether his age mitigated against the death penalty. His argument that the trial court's instruction failed to follow the law because it did not tell the jury that [it] must consider Burgess's age as a mitigating circumstance is misplaced. On Burgess's direct appeal the Alabama Court of Criminal Appeals considered his argument that the prosecutor disparaged age as a mitigating circumstance and misled the jury on the law regarding the mitigating circumstance of age. Rejecting this argument, the Court of Criminal Appeals found that '[t]he trial court correctly instructed the jury on mitigating circumstances, including the mitigating circumstance of age, and its responsibility to weigh those circumstances against the aggravating circumstances.' Burgess, 827 So. 2d at 162 [(emphasis added)]. While § 13A-5-51, Ala. Code 1975, included a list of mitigating circumstances for the trial court to explain to the jury, the statute did not require the trial court either to comment about whether any one or more existed in a particular case or to instruct the jury that [it] must find that a certain listed circumstance is mitigating based on the evidence presented. Counsel could not be ineffective for failing to request an instruction that was baseless. Bearden [v. State], 825 So. 2d [868,] 872 [(Ala. Crim. App. 2001)]."

(C. 1473-74.) Burgess has not shown that the circuit court erred, and he is due no relief. See Rule 32.7(d), Ala. R. Crim. P.

VIII. CLAIMS ALLEGING THAT COUNSEL WERE INEFFECTIVE DURING THE SENTENCING PHASE

A. ALLEGED FAILURE TO INVESTIGATE AND PRESENT MITIGATING EVIDENCE

Burgess alleges that his trial counsel "failed to investigate any of the reasonably available, compelling mitigating evidence ... between the time of the jury's penalty recommendation and the sentencing hearing, despite having almost two months to do so." (Burgess's brief, p. 73.) Burgess alleges that his counsel were ineffective for not presenting that mitigating evidence at the sentencing hearing before the trial judge. (Burgess's brief, pp. 73-74.)

The circuit court found that this claim lacked merit. First, the court noted that Burgess merely restated the allegations he had made about counsel's alleged failure to investigate and present mitigating evidence during the penalty phase. The circuit court found that those same allegations did not show that counsel were ineffective in preparing for and in litigating the sentencing phase. (C. 1474-75.) Second, the circuit court found that "no established Alabama caselaw specified in 1994 what evidence in mitigation, if any, a defendant could present during a ... sentencing hearing" conducted under former § 13A-5-47(c), Ala. Code

1975. (C. 1475.) The circuit court found that trial counsel could not be "'ineffective for failing to forecast changes in the law.'" (C. 1475 (quoting Jackson v. State, 133 So. 3d 420, 448 (Ala. Crim. App. 2009), quoting in turn Nicks v. State, 783 So. 2d 895, 923 (Ala. Crim. App. 1999)).) Burgess contends that the circuit court erred in both respects.

This Court has decided this issue adversely to Burgess. In State v. Mitchell, ___ So. 3d at ___, we held:

> "[U]nder Alabama's capital-sentencing scheme in effect at the time of Mitchell's trial and sentencing, this Court in Boyd v. State, 746 So. 2d 364, 398 (Ala. Crim. App. 1999), held: 'Section 13A-5-47, Ala. Code 1975, does not provide for the presentation of additional mitigation evidence at sentencing by the trial court. Therefore, trial counsel did not err in failing to do so.' (Emphasis added.) Although in Woodward v. State, 123 So. 3d 989, 1034 (Ala. Crim. App. 2011), this Court characterized that holding in Boyd as 'obiter dictum,' six months before the decision in Woodward (and five years after Mitchell's trial), this Court reaffirmed Boyd in Miller v. State, 99 So. 3d 349, 424 (Ala. Crim. App. 2011), quoting with approval the following from the trial court's order denying relief: '"[T]rial counsel could not be ineffective for failing to present additional mitigation evidence during the sentencing hearing because [former] 'Section 13A-5-47, Ala. Code 1975, does not provide for the presentation of additional mitigation evidence at sentencing by the trial court.' Boyd v. State, 746 So. 2d 364, 398 (Ala. Crim. App. 1999)."' Simply put, it would not have been unreasonable for Mitchell's counsel to rely on this Court's holding in Boyd, and the circuit court thus erred in concluding that trial counsel was ineffective for not presenting additional mitigating evidence at the separate sentencing hearing before the trial court. Cf. State v. Tarver,

> 629 So. 2d 14, 18-19 (Ala. Crim. App. 1993) ('Counsel's performance cannot be deemed ineffective for failing to forecast changes in the law.')."

(Footnote omitted.)

The circuit court did not err in finding that counsel could not be ineffective for not investigating and presenting evidence at the sentencing hearing. Summary dismissal of this claim was proper. See Rule 32.7(d), Ala. R. Crim. P.

B. DR. MAIER'S PRETRIAL MENTAL-HEALTH EVALUATION

Burgess contends that his trial counsel were ineffective for not objecting to the trial court's consideration of the pretrial mental-health evaluation that Dr. Lawrence Maier conducted. (Burgess's brief, p. 74.) Burgess argues that "Dr. Maier's opinions were based, in part, on information that was not disclosed to Mr. Burgess or his counsel." (Burgess's brief, pp. 74-75.) He contends that his trial counsel did no investigation of Burgess's social history before Dr. Maier's examination and did not "retain a qualified professional to conduct an evaluation" of Burgess after the trial court approved funds for counsel to do so. (Burgess's brief, p. 75.) He also asserts that counsel did not comply with an order from the trial court "that counsel provide specific information

about Mr. Burgess to assist Dr. Maier in his evaluation." (Burgess's brief, p. 75.) Finally, he contends that "Dr. Maier thus conducted a mental health evaluation without information about Mr. Burgess's social history that was necessary" and that "[c]ounsel also failed to investigate or obtain copies of the documents that the State provided to Dr. Maier." (Burgess's brief, p. 75.)

The circuit court addressed this claim in detail. (C. 1476-79.) The court explained that, under Rule 11.6(a), Ala. R. Crim. P., the trial judge had "to promptly review the report to determine if any reasonable grounds existed to doubt Burgess's mental [competency]." (C. 1476.) The circuit court found that Dr. Maier's report included "a brief, but accurate, summary of the alleged robbery and murder" and that Burgess gave information to Dr. Maier about his social history and background, including

> "information about his poor family upbringing, his father's neglect, his difficult relationships with family members, his children, his marital status, his relationships with three women, his having been stabbed with a razor, his alcohol and marijuana use, his removal from the job corps, his prior arrests and his history of no assessments, hospitalizations, counseling or treatment for mental health issues."

(C. 1478.) The circuit court found that Burgess had "plead[ed] no specific

facts ... that identify what documents or information" allegedly provided to Dr. Maier were not also provided to Burgess's trial counsel. (C. 1477.) Although Burgess disagrees with the circuit court's conclusion that he had not specifically pleaded this claim, he has not shown that the circuit court erred.[15] He is due no relief on this claim. See Rule 32.7(d), Ala. R. Crim. P.

C. PRESENTENCE REPORT

Burgess argues that "[r]easonably competent counsel would have objected to the trial court's consideration of the pre-sentence report and presented evidence of the report's gross inaccuracies and incompleteness." (Burgess's brief, p. 76.) In dismissing this claim, the circuit court found:

> "Burgess omits from this ineffective assistance claim two critical facts: first, Burgess was given an opportunity to complete a personal history interview form for the Probation Officer who was preparing the [presentence report] but refused to do so. ... Burgess also refused to provide the Probation Officer with the names of persons who could be contacted about his character and reputation."

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[15]We also note that the trial court found that Dr. Maier's opinion that Burgess suffered from an antisocial personality disorder was mitigating. (Trial C. 48.) Cf. Schoenwetter v. State, 46 So. 3d 535, 560 (Fla. 2010) ("Because the trial court in fact considered and weighed both of these factors as mitigation, ... the experts' testimony seems to have helped rather than harmed the defense.").

(C. 1479.) The circuit court also found that Burgess did not "plead any specific findings or conclusions of the trial court that were based solely on the [presentence report]." (C. 1480.) The circuit court concluded that "[n]o portion of the trial court's sentencing order reflects a finding or conclusion that resulted from its reliance on an error in or omission from the [presentence report]"; instead, the sentencing order showed that it depended solely on the evidence from Burgess's trial. (C. 1480.) The circuit court cited Calhoun v. State, 932 So. 2d 923, 977 (Ala. Crim. App. 2005), in which this Court held that any inaccuracies in the presentence report were harmless because (1) the defendant had cited nothing in the sentencing order showing that the trial court had relied on the alleged inaccuracies in the report and (2) the sentencing order showed that the trial court had relied on the evidence at trial.

Burgess's entire argument in this section of his brief is:

> "Trial counsel received the pre-sentence report in advance of the hearing and informed the court that they had insufficient time to review it, but they offered no objections, exceptions, or additions. (C. 981.) To obtain background information, the probation officer relied on files that were not disclosed to Mr. Burgess's counsel, and counsel made no effort to obtain those records. (C. 981.) The report contained numerous, highly prejudicial factual errors, including the omission of his history of physical and emotional

> abandonment, physical abuse, homelessness, and the other traumatic events that Mr. Burgess experienced. (C. 981-82.) In erroneously dismissing Mr. Burgess's claim, the court simply credited the State's factual allegations without holding a hearing to assess the disputed factual allegations. (See C. 1220; C. 1479-81.) Mr. Burgess disputed this allegation in his petition and intends to further dispute these facts at an evidentiary hearing. (C. 1220.)"

(Burgess's brief, pp. 76-77.) This does not satisfy Rule 28(a)(10), Ala. R. App. P., which requires that an argument include "the contentions of the appellant/petitioner with respect to the issues presented, and the reasons therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on." "'"[I]t is not the function of this Court ... to make and address legal arguments for a party based on undelineated general propositions not supported by sufficient authority or argument."'" Ex parte Borden, 60 So. 3d 940, 943 (Ala. 2007) (quoting Butler v. Town of Argo, 871 So. 2d 1, 20 (Ala. 2003), quoting in turn Dykes v. Lane Trucking, Inc., 652 So. 2d 248, 251 (Ala. 1994)).

Burgess is due no relief on this claim. See Rule 32.7(d), Ala. R. Crim. P.

D. EVIDENCE OF REMORSE

Burgess contends that his trial counsel were ineffective because, "[a]lthough trial counsel argued at the penalty phase that Mr. Burgess

was remorseful, they failed to present evidence of his remorse at the penalty phase or at the sentencing hearing, prejudicing him." (Burgess's brief, p. 77.) The circuit court held that, "except for Burgess's videotaped statement which the trial court had viewed and listened to numerous times," Burgess did not identify any "specific 'evidence of remorse' that was available and known to his trial counsel during the sentencing proceedings." (C. 1481.) The circuit court further found that "Burgess himself had two opportunities to convey the sincerity of his remorsefulness" to the trial court but "[h]e declined on both occasions." (C. 1481.)

Burgess is due no relief on this claim. See Rule 32.7(d), Ala. R. Crim. P.

IX. ALLEGATION THAT ATTORNEY BIGGS HAD A CONFLICT OF INTEREST

Burgess's entire argument in this section is that

> "[t]rial counsel Gregory Biggs had an actual conflict of interest during the entire time he represented Mr. Burgess; he was concurrently serving as a special prosecutor in another criminal case in the Morgan County Circuit Court. (C. 983-85.) Mr. Burgess alleged that this conflict of interest, which was not disclosed to him, adversely affected Mr. Biggs's representation. ...
>
> "Mr. Burgess sufficiently alleged that Mr. Biggs's

> concurrent service as defense counsel and special prosecutor in the same court placed him in a 'situation "inherently conducive to divided loyalties."' Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir. 1979) (citing Castillo v. Estelle, 504 F.2d 1243, 1245 (5th Cir. 1974)). Mr. Biggs was appointed special prosecutor by the same District Attorney who personally prosecuted Mr. Burgess. (C. 984.) Two Decatur police officers were involved in both cases—one as lead investigator—and Mr. Biggs relied on both officers' testimony to obtain a grand jury indictment against the other defendant. (C. 984); see Browning v. State, 607 So. 2d 339, 342 (Ala. Crim. App. 1992).
>
> "Mr. Burgess further demonstrated how Mr. Biggs's actual conflict of interest adversely affected his representation. See Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). For example, despite owing Mr. Burgess a duty 'to refute the prosecutor's arguments,' Zuck, 588 F.2d at 439, Mr. Biggs failed to challenge numerous instances of prosecutorial misconduct. (C. 984-85.) Despite owing Mr. Burgess a duty to impeach the prosecution's witnesses, Zuck, 588 F.2d at 439, Mr. Biggs failed to challenge actions taken by Decatur police officers, including their unconstitutional interrogation of Mr. Burgess. (C. 984-85.)"

(Burgess's brief, pp. 78-79.)

The circuit court addressed this claim in detail. (C. 1482-85.) The circuit court, relying on trial-court records and the allegations from Burgess's petition, stated the background for the claim and found that Burgess had not pleaded facts showing an actual conflict of interest. (Id.) The circuit court found:

> "In July 1991, parents who claimed that their minor daughter had been raped by Timothy Lynn Cox, retained

Decatur attorney Greg Biggs to prosecute Cox. Morgan County District Attorney Bob Burrell agreed to appoint Biggs as special prosecutor so long as the parents and Biggs understood that Burrell would recuse himself and his office from the Cox prosecution and retain no authority or responsibility in the case. The parents, Biggs, and Burrell signed a Notice of Appointment of Special Prosecutor that was filed with the Morgan County Circuit Clerk on July 26, 1991 and approved by the Circuit Court on July 29, 1991. (Clerk's Record, State v. Timothy Lynn Cox, Case No. CC-91-670, pages 35-36).

"Biggs presented the rape charge against Cox to the Morgan County Grand Jury which returned an indictment for rape in the first degree on August 5, 1991. (Clerk's Record, State v. Cox, at 2-4). Cox appeared for arraignment on November 21, 1991. (Clerk’s Record, State v. Cox, at 4). He filed a youthful offender application and appeared for the hearing on his petition on February 14, 1992. (Clerk's Record, State v. Cox, at 5), Except for two requests for trial continuances filed by Biggs, the Clerk's Record reflects no activity in the Cox case until May 26, 1995 when Biggs filed a motion to have Cox transferred from the Federal Corrections facility in Ashland, Kentucky, where he was serving a 30-month sentence. (Clerk's Record, State v, Cox, at 24-29). The transfer occurred, and Cox appeared before the undersigned on June 26, 1995, at which time he entered a guilty plea to second-degree assault and received a 20-month sentence to run concurrent with his federal sentences. (Clerk's Record, State v. Cox, at 14-15).

"The trial court appointed Wesley Lavender and Biggs to represent Burgess on July 28, 1993, approximately two years after Biggs's appointment as special prosecutor in the Cox case. Lavender and Biggs represented Burgess through his June 1994 capital murder trial and the judicial sentencing on August 24, 1994.

"Burgess now claims that Biggs had an actual conflict of interest by simultaneously serving as special prosecutor in the ... Cox case and defending Burgess on the capital murder charge. More specifically, Burgess alleges that an actual conflict of interest existed because Biggs was appointed as special prosecutor by District Attorney Bob Burrell who personally prosecuted Burgess's case. An actual conflict of interest occurs when a defense attorney places himself in a situation 'inherently conducive to divided loyalties.' Castillo v. Estelle, 504 F.2d 1243, 1245 (5th Cir. 1974). When a defense attorney owes duties to a party whose interests are adverse to those of the client he is defending, an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owed a duty to the defendant to take some action that could be detrimental to his other client. Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir. 1979). There must be an actual conflict of interest, not a potential conflict of interest, in order to render counsel's assistance ineffective. Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).

"Contrary to Burgess's suggestion, Biggs was engaged in his own private law practice and was not a staff attorney in Burrell's office when the young girl's parents retained him and he received the appointment to prosecute Timothy Lynn Cox. Likewise, during the entire time he served as special prosecutor, Biggs was not an employee of District Attorney Burrell. Burgess disregards the clear recorded fact that Burrell, as a condition to his appointment of Biggs, recused himself and his office from the Cox case and retained no authority over or responsibility for the case. Burgess pleads no specific facts showing that Burrell thereafter had any communication whatsoever with Biggs about the Cox case; that Burrell or any member of his staff thereafter participated, assisted, provided support or funding in Biggs's prosecution of Cox; that there was a nexus or substantial relationship between the Cox case and Burgess's case; that Biggs learned particular confidential information while

> prosecuting Cox that was relevant to Burgess's case; or that Biggs owed some duty to Burrell by reason of prosecuting the Cox case that was adverse to the interests of Burgess."

(C. 1482-84.) The circuit court distinguished the cases Burgess relied on: Pinkerton v. State, 395 So. 2d 1080 (Ala. Crim. App. 1980), and Zuck v. Alabama, 588 F.2d 436 (5th Cir. 1979). Pinkerton involved an attorney who represented a defendant with knowledge that a former client would be a witness for the prosecution—the former client had agreed to act as an informant in exchange for sentencing consideration, and his activities as an informant had led to the defendant's arrest. 395 So. 2d at 1082. In Zuck, the defendant's attorney was part of a law firm that simultaneously represented the prosecutor who was prosecuting the defendant's case. 588 F.2d at 438-39.

The circuit court continued its analysis:

> "Burgess further argues that Biggs had an actual conflict of interest because Decatur police officers, Gary Walker and Richard Crowell, testified before the grand jury in the Cox case and were on the prosecution's list of witnesses in Burgess's case. In actuality, Biggs called Walker as a defense witness in the hearing on Burgess's motions to suppress, and Walker then testified as a prosecution witness and was cross-examined by defense co-counsel Lavender. Crowell did not testify in Burgess's trial. In support of this actual conflict claim, Burgess fails to allege specific facts establishing that the Cox case was in any way related to Burgess's case; that Biggs learned particular confidential

> information from Walker or Crowell while prosecuting Cox that was relevant to Burgess's case and could have been used to cross-examine Walker; that Biggs owed a duty of loyalty to Walker and Crowell simply based on their involvement as potential prosecution witnesses in the Cox case; or that Biggs's appointment to represent Burgess two years after becoming the special prosecutor in the Cox case created a situation inherently conducive to divided loyalties.
>
> "Mere proof that a criminal defendant's attorney is prosecuting a case that involves witnesses who may become witnesses in the trial of the defendant's case is insufficient in and of itself to establish conflicting interests. Alleged facts that 'present only a possible, speculative, or merely hypothetical conflict' of interest do not establish a Sixth Amendment violation. See Williams v. State, 574 So. 2d 876, 878 (Ala. Crim. App. 1990) (No Sixth Amendment violation where the defendant's attorney, who had represented the family of a prosecution witness, did not actively represent conflicting interests in the defendant's capital case)."

(C. 1484-85.)

The circuit court correctly addressed and rejected each argument that Burgess made in support of his claim. Burgess has not shown that the circuit court erred, and he is due no relief. See Rule 32.7(d), Ala. R. Crim. P.

X. COMPENSATION OF APPOINTED ATTORNEYS

The circuit court did not err in summarily dismissing Burgess's claim alleging that his counsel were ineffective due to Alabama's statute for compensating attorneys appointed to represent capital defendants.

(C. 1486.) Alabama courts have consistently rejected these claims. See, e.g., Ex parte Grayson, 479 So. 2d 76 (Ala. 1985); Ingram v. State, 779 So. 2d 1225, 1279 (Ala. Crim. App. 1999); Stallworth v. State, 868 So. 2d 1128 (Ala. Crim. App. 2003). Burgess is due no relief on this claim. See Rule 32.7(d), Ala. R. Crim. P.

XI. INTERNATIONAL LAW

Like the claim addressed in Part X, this Court has rejected the basis for Burgess's claim alleging that his "[t]rial counsel unreasonably failed to object to Mr. Burgess's conviction and sentence on the grounds that they violated international law." (Burgess's brief, p. 80.) In this part of his petition, Burgess cites the International Covenant on Civil and Political Rights ("the ICCPR") as well as other provisions of international law that are not binding on Alabama. See, e.g., Sharifi v. State, 993 So. 2d 907, 920-21 (Ala. Crim. App. 2008) (rejecting claim based on the ICCPR). Thus, the circuit court did not err in summarily dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

XII. CLAIMS ALLEGING INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Burgess argues that the circuit court erred in dismissing his claims that his appellate counsel were ineffective. We address each claim in

turn.

A. ALLEGED FAILURE TO VIEW THE VIDEOS OF BURGESS'S STATEMENTS TO THE MEDIA

Burgess alleged that his appellate counsel did not watch State's Exhibits 100 or 101, which included Burgess's unredacted and redacted statements to the media. (C. 997.) He alleged that counsel should have argued that the redacted video was improperly edited and so prejudicial that it should have been excluded. (C. 998.)

Addressing this claim, the circuit court noted first that the trial court appointed local counsel to represent Burgess on appeal and that those attorneys "received assistance from attorneys affiliated with the Alabama Capital Representation Resource Center, which later became the Equal Justice Initiative of Alabama." (C. 1491.) On direct appeal,

> "Burgess's counsel raised approximately 25 major issues that included many subparts. Among the issues they presented, Burgess's appellate counsel claimed that the trial court erred in failing to suppress the videotaped statement that he made to news reporters while being escorted from the Decatur City Hall to the Morgan County Jail and in denying his motion to change venue. After reviewing the videotape and the record concerning Burgess's statement to the news reporters, the Court of Criminal Appeals concluded that the trial court properly admitted the statement into evidence. Burgess, 827 So. 2d at 177."

(C. 1491.)

As for Burgess's claim alleging that his counsel did not watch the videos, the circuit court found it insufficiently pleaded because, among other reasons, Burgess did "not plead specific facts showing how he knows or identifying a person who has firsthand knowledge that his appellate counsel failed to view State's Exhibits 100 and 101 in preparing his appeal." (C. 1492.) The circuit court noted that this Court's opinion on direct appeal "reflects that [this Court] actually reviewed the videotape and considered in substance every fact argued by Burgess in paragraph 557 of his second amended petition." (C. 1492.) In his petition, however, Burgess did not "plead facts that show what additional material information his appellate counsel could have explained to the Court of Criminal Appeals had they seen the content of the videotapes" that would have made a difference to the outcome of his appeal. (C. 1492.)

Burgess has not shown that the circuit court erred in summarily dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

B. OTHER CLAIMS ALLEGING INEFFECTIVENESS IN THE TRIAL COURT AND ON DIRECT APPEAL

Burgess contends that the circuit court erred in dismissing his claim alleging that appellate counsel were ineffective for not investigating and presenting evidence in the trial court and arguing on

appeal that "testimony during jury selection incorrectly represented the percentage of African Americans nineteen years or older in Morgan County." (Burgess's brief, pp. 82-83.) Burgess asserts that "counsel failed to ensure that records were preserved for review" and

> "failed to raise the following meritorious grounds for relief at all stages of appeal: Mr. Burgess's sentence was disproportionate and Alabama law requires the courts on appeal to conduct a proportionality review, see Ala. Code § 13A-5-53(b)(3) (1975); the trial court erred in denying Mr. Burgess's motion for change of venue, (C. 1000-01); and there was racial discrimination in the selection of the grand jury foreperson. (C. 1001.)"

(Burgess's brief, p. 83.)

The circuit court addressed Burgess's claims in detail. (C. 1493-96.) The circuit court, citing this Court's holding on direct appeal about Burgess's fair-cross-section claim, found that "even if the alleged missing record would have shown a higher percentage disparity ... Burgess still would not be entitled to relief" because he had not shown that the alleged underrepresentation was "the result of systematic exclusions of the group in the jury selection process." (C. 1493-94 (citing, among other authorities, Burgess, 827 So. 2d at 185).)

The circuit court cited this Court's proportionality review on direct appeal and thus rejected as insufficiently pleaded Burgess's contention

that his appellate counsel were ineffective for not seeking a proportionality review of Burgess's sentence. (C. 1494.) The circuit court also noted that appellate counsel had, in fact, challenged the denial of the motion seeking a change of venue. (C. 1495.)

Finally, as to the issue of alleged discrimination in the selection of the grand-jury foreperson, the circuit court found that Burgess had not sufficiently pleaded facts "showing that the foreperson of his grand jury was selected pursuant to a procedure ... supporting a presumption of discrimination." (C. 1495-96.) The circuit court also cited Ex parte Drinkard for its statement that Morgan County had changed its method of selecting grand-jury forepersons in 1993: "'Before 1993, the trial court appointed grand-jury forepersons, based on the recommendation of the prosecutor. Since that time, grand-jury forepersons have been selected by members of the grand jury itself.' That method 'forecloses a question of discrimination in the judicial process.'" (C. 1496 (quoting Drinkard, 777 So. 3d at 304).) Thus, the circuit court found, the underlying issue had no merit, and appellate counsel could not have been ineffective for not raising it. (C. 1496.)

Burgess's brief on these issues does not comply with Rule 28(a)(10),

Ala. R. App. P. See Ex parte Borden, 60 So. 3d at 943; Morris, 261 So. 3d at 1194; State v. Mitchell, ___ So. 3d at ___.

Burgess also contends that, "to the extent that his Strickland [v. Washington, 466 U.S. 668 (1984),] or juror misconduct claims were barred for failure to raise them earlier, appellate counsel were deficient for failing to do so." (Burgess's brief, p. 84.) The circuit court did not hold that these claims were barred from postconviction review—thus, there is no merit to Burgess's argument on this issue.

Burgess has not shown that the circuit court erred in summarily dismissing these claims. See Rule 32.7(d), Ala. R. Crim. P.

C. ALLEGED FAILURE TO "MARSHAL EVIDENCE IN SUPPORT OF THE J.E.B. CLAIM"

In this section of his brief, Burgess makes a conclusory, two-sentence argument that the circuit court erred in summarily dismissing his claim that his appellate counsel "unreasonably failed to argue specific record facts supportive of the claim." (Burgess's brief, p. 84.) This part of Burgess's brief does not comply with Rule 28(a)(10), Ala. R. App. P. See Ex parte Borden, 60 So. 3d at 943; Morris, 261 So. 3d at 1194; State v. Mitchell, ___ So. 3d at ___.

Burgess has not shown that the circuit court erred in summarily

dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

D. FAILURE TO ARGUE ON REHEARING THE CHANGE-OF-VENUE MOTION

Burgess alleged that his appellate counsel were ineffective for not arguing on rehearing that this Court had erred in affirming the circuit court's order denying the motion for a change of venue. As the circuit court found, the arguments that Burgess asserts that his appellate counsel should have made were a "rehash of the same arguments" that Burgess made in other parts of his petition. (C. 1500.) Those arguments are also unavailing here.

The circuit court did not err in summarily dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

XIII. JUROR-MISCONDUCT CLAIM

In Part XI of his petition, Burgess alleged that "jurors were exposed to and considered extrinsic evidence in violation of their duty to reach guilt and penalty verdicts based solely on the evidence presented at trial." (C. 1007.) The circuit court summarized the allegations Burgess made in support of this claim:

> "[A]fter the instructions were given by the trial court, an unidentified juror stated that one or more jurors had no knowledge of firearms and there was some confusion about

> how a gun had to be prepared for firing. He then asked, 'Is there a chance we might could get a gun expert to come in here and tell us these—educate someone of firearms.' The trial judge denied the request. (Trial Transcript at 1635.)
>
> "Burgess further alleges that after the jury returned to deliberate, 'a discussion took place in which individual jurors provided extrinsic knowledge and opinions about the operation of the .25 Titan semi-automatic and pistols in general'; that 'Juror 12 conducted a demonstration with the .25 Titan semi-automatic. State's Exhibit 72, for the eleven other jurors,' showing them 'how, based upon his personal knowledge, the pistol operated, including how the safety, slide, and trigger functioned, and how, in his view, the pistol could not have discharged unintentionally'; and that other jurors then 'contributed their knowledge and opinions about the operation of firearms.' After their discussions, the jurors voted to convict Burgess of capital murder. (Second Amended Petition at paragraph 690)."

(C. 1501-02.) The circuit court held that this claim did not give Burgess a right to relief because "[t]he alleged prejudicial extrinsic evidence that Burgess relies on to support his claim constitutes protected discussions and debates of the jurors during their deliberations and is not extraneous information under the exception to Rule 606(b), Ala. R. Evid." (C. 1505.) In reaching that conclusion, the circuit court relied on several decisions examining what is "extraneous" evidence, including Sharrief v. Gerlach, 798 So. 2d 646 (Ala. 2001), Bethea v. Springhill Memorial Hospital, 833 So. 2d 1 (Ala. 2002), and Marshall v. State, 182 So. 3d 573 (Ala. Crim.

App. 2014).

"[A] defendant seeking a new trial on the basis of juror misconduct has the initial burden to prove that a juror or jurors did in fact commit the alleged misconduct." Dawson v. State, 710 So. 2d 472, 475 (Ala. 1997). "The question whether the jury's decision might have been affected is answered not by a bare showing of juror misconduct, but rather by an examination of the circumstances particular to the case." Ex parte Apicella, 809 So. 2d 865, 871 (Ala. 2001).

Under Rule 606(b), Ala. R. Evid., a juror

> "may not testify in impeachment of the verdict or indictment as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."

(Emphasis added.) At issue is whether Burgess pleaded facts showing that "the jury was subjected to 'extraneous prejudicial information' that 'was improperly brought to the jurors' attention.'" (C. 1502.)

The circuit court relied on Warger v. Shauers, 574 U.S. 40 (2014), in which the United States Supreme Court explained the meaning of

"extraneous" information under Rule 606(b)(2)(A), Fed. R. Evid.:

> "Generally speaking, information is deemed 'extraneous' if it derives from a source 'external' to the jury. See Tanner [v. United States], 483 U.S. [107,] 117, 107 S. Ct. 2739 [(1987)]. 'External' matters include publicity and information related specifically to the case the jurors are meant to decide, while 'internal' matters include the general body of experiences that jurors are understood to bring with them to the jury room. See id., at 117-119, 107 S. Ct. 2739; 27 C. Wright & V. Gold, Federal Practice and Procedure: Evidence § 6075, pp. 520-521 (2d ed. 2007). Here, the excluded affidavit falls on the 'internal' side of the line: Whipple's daughter's accident may well have informed her general views about negligence liability for car crashes, but it did not provide either her or the rest of the jury with any specific knowledge regarding Shauers' collision with Warger."[16]

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[16]Rule 606(b), Fed. R. Evid., provides:

> "(b) During an Inquiry Into the Validity of a Verdict or Indictment.
>
> > "(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.
> >
> > "(2) Exceptions. A juror may testify about whether:
> >
> > > "(A) extraneous prejudicial information was improperly brought to the jury's attention;

Warger, 574 U.S. at 51-52 (2014) (emphasis added). The circuit court then cited Sharrief, supra, a medical-malpractice case in which the Alabama Supreme Court provided this guidance about "extraneous facts":

> "The plaintiffs misconceive the distinction, under Alabama law, between 'extraneous facts,' the consideration of which by a jury or jurors may be sufficient to impeach a verdict, and the 'debates and discussions of the jury,' which are protected from inquiry. This Court's cases provide examples of extraneous facts. This Court has determined that it is impermissible for jurors to define terms, particularly legal terms, by using a dictionary or encyclopedia. See Fulton v. Callahan, 621 So. 2d 1235 (Ala. 1993); Pearson v. Fomby, 688 So. 2d 239 (Ala. 1997). Another example of juror misconduct leading to the introduction of extraneous facts sufficient to impeach a jury verdict is an unauthorized visit by jurors to the scene of an automobile accident, Whitten v. Allstate Ins. Co., 447 So. 2d 655 (Ala. 1984), or to the scene of a crime, Dawson v. State, 710 So. 2d 472 (Ala. 1997).
>
> "The problem characteristic in each of these cases is the extraneous nature of the fact introduced to or considered by the jury. The improper matter someone argues the jury considered must have been obtained by the jury or introduced to it by some process outside the scope of the trial. Otherwise, matters that the jurors bring up in their deliberations are

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> "(B) an outside influence was improperly brought to bear on any juror; or
>
> "(C) a mistake was made in entering the verdict on the verdict form."

This rule "is substantially similar to" Rule 606(b), Ala. R. Evid. Sharrief v. Gerlach, 798 So. 2d 646, 652 (Ala. 2001).

> simply not improper under Alabama law, because the law protects debates and discussions of jurors and statements they make while deliberating their decision. CSX Transp. v. Dansby, 659 So. 2d 35 (Ala. 1995). This Court has also noted that the debates and discussions of the jury, without regard to their propriety or lack thereof, are not extraneous facts that would provide an exception to the general rule of exclusion of juror affidavits to impeach the verdict. Weekley v. Horn, 263 Ala. 364, 82 So. 2d 341 (1955).
>
> "Nothing contained in the affidavits indicates the jury considered any extraneous facts. All the statements in the affidavits relate to evidence that was presented at trial or to information that was otherwise brought to the attention of the jury during the trial. The affidavits provide no evidence that the jury consulted any outside sources of information regarding the definition of 'standard of care,' or regarding any other matter. Nothing in either of the affidavits indicates that the jury, or any particular juror, was influenced by any outside source."

798 So. 2d at 652-53 (emphasis added).

Next, the circuit court discussed Bethea, supra, in which the plaintiff alleged that the drug used to induce her labor, Pitocin, had injured her child. In her motion for a new trial, the plaintiff alleged that, during the jury's deliberations, "'some of the other women jurors discussed their own personal knowledge about Pitocin from their own pregnancy and that of their daughter or relatives stating that they did not believe Pitocin could cause the child's problems because it had not happened in their own situations.'" 833 So. 2d at 4 (quoting a juror's

affidavit). The Alabama Supreme Court rejected the argument that the information was "extraneous":

> "[F]or information to come within the extraneous-information exception to Rule 606(b), the information must come to the jurors from some external authority or through some process outside the scope of the trial, either (1) during the trial or the jury's deliberations or (2) before the trial but for the purpose of influencing the particular trial. In this case, we hold that the alleged prejudicial information—personal experiences with the use of Pitocin in induced labor—is not extraneous information under the exception to Rule 606(b). The information did not come to the jury from some external authority or through some process outside the scope of the trial, as defined above; rather, it arose solely from within the 'debates and discussions' of the jurors during the process of deliberating."

833 So. 2d at 8-9.

Finally, the circuit court discussed Marshall, supra, in which Marshall, who was charged with sexually abusing and killing his stepdaughter, alleged that during the guilt-phase deliberation a juror had "introduced 'extraneous information.'" 182 So. 3d at 614. After quoting extensively from Bethea, this Court rejected Marshall's claim:

> "Marshall contends that, during guilt-phase deliberation, juror M.J., in response to a question from another juror, stated that Alicia's 'vaginal tear could not have been caused by female masturbation' (Marshall's brief, p. 121), which, he says, is 'extraneous information.' Marshall, however, proffered no evidence indicating that juror M.J.'s statement—whether correct or incorrect—was obtained 'through some

process outside the scope of the trial.' See Springhill, 833 So. 2d at 8. Thus, juror M.J.'s statement 'arose solely from within the "debates and discussions" of the jurors during the process of deliberating' and was, therefore, 'not extraneous information under the exception to Rule 606(b).' Springhill, 833 So. 2d at 8-9. Juror M.J.'s statement was a '"matter[] that the jurors br[ought] up in their deliberations [and is] simply not improper under Alabama law, because the law protects debates and discussions of jurors and statements they make while deliberating their decision."' Springhill, 833 So. 2d at 8. Accordingly, the circuit court did not err when it excluded juror M.J.'s testimony under Rule 606(b)."

182 So. 3d at 618.

The circuit court then rejected Burgess's claim:

"In support of his ... claim that his jurors considered and relied on improper extraneous or extrinsic evidence in reaching their guilt and penalty phase verdicts, Burgess pleads no specific facts showing that the jurors' statements, explanations, and opinions about [the gun] during their deliberations were based on information that came from some external authority or through some process outside the scope of his trial. The statements, explanations, and opinions that Burgess attributes to the jurors clearly related to the operation of [the gun] and to Burgess's own statements that the .25 Titan semi-automatic fired accidentally and unintentionally when the victim struck him. Burgess alleges no facts showing that the jury consulted outside sources of information regarding the handgun's operation. Other than bare conclusions, Burgess pleads no facts showing that the jurors were influenced by any outside source or external authority."

(C. 1505.)

On appeal, Burgess contends that the jurors conducted an

"experiment" that "created extraneous evidence." (Burgess's brief, p. 89.) He argues that the decisions the circuit court relied on—Bethea, Marshall, and Sharrief—"each involved jurors expressing opinions about a key issue based on their personal experiences." (Burgess's brief, p. 90.) Burgess asserts:

> "Here, however, the misconduct consisted of an evidentiary process outside the scope of trial. Juror 12 did not simply relate his personal experience with firearms or observe for instance that no pistol he had used had discharged unintentionally. Rather, he experimented with and manipulated [the gun] outside the scope of trial to demonstrate that it could have discharged unintentionally."

(Burgess's brief, p. 90.) Burgess argues that the facts of his case are like the facts in Thomas v. State, 666 So. 2d 855, 858 (Ala. 1995), and Nix v. Andalusia, 21 Ala. App. 439, 109 So. 182 (1926). We disagree.

In Nix, which involved a Prohibition Era prosecution for possession of whiskey, the Alabama Court of Appeals found misconduct because a juror had tasted the whiskey, in violation of the judge's instructions and the law. 21 Ala. App. at 440, 109 So. at 182. In Thomas, the jurors during their deliberations

> "asked the judge for a pair of handcuffs so that they might determine to what extent handcuffs affect one's mobility. The judge denied the request and informed the jury that such experimentation was improper. After the judge denied that

request, a member of the jury put on the pants the defendant had been wearing at the time of his arrest (those pants having been put into evidence), had another juror bind his hands behind him with a cord, and attempted to reach into the pockets. ... Thomas maintains that the extraneous evidence 'affected the verdict' or at the very least was 'crucial in resolving a key material issue.' He says that this is obvious because, he says, the jurors would not have conducted their experiment if they had been convinced from the evidence properly before them that it was possible for him to have removed the cocaine from his pocket, an act necessary for the prosecution to prove in order to convict. One juror executed an affidavit saying that she had based her decision in part on the experiment. The Court of Criminal Appeals ... held that there was no reversible error because the jurors' experiment did not disclose any new fact prejudicial to the defendant. Here, however, new evidence was introduced by the juror's experiment. Before the experiment, the jury had heard no evidence of the defendant's reach while handcuffed and it had heard no evidence as to how loosely or tightly the handcuffs held his hands. <u>In addition, the rope used to bind the juror's hands during the experiment had not been introduced in evidence</u>. Because the improper experiment introduced new evidence crucial in resolving a key material issue (whether the defendant was physically capable of removing the cocaine from his pocket), the juror misconduct constituted reversible error.

"Further, the defendant claims that he did not learn the extent of the experiment until after the jury had returned its verdict, and, therefore, that he raised it at the first available time when he raised it in his motion for a new trial. We agree with this proposition. <u>Indeed, the defendant could scarcely have anticipated that the jurors would defy the judge's express orders to refrain from such experiments.</u> These <u>favorable</u> instructions from the trial judge, coupled with the unforeseeability of the jury's conduct, obviated any responsibility the defendant might otherwise have had to

interpose a contemporary objection."

666 So. 2d at 857-58 (some emphasis added).

Thomas and Nix are distinguishable. In both cases, the jurors defied the orders of the trial judge. Further, in Thomas the jurors during deliberations used an item—a rope—that was not in evidence. The alleged juror misconduct in Burgess's case is analogous to the challenged acts in Marshall and Bethea. The "conduct did not come to the jury from some external authority or through some process outside the scope of the trial ...; rather, it arose solely from within the 'debates and discussions' of the jurors during the process of deliberating." Bethea, 833 So. 2d at 8-9.

The circuit court did not err in finding that the evidence of alleged juror misconduct was inadmissible, and it did not err in summarily dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

XIV. BRADY CLAIMS

Burgess argues the circuit court erred in summarily dismissing his claims alleging that the State violated Brady v. Maryland, 373 U.S. 83 (1963). Burgess alleged that the State withheld a videotape and photographs of the crime scene taken by Decatur police officers, "which

would have revealed the condition of the scene prior to the time it was washed down"; "reports and statements pertaining to the photographic lineup that would have revealed that officers used improper methods to induce a witness to make a positive identification of Mr. Burgess"; and "affidavits collected by Decatur police officers" about his motion for a change of venue, "which would have demonstrated that the affidavits were biased, inaccurate, unreliable, and obtained using improper police tactics." (Burgess's brief, pp. 93-94.)

The circuit court rejected the claim about the videotape and photographs:

> "[T]he trial record discloses that within 30 to 45 minutes after the crime was reported, Decatur Police Department investigator John Boyd arrived at the crime scene and began making photographs of the crime scene. The shop had been secured, and the victim's body was still located in the building where she had been found by the first officers to arrive. Burgess's trial counsel stipulated at trial that 44 of the photographs accurately depicted the crime scene and the victim. Burgess does not plead specific facts identifying what photographs and video were withheld or belatedly disclosed, what the photographs and video depicted that was exculpatory, who took the photographs and video in question, when the allegedly withheld or belatedly disclosed photographs and video were made and, as to the photographs that were belatedly disclosed, when the disclosure actually occurred."

(C. 1506.)

In rejecting Burgess's claim about the photographic lineup the Decatur police showed to Patricia Wallace, who identified Burgess as the man she had seen at the crime scene, the circuit court cited this Court's holding on direct appeal that even if Wallace's identification of Burgess was affected by the lineup, it made no difference because Burgess's identification as the person who committed the robbery and murder was never at issue. (C. 1507 (citing Burgess, 827 So. 2d at 170-71).) The circuit court found that Burgess had pleaded

> "no specific facts that show what reports, statements or other information were withheld or belatedly disclosed by the State, what the alleged reports, statements or other information would have said or shown that was exculpatory and why the alleged statements, reports or other information, even if indicative of unduly suggestive police tactics, would probably have changed the outcome of his guilt phase trial. Burgess's allegations consist largely of bare conclusions based on speculation rather than specific facts, fail to sufficiently plead a cognizable claim that would entitle him to relief and do not create a material issue of fact or law that would entitle him to relief."

(C. 1507.)

Finally, as to the affidavits, the circuit court found:

> "[T]he prosecution during the hearing on his motion to change venue attempted to introduce affidavits that two Decatur police investigators collected from Morgan County citizens or business owners. Each of the affidavits consisted of a pre-

> printed form and purported to give the affiants' opinions that Burgess could get a fair trial in Morgan County. After a stinging cross-examination by Burgess's counsel revealed the tactics used by the investigators to collect the affidavits and their unreliability, the trial court refused to admit them into evidence. (Change of venue transcript at 201-202). Even if the prosecution did not produce the affidavits before the hearing on the change of venue issue, Burgess fails to establish that he was prejudiced. Because the trial court heard the evidence of how the affidavits were produced and collected and refused to admit them as evidence, they were immaterial and played no part in the trial court's ruling on Burgess's motion to change venue."

(C. 1507-08.)

Other than summarizing the allegations and asserting that the circuit court erred, Burgess offers no argument or authority in support of this claim. Thus, his brief does not comply with Rule 28(a)(10), Ala. R. App. P. See Ex parte Borden, 60 So. 3d at 943; Morris, 261 So. 3d at 1194; State v. Mitchell, ___ So. 3d at ___. Even so, the circuit court did not err in summarily dismissing these claims. Burgess is due no relief. See Rule 32.7(d), Ala. R. Crim. P.

XV. ALLEGATION THAT THE STATE PRESENTED FALSE AND MISLEADING TESTIMONY

Burgess contends that the circuit court erred in summarily dismissing his claim alleging "that the prosecutor knowingly introduced false and misleading testimony in violation of Napue v. Illinois, 360 U.S.

264 (1959)." (Burgess's brief, p. 95.)

The circuit court first noted that Burgess had not alleged that his claim was based on newly discovered material facts under Rule 32.1(e), Ala. R. Crim. P., and so the court held that the claim was barred under Rules 32.2(a)(3) and 32.2(a)(5), Ala. R. Crim. P., because Burgess could have raised it at trial or on appeal. (C. 1508.) The circuit court also found that Burgess had not sufficiently pleaded the claim:

> "[Burgess's] recurring contention is that the prosecutor knowingly presented testimony ... with the hope of convincing the jurors to draw inferences or conclusions that were favorable to the State's case. For example, he alleges that 'the prosecutor intentionally presented his case to mislead the jury to believe that the conduct of the officers was proper and the integrity of the evidence had been preserved.' But Burgess identifies no particular testimony of each witness that he contends was false and pleads no specific facts establishing why the testimony of any witness called by the prosecutor was false."

(C. 1509.) Burgess has not shown that the circuit court erred. He is due no relief. See Rule 32.7(d), Ala. R. Crim. P.

XVI. CLAIM THAT BURGESS'S AGE WHEN HE COMMITTED THE OFFENSE RENDERS HIM CONSTITUTIONALLY INELIGIBLE FOR THE DEATH PENALTY

Burgess contends that the circuit court erred when it summarily dismissed his claim alleging that Roper v. Simmons, 543 U.S. 551 (2005),

should be extended to render his death sentence unconstitutional. (Burgess's brief, p. 96.) The circuit court correctly held that "a defendant's chronological age, not his alleged 'mental age,' determines whether he is death-sentence eligible. Because he was 18 years old at the time of the 1993 robbery/murder, Burgess is legally entitled to no relief from the imposed sentence on the basis of a 'mental age' exception." (C. 1513 (citing Roper, supra; Thompson v. State, 153 So. 3d 84, 177-78 (Ala. Crim. App. 2012); and Jackson, 133 So. 3d at 466).) The circuit court did not err by following this Court's binding precedent. See Reynolds v. State, 114 So. 3d 61, 157 n.31 (Ala. Crim. App. 2010) ("[T]his Court is bound by the decisions of the Alabama Supreme Court and has no authority to reverse or modify those decisions."). Thus, Burgess has no right to relief. See Rule 32.7(d), Ala. R. Crim. P.

XVII. CLAIM THAT ALABAMA'S DEATH-PENALTY STATUTE IS UNCONSTITUTIONAL

Burgess argues that the circuit court erred when it summarily dismissed his claim alleging that Alabama's death-penalty statute in effect at the time of his trial "required that the trial court, not the jury, make every finding necessary to impose the death penalty." (Burgess's brief, p. 97.) As Burgess acknowledges, the Alabama Supreme Court

rejected this argument in Ex parte Bohannon, 222 So. 3d 525 (Ala. 2016). The circuit court did not err in summarily dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

XVIII. ANOTHER CLAIM BASED ON INTERNATIONAL LAW

Burgess argues that "his grounds for relief are supported by instruments and customs of international law that may provide greater protections than some provisions of domestic law." (Burgess's brief, p. 99.) As noted above, this claim lacks merit under Sharifi, supra. Burgess is due no relief. See Rule 32.7(d), Ala. R. Crim. P.

XIX. MOTION TO DISQUALIFY

In July 2003, Burgess moved for the circuit court to "enter an order recusing the Offices of the District Attorney for the Eighth Judicial Circuit and the Attorney General." (C. 345.) Burgess alleged that his trial counsel Lavender had been employed part-time with the district attorney since 1995 and that trial counsel Biggs had been employed full-time with the Attorney General's Office from 1995 to 2001. (C. 346.) The circuit court denied Burgess's request to enter an order recusing both offices, but the court ordered:

> "(a) Neither Mr. Lavender nor Mr. Biggs shall participate or assist with the defense of the Rule 32 petition

filed by [Burgess].

"(b) Neither Mr. Lavender nor Mr. Biggs [shall] disclose to the District Attorney, the Attorney General, or members of their respective staffs any information, opinions, documents, or records that each acquired, prepared, or developed during or as a result of their representation of [Burgess] in the trial court.

"(c) Neither Mr. Lavender nor Mr. Biggs shall permit either the District Attorney, Attorney General, or any member of their respective staffs to have access to any files, papers, notes, and documents relating to their representation of [Burgess] in the trial court.

"(d) Neither the District Attorney, the Attorney General, nor any member of their respective staffs shall discuss or exchange information acquired by Mr. Lavender or Mr. Biggs while representing [Burgess] or relating to any aspect of their representation of [Burgess] in the trial court.

"(e) Neither the District Attorney, the Attorney General, nor any member of their respective staffs shall request or obtain any files, records, papers, notes, or documents acquired or prepared by Mr. Lavender or Mr. Biggs that relate to their representation of [Burgess] in the trial court.

"(f) Neither the District Attorney, the Attorney General, nor any member of their respective staffs shall hold meetings, conferences, discussions, or conversations concerning this proceeding in which Mr. Lavender or Mr. Biggs is present or is a participant.

"(g) Neither the District Attorney, the Attorney General, nor any member of their respective staffs shall use in the defense of this case any information acquired by Mr. Lavender or Mr. Biggs during their representation of [Burgess] in the trial court."

(C. 400-01.) After the State moved the court to reconsider, the circuit court vacated that order and entered another order denying Burgess's motion to recuse. (C. 536.) The circuit court found that Burgess, by alleging that his counsel had been ineffective, had "waived any claim of privilege with regard to information known to or possessed by his former counsel that is relevant and material to those allegations." (C. 537.) The circuit court ruled, however, that Burgess was "not foreclose[d] … from claiming privilege with respect to any specific information that clearly and legitimately is confidential and that has no bearing on the issues in this case." (C. 537.)

On appeal, Burgess asserts that "the circuit court erred in denying [his] recusal motion and permitting trial counsel to assist the State and disclose privileged information." (Burgess's brief, p. 99.)

Burgess's entire argument on this point is:

> "In light of these conflicts of interest, Mr. Burgess filed a motion to recuse both the District Attorney and the Attorney General from the Rule 32 proceedings and to protect privileged information. (C. 345.) The circuit court found that Mr. Burgess had waived privilege with regard to his ineffectiveness claims and permitted the State to communicate with and receive assistance from trial counsel. (C. 536-37.)

> "This was error. Alabama and federal courts have recognized that a defendant's constitutional rights may be violated by his former lawyer's breach of the attorney-client relationship. See, e.g., Hannon v. State, 266 So. 2d 825, 829 (Ala. Crim. App. 1972); Zuck [v. Alabama], 588 F.2d [436,] 438 [(5th Cir. 1979)]. The Alabama Rules of Professional Conduct prohibit such conflicts. See Rule 1.11(c); Rule 1.9(b); Rule 1.6(a).
>
> "Moreover, because the court's order did not limit what trial counsel could disclose (C. 537), it improperly authorized disclosure of confidential information unrelated to Mr. Burgess's ineffectiveness claims. See State v. Click, 768 So. 2d 417, 421-22 (Ala. Crim. App. 1999)."

(Burgess's brief, pp. 99-100.) Burgess's argument on this issue does not show that the circuit court erred. See Rule 28(a)(10), Ala. R. App. P. And the record refutes his claim that the circuit court "authorized disclosure of confidential information unrelated to Mr. Burgess's ineffectiveness claims"—the circuit court found that Burgess was not foreclosed from claiming that other matters remained privileged, but it does not appear that Burgess pursued the matter any further. Cf. Sneed v. State, 1 So. 3d 104, 122 (Ala. Crim. App. 2007) ("In Alabama, there is not a per se rule that a district attorney's office must recuse itself when one assistant attorney has previously represented a defendant. See Smith v. State, 639 So. 2d 543 (Ala. Crim. App. 1993); Terry v. State, 424 So. 2d 710 (Ala. Crim. App. 1982); Hannon v. State, 48 Ala. App. 613, 266 So. 2d 825 (Ala.

Crim. App. 1972)."); State v. Click, 768 So. 2d 417, 421 (Ala. Crim. App. 1999) ("A postconviction petitioner who raises a Sixth Amendment claim of ineffective assistance of counsel 'waives the attorney-client privilege as to matters reasonably related to the claim of inadequate representation.' United States v. Mansfield, 33 M.J. 972, 984 (A.F.C.M.R. 1991), review granted, 37 M.J. 246 (C.M.A.), aff'd, 38 M.J. 415 (C.M.A. 1993), cert. denied, 511 U.S. 1052, 114 S. Ct. 1610, 128 L. Ed. 2d 338 (1994).").

Burgess is due relief on this issue.

XX. REQUESTS FOR DISCOVERY

Burgess contends that the circuit court erred when it denied his requests for postconviction discovery. (Burgess's brief, pp. 100-01.) A petitioner has no right to discovery in a postconviction discovery unless the petitioner shows "good cause." Ex parte Land, 775 So. 2d 847, 852 (Ala. 2000), overruled on other grounds, State v. Martin, 69 So. 3d 94 (Ala. 2011). Because the circuit court correctly found that all the claims in Burgess's petition lacked merit or were insufficiently pleaded, he did not show good cause and thus has no right to discovery. See, e.g., Yeomans, 195 So. 3d at 1051.

The circuit court did not err in denying Burgess's requests for

postconviction discovery. Ex parte Land, supra.

XXI. CUMULATIVE-ERROR CLAIM

Burgess's final claim is that he has a right to relief based on alleged "cumulative error." (Burgess's brief, p. 102.) Alabama does not recognize "cumulative error" as applied to ineffective-assistance-of-counsel claims. Carruth, 165 So. 3d at 651 ("Alabama does not recognize a 'cumulative effect' analysis for ineffective-assistance-of-counsel claims. ... Accordingly, this claim was meritless and the circuit court was correct to summarily dismiss it. See Rule 32.7(d), Ala. R. Crim. P.). And because Burgess has shown no error in the circuit court's dismissal of his petition, there can be no cumulative error.

The circuit court did not err in summarily dismissing this claim. Rule 32.7(d), Ala. R. Crim. P.

CONCLUSION

The judgment of the circuit court is affirmed.

AFFIRMED.

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