APPENDIX

Appendix A

ALABAMA COURT OF CRIMINAL APPEALS

No. CR-16-0510

BRANDON WASHINGTON

v.

STATE OF ALABAMA

April 20, 2018

MEMORANDUM

BURKE, JUDGE.

Brandon Washington was convicted of murder made capital because it was committed during the course of a robbery, *see* § 13A-5-40(a)(2), Ala. Code 1975, and was sentenced to death. This Court affirmed Washington's conviction and sentence in *Washington v. State*, 106 So. 3d 423 (Ala. Crim. App. 2007). However, the Alabama Supreme Court reversed Washington's death sentence and remanded his case for a new penalty-phase hearing. *Ex parte Washington*, 106 So. 3d 441 (Ala. 2011). On remand, the State declined to seek the death penalty and Washington was sentenced to life imprisonment without the possibility of parole. This Court issued a

certificate of judgment on October 3, 2012. On October 1, 2013, Washington filed a petition for postconviction relief pursuant to Rule 32, Ala. R. Crim. P., and subsequently amended that petition. After considering the State's response, as well as affidavits submitted by three witnesses, the circuit court denied relief. This appeal follows.

In his petition, Washington raised numerous issues regarding the adequacy of defense counsel's representation both before and during trial. A recitation of the facts will be helpful in understanding those issues. This Court accurately summarized the facts of Washington's case in its opinion on direct appeal as follows:

> "Twenty-year-old [Justin] Campbell, a married father of a two-year-old child, had gone to work at the Radio Shack store in Huffman on January 16, 2005. He typically worked at another Radio Shack store, but was assigned to work at the Huffman store because another worker was on vacation and because thefts had been reported at that store and Justin was to watch for the culprits. A manager for Radio Shack testified that she spoke with Justin at approximately 4:45 or 5:00 p.m. that day. When Justin's wife, Rhonda, was unable to contact him at the end of the day, she telephoned his father, Stephen Campbell, who lived nearby. Stephen drove to the Radio Shack store and noticed that Justin's car was still in the parking lot. He entered the store, which was unlocked, and called loudly to Justin. As he walked to the

back of the store, he saw his son's feet and thought that perhaps Justin had been tied up. As he stepped into the back room of the store, he saw that Justin had been shot; he was dead. Stephen knelt down beside his son to say a prayer, and then he walked out of the store and dialed 911 for emergency assistance. A Birmingham police officer who was patrolling the area saw Stephen outside the Radio Shack waving his arms frantically. When the officer stopped, Stephen told her, 'They shot my baby.' (R. 353.)

"The autopsy revealed that Justin had been shot in the back of the head from an intermediate distance with a .357 or .38 caliber weapon. The weapon was not recovered. $1,050 had been stolen from the store, and Justin's wallet had been taken.

"Eighteen-year-old Brandon Washington had been a sales associate at the Huffman Radio Shack store for several months, but his employment had been terminated earlier in January for failing to report to work. After his employment was terminated, he attempted to transfer to another store, and he was 'aggravated' when he learned that his employment had been terminated for failing to report to work. (R. 307.) Washington scheduled a meeting with the district manager about the termination, but Washington did not attend the scheduled meeting.

"Evidence was collected at the scene and items of clothing were collected at Washington's apartment and from his vehicle. Forensic tests of that evidence did not connect Washington to the crime.

"Michael Dixon, who testified at Washington's trial that he was best friends with Washington, lived with his parents in their house, which was 3.9 miles from the Radio Shack store. Dixon testified that Washington was a frequent and welcome visitor at his parents' house, and that on the day of the murder Washington came to his house between 5:00 and 5:30 p.m. He testified that Washington said nothing to him about the murder at Radio Shack, that he did not see a gun, and that Washington did not change clothes at his house. Dixon also testified that he had previously given statements to the police, and that he had told the police that when Washington came to his house on the day of the murder, he had shown Dixon a .357 handgun and money that he had taken in a robbery at Radio Shack. Dixon told the police that Washington had told him that he shot the Radio Shack employee in the head. In his statement to the police, he said that Washington had changed his clothes at the house and that when he left he took the clothes with him. Dixon also told police that he had found the .357 caliber handgun and that he had given it to Washington because Washington had wanted it. On cross-

examination, Dixon testified that the statements he gave to the police were false, that Washington did not have a gun or money with him on the day of the murder, that Washington did not change his clothing at Dixon's house, and that he did not admit to killing a Radio Shack employee. He testified that he made those statements because the police threatened to charge him with capital murder and to lock up his family if he did not tell them what they wanted to hear.

"Leon Oden, Dixon's stepfather, testified that Washington was like a son to him and that Washington was always welcome at his house. Oden recalled a time when Washington had gotten into his house before Oden arrived there; he did not know how Washington had gotten into the house. Oden testified that he had owned a .357 handgun that he had kept in his nightstand in his bedroom. He put the weapon in the nightstand in 2001, when he moved into the house, and he did not check on it again until late in January 2005, after the murder. The gun was no longer in the nightstand, and Oden contacted the police and filed a report about the missing weapon. Oden stated that Washington came to his house at approximately 5:00 p.m. on the day of the murder.

"Detective Roy Bristow testified that he was the lead investigator on the robbery-murder of Justin Campbell. He testified about the crime scene and about the investigation. He stated

that none of the fingerprints at the scene matched Washington's, but it would not have surprised him if Washington's prints had been there, because he had worked at the store. Only one fingerprint matched the victim. Det. Bristow testified that Washington was considered a suspect early in the investigation because his employment at the Radio Shack store had recently been terminated. He also testified that, on January 20, 2005, a woman placed an anonymous telephone call to the police and told them she had information about the murder. She told Det. Bristow that a female friend of hers had told her that, on January 16, 2005, Washington had killed a man at the Radio Shack store, and he had disposed of the gun.

"Det. Bristow testified about his investigation and the interviews he conducted. He stated that during the investigation, Washington became the primary suspect and that he had received similar information about Washington's role in the robbery-murder from his interviews with Michael Dixon; April Eatmon, Washington's former girlfriend; and Verrick Taylor, who had been a case manager of Washington's at a group home years earlier.

"April Eatmon testified that a day or so after the robbery-murder, Washington contacted her and said he wanted to speak to her. When she met with Washington, he told her that he had gone to the Radio Shack store, that he took Justin's wallet and some money from the store,

and then he took Justin to the back of the store and shot him. He said he went to Mike's house following the shooting. Eatmon said that Washington told her that he threw the money from the robbery onto Mike's bed to show Mike, that he burned the clothes he was wearing at the time of the crime, and that he threw the murder weapon off a cliff.

"Verrick Taylor testified that he had worked for a foster-care agency several years earlier and that Washington was one of his foster-care cases. He said that he had initially met Washington when Washington was 12 or 13 years old and was living in a group home. Taylor said that he and Washington remained in contact after Taylor left the foster-care agency. Taylor had told Washington that he would be there for him if he needed to talk about college choices or relationship issues, and he said that Washington telephoned him on occasion. During the weekend of the murder, Washington telephoned Taylor and said he wanted to talk. Washington went to Taylor's house the day after the murder and told Taylor that he was in something '"real deep."' (R. 713.) Washington told Taylor that he had gone to the Radio Shack store where he had been employed and that he had told the employee working there to tell him where the money was. He told Taylor that the employee had repeatedly pleaded for his life and said that he had a two-year-old child. Washington told Taylor that he directed the employee to

> get on the floor and he shot the employee in the head. Washington said he grabbed the money and a videotape from the security camera and left. He said he went to the woods, buried the gun, burned the clothes he had worn during the commission of the crime and the videotape so there would be no evidence, and he kept the money. Taylor said that Washington pulled two stacks of money out of his jacket and showed them to Taylor. The following day, Taylor telephoned Washington. Washington mentioned Det. Bristow. Taylor stated that, on January 19 or sometime thereafter, he telephoned a citizen crimes reporting program known as Crime Stoppers to report the information Washington had given him. He said that he had developed a relationship with Washington during the previous years and that he had wrestled with the decision about disclosing to authorities the information about Washington. Taylor gave the information to Det. Bristow when Det. Bristow later came to Taylor's house."

Washington, 106 So. 3d, at 425-28.

Standard of Review

"The standard of review on appeal in a post conviction proceeding is whether the trial judge abused his discretion when he denied the petition." *Elliott v. State*, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992). """A judge abuses his discretion only when his decision is based on an erroneous conclusion of law or where the record contains no

evidence on which he rationally could have based his decision."'" *Hodges v. State*, 926 So. 2d 1060, 1072 (Ala. Crim. App. 2005), quoting *State v. Jude*, 686 So. 2d 528, 530 (Ala. Crim. App. 1996), quoting in turn *Dowdy v. Gilbert Eng'g Co.*, 372 So. 2d 11, 12 (Ala. 1979), quoting in turn *Premium Serv. Corp. v. Sperry & Hutchinson, Co.*, 511 F. 2d 225 (9th Cir. 1975). However, "when the facts are undisputed and an appellate court is presented with pure questions of law, that court's review in a Rule 32 proceeding is de novo." *Ex parte White*, 792 So. 2d 1097, 1098 (Ala. 2001). In either instance, this Court may affirm the judgment of the circuit court for any reason, even if not for the reason stated by the circuit court.[1] *See Reed v. State*, 748 So. 2d 231 (Ala. Crim. App. 1999)("If the circuit court is correct for any reason, even though it may not be the stated reason, we will not reverse its denial of the petition."). Furthermore, Rule 32.7(d), Ala. R. Crim. P., provides that a circuit court may summarily dismiss a petition 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 ...." "'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 (Ala.1992)

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[1] This general rule is subject to exceptions not applicable here. *See, e.g.*, *Ex parte Clemons*, 55 So. 3d 348 (Ala. 2007).

(quoting *Bishop v. State*, 592 So. 2d 664, 667 (Ala. Cr. App. 1991) (Bowen, J., dissenting))."

Analysis

Washington claimed that he was denied effective assistance of counsel during the guilt phase of his trial because, he says, counsel failed to investigate and present certain evidence; failed to investigate and impeach the State's lead witness; failed to object to certain testimony; failed to object to alleged prosecutorial misconduct; and failed to present evidence of Washington's good character. Washington also alleged that counsel failed to tell him about a favorable plea offer from the State. The circuit court considered affidavits regarding defense counsel's alleged failure to communicate a plea offer and found that Washington failed to meet his burden of proof on that issue. The circuit court summarily dismissed the remaining claims.

Rule 32.3, Ala. R. Crim. P., provides that "[t]he petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief." Further, Rule 32.6(b), Ala. R. Crim. P., provides that "[e]ach claim in the petition must contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings."

To prevail on an ineffective-assistance-of-counsel claim, a petitioner must show that his counsel's performance was deficient and that counsel's

deficient performance prejudiced him. *See Brown v. State*, 663 So. 2d 1028 (Ala. Crim. App. 1995), citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Furthermore, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 U.S. at 689. In *Lee v. State*, 44 So. 3d 1145, 1154-55 (Ala. Crim. App. 2009), this Court held:

> "'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. Cf. *Engle v. Isaac*, 456 U.S. 107, 133-34 (1982). 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." See *Michel v. Louisiana*, [350 U.S. 91] at 101 [(1955)]. 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 v. Washington*, 466 U.S. at 689, 104 S.Ct. 2052.

> '"'"This court must avoid using "hindsight" to evaluate the performance of counsel. We must evaluate all the circumstances surrounding the case at the time of counsel's actions before determining whether counsel rendered ineffective assistance.'" *Lawhorn v. State*, 756 So. 2d 971, 979 (Ala. Crim. App. 1999), quoting *Hallford v. State*, 629 So. 2d 6, 9 (Ala. Crim. App. 1992). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052.'

> "*A.G. v. State*, 989 So. 2d 1167, 1171 (Ala. Crim. App. 2007)."

With these principles in mind, we will address each of Washington's issues in turn.

I.

Washington alleged that defense counsel was ineffective because, he said, counsel failed to investigate exculpatory evidence and present that evidence at trial. Washington also alleged that counsel failed to investigate other potential suspects, and failed to establish an alibi for Washington on the night of the murder.

A.

First, Washington claimed that an adequate investigation would have revealed that he did not burn the clothes he was wearing on the night of the murder. According to Washington, that evidence would have contradicted the testimony of April Eatmon and Verrick Taylor who both stated that Washington told them he burned the clothes he wore during the murder. Washington stated that there were photographs of him at a party prior to the murder wearing "blue jeans, a black t-shirt, a blue and yellow jacket, and red Nike sneakers.' (C. 133.)[2] Washington also claimed that his foster mother would have testified that he returned home that

[2] "C" denotes the clerk's record in the present case. "R" denotes the record on appeal from *Washington v. State*, 106 So. 3d 423 (Ala. Crim. App. 2007). This Court may take judicial notice of its own records. *Hull v. State*, 607 So. 2d 369 (Ala. Crim. App. 1992).

same evening wearing the same clothes. According to Washington, this evidence would have likely caused the jury to disbelieve Eatmon's and Taylor's testimony.

However, a review of the record from Washington's trial reveals that Eatmon testified that Washington told her "that he was at a party that night or whatever, and he went home and changed his clothes and then he went to Radio Shack and was looking at some phones and told [the victim] to get in the back and shot him." (R. 680.) Thus, the evidence at trial indicated that Washington changed the clothes he was wearing at the party before he committed the murder. Accordingly, the evidence proffered in Washington's petition would not have contradicted Eatmon's and Taylor's testimony that Washington burned the clothes that he wore during the murder. Thus, even if counsel had presented the evidence and testimony identified in Washington's petition, Eatmon's and Taylor's testimony would not have been undermined. Because Washington failed to state a claim that, if true, would establish that he was denied effective assistance of counsel, Washington failed to adequately plead a claim for relief, and the trial court was correct to summarily dismiss this claim. *See* Rules 32.3 and 32.7(d), Ala. R. Crim. P.

B.

Next, Washington alleged that counsel was ineffective for failing to investigate alternative suspects and present that evidence at trial. In his petition, Washington claimed that employees at a

nearby store would have testified that, around the time the crime was committed, a suspicious man – who was not Washington – entered their store and "cased" it, causing them to fear that he may have been contemplating a robbery. (C. 135-36.) Washington concedes that defense counsel elicited testimony about the suspicious man during his cross-examination of Detective Bristow. However, he claimed that the cross-examination was inadequate.

Evidence that another individual was acting suspiciously inside a nearby store at the time of the crime would not have undermined the State's case against Washington. As noted, the State did not present any physical evidence linking Washington to the crime. The crux of its case rested on Eatmon's and Taylor's testimony that Washington admitted to the murder. Moreover, Washington did not assert in his petition that there existed any evidence that the suspicious man from the nearby store was the actual perpetrator of the crime. Accordingly, Washington failed to adequately plead facts that, if true, would have established that counsel was ineffective, and the circuit court was correct to summarily dismiss this claim. *See* Rules 32.3 and 32.7(d), Ala. R. Crim. P.

Washington also asserted that, in the days leading up to the crime, the victim suspected that two Radio Shack employees – neither of which was Washington – had been stealing from the company. According to Washington, counsel failed to investigate these individuals to determine their whereabouts on the night of the murder. Had counsel done so, Washington argued, there would have been

"a reasonable probability that he would have discovered additional information implicating" those employees as suspects, "thereby casting doubt on the prosecution's case against [him]." (C. 142.)

However, Washington did not assert what that additional evidence would have been nor did he plead that either of those employees were responsible for the murder. Rather, as he did in the previous claim, Washington merely speculated that further investigation into these individuals may have cast doubt on the prosecution's case. However, investigation into the whereabouts of those two individuals would not have undermined the State's evidence that Washington admitted to the murder on two separate occasions to two different people. Accordingly, he failed to plead facts which, if true, would have demonstrated that counsel's performance was deficient. Thus, summary dismissal of this claim was appropriate. *See* Rules 32.3 and 32.7(d), Ala. R. Crim. P.

Finally, Washington alleged that a witness named Andy Kendrick told police that he saw a white male sitting in a gold Lincoln Towncar behind the Radio Shack between 8:00 and 8:30 the morning before the murder, and then saw the same man leave the Radio Shack and walk to a nearby liquor store before the police arrived on the night of the murder.[3] Like the two previous claims, Washington failed to

[3] In his petition, Washington stated that Kendrick told police that he saw the white man leave the store between 9:00 and 9:30 p.m. on the night of the murder. Noting that the police arrived shortly after 8:00 p.m., Washington surmised that Kendrick must have been mistaken about the time.

set forth any facts that, if proven, would have demonstrated that the individual that Kendrick saw leaving the Radio Shack committed the murder nor would it have undermined the State's evidence that Washington admitted to the crime. Accordingly, Washington failed to meet his burden of pleading under Rule 32.3, Ala. R. Crim. P.

We also note that the circuit judge who denied Washington's Rule 32 petition also presided over his trial. In her order denying relief, the court noted that evidence regarding the potential alternative suspects was discussed at trial through defense counsel's cross examination of Detective Bristow and was argued to the jury during closing argument. The circuit court stated that "these matters were thoroughly sifted through on cross examination, and were strategically handled by counsel in a way most advantageous to the Defendant during the trial." (C. 19.) The Alabama Supreme Court has held that "a judge who presided over the trial or other proceedings and observed the conduct of the attorneys at the trial or other proceedings need not hold a hearing on the effectiveness of those attorneys based on conduct that he observed." *Ex parte Hill*, 591 So. 2d 462, 463 (Ala. 1991). Accordingly, summary dismissal of these claims was proper under Rule 32.7(d), Ala. R. Crim. P., and Washington is due no relief on appeal.

C.

Next, Washington claimed that counsel was ineffective for failing to investigate and present evidence of his alibi during the time the crime was committed. According to Washington, a reasonably

diligent investigation would have established the following time line: Washington left a party at 4:30 p.m. on the afternoon of the murder, spoke with a friend for approximately fifteen to twenty minutes, went inside a Wal Mart to purchase batteries, and then arrived at Dixon's house "at 5:00 or 5:30." (C. 148.) Washington identified the witnesses who would have given this testimony, and claimed that security footage from the Wal-Mart - which has since been erased - would have shown him entering the store and buying batteries.

However, Washington concedes that, even if his time line is accurate[4], there was a four-minute window of time that is unaccounted for. Thus, even if defense counsel had conducted the investigation proposed in Washington's Rule 32 petition, he would not have been able to account for his whereabouts for the entire day. In its order denying relief on this issue, the circuit court correctly concluded that, even if all of the witnesses listed in Washington's petition had testified, that evidence would not have provided a firm alibi. None of the witnesses proffered by Washington would have testified to his exact whereabouts at the time the crime was committed. The circuit court also noted that defense counsel's cross examination of Detective Bristow regarding the time line of events leading up to and after the murder was "extremely effective." (C. 21.) Accordingly,

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[4] Washington based his time line on testimony that it takes approximately 10 minutes to drive from the crime scene to Dixon's house. (C. 148-49.) However, Washington did not state how long it would have taken to drive from the party to Wal-Mart or from Wal-Mart to Radio Shack.

Washington failed to state facts which, if true, would have entitled him to relief and summary dismissal of this claim was appropriate. *See* Rules 32.3 and 32.7(d), Ala. R. Crim. P.

II.

Next, Washington claimed that defense counsel failed to adequately investigate the State's lead witnesses and failed to adequately impeach their testimony at trial. As noted, the State presented testimony from Washington's ex-girlfriend, April Eatmon, and from Verrick Taylor, Washington's former counselor. Both witnesses testified that Washington admitted to them that he murdered Justin Campbell, took money from the Radio Shack, burned the clothes he was wearing, and disposed of the gun.

A.

Washington claimed that defense counsel failed to conduct a reasonable investigation into April Eatmon. Had he done so, Washington said, counsel would have discovered evidence that could have been used to undermine her credibility. Specifically, Washington claimed that Eatmon's mother had been romantically involved with Detective Bristow's brother, Cassanova Bristow, and that she had pressured Eatmon to testify. Washington also asserted that there was "bad blood" between himself and Eatmon. According to Washington, he gave Eatmon $400 to pay for an abortion which she instead used to go shopping. However, Washington claimed that Eatmon's mother nevertheless demanded that Washington give Eatmon more

money to procure the abortion. Finally, Washington alleged that Eatmon believed that he had vandalized her vehicle and slashed her tires shortly before the trial began. Washington claimed that, had this evidence been known to defense counsel and presented at trial, there is a reasonable probability that the jury would have found Eatmon's testimony to be unreliable.

In its order denying relief on this issue, the circuit court stated that testimony regarding Washington's alleged failure to give Eatmon additional money for an abortion, as well as Eatmon's suspicion that Washington may have vandalized her car shortly before trial, "might have very well been areas of cross examination counsel wanted to avoid." (C. 22.) Had defense counsel presented this evidence, it could have cast Washington in a very negative light despite the fact that he was young and had no criminal record. A review of the record reveals that defense counsel's cross-examination of Eatmon focused on her inconsistencies in her statement to Detective Bristow as well as the fact that Detective Bristow suggested certain details to her during their interview. Defense counsel also asked Eatmon if she knew Detective Bristow's brother, Cassanova Bristow, to which she replied, "No, sir." (R. 691.) Accordingly, counsel's failure to delve into whether Washington financed an abortion or vandalized his exgirlfriend's car did not fall below an objective standard of reasonableness. Therefore, Washington failed to adequately plead that counsel's performance was deficient in this regard and the circuit court was correct to summarily dismiss this claim. *See* Rules

32.3 and 32.7(d), Ala. R. Crim. P., *see also Ex parte Hill*, 591 So. 2d 462, 463 (Ala. 1991) ("A judge who presided over the trial or other proceedings and observed the conduct of the attorneys at the trial or other proceedings need not hold a hearing on the effectiveness of those attorneys based on conduct that he observed.").

Finally, Washington alleged that, after the trial, Eatmon received a cash reward from Radio Shack. At trial, Eatmon testified that she was only made aware of the reward after she came forward and spoke with Detective Bristow. Eatmon testified that, according to Detective Bristow, she could not receive the reward because she had taken too long to come forward. Washington argues that counsel should have questioned Eatmon further about her interest in the reward and pointed out that the reward was available for people who provided information leading to the arrest and conviction of the person responsible for the crime and, therefore, that Eatmon could still potentially claim the reward. However, Washington did not allege facts demonstrating when Eatmon became aware that she was eligible to receive the reward. Thus, he failed to adequately plead this ground for relief and summary dismissal was appropriate. *See* Rules 32.3 and 32.7(d), Ala. R. Crim. P.

B.

Washington also claimed that counsel was ineffective for failing to undermine the credibility of Verrick Taylor, Washington's former group-home counselor and case manager. As noted, Taylor

testified that Washington came to his house and admitted that he robbed and murdered Justin Campbell. In his petition, Washington alleged that his and Taylor's relationship had "ended poorly" over a year before Washington allegedly confessed to him. (C. 154.) Washington claimed that Taylor had been fired from Seraaj Family Homes, the agency that oversaw Washington's foster care. According to Washington, Seraaj had records that would document his and Taylor's deteriorating relationship and would prove that Taylor was not someone in whom Washington would have confided. Washington also identified witnesses who, he said, "knew Mr. Taylor and Mr. Washington and had insight into their strained relationship...." (C. 155.)

However, Washington did not specifically identify which records defense counsel should have obtained nor did he describe with any specificity what would be contained in those records. Similarly, Washington did not specify what "insight" the mutual acquaintances would have testified to regarding his and Taylor's relationship. Washington merely alleged that he had informed defense counsel that the relationship had "ended badly." Without more, it is impossible to determine whether such records and testimony would have actually undermined Taylor's credibility. Accordingly, Washington failed to adequately and specifically plead the facts that would entitle him to relief. *See* Rules 32.3, 32.6(b), and 32.7(d), Ala. R. Crim. P.

Washington also alleged that Taylor, like Eatmon, may have been motivated to give false testimony in hopes of receiving a reward.

Washington notes that Taylor was asked about the reward during cross examination, but stated that he had not applied to receive it nor did he plan to. Washington argued that defense counsel should have questioned Taylor further on this matter. However, it is impossible to determine from the face of the pleadings what evidence, if any, would have been elicited by further questioning. Accordingly, this claim was inadequately pleaded and, therefore, was properly dismissed by the circuit court. *See* Rules 32.3, 32.6(b), and 32.7(d), Ala. R. Crim. P.

III.

Next, Washington claimed that defense counsel was ineffective in regard to his handling of certain witnesses, by failing to object to certain testimony, and by failing to object to alleged instances of prosecutorial misconduct.

A.

Washington claimed that defense counsel was ineffective for failing to object when the State called Michael Dixon as a witness. Dixon had previously given two contradictory stories to police. Initially, Dixon denied any knowledge of the robbery and murder at Radio Shack. However, during a subsequent interview with Detective Bristow, Dixon stated that when Washington came to his house on the day of the murder, Washington showed him a .357 handgun and money that he had taken in a robbery at Radio Shack. Dixon also told Detective Bristow that Washington had told him that he shot the Radio Shack employee in the head. In his second statement to the police, Dixon also said that

Washington had changed his clothes at the house and that when he left he took the clothes with him. However, at trial, Dixon stated that Washington never showed him a gun or money; did not admit to any crimes; and did not change clothes. Dixon testified that his second statement to the police was false, and that Detective Bristow had coerced him to implicate Washington. The trial court then allowed the State to introduce Dixon's prior inconsistent statement – in which he implicated Washington – as impeachment evidence.

In his petition, Washington asserted that Dixon had recanted his second statement to police prior to trial and that the State "knew this or should have known this through counsel." (C. 158-59.) Therefore, Washington said, the State called Dixon to testify for the sole and improper purpose of introducing his prior inconsistent statement. Washington claimed that defense counsel should have objected to Dixon being called as a witness on that basis.

However, Washington did not plead any facts indicating that the State acted in bad faith by calling Dixon as a witness. Rather, he made the conclusory allegation that the State should have known that Dixon was going to testify favorably for Washington at trial. As noted, Dixon had given a statement to police in which he claimed that Washington admitted to the murder. There was no reason for the State to believe that Dixon would testify otherwise at trial. Accordingly, Washington failed to adequately plead a claim for relief. *See* Rules 32.3 and 32.7(d), Ala. R. Crim. P.

Moreover, a review of the record reveals that Dixon was a favorable witness for Washington and that his testimony provided the jury with evidence of a potential alibi for most of the evening. If defense counsel was truly aware that Dixon was going to testify under oath that Washington never admitted to the crime and was at Dixon's home for several hours on the night of the murder, there was no reason to object to the State's decision to call Dixon as a witness. The fact that Dixon was called by the State allowed Washington to use leading questions in his cross examination in order to more effectively probe Dixon's claim that he was coerced by police to implicate Washington. Counsel is not ineffective for failing to raise a meritless objection. *See Patrick v. State*, 680 So. 2d 959, 963 (Ala. Crim. App. 1996) (holding that counsel would not be ineffective for failing to assert a meritless claim).

Washington also claims that counsel should have objected to the State's use of Dixon's prior inconsistent statement because, he said, the prejudicial effect of the evidence substantially outweighed its probative value. However, Rule 607, Ala. R. Evid., allows a party to impeach its own witness. Dixon's testimony, was undoubtedly prejudicial. However, it was also cumulative to the testimony given by Eatmon and Taylor and, therefore, was not unfairly prejudicial. Accordingly, even if counsel had objected to the use of Dixon's prior inconsistent statement, it would have been properly overruled. Therefore, counsel was not ineffective for failing to raise a meritless objection.

See Patrick v. State, 680 So. 2d 959, 963 (Ala. Crim. App. 1996).

B.

Next, Washington claimed that counsel was ineffective for failing to object when Detective Bristow gave his opinion regarding Dixon's prior inconsistent statement. At trial, Detective Bristow testified that, in his opinion, Dixon's statement in which he implicated Washington was the truth because, he said, that statement corroborated the statements of Eatmon and Taylor. (R. 559.) Washington asserted that defense counsel should have objected to Detective Bristow's opinion under Rule 701, Ala. R. Evid., because Bristow was not an expert witness.

In its order denying relief on this issue, the circuit court notes that Bristow's testimony may have been improper. However, the court concluded that this isolated error did not constitute ineffective assistance of counsel. In *Hutchins v. State*, 568 So. 2d 395, 397 (Ala. Crim. App. 1990), this Court held: "'Even if counsel committed what appears in retrospect to have been a tactical error, that does not automatically mean that petitioner did not receive an adequate defense in the context of the constitutional right to counsel.' *Ex parte Lawley*, 512 So. 2d 1370 (Ala. 1987). '"An accused is not entitled to error-free counsel."' *Stringfellow[v. State]*, 485 So. 2d [1238,] 1243." The circuit court also noted that it instructed the jury regarding its role in weighing the evidence and assessing the credibility of the witnesses. It is well settled that jurors are presumed to follow the

trial court's instructions. *See Brooks v. State*, 973 So. 2d 380, 409 (Ala. Crim. App. 2007). Accordingly, Washington was due no relief on this claim.

C.

Washington also alleged that defense counsel was ineffective for failing to object to the prosecutor's use of Dixon's prior inconsistent statement during closing arguments. Washington claimed that the prosecutor urged the jury to consider Dixon's testimony as substantive evidence as opposed to impeachment evidence. In support of that allegation, he cited the following excerpt from the State's closing argument:

> "After the shooting, [Washington] ran straight to his best friend, his best friend who is like a brother to him. His best friend came today and he testified, he said that when he was talking to Detective Bristow, the first time, you know, he denied that he knew anything. The second time, he told Detective Bristow a different story."

(R. 781.) According to Washington, that argument improperly characterized Dixon's prior inconsistent statement as substantive evidence of Washington's guilt. However, in the very next sentence, the prosecutor stated: "But don't just take his testimony, in fact you don't have to even take his testimony." (R. 781.) The prosecutor then pointed to Taylor's and Eatmon's testimony which was properly admitted as substantive evidence. Accordingly, the record belies Washington's assertion that this particular statement was improper.

Washington also points to the prosecutor's rebuttal argument in which he stated that Dixon "wanted to do what was right, but he had a hard time turning in his best friend, his brother, he didn't want to do that. But he did the right thing, he told the truth. His statement, his statement is the same as the other two." (R. 790.) Additionally, Washington points to portions of the State's closing argument in which the prosecutor said that Dixon testified that Washington had a .357 handgun.

Although these isolated statement may have been improper, we cannot say that counsel was ineffective for failing to object. This Court has held:

> "'There is no doubt that, in the heat of argument, counsel do occasionally make remarks that are not justified by the testimony, and which are, or may be, prejudicial to the accused.... If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation.'"

Thompson v. State, 153 So. 2d 84, 169 (Ala. Crim. App. 2012), quoting *Dunlop v. United States*, 165 U.S. 486, 498, 17 S.Ct. 375, 41 L.Ed. 799 (1897). Additionally, this Court has held that

> "[P]rosecutors are to be allowed a wide latitude in their exhortations to the jury. *Varner v. State*, 418 So. 2d 961 (Ala. Cr. App. 1982). 'Statements of counsel and argument must be

> viewed as in the heat of debate and must be valued at their true worth rather than as factors in the formation of the verdict.' *Orr v. State*, 462 So. 2d 1013, 1016 (Ala. Cr. App. 1984)."

Armstrong v. State, 516 So. 2d 806, 809 (Ala. Crim. App. 1986). Thus, even if counsel had raised objections to these comments, the trial court would not have committed reversible error by overruling them. As noted, two other witnesses testified that Washington admitted to the murder, and counsel may have made the strategic choice not to object in order to avoid calling undue attention to Dixon's prior inconsistent statement.

Washington also argued that counsel was ineffective for failing to request a limiting instruction informing the jury that it was to consider Dixon's prior inconsistent statement only for impeachment purposes. However, as noted above, defense counsel may have made the strategic choice to avoid having the jury focus on the fact that Dixon gave contradictory statements to police. Dixon's sworn trial testimony was favorable to Washington. Had defense counsel repeatedly brought attention to the fact that Dixon had given inconsistent statements to police, the jury could have completely discounted his testimony, including the testimony that was beneficial to Washington. Accordingly, Washington's pleadings regarding this issue were meritless and did not demonstrate that defense counsel was ineffective. Therefore, summary dismissal was appropriate. *See* Rule 32.7(d), Ala. R. Crim. P.

D.

Washington also claimed that counsel was ineffective for failing to object to victim-impact testimony from the victim's wife. A review of the record reveals that Justin Campbell's wife testified that Campbell was a good husband and a good father. Washington alleged that this testimony "likely inflamed the jury and prejudiced Mr. Washington's defense." (C. 165.) However, Washington failed to cite any authority supporting that contention nor did he specifically plead how that isolated testimony, when viewed in the context of the entire trial, so inflamed the jury to the point that his defense was prejudiced. A review of the entire record does not convince this Court that Mrs. Campbell's brief testimony regarding her husband's characteristics prejudiced Washington in any way. Accordingly, counsel was not ineffective for failing to object and the circuit court was correct to deny relief on this claim pursuant to Rule 32.7(d), Ala. R. Crim. P.

E.

Finally, Washington asserted that the State committed several instances of prosecutorial misconduct and that defense counsel was ineffective for failing to object. Washington first claims that the prosecutor committed misconduct when he allegedly vouched for the credibility of Eatmon and Dixon by stating that both witnesses were telling the truth. (R. 782, 790.) However, these statements do not constitute prosecutorial misconduct. As noted above, "'[s]tatements of counsel and argument must be viewed as in the heat of debate and must be valued

at their true worth rather than as factors in the formation of the verdict.' *Orr v. State*, 462 So. 2d 1013, 1016 (Ala. Cr. App. 1984)." *Armstrong v. State*, 516 So. 2d 806, 809 (Ala. Crim. App. 1986). Further, the trial court instructed the jury that the arguments of counsel were not evidence and the jury is presumed to follow the trial court's instructions. *See Brooks v. State*, 973 So. 2d 380, 409 (Ala. Crim. App. 2007). Thus, any objection by defense counsel would have been meritless and his failure to object did not constitute ineffective assistance of counsel. *See Patrick v. State*, 680 So. 2d 959, 963 (Ala. Crim. App. 1996) (holding that counsel would not be ineffective for failing to assert a meritless claim).

Washington next claimed that the State committed prosecutorial misconduct by referring to alleged victim-impact testimony during closing arguments. Washington points to the portion of the State's closing argument in which the prosecutor referred to testimony indicating that the victim begged for his life and told Washington that he had a two-year-old son. However, the prosecutor's statements were based strictly on the testimony of Verrick Taylor which was properly admitted as substantive evidence of Washington's guilt. Taylor testified that Washington told him that, before he murdered Campbell, Campbell stated: "'[l]ook man, please don't shoot me. I got, you know, I've got a two-year-old.'" (R. 715.) Thus, the prosecutor's argument was based on facts that were elicited during the trial and did not constitute victim-impact testimony. Accordingly, any objection would have been overruled. *See Patrick v. State*, *supra*.

Next, Washington claimed that the prosecutor committed misconduct by referring to Washington as "cold blooded" and "heartless." (R. 831, 835.) However, "'[a] prosecutor is entitled to argue forcefully.... '[E]nthusiatic rhetoric, strong advocacy, and excusable hyperbole' are not grounds for reversal.... The jury are presumed to have a certain measure of sophistication in sorting out excessive claims on both sides.'" *Thompson v. State*, 153 So. 3d 84, 159 (Ala. Crim. App. 2012), quoting *Commonwealth v. Wilson*, 427 Mass. 336, 350, 693 N.E.2d 158, 171 (1998). Thus, these statements did not constitute prosecutorial misconduct and defense counsel was not ineffective for failing to object. *See Patrick v. State*, *supra*.

Additionally, Washington asserted that the prosecutor committed misconduct by referring to testimony that blood was coming out of the victim's head "like a fountain." (C. 167.) However, this argument was nearly a direct quote from Verrick Taylor's testimony. *See* (R. 717)("[Washington] said, 'You ever seen a water fountain? Blood was just shooting out of his head like a water fountain.'") Accordingly, this was not improper argument and any objection would have been overruled. *See Patrick v. State*, *supra*.

Washington also points to an instance during the State's closing argument when the prosecutor misstated a witness's testimony regarding the time frame that Washington arrived at Dixon's house. As noted, Dixon testified that Washington arrived between 5:00 and 5:30 on the night of the murder. Dixon's step-father, Leon Oden, also testified that

Washington arrived during that time frame. During closing arguments, the prosecutor stated that Oden testified that the time was between 5:30 and 5:45. (R. 832-33.) However, the prosecutor immediately followed that statement by saying, "That is the way I remember it. Y'all remember it the way you do." (R. 832.) Prior to closing arguments, the trial court instructed the jury that what the attorneys say is not evidence. (R. 778.) Nothing in Washington's petition indicates that the jury gave more credence to the prosecutor's isolated statement than it did to Oden's testimony. Accordingly, Washington has failed to plead facts demonstrating that he was prejudiced by counsel's failure to object.

None of the statements or arguments that Washington identified in his petition constituted prosecutorial misconduct. Thus, any objections to those comments would have been overruled and would have served only to call undue attention them. Accordingly, defense counsel was not ineffective for failing to object in those instances and the circuit court was correct to deny relief.

F.

Washington next argued that defense counsel was ineffective for failing to object to the crime scene photos because, he said, their gruesome nature was unfairly prejudicial to Washington. However, the photographs in question were not inadmissible. This Court has held:

> "[A]utopsy photographs, although gruesome, are admissible to show the extent of a victim's injuries. *See Dabbs v. State*, 518 So. 2d 825

> (Ala. Crim. App. 1987)." *Sneed v. State*, 1 So. 3d 104, 133 (Ala. Crim. App. 2007), cert. denied, 555 U.S. 1155, 129 S.Ct. 1039, 173 L.Ed.2d 472 (2009). "The fact that a photograph is gruesome and ghastly is no reason to exclude it from the evidence, so long as the photograph has some relevancy to the proceedings, even if the photograph may tend to inflame the jury. *Magwood v. State*, *supra*, 494 So. 2d at 141."

Bankhead v. State, 585 So. 2d 97, 109–10 (Ala. Crim. App. 1989). Because the photographs in question were admissible, any objection would have been overruled. Thus, counsel was not ineffective for failing to raise this meritless objection. *See Patrick v. State*, *supra*.

IV.

Washington next claimed that counsel was ineffective for failing to investigate the circumstances of Washington's life and to present evidence during the guilt phase of his good character. He identified numerous witnesses, including friends and family members, that he claimed would have testified to his good character. Washington argued that any reasonable attorney would have interviewed these witnesses and gathered other evidence in order to present Washington in a positive light, contrary to the State's assertions that he was a "callous criminal." (C. 169.)

In the present case, the circuit court – who, as noted, presided over Washington's trial – stated that "putting on character evidence in this case would

have been extremely risky at the guilt phase." (C. 25.) In *Daniel v. State*, 86 So. 3d 405, 418 (Ala. Crim. App. 2011), this Court agreed with a circuit court's conclusion regarding the questionable advisability of introducing character evidence during the guilt phase of a trial. This Court noted: "'"Whether to introduce character evidence and potentially open the door for impeachment is clearly one of tactics and strategy."'" *Daniel v. State*, 84 So. 3d at 419, quoting *Smith v. State*, 288 Ga. 348, 354, 703 S.E.2d 629, 636 (2010), quoting in turn *Washington v. State*, 276 Ga. 655, 659, 581 S.E.2d 518 (2003).

In addition to the character witnesses that Washington identified, he also stated that social services records existed that revealed a "troubled teen" who had overcome adversity. Without identifying any specific records, Washington characterizes those records as evidence that he overcame adversity and maintained a clean criminal record. However, those records could have also contained negative information that could have been used against Washington. In a previous section of his petition, Washington stated that one of the State's witnesses suspected him of vandalizing her car. Washington also claimed that he had given that same witness, his ex-girlfriend, money to obtain an abortion. Considering those facts, along with the uncertainty of the contents of Washington's social services records, it was not unreasonable for counsel to refrain from introducing character evidence during the guilt phase of Washington's trial and thus opening the door for the State to rebut that evidence.

Moreover, evidence that Washington was a college student who had no criminal record despite a troubled upbringing was submitted to the jury through the testimony of Verrick Taylor. (R 706-10.) Accordingly, Washington's claim lacks merit and the circuit court was correct to deny relief. Rule 32.7(d), Ala. R. Crim. P.

V.

Washington next claimed that the cumulative effect of defense counsel's errors entitled him to relief. In discussing a cumulative-error analysis in a Rule 32 petition, this Court has held:

> "[I]t is well settled in Alabama that an ineffective-assistance-of-counsel claim is a general claim that consists of several different allegations or subcategories, and, for purposes of the pleading requirements in Rule 32.3 and Rule 32.6(b), '[e]ach subcategory is [considered] a[n] 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). As this Court explained in *Taylor v. State*, 157 So. 3d 131 (Ala. Crim. App. 2010):
>
> > "'Taylor also contends that the allegations offered in support of a claim of ineffective assistance of counsel must be considered cumulatively, and he cites *Williams v. Taylor*, 529 U.S. 362 (2000). However, this Court has noted: "Other states and federal courts are not in

agreement as to whether the 'cumulative effect' analysis applies to *Strickland* claims"; this Court has also stated: "We can find no case where Alabama appellate courts have applied the cumulative-effect analysis to claims of ineffective assistance of counsel." *Brooks v. State*, 929 So. 2d 491, 514 (Ala. Crim. App. 2005), quoted in *Scott v. State*, [Ms. CR–06–2233, March 26, 2010] --- So.3d ----, ---- (Ala. Crim. App. 2010); *see also McNabb v. State*, 991 So. 2d 313, 332 (Ala. Crim. App. 2007); and *Hunt v. State*, 940 So. 2d 1041, 1071 (Ala. Crim. App. 2005). More to the point, however, is the fact that even when a cumulative-effect analysis is considered, only claims that are properly pleaded and not otherwise due to be summarily dismissed are considered in that analysis. A cumulative-effect analysis does not eliminate the pleading requirements established in Rule 32, Ala. R. Crim. P. An analysis of claims of ineffective assistance of counsel, including a cumulative-effect analysis, is performed only on properly pleaded claims that are not summarily dismissed for pleading deficiencies or on procedural grounds. Therefore, even if a cumulative-effect analysis were required by Alabama law, that factor would not eliminate Taylor's obligation to plead each claim of

> ineffective assistance of counsel in compliance with the directives of Rule 32.'"

Bryant v. State, 181 So. 3d 1087, 1104 (Ala. Crim. App. 2011). Accordingly, Washington was not entitled to relief on this claim and the circuit court was correct to summarily dismiss it. *See* Rule 32.7(d), Ala. R. Crim. P.

VI.

In his amended petition, Washington asserted that defense counsel failed to communicate to him a favorable plea offer that was made by the State during his trial. A review of the record reveals that the State offered, and Washington rejected, an offer to plead guilty in exchange for a sentence of life imprisonment. (R. 671-72.) However, in the State's response to Washington's initial Rule 32 petition, the State argued that defense counsel's performance was not deficient because "the State's attorney prosecuting the case felt that counsel had performed so well that, during a break in the trial, the Deputy District Attorney offered a plea deal of thirty (30) years to Petitioner and his counsel." (C. 104.) According to Washington, defense counsel never told him that the State had offered a plea deal for 30 years and that this was the first time he had ever heard of such an offer. (C. 177.) Washington asserted that, despite maintaining his innocence throughout his trial, he would have accepted the State's offer and pleaded guilty in exchange for a 30-year sentence.

In *Missouri v. Frye*, 566 U.S. 134, 145 (2012), the United States Supreme Court held that, "as a general

rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." Failure to do so constitutes deficient performance under *Strickland*. *Id.* at 146. The Supreme Court further explained:

> "To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time."

Id. at 147.

After Washington filed his amended petition, the circuit court issued an order instructing the deputy district attorney who prosecuted Washington as well as Washington's defense counsel to "submit affidavits to this Court regarding their respective recollections as to whether or not a plea offer of 30 years was made during the trial in this case." (C. 12.)

Emory Anthony, Washington's defense counsel, submitted an affidavit in which he stated, in pertinent part, that "Deputy D.A. Mike Anderton made an offer of 30 years to settle the Capital Murder Charge. I talked with Brandon Washington and his Grandmother, which [sic] Brandon refused to accept the plea offer. I do not know if this offer was ever put on the record." (C. 229.) Michael Anderton, the deputy district attorney who prosecuted Washington, submitted an affidavit stating that, "[a]s a direct result of Mr. Anthony's effectiveness, I offered a plea agreement to the Defendant and his counsel that involved a number of years. I do not recall the number of years offered, but recollect that the offer was for a term of less than a life sentence. Mr. Anthony, at the Defendant's direction, rejected the offered plea agreement." (C. 230.) In addition to those affidavits, Washington submitted an affidavit from his grandmother, Amanda Washington[5]. In her affidavit, Ms. Washington stated that she was present when defense counsel told her grandson about the offer of a life sentence in exchange for a guilty plea. She then stated:

> "I recently learned from Brandon's current lawyer that during trial the district attorney extended Brandon a plea offer through Mr. Anthony for 30 years in prison. That is the first I had ever heard of a plea offer for 30 years. I never heard Mr. Anthony mention any plea offer other than for life in prison. Based on my relationship with Brandon, I am confident that

[5] The parties stipulated that the content of Ms. Washington's affidavit was true. (C. 226.)

> if any other offer had been communicated to him, he would have told me about it."

(C. 225.)

Rule 32.9(a), Ala. R. Crim. P., provides that "[t]he court in its discretion may take evidence by affidavits, written interrogatories, or depositions, in lieu of an evidentiary hearing, in which event the presence of the petitioner is not required, or the court may take some evidence by such means and other evidence in an evidentiary hearing." In its order denying relief, the circuit court considered the affidavits along with Washington's pleadings and made the following findings:

> "Regardless of whether this offer of 30 years was placed on the record, it is both Mr. Anderton's and Mr. Anthony's recollection, that *any* offer or settlement for less than Life was communicated and rejected by the Defendant. Evidence of the Defendant's position, *at that time*, is made clear from the record in this case cited above. Therefore, this court does not find that the Petitioner has met his burden under *Frye* of showing a 'reasonable probability' that the Defendant would have accepted a thirty year offer, or that this Court would have accepted the plea agreement, after the Defendant had proclaimed his innocence in the open and very public courtroom. The Petitioner has not proven counsel's performance ineffective, or that, but for his performance, the result would have been

> different under *Strickland* as claimed in part II of this Petition."

(C. 29.)

Thus, the circuit court resolved the disputed issue, i.e., whether a 30-year plea offer was communicated to Washington, in the State's favor. The circuit court also found, based on the affidavits as well as its own recollection of the proceedings, that there was not a reasonable probability that Washington would have accepted a 30-year plea offer nor that she would have approved it. Washington points to the fact that the parties stipulated to the truth of his grandmother's affidavit. However, Ms. Washington's affidavit stated that *she* "never heard Mr. Anthony mention any plea offer other than for life in prison" and that based on her relationship with Washington, she was "confident" that he would have told her about any other plea offers. Thus, her testimony does not rule out the possibility that Washington may have chosen not to tell her about the offer.

"The standard of review on appeal in a post conviction proceeding is whether the trial judge abused his discretion when he denied the petition." *Elliott v. State*, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992). "A judge abuses his discretion only when his decision is based on an erroneous conclusion of law or where the record contains no evidence on which he rationally could have based his decision." *Hodges v. State*, 926 So. 2d 1060, 1072 (Ala. Crim. App. 2005) (internal citations omitted). The affidavits of Mr. Anthony and Mr. Anderton, though

contrary to Washington's assertion in his petition, constitute sufficient evidence on which the circuit court could have based its findings, i.e., that defense counsel did in fact communicate a 30-year plea deal to Washington that he rejected. Further, the trial court did not find Washington's assertion that he would have accepted a the plea deal to be credible. Thus, Washington failed to prove his claim that counsel rendered deficient performance under *Frye*. A petitioner must meet both prongs of *Strickland*, i.e., deficient performance and prejudice, in order to prove a claim that counsel was ineffective. Accordingly, Washington failed to meet his burden of proof and the trial court was correct to deny this claim. *See* Rule 32.3, Ala. R. Crim. P.

For the foregoing reasons, the judgment of the circuit court is affirmed.

AFFIRMED.

Windom, P.J., and Welch, Kellum, and Joiner, JJ., concur.

Appendix B

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA BIRMINGHAM DIVISION

No. CC-2005-001757.60

STATE OF ALABAMA
v.
BRANDON WASHINGTON

Dec. 30, 2016

ORDER

The Court has throughly reviewed and considered the allegations in the Amended Rule 32 Petition filed on behalf of Brandon Washington, the responses filed by the State by and through the District Attorney, the transcript of the proceedings in this case, and the affidavits submitted to the Court from Ms. Amanda Washington, and trial counsel, ADA Michael Anderton, and Mr. Emory Anthony. Based upon all the above, this Court makes the following findings of fact and conclusions of law and hereby DENIES all

relief sought in Washington's Amended Rule 32 Petition.

PROCEDURAL HISTORY

On or about January 13, 2006 the Petitioner was convicted of Capital Murder. Petitioner was then sentenced by this court to death after a jury recommendation of same by an 11-1 vote. On automatic direct appeal, the Court of Criminal Appeals affirmed the conviction, however, remanded the case for re-sentencing because a new Pre-sentence report had not been ordered following the conviction and the Youthful Offender report considered by the court in it's stead by agreement. The trial court sentenced the Defendant to death a second time, and the Court of Criminal Appeals affirmed the sentence. Petitioner appealed to the Alabama Supreme Court, which affirmed the conviction on or about 4-15-11, but reversed the death sentence due to the admission of improper victim impact testimony from a parent. On remand the State opted not to seek the death penalty and the trial court sentenced the Defendant to LWOP. The Court of Criminal Appeals affirmed the Petitioner's sentence and issued a Certificate of Judgment on October 3, 2012.

Petitioner Brandon Washington timely filed a Petition pursuant to Rule 32 of the Alabama Rules of Criminal Procedure with this Court on October 1, 2013, challenging his conviction for capital murder and sentence of LWOP on the basis of ineffective assistance of counsel. On December 6, 2013, the State filed a Motion to Dismiss Mr. Washington's Rule 32

Petition which included in the grounds, the fact that ADA Michael Anderton had communicated a "plea deal of thirty (30) years" to the Petitioner's trial counsel, Mr. Emory Anthony. As a result of this information, which the Petitioner claims was never communicated to him during the trial, an Amended Rule 32 Petition was filed with permission of the Court on 12-20-13. This Amended Rule 32 added a *Lafler/Frye* claim. Several responses by both the State and the Petitioner followed, including an affidavit from the Petitioner's grandmother, Ms. Amanda Washington. Affidavits were ultimately ordered by the Court due on or before 2-16-16 regarding the trial attorneys' recollections of this thirty (30) year plea offer.

LEGAL PRINCIPALS CONCERNING RULE 32 PROCEEDINGS IN THIS CASE

In order to prevail on a claim of ineffective assistance of counsel, a Petitioner must show two components. First, the petitioner must show that his trial counsel's performance was deficient, meaning that counsel's acts or omissions were outside the range of professionally competent assistance. *Strickland v. Washington*, 466 U.S. 668 at 688, 690; *Ex Parte Green*, 15 So. 3d. 489, 492 (Ala. 2008). For counsel's performance to be deficient, it must fall below an objective standard of reasonableness under prevailing professional norms. *Williams v. Taylor*, 529 U.S. 362 (2000) at 390, 391. Second, the petitioner must show that counsel's deficient performance prejudiced the outcome of the trial.

Strickland at 687. To show prejudice, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Id.*

In it's consideration of an ineffective assistance of counsel claim(s), the circuit court should indulge in a "strong presumption that the 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." *Strickland* at 689. The Supreme Court has held that

> "In assessing prejudice under *Strickland* the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, *Strickland* asks whether it is 'reasonably likely' the result would have been different. This does not require a showing that counsel's actions 'more likely that not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than not standard is slight and matters 'only in the rarest of case'. The likelihood of a different result must be substantial, not just conceivable."

Harrington v. Richter, 2011-WL 148587, *18 (Jan. 19, 2011).

The *Lafler/Frye* claim made in part II of the Amended Petition, based on the allegation that Petitioner's trial counsel was deficient for not communicating an offer of settlement of thirty (30) years during the trial, is also subject to the *Strickland* standard set forth above, which was extended to pre-trial, plea bargaining, in these cases. *Lafler v. Cooper*, 132 S.Ct. 1376 (2012); *Missouri v. Frye*, 132 S.Ct. 1399 (2012). In the *Frye* case, counsel failed to inform the Defendant of an offer of settlement that had an expiration date. The Supreme Court in *Lafler*, which is not on point here, held that "where counsel's ineffective advice led to an offers' rejection and where the prejudice alleged is having to stand trial, a defendant must show that but for the ineffective advice, there is a reasonable probability that the plea offer would have been presented to the court, that the court would have accepted its terms and that the conviction or sentence, or both under the offer's terms would have been less severe that under the actual judgment and sentence imposed." *Id.* The petitioner in a Rule 32 may establish prejudice by showing that but for the counsel's deficient performance, (1) the defendant would have accepted a plea offer, (2) the court would have approved it, and (3) it would have resulted in a less severe sentence than that actually imposed after trial. *Frye* at 1403.

I. WASHINGTON FAILED TO PROVE THAT TRIAL COUNSEL WAS INEFFECTIVE FOR NOT ADEQUATELY INVESTIGATING EVIDENCE CRITICAL TO THE DEFENSE.

The Petitioner alleges in 1A(1) that the Defendant's attorney failed to investigate and present exculpatory evidence that the Defendant did not burn the clothes he was wearing during the time the murder was committed. However, the Petitioner does not set forth with any specifics what witnesses could have been called, which would have successfully contradicted the testimony presented by the State on this point, or that the such testimony would have made any difference in the verdict as required under *Strickland* in this Court's assessment of trial counsel's performance.

The State presented testimony from Michael Dixon, who admitted that he told the police in a prior statement, that the Defendant had changed his clothes at Michael Dixon's house and left his house with his clothes he had been wearing when he admitted to Dixon he had robbed the Radio Shack, as well as the gun he had used. (R-480, 481) This witness was throughly cross examined by counsel for the Defendant about the circumstances he made this statement to the police, in contrast to his sworn testimony at trial. (R-480) At trial Dixon testified that the Defendant had not confessed and not changed his clothes at this home. (R-480) The State presented testimony as well from an April Eatmon, who testified that the Defendant told her he had thrown the gun off a cliff and admitted to burning his clothes he had been wearing during the murder. (R-

683, 684) Defendant's counsel cross examined this witness concerning her past relationship with the Defendant and her motivation for a reward in return for her testimony implicating the Defendant. (R-644) The State also called Verrick Taylor, the Defendant's case manager from a therapeutic foster care home, where the Defendant had once resided. Mr. Taylor testified that the Defendant also admitted to him that he had shot the victim in the head at the Radio Shack, had burned his clothes and the store's video tape, and had buried the gun he used. (R- 718) This witness was also throughly cross examined by Defendant's counsel concerning his motivation to call Crime Stoppers for a reward and the delay in coming forward. (R-734)

In 1A(2), the Petitioner claims that counsel was ineffective due to his failure to investigate alternative suspects, specifically a suspicious unknown black male who came into a neighboring store around 6 pm reported by a Ebony Gary; Marvin Smith and Ron Carter, who were employees of the Radio Shack; and an unknown white male seen by a witness, Andy Kendrick, leaving the Radio Shack at some point before the police arrived at the scene. All of these "alternative suspects" had been investigated by the police and made known to the Defendant before trial. They were in fact discussed at trial, as brought out in cross examination of the Detective by the Defendant's counsel. The following are portions of the record where there was extensive probing by counsel into the "alternative suspects" in his cross examination of Detective Roy Bristow. (R-611-612-unidentified suspicious black male-Ebony Gary

interview, R-568,569- Marvin Gary interview, R-594, 601-602- Ron Carter interview, and R-572-77- unidentified white male-Andy Kendrick interview). Counsel also argued all of these "alternative suspects" in his closing argument. (R- beginning at 798) To have investigated any of these matters further, might very well have been detrimental to the Defendant. The Court finds that these matters were thoroughly sifted through on cross examination, and were strategically handled by counsel in a way most advantageous to the Defendant during the trial.

In 1A(3) the Petitioner claims that counsel for the Defendant was ineffective in his failure to investigate the Petitioner's "alibi" or his whereabouts the night of the crime, through witness interviews, Walmart video, and phone records and present same to jury. The Petitioner does not claim that an investigation by the Defendant's counsel by interviews of the Defendant's family members would have proven that the Defendant was at a party at the same time as the murder, therefore, there is no point in addressing that issue. None of these "party" witnesses would have been able to prove the Defendant's alibi defense, but merely establish when they last saw the Defendant, which was well before the estimated time of the murder.

The Petitioner also claims that he went to Walmart before going to Michael Dixon's house to purchase batteries. The Defendant himself gave a statement to police concerning the specific door he said he entered on the night of the murder. The State proved that the Detective went to Walmart and observed the video of this specific door "nearest" the

food, and the Defendant was not observed at the Walmart. (R-607) There was very lengthy cross examination on this topic, and on the time line of the Defendant's whereabouts when Detective Bristow was on the stand. The Defendant's counsel brought out the fact that the Defendant might have been mistaken about the door he entered, and the Detective did not observe the camera footage of the other door. (R-607) The failure of Defense counsel to call witnesses who spoke to the Defendant on the phone during the time frame of the murder would not have firmed up an alibi or proven where the Defendant was at the time of the murder. Both Michael Dixon and his father Leon Oden were called by the State, and were cross examined on the issue of when the Defendant arrived at their home and how long he stayed. In fact, these two witnesses generally provided the "alibi" defense the Petitioner claims was not provided. (R- 472 and 491 respectively) These alibi issues were also argued by the Defendant in closing argument as well. The cross examination by defense counsel, of the lead detective Roy Bristow, was extremely effective in this Court's opinion, and was so much so, that after counsel finished, it was then at a break, that the State made an offer of settlement for a Life sentence that had never been made before. (R-563-668) The Court finds that counsel for the Petitioner was in fact very effective in providing the jury exculpatory evidence concerning the matters of burned clothes, alternative suspects, and alibi through the cross examination of the State's own witnesses and argument thereof.

The Petitioner claims in IB that counsel was ineffective in failing to investigate the State's lead witnesses and adequately impeach them at trial. Once again, this Court points to the very thorough and methodical way in which defense counsel crossed examined the two most damaging witnesses for the defense, Ms. April Eatmon, and Mr. Verrick Taylor. Both of these witnesses testified that the Defendant confessed the murder to them, therefore, were the most crucial witnesses called by the State. These two witness, were corroborated, however, by each other, and the testimony offered through Michael Dixon in his first statement to the police. Counsel for the Defendant was armed with material for cross examination provided to him by the State and known by the Defendant before the trial began. Issues concerning the relationships both past and present were known by the Defendant and were strategically explored with these witnesses. Matters alleged in the Petition concerning prior antagonism with Ms. Eatmon over her tires being slashed and failure of the Defendant to pay for an abortion, might have very well been areas of cross examination counsel wanted to avoid. Certainly areas of the Defendant's file with DHR/foster care might have been areas to avoid as well in the cross examination of his former counselor. If anything, cross examination of the counselor in these areas would have only established the strong relationship between the Defendant and Mr. Taylor, which was inconsistent with the Defendant's theory that a confession to Mr. Taylor was not logical or to be believed. Ms. Eatmon was questioned concerning the Crime Stopper's reward in the record at 644-646, 697, 699, 701-703, 704. Mr.

Taylor was cross examined concerning the Crime Stopper's reward in the record at 644-646, 734, 738-746, 754, 762. Petitioner does not allege what additional information counsel for the Defendant could have discovered which would have improved his cross, or provided the jury with additional information to discredit these witnesses, which was not covered by the Defendant's counsel at trial. The Petitioner does not show ineffective assistance of counsel in this area of investigation or that any additional investigation, would have probably resulted in a different outcome under *Strickland*.

In 1C the Petitioner claims counsel was ineffective for failure to object to the admission of irrelevant and prejudicial evidence and failed to request proper jury instructions. Specifically in 1C(1) the Petitioner claims that counsel failed to object to Michael Dixon being called as a witness by the State and questioned about a prior inconsistent statement made to the police upon testifying at trial to something completely different. Mr. Dixon and his father Mr. Oden provided the Defendant's "alibi" testimony, therefore, this Court is perplexed as to why the Petitioner would object to trial counsel failing to object to his being called as a witness. The circumstances of his prior inconsistent testimony were thoroughly covered by counsel on cross examination, as were all of the exculpatory evidence which the witness testified to on the Defendant's behalf. There is nothing to suggest from the pleadings or in the record that Michael Dixon's prior inconsistent statements to the police would not have or should not have been admissible as prior

inconsistent statement impeachment. Rule 607 of the Alabama Rules of Evidence certainly does not disallow a party from impeaching it's own witness. Rule 607 "abrogates the common law requirement that a party could impeach his own witness by inconsistent statement only if surprised by the witness' testifying inconsistent with his prior statement." See 1 *McElroy's* 165.01(6)(a) There has been no showing by the Petitioner that the State violated any "good faith standard" here as discussed in *Burgin v. State* and cited in the Petition, or that the State had prior knowledge of what the witness Dixon was actually going to say at trial, as he had given at least two different statements to the police. (No. CR-00-1645, 2002 WL 1138884, at *2 (Ala. Crim. App. May 31, 2002) (R-478) The jury was also instructed in the charge by the Court concerning their ultimate role in weighing the evidence and assessment of witness' credibility, which was not prejudicial nor highlighted the inconsistency of witness Dixon's testimony, as the Petitioner suggests trial counsel should have requested. (R-846-848) Even if the Court had barred the State from impeaching the witness on his prior inconsistent statement to police, there is no reasonable probability that the jury would have returned a different verdict. Mr. Dixon's prior inconsistent testimony to police, was cumulative to the testimony offered by the State from both Verrick Taylor, and April Eatmon, who both testified the defendant confessed the murder to them.

In 1C the Petitioner also claims the failure of counsel to object to the opinion evidence of the lead

detective concerning the veracity of Mr. Dixon's statement implicating the Defendant to the police was ineffective assistance. While the prosecutor's question to the detective might have been improper, and objectionable, as well the answer, this error alone does not constitute ineffective assistance. *Hutchins v. State*, So.2d 395, 397 (Ala. Crim. App. 1990). Counsel might also have made a strategic decision and not objected to Detective Bristow's opinion about what statement was true, for the purpose of later argument in closing, as to the detective's prejudice towards this witness. (R-803) Again, the jury was also instructed as to their role in ultimately deciding the facts, the credibility of the witnesses and what weight to give to the evidence. (R-846-848)

The Petitioner also claims in 1C(1) that counsel should have objected to several comments made by the prosecutor concerning Mr. Dixon's testimony in closing argument, but fails to specifically demonstrate how an objection would have been helpful at this point in the proceedings. Petitioner has not proven this testimony inadmissible 607 impeachment. If anything an objection at this point to testimony already admitted into evidence would have only highlighted it's importance to the jury, and may have very likely been overruled.

In 1C(2) the Petitioner claims that counsel's failure to object to "victim impact testimony" from the mother and wife generally concerning the victim being a good husband and father, was ineffective assistance. Counsel in fact did object to the line of questioning albeit a bit late, but this testimony was

not proven overly prejudicial. This performance had no effect on the outcome of the trial.

In 1C(3) the Petitioner cites instances of alleged prosecutorial misconduct, that in this, the trial court's opinion, did not give rise to unfair prejudice to the Defendant, nor were they grounds for reversal on appeal. Failure to object at the time, therefore, does not give rise to ineffective assistance of counsel under the *Strickland* standard.

In 1C(4) the Petitioner claims failure to object to crime scene photos violated the standard of performance required under *Strickland*. Petitioner improperly assumes, however, that an objection would have been sustained. The Defendant's statement to Verrick Taylor about where and how he shot the victim and the aftermath, as he described the blood coming out of the victim's head like a "water fountain" made the crime scene photos, including the enlargements, extremely relevant. (R-717) There is no error here.

In 1D the Petitioner alleges that counsel failed to investigate the circumstances of the Defendant's life or present evidence of his good character at the guilt phase, however, does not set forth how any of the witnesses suggested in the Petition would have withstood the cross examination of the State concerning their knowledge of his background, which would have been opened up, as well as their knowledge of the facts of the murder. In this Court's opinion, putting on character evidence in this case would have been extremely risky at the guilt phase. There is no evidence presented by the Petitioner, that

counsel's failure to put on good character evidence was anything other than a purposeful, strategic decision.

In 1E the Petitioner reclaims that trial counsel's ineffectiveness prejudiced the Defendant during the guilt phase of the trial. The Petitioner correctly argues that under *Strickland*, the Petitioner need not show that any single mistake prejudiced the defense, but that the Court should evaluate the totality of the evidence in assessing whether a different outcome was reasonably probable, but for counsel's professional lapses. *Williams v. Taylor*, 529 U.S. 362, 397 (2000). The likelihood of a different result must be substantial, not just conceivable. *Harrington v. Richter*, 2011 WL 148587, at *18 (Jan. 19, 2011). Moreover, there is a strong presumption that trial counsel's conduct falls within the wide range of reasonable professional assistance. The presumption of competence of trial counsel must be disproved by the Rule 32 petitioner, and the petitioner continually bears the burden of persuasion on this issue. *Hunt v. State*, 940 So. 2d 1041, 1059 (Ala. Crim. App. 2005) This Court has not been so persuaded, and does not find any ineffectiveness as required under the *Strickland* standard, that resulted in counsel's failure to investigate as set forth in the Petition at 1A, B, C, D, or E.

II. WASHINGTON FAILED TO PROVE INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE COUNSEL FAILED TO

COMMUNICATE A FORMAL PLEA OFFER FROM THE STATE

Petitioner bases his *Lafler/Frye* claim on the pleading of the State of December 6, 2013, in response to the original Rule 32 Petition, where the District Attorney states that a 30 year offer was made at the trial. This statement was made in the context of conveying how effective counsel for the Defendant had been on his cross examination of the lead detective in the case, which had resulted in an offer of settlement by the State to plead to murder in return to a sentence of 30 years. The record only shows an offer of a Life sentence to a plea of murder, which the Defendant rejected as follows:

> Mr. Anderton: ...We extended an offer to Mr. Anthony on behalf of his client to allow Brandon Washington to plead guilty to the murder and receive a sentence of life in this case. It was -- it is my understanding that Mr. Anthony spoke to the Defendant and spoke to, I believe the Defendant's grandmother, along with his co-counsel, Brandon Taylor, the four of them in a room, and Mr. Anthony has told me that Mr. Washington does not wish to accept that offer.
>
> Mr. Anthony: And for the record, that is correct.
>
> The Court: And Mr. Anthony, do you believe you've had sufficient time to discuss the offer with your client, and he understands it?

> Mr. Anthony: Well, he understands, and that is why I brought his grandmother back in there. And you know, for the record, he is saying he didn't do it. He is saying he is not guilty.
>
> The Court: He pleads not guilty?
>
> Mr. Anthony: Right.

(R-671, 672) There is no mention of a 30 year offer in the record. This Court requested the attorneys submit affidavit's on this issue for consideration by the Court on this issue. Mr. Anthony recollects that a thirty year offer was made by Mr. Anderton, which he communicated to his client and was rejected. Mr. Anderton recalls an offer less that Life was communicated to Mr. Anthony, who represented to him that his client rejected it. He did not recall in his affidavit whether the 30 year offer was on the record, but that it was made after the Detective testified. The Affidavit of Ms. Washington, reflects that she was only aware of Mr. Anthony communicating a Life offer, which her grandson, the Defendant rejected. This affidavit was stipulated as true by the attorneys. While Mr. Anthony's and Mr. Anderton's recollections are contrary to that of Ms. Washinton, and now the Petitioners', the record is clear that the Defendant, in the midst of being on trial in a capital murder case, wherein he faced a serious threat of conviction and the death penalty, refused an offer of Life with the possibility of parole. In fact the record is clear, and it is this Court's recollection, that the Defendant, standing in the open court with his attorney, the prosecutor, the victim's family and the

press, through his attorney, maintained his innocence to the charge. In fact, his position in rejecting the offer of settlement, was that "he is saying he didn't do it, he is saying he is not guilty". (R-672) There was no evidence in the *Frye* case that an offer of settlement with an expiration date was ever communicated by counsel to his client or that he would have accepted or rejected it, as we have here.

In *Frye*, the Supreme Court applied *Strickland*'s two prong test claim based on counsel's failure to inform the habeas petitioner of a plea offer. The Court held that this failure satisfied *Strickland*'s performance prong: "defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.". *Missouri v. Frye*, 132 S. Ct. 1399, at 1408 (2012) In the *Frye* case, the Court explained that to show prejudice in the plea bargaining context, "defendants must demonstrate a "reasonable probability" that (1) "they would have accepted the earlier plea offer", and (2) "the plea offer would have been entered without the prosecution canceling it or the trial court refusing to accept it". *Frye* at 1403 The Petitioner's argument in the Petition that a 30 year sentence was far less that a Life sentence, and "substantially more favorable to Mr. Washington" is erroneous. To the contrary, and well known to an experienced defense counsel such as Mr. Anthony, in Alabama, there is not a significant difference in the two sentences, from Alabama's Department of Corrections and Board of Pardon and Parole's perspectives. Regardless of whether this offer of 30 years was placed on the

record, it is both Mr. Anderton's and Mr. Anthony's recollection, that any offer of settlement for less that Life was communicated and rejected by the Defendant. Evidence of the Defendant's position at that time, is made clear from the record in this case cited above. Therefore, this court does not find that the Petitioner has met his burden under *Frye* of showing a "reasonable probability" that the Defendant would have accepted a thirty year offer, or that this Court would have accepted the plea agreement, after the Defendant had proclaimed his innocence in the open and very public courtroom. The Petitioner has not proven counsel's performance ineffective, or that, but for his performance, the result would have been different under *Strickland* as claimed in part II of this Petition.

CONCLUSION

For the reasons stated above, this Court finds that Washington failed to prove by a preponderance of the evidence that he is entitled to the post conviction relief sought. The First Amended Rule 32 Petition is denied.

Appendix C

COURT OF CRIMINAL APPEALS OF STATE OF ALABAMA

No. CR-16-0510

BRANDON WASHINGTON
v.
STATE OF ALABAMA

(Appeal from Jefferson Circuit Court: CC05-1757.60)

May 11, 2018

NOTICE

You are hereby notified that on May 11, 2018, the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

s/ D. Scott Mitchell
D. Scott Mitchell, Clerk
Court of Criminal Appeals

cc: Hon. Teresa T Pulliam, Circuit Judge
Hon. Anne-Marie Adams, Circuit Clerk

Alexis Danneman, Attorney - Pro Hac
Steven D Merriman, Attorney - Pro Hac
Robert D Segall, Attorney
Charles C Sipos, Attorney - Pro Hac
Eric J Weiss, Attorney - Pro Hac
Jack William Wills, Asst. Atty. Gen.

Appendix D

IN THE SUPREME COURT OF ALABAMA

No. 1170751

EX PARTE BRANDON WASHINGTON

July 13, 2018

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on July 13, 2018:

Writ Denied. No Opinion. Bryan, J. - Stuart, C.J., and Parker, Main, and Mendheim, JJ., concur.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties,

the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Julia J. Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 13th day of July, 2018.

s/ Julia Jordan Weller

Clerk, Supreme Court of Alabama