APPENDIX

A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-10956-G

DANNY L SMITH,

Petitioner-Appellant,

versus

STATE OF ALABAMA,
LIMESTONE PRISON,
WARDEN,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

ORDER:

Danny Smith, an Alabama prisoner serving multiple life sentences for seven separate felony convictions arising from two criminal cases, filed the instant 28 U.S.C. § 2254 petition, which the district court denied. He moved for reconsideration, pursuant to Fed. R. Civ. P. 59(e), the court denied the motion, and denied him a certificate of appealability ("COA") and *in forma pauperis* ("IFP") status. He now moves this Court for both.

Mr. Smith's claims do not warrant a COA because they all were procedurally defaulted, as they were dismissed by the state court on adequate and independent state grounds, namely Alabama Rule of Criminal Procedure 32, which prohibits challenging multiple judgments in one petition and prohibits raising claims that could have been, but were not, raised on direct appeal. These findings are adequate, as Mr. Smith's state habeas petitions each challenged his guilty pleas

from both his November 2007 and August 2008 cases, and he did not directly appeal his convictions or sentence. As such, Mr. Smith's claims therefore all are subject to procedural default in federal habeas review. *See Bailey v. Nagle*, 172 F.3d 1299, 1302-03 (11th Cir. 1999); *Judd v. Haley*, 250 F.3d 1308, 1313 (11th Cir. 2001).

Moreover, Mr. Smith does not warrant excuse for this default because he did not argue actual innocence and failed to demonstrate sufficient cause for his default. *McKay v. United States*, 657 F.3d 1190, 1196 (11th Cir. 2011). Finally, no COA is warranted in the denial of Mr. Smith's Rule 59(e) motion, because he offered no newly discovered evidence, nor manifest errors of law. *See Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007). As such, Mr. Smith's motion for a COA is DENIED, and his motion for IFP status is DENIED AS MOOT.

/s/ Jill Pryor
UNITED STATES CIRCUIT JUDGE

APPENDIX

B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

DANNY L. SMITH,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No.: 4:17-cv-01223-RDP-JEO
	)	
STATE OF ALABAMA, et al.,	)	
	)	
Respondents.	)	

ORDER

The petitioner has filed yet another motion attempting to stay this action, reinstate a previously dismissed action, investigate an allegedly stolen § 2254 petition, with an additional habeas petition attached which includes further allegations of mail theft. (Doc. 15). Once again, the court instructs the petitioner that his action which was eventually docketed as 1:18-cv-00688-MHH-JEO was not stolen by prison officials, but instead was filed as an amended petition in this action and therefore not given a new docket number. (*See* Docs. 10, 11, and 12). When the petitioner again submitted the petition, the clerk's office opened a new case. Because the court found all of the petitioner's claims arise from one sentencing, with all the sentencings running concurrently, the new case was closed and the new petition filed as an amendment in the this case. The petitioner's "Motion to Cause Investigation of Legal Mail Theft and Motion to Postpone

Proceedings" (doc. 15) is **DENIED**. To the extent he attempts to file an additional habeas petition, he is instructed as follows:

As previously explained to the plaintiff, because all of the claims in this action, and in 1:18-cv-00688-MHH-JEO, arise from the same state court and the same sentencing, they are properly considered in one federal habeas petition. Rule 2(e) of the Rules Governing Section 2254 cases states:

> **(e) Separate Petitioner for Judgments of Separate Courts.**
>
> A petitioner who seeks relief from judgments of more than one state court must file a separate petition covering the judgment or judgments of each court.

Id., see also Rainey v. Sec'y for Dept. of Corr., 443 F.3d 1323, 1327 (11th Cir. 2006) *overruled on other grounds by Ferreira v. Sec'y, Dept. of Corr.*, 494 F.3d 1286 (11th Cir. 2007) ("A petitioner is permitted to challenge multiple judgments in a single petition under Rule 2(d) of the Rules Governing Section 2254 Cases in the United States District Courts.");[1] *Werdell v. Dept. of Corr.*, 520 Fed.App'x 854

[1] As explained by the Court in *Rainey*, Rule 2(d) of the Rules Governing Section 2254 Cases used to state:

> [A] petition shall be limited to the assertion of a claim for relief against the judgment or ***judgments*** of a single state court (sitting in a county or other appropriate political subdivision). If a petitioner desires to attack the validity of the judgments of ***two or more state courts*** under which he is in custody or may be subject to future custody, as the case may be, he shall do so by separate petitions.

(11th Cir. 2013) ("The judgment in this case is vacated and the case is remanded so that the district court can ... allow the petition to proceed in that court without dismissal on the ground that it violated Rule 2(e) of the Rules Governing Section 2254 Cases.").

According to state court records, the Circuit Court of Etowah County sentenced the petitioner on seven distinct charges on August 7, 2008.[2] (*See e.g.*, doc. 7-3 at 17 ("SMITH was sentenced on all case No's, as state above, on August [7], 2008.). In CC 07-786 and CC 07-787, the record reflects the sentences in all seven cases will run concurrently. (Docs. 7-1 and 7-2). According to the petitioner, because he did not plead guilty to all seven charges on the same date, he should be able to proceed on multiple, simultaneous petitions. (Doc. 15 at 2). However, he then requests this court "set aside the stay and abeyance of the first § 2254 petition under case no. 1:18-cv-00688-MHH-JEO, and join this sister petition with first litigation for purposes of 'considering' a single § 2254 proceeding ...." (Doc. 15 at 9).

Rule 2(d), Rules Governing Section 2254 Cases in the United States District Courts (emphasis added). In 2005, the Rules were amended and the relevant provision became Rule 2(e), quoted above. *Rainey*, 443 F.3d at 1327 n. 5.

[2] Those cases, all in the Circuit Court of Etowah County, Alabama, are as follows: CC06-269, Assault 1st, guilty plea August 7, 2008; CC 07-41, ASORCNA violation, guilty plea August 7, 2008; CC07-784.01, Burglary 1st, guilty plea August 7, 2008; CC07-784.02, Assault 2nd, guilty plea August 7, 2008; CC07-785, Criminal Mischief 2nd, guilty plea August 7, 2008; CC07-786, Burglary 3rd guilty plea November 6, 2007; CC07-787, Theft of Property 3rd, guilty plea November 6, 2007.

The defendants assert, *inter alia*, this petition is untimely because under 28 U.S.C. § 2244(d)(1) the petitioner had one year from the date his convictions became final to file a petition. (Doc. 7). From the sentencing date of August 7, 2008,[3] the petitioner had forty-two days to file an appeal, until September 18, 2008. Because no appeal was filed within that time frame, his convictions all became final on September 18, 2008, and he therefore had until September 18, 2009, in which to file a petition here. *See McCloud v. Hooks*, 560 F.3d 1223, 1229 (11th Cir. 2009) (citing *Ferreira v. Secretary for the Department of Corrections*, 494 F.3d 1286, 1293 (11th Cir. 2007) ("AEDPA's statute of limitations begins to run from the date both the conviction and the sentence the petitioner is serving at the time he files his application become final because judgment is based on both the conviction and the sentence."). Any Rule 32 petition properly filed within that time limit tolls the statute of limitations during its pendency. 28 U.S.C. § 2244(d)(2). The petitioner here filed multiple petitions in the state courts for Rule 32 relief. The undersigned does not address this contention at this time other than to note only that relevant analysis will apply to all seven of the convictions with concurrent sentences challenged in the two separate, and now consolidated, petitions filed with this court.

[3] The respondents repeatedly refer to these pleas and sentencing as occurring on August 5, 2008. (*See e.g.*, doc. 7 at 2). However, the records filed in support of their response clearly state the pleas occurred on August 7, 2008. (Docs. 7-1, 7-2).

For the reasons set forth above, the petitioner is **ORDERED** to amend his petition. He is instructed that he is to include in the amended petition all of his claims for each of the seven underlying state court actions for which he was sentenced on August 7, 2008, regardless of the date on which he pleaded guilty. The petitioner is further instructed he must use the court's form for a petition under 28 U.S.C. § 2254 for writ of habeas corpus. *See* Rule 1(d), *Rules Governing Section 2254 Cases.* The petitioner must write "4:17-cv-01223-RDP-JEO" at the top of his amended petition. The petitioner shall not cite legal authority in the amended petition. Rather, he must clearly set forth each ground for relief, along with the supporting facts for each ground specified, on the form provided. *See* Rule 2(c)(1) and (2), *Rules Governing Section 2254 Cases.*

The petitioner is further instructed that he may not include any extraneous claims or facts. He may not include allegations of a stolen or missing 28 U.S.C. § 2254 petition. He must include **EVERY** claim he has from **EVERY** case for which he was sentenced on August 7, 2008. The petitioner is instructed that any contention not included in the amended petition filed pursuant to this Order will be deemed abandoned. *See e.g., Cromartie v. Warden, Georgia Diagnostic & Classification Prison,* 2017 WL 1234139, at *1 n. 1 (M.D. Ga. Mar. 31, 2017), certificate of appealability denied sub nom., *Cromartie v. GDCP Warden,* 2018

WL 3000483 (11th Cir. Jan. 3, 2018) (citing *Blankenship v. Terry,* 2007 WL 4404972, at *40 (S.D. Ga. 2007) (stating that claims not briefed are abandoned because "mere recitation in a petition, unaccompanied by argument, in effect forces a judge to research and thus develop supporting arguments—hence, litigate—on a petitioner's behalf") (citations omitted).

The petitioner is therefore **ORDERED** to file an amended habeas application, on the form provided, within thirty (30) days of today's date. The petitioner's failure to comply with this order will subject this action to dismissal without further notice. Upon receipt of the amended petition, the undersigned will enter an order providing the government with an opportunity to respond, as appropriate.

The Clerk is **DIRECTED** to serve a copy of this Order on all parties of record and to provide the petitioner with two (2) copies of the court's form for filing a petition for habeas corpus under 28 U.S.C. § 2254.

DATED this 11th day of July, 2018.

John E. Ott

JOHN E. OTT
Chief United States Magistrate Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

DANNY L. SMITH,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No.: 4:17-cv-01223-RDP-JEO
	)	
STATE OF ALABAMA, et al.,	)	
	)	
Respondents.	)	

REPORT AND RECOMMENDATION

This is a petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 by Danny L. Smith, an Alabama state prisoner, challenging his life sentences imposed on August 7, 2008, after he pleaded guilty in Etowah County Circuit Court to seven separate felony and misdemeanor charges.[1] (Doc. 1). Smith filed his *pro se* petition for writ of habeas corpus on July 19, 2017.[2] (*Id.*, at 29). Based

[1] The court takes judicial notice of the state court records in each of the seven cases: CC-06-269, Assault 1st, guilty plea August 7, 2008; CC-07-41, ASORCNA violation, guilty plea August 7, 2008; CC-07-784.01, Burglary 1st, guilty plea August 7, 2008; CC-07-784.02, Assault 2nd, guilty plea August 7, 2008; CC-07-785, Criminal Mischief 2nd, guilty plea August 7, 2008; CC-07-786, Burglary 3rd, guilty plea November 6, 2007; CC-07-787, Theft of Property 3rd, guilty plea November 6, 2007. *See Keith v. DeKalb County, Georgia*, 749 F.3d 1034, 1041 n.18 (11th Cir. 2014) (citing Fed. R. Evid. 201); *Grider v. Cook*, 522 F. App'x 544, 546 n.2 (11th Cir. 2013).

[2] Smith signed his petition on July 19, 2017. (Doc. 1 at 29). Although not docketed until July 21, 2017, Smith is entitled to a presumption that his petition was tendered to prison officials for filing on the date he signed it. *See Houston v. Lack*, 487 U.S. 266, 275 (1988).

on court orders, Smith filed an amended *pro se* petition on August 2, 2018.[3] (Doc. 17). He is incarcerated in Limestone Correctional Facility, in Harvest, Alabama. In accordance with the usual practices of this court and 28 U.S.C. § 636(b), the matter was referred to the undersigned magistrate judge for a preliminary review and recommendation.

PROCEDURAL HISTORY

On November 6, 2007, Smith pled guilty to third degree burglary and third degree theft of property. (Doc. 7-6 at 25; doc. 7-7 at 2). On August 7, 2008, Smith pled guilty to first degree burglary, second degree assault, first degree assault, second degree criminal mischief, and violation of the Community Notification Act. (Doc. 7-6 at 30; doc. 7-7 at 3; doc. 7-31 at 40).

Smith was sentenced on August 7, 2008, under the Habitual Offender Act to life imprisonment in five of these cases, with each of the life terms to run concurrently all of these convictions on August 7, 2008. (Doc. 7-6 at 26-30; doc. 7-7 at 2; doc. 7-10 at 31-33). In the two misdemeanor cases (CC-07-785 and CC-07-787), Smith received 12 month sentences, also to run concurrently with five life sentences. (Doc. 7-10 at 33). Smith did not file a direct appeal.

[3] For the reasons set forth in the court's Orders of May 8, 2018, and July 11, 2018 (docs. 12 and 16), the undersigned considers solely the claims set forth in the Amended Petition.

Smith filed his first motion for collateral review on July 20, 2009, in CC-07-786 and CC-07-787.[4] (Doc. 7-3 at 16). At some point in September 2009, Smith amended his petition to include additional claims.[5] (Doc. 7-7 at 16-17). On May 14, 2012, the trial judge dismissed the Rule 32 petition without prejudice, based on Ala. R. Crim. P. 32.1, which prohibits challenging multiple judgments in one petition. (*Id.*, at 34). Smith appealed that ruling and on December 7, 2012, the Alabama Court of Criminal Appeals ("ACCA") affirmed the trial court's dismissal. (*Id.*, 7-7 at 36; Doc. 7-13). The Alabama Supreme Court denied certiorari on March 15, 2013. *See Ex parte Danny L. Smith*, No. 1120438, 162 So. 3d 952 (Ala. 2013) (table).

On April 5, 2013, Smith filed two new petitions for collateral review under Rule 32, Ala. R. Crim. P. (Doc. 7-17 at 29, doc. 7-18 at 5, 9). The circuit court again dismissed the petitions, this time with prejudice, on September 24, 2013, citing to Rule 32.1, Ala. R. Crim. P., and Smith again appealed. (Doc. 7-17 at 2; doc. 7-18 at 11, 13). On January 12, 2015, the ACCA affirmed the dismissal for violation of Rule 32.1, Ala. R. Crim. P., but reversed and remanded to the circuit court for dismissal of the petition without prejudice. (Doc. 7-21). On February 24,

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[4] Those cases were the Burglary 3rd and Theft of Property 3rd, to which Smith had pleaded guilty on November 6, 2007.

[5] The amendment is undated and the Etowah County Clerk's Office stamp is illegible. (*See* doc. 7-7 at 16-17).

2015, the Circuit Court of Etowah County complied. (Doc. 7-23). Smith did not appeal that dismissal.

On March 12, 2015, Smith filed a third Rule 32 petition. (Doc. 7-24 at 4). The district attorney again moved to dismiss, asserting Smith again challenged multiple judgments in a single petition. (Doc. 7-25 at 31). The trial court dismissed the third Rule 32 petition on May 18, 2015, noting Smith had reserved no issues for appeal and waived his right to petition for post-conviction relief. (Doc. 7-25 at 32-33). The trial court advised Smith the only grounds on which he could file post-conviction pleadings were those found in Rule 32.2(a)(3) and (5), Ala. R. Crim. P.[6] (*Id.*). Smith appealed that dismissal[7] and on October 16, 2015, the ACCA again affirmed the dismissal of his petitions for co-mingling multiple

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[6] Rule 32.2 states in relevant part:

> (a) Preclusion of Grounds. A petitioner will not be given relief under this rule based on any ground:
>
> ...
>
> (3) Which could have been but was not raised at trial, unless the ground for relief arises under Rule 32.1(b); or
>
> ...
>
> (5) Which could have been but was not raised on appeal, unless the ground for relief arises under Rule 32.1(b).

In turn, Rule 32.1(b) allows a post-conviction petition for relief if "[t]he court was without jurisdiction to render judgment or impose sentence." Rule 32.1(b), Ala. R. Crim. P.

[7] Smith actually brought two separate, parallel petitions in his third round of seeking collateral review. (*See e.g.*, Doc. 7-25 at 20, 23, 57).

judgments in a single proceeding.[8] (Doc. 7-25 at 56; Doc. 27-28). Smith did not appeal to the Alabama Supreme Court and the ACCA issued a Certificate of Judgment on November 4, 2015. (Doc. 7-29).

Smith brought a fourth round of Rule 32 proceedings on November 6, 2015.[9] (Doc. 7-30 at 10). On November 7, 2016, the state filed a response addressing each of the claims in cases CC-07-786 and CC-07-787 on their merits. (Doc. 7-33 at 26). In its December 5, 2016, Order denying relief, the Rule 32 court addressed these claims and permanently enjoined Smith from filings any pleading with grounds previously raised or which could have been raised, unless he first showed good cause for his failure to raise such claims earlier. (Doc. 7-33 at 58-65). On appeal (doc. 7-34 at 5), the ACCA held in pertinent part:

> First, Smith alleged in his petition that he was entitled to equitable tolling because the filing of his first Rule 32 petition was timely and was dismissed without prejudice. Smith maintains that, because all three of his previous petitions were dismissed without prejudice because his petitions challenged multiple judgments, he is entitled to equitable tolling.
>
> The Alabama Supreme Court has held that
>
> > "when a Rule 32 petition is time-barred on its face, the petition must establish entitlement to the remedy afforded by the doctrine of equitable tolling. A petition that does not assert equitable tolling, or that asserts it but

[8] The court delineated these judgments as "his November 2007 guilty plea proceedings, his August 2008 guilty plea proceedings, and a habeas corpus proceeding." (Doc. 7-28 at 3).

[9] Although stamped as received by the Etowah County Clerk's Office on November 20, 2015, Smith dated his petition on November 6, 2015.

> fails to state any principle of law or any fact that would entitle the petitioner to the equitable tolling of the applicable limitations provision, may be summarily dismissed without a hearing. Rule 32.7(d), Ala. R. Crim. P."

Ex parte Ward, 46 So. 3d 888, 897-98 (Ala. 2007). "[T]he threshold necessary to trigger equitable tolling is very high, lest the exceptions swallow the rule." *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000). "Equitable tolling is appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Sandvik v. U.S.*, 177 F.3d 1269, 1271 (11th Cir. 1999) ... *Irwin v. Department of Veteran Affairs*, 498 U.S. 89, 96 (1990) ("Federal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.").

In the present case, although Smith alleges that he was entitled to equitable tolling in his petition and again on appeal, his assertion is unavailing. Each of his previous petitions were dismissed on the ground that his petition challenged multiple judgments. Smith maintains that, because his first petition was filed within the statutory period and he was actively seeking judicial remedies from that time, he should be entitled to equitable tolling. Based on his contention, Smith could have had a meritorious argument for equitable tolling when he filed his second petition after the court had explained that he could not file a petition challenging multiple judgments. However, Smith continued to file petitions with the same defect even after being told numerous times by this Court and the circuit court the reason that the petitions were defective. Thus, the circumstances in the instant case that Smith claims entitle him to equitable tolling were fully within Smith's control and were avoidable with diligence from Smith. Therefore, Smith has not pleaded sufficient facts in his Rule 32 petition to satisfy his high "burden of demonstrating in his petition that there are such extraordinary circumstances justifying the

> application of the doctrine of equitable tolling." *Ex parte Ward, supra.*

(Doc. 7-37 at 3-4). After determining that Smith was not entitled to equitable tolling, in affirming the trial court's dismissal of the petition, the ACCA addressed the specific procedural bars which applied. (*Id.*, at 5-11). Smith's petition for writ of certiorari with the Alabama Supreme Court was denied without opinion and a certificate of judgment was entered July 7, 2017. (Doc. 7-40; doc. 7-42).

On July 19, 2017, Smith filed the instant habeas petition, attempting to address solely his claims arising from cases CC-07-786 and CC-07-787. (Doc. 1). At the time, his claims based on the August 7, 2008, pleas were still pending in the Alabama appellate courts. When the Alabama Supreme Court denied certiorari in those cases, Smith brought a second habeas action in this court. *See* 1:18-cv-00688-MHH-JEO. Because all of the petitioner's claims arose out of one sentencing, this court consolidated the actions and provided the petitioner with the opportunity to file an amended habeas petition.[10] The amended petition is thus the operative one for this court's review. (Doc. 17).

[10] To the extent Smith attempts to argue that state law, specifically Rule 32.1 requiring separate state court petitions, is contrary to ***this court's*** findings in applying federal law, this is irrelevant. (*See* doc. 17 at 6-7, 9-12; doc. 24 at 1-29; doc. 27). No requirement exists that federal procedural rules align with state procedural rules, nor does a state procedural requirement which differs from a federal one in any way implicate the United States Constitution or other federal rights. To the extent the petitioner attempts to raise such a claim as Ground Two in his amended petition (doc. 17 at 15-17), relief on that basis is due to be denied.

Pursuant to the court's order to show cause (doc. 4), the respondents filed an answer on August 18, 2017, supported by exhibits, asserting that this petition is untimely (doc. 7); and a supplemental answer on August 31, 2018, again asserting the petition is untimely (doc. 20). By order dated September 4, 2018, the parties were notified that the amended petition would be considered for summary disposition, and Smith was notified of the provisions and consequences of this procedure under Rule 8 of the Rules Governing Section 2254 Cases. (Doc. 21). After requesting and receiving an extension of time in which to respond, Smith filed a response on October 1, 2018, and a motion for summary judgment, for evidentiary hearing, and for appointment of counsel on October 4, 2018. (Docs. 22-24). The court ordered that the motion for summary judgment would be treated as a further response, and denied the remainder of that motion. (Doc. 26, text order of October 23, 2018). Smith later filed a Motion for Leave to File Petitioner's Supplemental Points of Authorities (doc. 27), which the court construed as yet a further response.

PETITIONER'S CLAIMS

Smith appears to present the following grounds in his amended petition:

I. He is entitled to statutory and equitable tolling[11] (doc. 17 at 9, 76);

[11] The plaintiff presents various versions of this claim as grounds one and ten in his amended petition.

II. Rule 32.1(f) is unconstitutional as applied to him and thus he is entitled to statutory or equitable tolling (doc. 17 at 15-17);

III. He was denied counsel during collateral review and during sentencing (doc. 17 at 20);

IV. His guilty plea was not voluntary because of ineffective counsel[12] (doc. 17 at 24, 52, 72);

V. His convictions for assault are unconstitutional and counsel was ineffective for failing to raise this (doc. 17 at 61);

VI. His life sentences are manifestly unjust because the crime of a convicted sex offender changing residences without notice was repealed on July 1, 2011 (doc. 17 at 66);

VII. His guilty plea was involuntary because he did not know waiving his right to state appeal affected his right to federal review and the state court violated *Boykin v. Alabama* (doc. 17 at 48, 50, 69).

ANALYSIS

A. Claims which are Procedurally Defaulted

I. *The Petitioner is Entitled to Statutory and Equitable Tolling*

II. *Rule 32.1(f) is Unconstitutional as Applied and thus Petitioner is Entitled to Statutory or Equitable tolling*

IV. *The Guilty Plea was not Voluntary Because of Ineffective Counsel*

V. *The Convictions for Assault are Unconstitutional and Counsel was Ineffective for Failing to Raise This*

Smith asserts his two most recent state court collateral actions should have been found to be timely filed. The respondents counter that Smith received

[12] The plaintiff presents various versions of this claim as grounds four, five, and nine in his amended petition.

instructions from the Alabama Court of Criminal Appeals on how to properly file his petitions, yet he chose to ignore that advice. (Doc. 7 at ¶ 17; Doc. 20 at ¶ 18). In turn, Smith's failure to timely file proper petitions caused their dismissal, and thus those claims are unexhausted and therefore defaulted here. To avoid this result, Smith argues his claims should be reached on their merits through application of equitable tolling.[13]

In considering the Rule 32 petitions, the state courts found Smith's equitable tolling argument foreclosed by Rule 32.2(c), Ala. R. Crim. P. Quoting from its earlier decision in *Smith v. State*, CR-16-0417, __So. 3d__ (Ala. Crim. App. 2016), the ACCA held:

> Smith maintains that, because his first petition was filed within the statutory period and he was actively seeking judicial remedies from that time, he should be entitled to equitable tolling. Based on his contention, Smith could have had a meritorious argument for equitable tolling when he filed his second petition after the court had explained that he could not file a petition challenging multiple judgments. However, Smith continued to file petitions with the same defect even after being told numerous times by this Court and the circuit court the reason that the petitions were defective. Thus, the circumstances in the instant case that Smith claims entitle him to equitable tolling were fully within Smith's control and were avoidable with diligence from Smith. Therefore, Smith has not pleaded sufficient facts in his Rule 32 petition to satisfy his high

[13] Both Smith and the respondents set forth extensive arguments on statutory tolling. The undersigned notes these arguments only implicate the timeliness of the petition here, the application of which allows the court to address the claim on their merits. Rather than engage in an extensive analysis of the timeliness of Smith's § 2254 petition given the convoluted state court history of his claims, the undersigned address the claims based on the posture in which they were presented in the state courts. In doing do, the undersigned makes no findings on the timeliness of the petition.

> "burden of demonstrating in his petition that there are such extraordinary circumstances justifying the application of the doctrine of equitable tolling." *Ex parte Ward, supra.*

(Doc. 7-37 at 4).

Before bringing a habeas action in federal court, a petitioner must exhaust all state court remedies that are available for challenging his conviction, either on direct appeal or in a state court post-conviction motion. 28 U.S.C. § 2254(b)(1), (c). Exhaustion requires that prisoners give the state courts "one full opportunity" to resolve all constitutional issues by "invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). To properly exhaust a federal claim, a petitioner must "fairly present" the claim in each appropriate state court, thereby affording the state courts a meaningful opportunity to "pass upon and correct alleged violations of its prisoners' federal rights." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (internal quotations omitted).

"[F]ederal court[s] will not review the merits of claims including constitutional claims that a state court declined to hear because the prisoner failed to abide by a state procedural rule." *Martinez v. Ryan*, 566 U.S. 1, 9 (2012) (citing *Coleman v. Thompson*, 501 U.S. 722, 747–748 (1991) (other citations omitted). Where the state court correctly applies a procedural default principle of state law to arrive at the conclusion that the petitioner's federal claims are barred, the federal

court must respect the state court's decision. *Atkins v. Singletary*, 965 F.2d 952, 956 (11th Cir. 1992), cert. denied, 515 U.S. 1165 (1995); *Meagher v. Dugger*, 861 F.2d 1242, 1245 (11th Cir. 1988). When a petitioner fails to properly exhaust a federal claim in state court, and the unexhausted claim is now procedurally barred under state law, the claim is procedurally defaulted and federal review is barred. *Bailey v. Nagle*, 172 F.3d 1299, 1302-03 (11th Cir. 1999). "However, a state court's rejection of a federal constitutional claim on procedural grounds may only preclude federal review if the state procedural ruling rests upon 'adequate and independent' state grounds." *Ward v. Hall*, 592 F.3d 1144, 1156 (11th Cir. 2010) *See also Cone v. Bell*, 556 U.S. 449, 465 (2009) (quoting *Coleman v. Thomas*, 501 U.S. 722, 729-30 (1991) ("federal courts will not review questions of federal law presented in a habeas petition when the state court's decision rests upon a state law ground that is independent of the federal question and adequate to support the judgment.").

An "adequate and independent" state court procedural ruling consists of the following three elements: (1) the last state court rendering a judgment in the case must clearly and expressly state that it is relying on state procedural rules to resolve the federal claim without reaching the merits of that claim; (2) the state court's decision must rest entirely on state law grounds and not be intertwined with an interpretation of federal law; and (3) the state procedural rule must be adequate,

i.e., firmly established and regularly followed and not applied in an arbitrary or unprecedented fashion.[14] *Boyd v. Comm'r, Alabama Dep't of Corr.*, 697 F.3d 1320, 1336 (11th Cir. 2012) (citing *Card v. Dugger*, 911 F.2d 1494 (11th Cir. 1990)); *Ward*, 592 F.3d at 1156-57 (citing *Judd v. Haley*, 250 F.3d 1308, 1313 (11th Cir. 2001)). Rule 32.2(c) has been held to be "firmly established and regularly followed," such that it suffices as an independent and adequate state ground to preclude federal habeas review. *Hurth v. Mitchem*, 400 F.3d 857, 861-63 (11th Cir. 2005).

"When a state court denies a claim as defaulted based on an adequate and independent state procedural rule, a petitioner may not bring the claim in federal habeas," *Butts v. GDCP Warden*, 850 F.3d 1201, 1203 (11th Cir. 2017) (quoting *Lucas v. Warden, Ga. Diagnostic & Classification Prison*, 771 F.3d 785, 801 (11th Cir. 2014)), "unless the habeas petitioner can show 'cause' for the default and 'prejudice' attributable thereto ... or demonstrate that failure to consider the federal claim will result in a 'fundamental miscarriage of justice.'" *Coleman v. Thompson*, 501 U.S. 722, 749–50 (1991) (citations and internal quotation marks omitted). To show cause, a petitioner must prove "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v.*

[14] In a situation "where a state court has ruled in the alternative, addressing both the independent state procedural ground and the merits of the federal claim, the federal court should apply the state procedural bar and decline to reach the merits of the claim." *Alderman v. Zant*, 22 F.3d 1541, 1549 (11th Cir. 1994).

Carrier, 477 U.S. 478, 488 (1986); *Bishop v. Warden GDCP*, 726 F.3d 1243, 1258 (11th Cir. 2013). "Prejudice" requires a showing that at least a reasonable probability exists the results of the proceeding would have been different. *Spencer v. Sec'y, Dept. of Corr.*, 609 F.3d 1170, 1180 (11th Cir. 2010). A fundamental miscarriage of justice exists "in an extraordinary case where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Ward*, 592 F.3d at 1157 (quoting *Carrier,* 477 U.S. at 496).

Of the multiple grounds raised in the amended petition, actual innocence is not among them. Rather, Smith argues the state's application of Rule 32.1(f) was unlawful, unjust, and in violation of his due process and equal protection rights, and therefore Rule 32.2(c) should not apply to him. (Doc. 17 at 9-12, 16-17). As previously noted, Rule 32.2(c), Ala. R. Crim. P.,[15] is an independent and adequate state ground, sufficient to preclude federal habeas review. *Hurth,* 400 F.3d at 861-63.

Smith's equitable tolling arguments are without merit. Equitable tolling is available only where a petitioner "shows (1) that he has been pursuing his rights

[15] Alabama Rules of Criminal Procedure Rule 32.2(c) sets forth a one year limitations period for claims based on the grounds set forth in Rules 32.1(a) and (f). Rule 32.1(a) provides a remedy for claims that the Constitution of the United States or the State of Alabama require a new trial. Rule 32.1(f) excuses untimely appeals where the petitioner was not at fault for the failure and requires claims arising from separate guilty pleas be set forth in separate petitions. Also relevant here, Rule 32.1(b) allows relief on the ground that the trial court was without jurisdiction to render judgment or impose sentence. Rule 32.2(a)(5) excuses the failure to raise claims on Rule 32.1(b) grounds from the requirement that all grounds for relief must be raised at trial or on appeal.

diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (citations and internal quotation marks omitted). For equitable tolling to apply, the Eleventh Circuit requires "rare and exceptional circumstances, such as when the State's conduct prevents the petitioner from timely filing." *Lawrence v. Florida*, 421 F.3d 1221, 1226 (11th Cir. 2005). A petitioner seeking equitable tolling bears the burden of showing that it is warranted. *Hunter v. Ferrell*, 587 F.3d 1304, 1308 (11th Cir. 2009). Moreover, he must show a causal connection between the alleged extraordinary circumstances and the late filing of his petition. *San Martin v. McNeil*, 633 F.3d 1257, 1267 (11th Cir. 2011).

Smith first asserts that because he fired his counsel two days after his November 2007 guilty pleas, and did not have new counsel appointed until his sentencing in August 2008, he is entitled to equitable tolling.[16] (Doc. 9 at 2-3). According to Smith, he tried to withdraw his guilty plea, which the trial court denied, and this somehow demonstrates his claims should be found timely, as those should have been considered "tolling motions." (*Id.*, at 3-6). Smith's reliance on *Artuz v. Bennett*, 531 U.S. 4 (2000), is misplaced. That case held "the question whether an application has been 'properly filed' is quite separate from the question

[16] As addressed *infra*, this assertion of Smith's is belied by the state court records, which reflect Smith had counsel prior to and during the August 2008 trial, which terminated when Smith entered a plea of guilty to those and other charges. At sentencing, Smith had both trial counsel, Mr. Stracener, and also Mr. Stewart, who represented Smith on the charges to which he had previously pleaded guilty.

whether the claims *contained in the application* are meritorious and free of procedural bar." *Id.*, at 9 (emphasis in original). While Smith's first state petition for collateral review was "timely filed" for purposes of tolling the statute of limitations for 28 U.S.C. § 2244(d)(2), this is a wholly separate question from whether the state petition complied with state procedural rules such that the petition could be addressed on its merits. *See id.*

Motions filed prior to the time a conviction becomes final cannot toll the time for filing post-conviction relief. *See e.g.*, Rule 32.2(c), Ala. R. Crim. P. (calculating the time to file a petition for relief from conviction not appealed to the Alabama Court of Criminal Appeals as "within one (1) year from the time for filing an appeal lapses...") and Rule 4(b), Ala. R. App. P. (stating in a criminal case "a notice of appeal by the defendant shall be filed within 42 days (6 weeks) after pronouncement of the sentence."); *McCloud v. Hooks*, 560 F.3d 1223, 1228 (11th Cir. 2009) (in Alabama, the time to appeal expires 42 days after entry of final judgment). Thus, Smith's assertion that his motions to withdraw his guilty plea had some "tolling" effect on the state court limitations period is unsupported by any legal precedent.[17]

In the state court opinions addressing these claims, the ACCA held:

[17] In any event, Smith could have---but failed to---raise any claims concerning the November 2007 guilty pleas at his August 7, 2008, sentencing.

.... In his petition, Smith claimed that his guilty plea was involuntary and his counsel was ineffective because counsel "threatened him" that he would get life without parole in future pending cases. (C. 29.) Smith also alleged that counsel was unprepared for trial because counsel failed to subpoena or call his defense witnesses to testify on his behalf and counsel failed to collect evidence to support his defense. Smith claims that counsel forced him into pleading guilty when counsel suggested that Smith enter a blind plea agreement and told Smith that, by Smith accepting responsibility, the judge "might be" lenient on Smith. (C. 32.)

....

First, we note that, although Smith contends that the effect of counsel's errors rendered his counsel ineffective and his guilty plea involuntary, our reading of Smith's petition does not indicate that Smith pleaded specific facts indicating that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Therefore, we do not believe Smith has properly pleaded facts establishing that he was prejudiced by counsel's errors. *See Culver*, 549 So. 2d at 572.

Moreover, even if Smith's petition could be construed in a manner indicating that Smith had properly pleaded his ineffective-assistance-of-counsel claim, Smith's claims are still nonjurisdictional claims that are subject to the preclusions set forth in Rule 32.2. Ineffective-assistance of counsel claims and claims regarding the voluntariness of guilty pleas are not jurisdictional issues. *Catchings v. State*, 684 So. 2d 168, 169 (Ala. Crim. App. 1995) (A challenge to the voluntariness of a guilty plea is not jurisdictional and, although it can be raised for the first time in a Rule 32 petition, it is subject to the limitations period in Rule 32.2(c), Ala. R. Crim. P.); *Baker v. State*, 667 So. 2d 50, 51 (Ala. 1995) (Although claims of ineffective assistance of counsel may be presented for the first time in a Rule 32 petition, they are nevertheless subject to the limitations period in Rule 32.2(c), Ala. R. Crim. P.). *See also Cantu v. State*, 660 So. 2d 1026 (Ala. 1994) (holding that the voluntariness of a guilty plea can be raised for the first time in a timely filed Rule 32 petition). As the State correctly noted in its motion to dismiss, Smith's petition was not timely filed. Smith was sentenced on August 7, 2008. The instant petition was not filed until November 6, 2015, which was well

> outside the one-year limitations period in Rule 32.2(c), Ala. R. Crim. P. Therefore, Smith's claims challenging the voluntariness of his guilty plea and alleging ineffective-assistance of counsel are precluded under Rule 32.2 (c).

(Doc. 7-37 at 5-7 (*Smith v. State*, No. CR-16-0417 (Ala. Crim. App. Apr. 21, 2017))). In the companion case, the Court found:

> Smith, in his petition and in his brief on appeal, essentially argues that because his counsel did not prepare for trial, he was forced to plead guilty and confess his guilt in the guilty plea proceeding. However, all of Smith's claims related to ineffective assistance of counsel are, as found by the circuit court, precluded by Rule 32.2(c).
> . . . .
>
> Although couched in jurisdictional terms, Smith's ineffective assistance claims are not truly jurisdictional and therefore subject to the procedural bars of Rule 32, Ala. R. Crim. P. *See, e.g. Cogman v. State*, 852 So.2d 191, 192-193 (Ala. Crim. App. 2002) (a claim alleging ineffective assistance of counsel is not jurisdictional).

Smith v. State, No. CR-16-0782, at 17 (Ala. Crim. App. Dec. 8, 2017).

The state courts' appropriate determination that the petitioner's claims were barred by Rule 32.2(c), forecloses consideration of these claims here.

B. Merits

Pursuant to 28 U.S.C. § 2254(d), an application for a writ of habeas corpus shall not be granted with respect to any claim adjudicated on its merits in state court unless the adjudication resulted in (1) a decision that was contrary to, or involved an unreasonable application of a clearly established federal law, as determined by the Supreme Court of United States, or (2) a decision that was based

on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *See e.g., Premo v. Moore*, 562 U.S. 115, 120-21 (2011). A state court's determination is "contrary to" a federal law if it "fails to apply the correct controlling standard or if it applies the controlling authority to a case involving facts materially indistinguishable" from those in a controlling case, but reaches a different result. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). A state court's decision is an "unreasonable application" of federal law if it correctly identifies the governing rule but applies it to a new set of facts in an objectively unreasonable manner, or if it fails to extend a clearly established legal principle to a new context in an objectively unreasonable manner. *Id.*, at 407.

1. Claims Concerning Ineffective Assistance of Counsel

IV. Ineffective Assistance of Counsel at Guilty Plea[18]

V. The Petitioner's Convictions for Assault are Unconstitutional and Counsel was Ineffective for Failing to Raise This

VII. The Guilty Plea was Involuntary because the Petitioner Did Not Know Waiving His Right to State Appeal Affected His Right to Federal Review and because the State Court Violated Boykin v. Alabama

When a petitioner raises claims of ineffective assistance of counsel, the two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), applies. To obtain relief, a petitioner must establish that: (1) "counsel's representation fell

[18] To the extent grounds IV and V are not barred because of the petitioner's procedural default, the undersigned has considered these claims on their merits.

below an objective standard of reasonableness," and (2) "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 688, 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, at 694. Smith makes no such allegations. At best, he asserts he would have received something less than life imprisonment but for his counsel's errors. Given that Smith pleaded guilty, the second prong of *Strickland* demands more than his conclusory allegations his counsel should have done something more. *See e.g., Chavez v. Sec'y, Fla. Dep't of Corr.*, 647 F.3d 1057, 1061 (11th Cir. 2011) (requiring specific, non-conclusory allegations in a habeas petition). Smith fails to identify any action or inaction by any of his counsel which arguably fell below the standard of reasonableness. And even assuming that any of Smith's counsel were ineffective, he has not demonstrated how, as a result of those unprofessional errors, the result of his proceedings would have been different. *See e.g. Harris v. Comm'r, Ala. Dep't of Corr.,* 874 F.3d 682, 691-692 (11th Cir. 2017) ("Put differently, Harris has not explained how specific acts or omissions of her first seven lawyers caused the failed strategy presented at trial by her eighth and ninth lawyers. Her general allegations … do not supply the causal link her claim requires.").

As set forth in more detail below, Smith's general assertion that his various counsel were ineffective does not state a viable ground for relief.

a. Claims IV and VII – The Guilty Plea

The standard for determining the validity of a guilty plea is "whether the plea represents a voluntary intelligent choice among the alternative courses open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). The assistance of counsel received by a petitioner is relevant to the question of whether a guilty plea was knowing and intelligent insofar as it affects the petitioner's knowledge and understanding. *See McMann v. Richardson*, 397 U.S. 759, 770-71 (1970) (stating validity of guilty plea depends not on whether counsel's advice was "right or wrong" but whether that advice "was within the range of competence demanded of attorneys in criminal cases"); *Lefkowitz v. Newsome*, 420 U.S. 283, 288 (1975) ("[T]he general rule is that a guilty plea, intelligently and voluntarily made, bars the later assertion of constitutional challenges to the pretrial proceedings.").

> [T]he representations of the defendant, his lawyer, and the prosecutor at such a hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.

Blackledge v. Allison, 431 U.S. 63, 73-74 (1977) (citations omitted).

"A reviewing federal court may set aside a state court guilty plea only for failure to satisfy due process." *Massey v. Warden*, 733 F. App'x 980, 988 (11th Cir. 2018) (quoting *Stano v. Dugger*, 921 F.2d 1125, 1141 (11th Cir. 1991). Due process requires that a guilty plea be entered knowingly and voluntarily. *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969). However, a guilty plea accepted "without an affirmative showing that it was intelligent and voluntary" is in error. *Id.*, at 242. A plea is not voluntary in the constitutional sense "unless the defendant received real notice of the true nature of the charge against him." *Henderson v. Morgan*, 426 U.S. 637, 645 (1976) (quotation marks omitted). Due process is satisfied so long as "the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel." *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005). Even where the foregoing is lacking, "due process is still satisfied if the record as a whole establishes that the defendant fully understood the nature of the charges." *Massey*, 733 F. App'x at 989 (citing *Henderson*, 426 U.S. at 645 n.13 (noting that a defendant's guilty plea is voluntary if the record contains "proof that he in fact understood the charge"); *Stinson v. Wainwright*, 710 F.2d 743, 747-48 (11th Cir. 1983) (applying *Henderson* to conclude that the state court records as a whole, including the plea and sentencing transcripts, supported the conclusion that the plea was voluntary)). Finally, "even without such an express representation, it may

be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." *Massey* 733 F. App'x at 989 (quoting *United States v. Monroe*, 353 F.3d 1346, 1350 and n. 3 (11th Cir. 2003).

Here, the record from the November 2007 guilty pleas in cases CC-07-786 and CC-07-787 reflects as follows:

> THE COURT: All right. Mr. Smith, you're represented by Eddy Cunningham. I need to ask you if you believe you've had enough time to speak with Mr. Cunningham concerning all the issues regarding your matter?
>
> THE DEFENDANT: Yes, sir, I have. But as he stated, I'd like – I'm making this as a best-interest plea based on his advice.
>
> THE COURT: All right. You understand that you are accused in an indictment of burglary in the third degree and also a charge in a misdemeanor case of theft of property in the third degree?
>
> THE DEFENDANT: Yes, sir, I understand that.
>
> THE COURT: Have you been given a copy of the indictment in the charge or has it been read to you and do you understand the contents?
>
> THE DEFENDANT: No, sir, I haven't been given a copy. That's honesty.
>
> THE COURT: Have you had them explained to you?
>
> MR. CUNNINGHAM: Danny, just a second. I'm gonna go on record here. The indictments are laying right there on the record. You and I have been looking at them all day, okay ?
>
> Now, I don't want you to mislead the Court that I have not represented you properly.

THE DEFENDANT: No, I'm not.

MR. CUNNINGHAM: You know what you're charged with, don't you?

THE DEFENDANT: Yes, sir, I understand.

MR. CUNNINGHAM: It's burglary and it's theft.

THE DEFENDANT: I do know that.

MR. CUNNINGHAM: And it's from the home of Ms. Geneva Patterson, correct?

THE DEFENDANT: Yes, sir.

MR. CUNNINGHAM: Okay.

THE DEFENDANT: You -- he asked me if I had read the indictment and I told him correctly.

. . . .

MR. CUNNINGHAM: Do you want it read to you?

THE DEFENDANT: No, sir, I don't want it read to me but I just wanted to answer truthfully.

THE COURT: Well, I think I asked it this way, but let me be sure if I asked if you had either read the indictment and charge or if you had had it explained to you?

THE DEFENDANT: Yes, sir, I understand the charges against me.

THE COURT: All right. You understand what makes up the crimes of burglary third degree and theft of property third degree or do you require any explanation of that?

THE DEFENDANT: I'm good with it, Your Honor. I understand it.

THE COURT: All right. Now, I'm going to show you a form called the Explanation of Rights and Plea of Guilty form. I'm going to ask you if you recognize this form?

THE DEFENDANT: Yes, sir, I do.

THE COURT: Is this your signature that appears on the back?

THE DEFENDANT: Yes, sir, it is.

THE COURT: Did anyone force you or coerce you to sign this document?

THE DEFENDANT: No, sir, they did not.

THE COURT: All right. Did you sign it of our own free will and accord?

THE DEFENDANT: Yes, sir, I did.

THE COURT: All right. Do you understand the contents of this document or do you need anyone to explain any part of it to you further?

. . . .

THE DEFENDANT: .... Yes, sir. I want to clarify this where it's checked. Does that mean the Court has a right to sentence me to a life sentence or to ninety-nine years with three prior felonies?

THE COURT: Yes. Well, my understanding that the State is going to proceed under the Habitual Offender Act and that that -- if I sentence under the Habitual Offender Act, it would result in a sentence of between fifteen and ninety-nine years in the state penitentiary?

THE DEFENDANT: Yes, sir. I didn't know they had to file anything to proceed --

. . . .

I'm apologetic to the Court, Your Honor. I'm so sorry about this. I just want to make sure I understand ....

THE COURT: All right. Well, are you ready to proceed?

THE DEFENDANT: So I could receive up to a life sentence is the –

THE COURT: Well, the range would be – under the Habitual Offender Act, the range would be fifteen to ninety-nine years or life in the state penitentiary.

There is also an option for the Court to sentence under the Sentencing Standards. And I would have to tell you I have made no decision in that regard one way or the other.

THE DEFENDANT: Yes, sir.

It sheds a little bit of different light, Your Honor, from the way I had understood it in the beginning. Due to the fact that I hadn't really – I don't think I fully understood the ninety-nine -- fifteen to ninety-nine or life, which I do now

And at the time I was doing my reasoning in my best-interest plea, I didn't take fully that into account. So if I might have just a second to think about it.

THE COURT: Do you need to confer with your attorney? We can take a five-minute break and you can speak with your attorney.

THE DEFENDANT: Your Honor, if I could, please. I'd be more than appreciative of that.

THE COURT: Go right ahead.

THE DEFENDANT: Thank you, sir.

(Short break taken.)

THE COURT: We're back on the record. And I believe I was asking you, Mr. Smith, if you had any questions about the Explanation of Rights and Plea of Guilty form or you understood its contents.

THE DEFENDANT: Yes, sir, that is correct.

THE COURT: That you do understand its contents?

THE DEFENDANT: Yes, sir, that's correct.

THE COURT: Do you require any further explanation of its provision and the Explanation of Rights and Plea of Guilty?

THE DEFENDANT: No, sir.

THE COURT: All right. Do you understand that if you tell me you're guilty and the Court accepts your plea, that at a sentencing hearing that right now is scheduled for January 14th, 2008, that I will impose a sentence upon you, and based on the fact that the State has indicated intent to proceed under the Habitual Offender Act and apparently is going to -- intending on showing three -- at least three prior felonies; that that could be a severe sentence?

THE DEFENDANT: (Witness nods head affirmatively.)

THE COURT: Based upon what we discussed earlier about the habitual offender penalties?

THE DEFENDANT: Yes, sir, I understand that.

. . . .

THE COURT: Okay. Do you understand that as to each of the crimes that you're charged with, you have the right to say that you're not guilty?

THE DEFENDANT: Yes, sir.

. . . .

THE COURT: You understand, of course, if you tell me you're not guilty, you have the following Constitutional rights: The right to a speedy and public trial?

. . . .

THE DEFENDANT: Yes.

THE COURT: The right to be tried by a jury?

THE DEFENDANT: Yes, sir.

THE COURT: The right to see, hear and question all witnesses against you?

THE DEFENDANT: Yes, sir.

THE COURT: The right at trial to present evidence in your favor and either testify for yourself or remain silent?

THE DEFENDANT: Yes, sir.

THE COURT: The right to have a trial judge order into court all evidence and witnesses in your favor?

THE DEFENDANT: Yes, sir.

THE COURT: The right to have a qualified lawyer defend you before, during and after the trial, such as Mr. Cunningham here?

THE DEFENDANT: Yes, sir.

THE COURT: You understand that if you tell me you're guilty, however, you would give up all of these Constitutional rights that I just mentioned to you and those contained in the Explanation of Rights and Plea of Guilty that I went over and you said that you understood and executed?

THE DEFENDANT: Yes, sir.

. . . .

THE COURT: Do you understand that if you were to tell me that you're guilty, I could give you the same punishment as if you told me you were not guilty, we had a trial concerning your matters and you happened to be found guilty in that trial and I gave you a sentence at that time?

THE DEFENDANT: I wasn't aware of it, but I am now, yes, sir.

THE COURT: Okay. Does that cause you any -- do you understand that? Do you want to proceed with the plea with that understanding?

THE DEFENDANT: Just one second. Let me concentrate on that thought just a minute.
Yes, sir, I do.

THE COURT: You understand you may not receive probation?

THE DEFENDANT: Yes, sir.

THE COURT: You understand that if you tell me you're guilty, I will not set sentencing until after I've read your past criminal record, if any, and any report or recommendation of the probation officer and also reviewed the Sentencing Standards?

THE DEFENDANT: Yes, sir.

THE COURT: Has any one threatened you, your family or anyone else to get you to say that you're guilty?

THE DEFENDANT: No, sir.

THE COURT: Has any one promised anything to you or your family to get you to say that you're guilty?

THE DEFENDANT: No, sir.

THE COURT: Has anyone told you, promised you or suggested to you you would receive a lighter sentence, probation or favor to say that you're guilty?

THE DEFENDANT: No, sir. We had some offers and plea agreements and negotiations, but nothing other than that.

THE COURT: All right. Anybody made any specific promises to you?

THE DEFENDANT: No, sir.

THE COURT: All right. Now, are you reserving any issues for appeal and/or Rule 32?

MR. CUNNINGHAM: No, sir, we have no issues on appeal.

THE DEFENDANT: There are none on appeal, no, sir.
THE COURT: Do you understand, then, by pleading guilty that you waive your right to an appeal?

THE DEFENDANT: Yes, sir.

. . . .

THE COURT: All right. So if you're waiving your rights of appeal, I'm just asking if you understand -- by that, I'm asking if you understand that entails withdrawing or waiving your right to withdraw your plea of guilt?

THE DEFENDANT: If I could get you to read that question once more. I'm sorry.

THE COURT: All right. Do you waive -- do you understand if you waive your right to an appeal that you reserve no issues for appellate review?

THE DEFENDANT: Yes, sir, I understand that.

THE COURT: That you waive your right to withdraw your plea of guilt?

THE DEFENDANT : Yes, sir, I understand that.

. . . .

THE COURT: And that you specifically reserve no issues for appellate review, you understand?

THE DEFENDANT: Yes, sir.

(Doc. 7-7 at 58-74). The prosecutor then stated in open court and on the record what the state expected to prove should the case go to trial. (*Id.*, at 74-76).

Smith's assertion that counsel was ineffective for not advising him of his direct appeal rights (doc. 17 at 20, 25) is wholly refuted by the record.[19] Similarly, Smith's assertion that the state court violated *Boykin v. Alabama, supra*, by not advising him of the possible sentence ranges (*id.*, at 48, 50) is contradicted by the record. The plea colloquy transcript demonstrates that Smith understood the charges against him and the possible punishments. His claims otherwise, in light of the record, "are wholly incredible." *Blackledge*, 431 U.S. at 74.

The trial court record further reflects that, rather than being appointed "midstream" as claimed by Smith (doc. 17 at 20), counsel at sentencing had been representing Smith for multiple months, had filed motions on his behalf, and had been actively representing the petitioner in criminal trial in cases CC-07-784.01, CC-07-784.02 and CC-07-785 when the deal for a guilty plea was struck. (Doc. 7-7 at 83; doc.7-10 at 12). Counsel Scott Stewart, appointed to represent Smith on charges resulting in the November 2007 guilty plea, was present as well. (Doc. 7-

[19] Although somewhat indecipherable, Smith asserts counsel Ed Cunningham abandoned him after these guilty pleas. (Doc. 24 at 34). He claims his next counsel "failed to speak to Smith before or during proceedings, denying Smith allocution, and autonomy knowledge, for a proper sentence, then Scott Stewart also abandoned Smith during the 30 day Rule 24 and the 42 day Rule 4 appeal windows...." Smith "alleges he should be afforded a 'direct appeal review' under the exception window provided through § 2244(d)(A)(B), and (2)." (Doc. 17 at 20-21). The record reflects Smith was represented by counsel at his guilty plea and sentencing. The ACCA found this claim by Smith "is refuted by the record" (doc. 7-37 at 5), and barred by Rule 32.2(c). *Smith v. State*, CR 16-0417 at 17.

10 at 18). And to the extent Smith complains about the appointment of Stewart for purposes of sentencing only, he has demonstrated no prejudice from Stewart's representation of him.

On August 7, 2008, Smith signed a plea agreement which included the statement "The Defendant specifically reserved NO issues for appellate review" and "The Defendant agreed that he is pleading guilty freely and voluntarily having been adequately and satisfactorily represented by Counsel." (Doc. 7-6 at 19-20). Counsel B. Dale Stracener signed the agreement the same date, certifying he has discussed the case with Smith "and have advised the Defendant of the Defendant's rights and all possible defenses." (*Id.*, at 20). Smith and counsel also signed an "Explanation of Rights and Plea of Guilty" on August 7, 2008, which included an explanation of possible sentences under the Habitual Offender Act. (*Id.*, at 21-22). The following exchange then occurred in open court and on the record:

> THE COURT: All right. Now, I'm going to show you some forms. I need you to acknowledge you recognize these forms. And let me say for the record I said, "Represented by Dale Stracener." Also present for the record is Scott Stewart, represents Mr. Stracener (sic) on which counts?
>
> MR. STEWART: CC-07-786 and 787.
>
> MR. STRACENER: For the record, Your Honor, he represents Mr. Smith, not Mr. Stracener.
>
> THE COURT: I apologize. You're right .... Now, these forms -- first is the plea agreement. Do you recognize that form?

THE DEFENDANT: Yes, sir, I do.

THE COURT: Is this your signature that appears on the back?

THE DEFENDANT: Yes, sir, it is.

THE COURT: Did you sign it of your own free will?

THE DEFENDANT: Yes, sir, I did.

THE COURT: All right. It contains case number CC-07-784.01, 784.02, 785, 796, CC-06-269 and CC-06-416 (sic); is that correct?

THE DEFENDANT: (Nods head affirmatively.)

THE COURT: So it's your understanding that this plea agreement includes all of these counts?

THE DEFENDANT: Yes, sir, I do.

THE COURT: All right. Now, do you understand the contents of this agreement or you wish to have any portion of it explained to you?

THE DEFENDANT: I understand it. Mr. Stracener has already explained it.

THE COURT: All right. Next is the Explanation of Rights and Plea of Guilty. Do you recognize that form?

THE DEFENDANT: Yes, sir, I do.

THE COURT: It is involving CC-07-784.01. Is there a form for the criminal –

MR. STRACENER: We just did it for the most serious one, Your Honor.

. . . .

THE COURT: Well, there was a second felony.

MR. STRACENER: Yeah, 784.02 and 785.

THE COURT: Y'all add that to the plea agreement.

MR. PHILLIPS: Just add those numbers on it?

MR. OGLETREE: There was a total of five felonies and two misdemeanors .... For the record, here are the felonies: CC-2006-269, assault first; CC 2007-410, community notification; CC-2007-784.01, which was this case, burglary first; CC-2007-784.02, assault second in this case; CC-2007-786, burglary third, which was one that he has pled on but not yet sentenced.

MR. PHILLIPS: That one won't be on the plea agreement, though, will it?

MR. STRACENER: No, 786 won't if he's pled on it already.

MR. OGLETREE: If he's pled on it.

And then the two misdemeanors. CC-2007-785 was the criminal mischief second in this case. And then CC-2007-787 is a theft of property third that he has already pled to but not yet sentenced.

. . . .

THE COURT: All right. Next, I'm going to show you the Explanation of Rights and Plea of Guilty form. Do you recognize this form?

THE DEFENDANT: Yes, sir, I do.

THE COURT: And you believe your signature appears on the back of this form?

THE DEFENDANT: Yes, sir.

THE COURT: Did you sign it of your own free will?

THE DEFENDANT: I did.

THE COURT: Do you understand the contents of this form, or do you wish to have Mr. Stewart or Mr. Stracener explain anything to you?

THE DEFENDANT: I understand it fully.

THE COURT: Now, you understand this Explanation of Rights and Plea of Guilty involves CC-07-410, which is violation of the Community Notification Act; CC-07-784.01, which is burglary first; CC-07-784.02, which is assault second; CC-07-785, criminal mischief; and CC-06-269, assault first. You understand this Explanation of Rights and Plea of Guilty involves all these charges?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Now, you understand that if you plead guilty in these matters and the Court accepts your plea, that I will impose a sentence upon you. And due to the range involved that -- or possibilities that I explained to you earlier as a result of the stipulation of three prior felonies, that there could be -- the sentence could be severe?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Now, you understand that each of these crimes that you're charged with, you have not yet pled upon, that you have the right to say that you're not guilty?

THE DEFENDANT: Yes, sir.

. . . .

THE COURT: But do you understand if you tell me that you are not guilty on each of these, you have the following constitutional rights: The right to a speedy and public trial?

THE DEFENDANT: Yes, sir.

THE COURT: The right to be tried by a jury?

THE DEFENDANT: Yes, sir.
THE COURT: The right to see, hear and question all witnesses against you?

THE DEFENDANT: Yes, sir.

THE COURT: The right at trial to present evidence in your own behalf and either testify for yourself or remain silent?

THE DEFENDANT: Yes, sir.

THE COURT: The right to have a trial judge order into court evidence and witnesses that may be in your favor?

THE DEFENDANT: Yes, sir.

THE COURT: And the right to have a qualified attorney, such as Mr. Stracener and Mr. Stewart, represent you before, during and after any trial?

THE DEFENDANT: Yes, sir.

THE COURT: But you understand that if you tell me you're guilty, that you will give up all these constitutional rights that I've just discussed?

THE DEFENDANT: Yes, sir.
. . . .

THE COURT: Do you understand you could receive the same punishment as if you were to maintain that you were not guilty and we had a trial through jury verdict and a jury happened to find you guilty and I sentenced you at that time?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that you give up your right to an appeal?

THE DEFENDANT: Yes, sir.

THE COURT: Understand you're giving up your right to withdraw your plea of guilt?

THE DEFENDANT: Yes, sir.

THE COURT: Understand you're giving up your right to an appellate bond?

THE DEFENDANT: Yes, sir.

THE COURT: Understand you're giving up any challenges you could bring pursuant to Rule 32 of the Alabama Rules of Criminal Procedure?

THE DEFENDANT: Yes, sir.

THE COURT: Understand you're waiving any motions, defenses, objections or requests which you have made in your cases or you could make in your cases?

THE DEFENDANT: Yes, sir.

THE COURT: You understand that on all these cases you're specifically reserving no issues for appellate review?

THE DEFENDANT: Yes, sir.

THE COURT: Has anyone threatened you or your family to get you to say that you're guilty?

THE DEFENDANT: No, sir.

THE COURT: Has anyone made any promises of reward to you or your family in exchange for getting you to say that you're guilty?

THE DEFENDANT: No, sir.

> THE COURT: Has anyone told you or suggested to you or indicated to you that you would receive a lighter sentence, probation or other favor in exchange for saying that you're guilty?
> THE DEFENDANT: No, sir.
> . . . .
>
> THE COURT: What is your plea?
>
> THE DEFENDANT: Guilty, Your Honor.
>
> THE COURT: Now, that is – is that guilty on each of these that I've mentioned?
>
> THE DEFENDANT: Yes, sir, it is.

(Doc. 7-10 at 18-29).

As with the November 2007 plea, this colloquy reflects the petitioner's plea of guilty was "intelligent and voluntary." *Massey*, 733 F. App'x at 988 (quoting *Boykin*, 395 U.S. at 242); *see also Ireland v. State*, 250 So. 2d 602, 603 (Ala. 1971) (holding where a defendant signed a lengthy form explaining his rights, his attorney told him to read the form and the trial court asked the defendant if he has read and understood the form, guilty plea was knowingly and voluntarily made).

b. Waiver of Right to Appeal

In each of the Sentencing Orders entered by the trial court, the judge noted:

> The Defendant having waived his/her right of appeal as part of the plea agreement herein, the Court specifically finds:
>
> 1. Defendant has reserved no issues for appellate review. Defendant and the Court have entered into a colloquy wherein the Defendant was advised of the consequences of waiving his/her appeal right, his/her right to file a motion to withdraw his/her plea within (30) thirty days,

> and [his]/her right of appeal in the event the Court denies his/her motion to withdraw his/her plea.

(Doc. 7-6 at 26 (CC-2006-269), 27 (CC-2007-41), 28 (CC-2007-784.01), 29 (CC-2007-784.02), 30 (CC-2007-785); doc. 7-7 at 2 (CC-2007-786), 3 (CC-2007-787)).

The ACCA held:

> In his petition, Smith claimed that he failed to file a direct appeal through no fault of his own because his counsel was ineffective. *See* (C. 36-37.) As best we can determine, he attempts to reassert this claim on appeal. However, on appeal, Smith actually claims that he failed to appeal through no fault of his own because the trial court told him that he had no right to appeal under his written plea agreement, and failed to inform him that he had a right to appellate review of the denial of his motions to withdraw his guilty plea. Because this claim is a different claim than the claim he previously raised in his petition, this claim will not be considered by this Court on appeal. *See Pate v. State*, 601 So.2d at 213. To the extent that Smith might have been attempting to raise a different issue on appeal, Smith's pleadings and his appellate brief employ a "scatter-gun" approach and he has failed to properly apprise this Court of the other possible allegations in a manner that would allow this court to address such claims.

(Doc. 7-37 at 9). This claim is unexhausted and hence procedurally defaulted as Smith did not properly raise it in state court.

To the extent Smith challenges his sentence, and not his plea, this does not provide a basis upon which actual prejudice from ineffective assistance of counsel can be based. *See e.g., Williams v. Sec'y, Dep't of Corr.*, 2017 WL 7551046, *3 (11th Cir. Dec. 27, 2017) (unpublished) (citing *Johnson v. Alabama*, 256 F.3d 1156, 1171 (11th Cir. 2001) (challenge to a guilty plea based on misunderstanding of sentence does not allege "actual, factual innocence" to excuse procedural

default). Because Smith's sentence was within the realm of possible sentences for the crimes to which he pleaded guilty, he cannot now show imposition of his sentence prejudiced him.

Finally, Smith's argument his counsel failed to inform him that if he pleaded guilty he would waive his rights to federal review (doc. 17 at 50), has no merit and no foundation in the record. This petition is currently before the court on federal habeas review and in neither the response nor the supplemental response does the State assert the petitioner waived this right. As with many of the other grounds raised by Smith, no evidence supports this argument.

All of the grounds raised by Smith concerning the validity of his guilty pleas are without merit and due to be dismissed.

2. Claim V: The Assault Conviction[20]

Smith claims prejudice from counsel's ineffectiveness because he believes the state could not prove the "serious physical injury" element for first degree assault.[21] (Doc. 24 at 30). He argues counsel should have researched state law,

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[20] This claim solely pertains to state court action CC 2006-269.

[21] The statute provides that: a person commits first degree assault in Alabama if:

> (1) With intent to cause serious physical injury to another person, he or she causes serious physical injury to any person by means of a deadly weapon or a dangerous instrument; or

counsel waived the state's burden to prove serious physical injury, and but for counsel's failure to let him know the state could not show "serious physical injury," Smith would not have entered a guilty plea to the first degree assault charge. (*Id.*, at 31). Smith fails to establish how, if the first degree assault outcome had been different, this would have had any impact on the sentence he received, given the sentence was imposed under the Habitual Offender Act and Smith pleaded guilty to multiple other felonies at the same time. (Doc. 7-6 at 19, 21). Moreover, the record reflects Smith received a life sentence based on his conviction for first degree burglary, a felony, with which the assault conviction ran

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> (2) With intent to disfigure another person seriously and permanently, or to destroy, amputate or disable permanently a member or organ of the body, he or she causes such an injury to any person; or
>
> (3) Under circumstances manifesting extreme indifference to the value of human life, he or she recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes serious physical injury to any person; or
>
> (4) In the course of and in furtherance of the commission or attempted commission of arson in the first degree, burglary in the first or second degree, escape in the first degree, kidnapping in the first degree, rape in the first degree, robbery in any degree, sodomy in the first degree or any other felony clearly dangerous to human life, or of immediate flight therefrom, he or she causes a serious physical injury to another person; or
>
> (5) While driving under the influence of alcohol or a controlled substance or any combination thereof in violation of Section 32-5A-191 he causes serious bodily injury to the person of another with a motor vehicle.

Ala. Code § 13A-6-20(a) (1987).

concurrently.[22] (*Id.*, at 21, 26). Because nothing in the first degree assault case, even complete dismissal of it, would have impacted Smith's life sentence, he can show no prejudice resulting from his counsel's actions. Moreover, where "a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to deprivation of constitutional rights that occurred prior to the time of the plea." *Tollet v. Henderson*, 411 U.S. 258, 267 (1973).

3. Claim III: Claim of Denial of Counsel During Collateral Review and Sentencing

Smith asserts he is entitled to relief because he was denied counsel during sentencing and on collateral review. (Doc. 17 at 20). As previously stated, the ACCA found this claim procedurally barred by Rule 32.2(c), Ala. R. Crim. P. Additionally, Smith had counsel at sentencing. He asserts both that counsel was appointed "midstream" in the sentencing proceedings, and that counsel would not speak to him prior to the sentencing proceeding. (*Id.*). As to Smith's claims regarding sentencing, he had two counsel present, one on the charges to which he

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[22] To the extent Smith argues he could not be convicted of both assault and burglary for breaking into his mother in law's home and attacking Jeffrey Dearman therein (doc. 17 at 60), Smith is simply wrong. Burglary and assault are two separate crimes. While Smith argues that CC-07-784.01 and CC-07-784.02 both charged assault, in considering this claim on its merits, the ACCA held "first-degree burglary, where the indictment charges an intent to commit assault, and second-degrees assault are separate offenses. Second-degree assault under the circumstances of this case is not a lesser-included offense of first-degree burglary." *Smith v. State*, CR-16-0782, at 19 (Ala. Crim. App. 2017).

pleaded guilty in November 2017, and separate counsel for the remaining charges. Smith sets forth no allegation as to how counsel's actions or inactions ***during sentencing*** impacted the outcome of that proceeding and therefore shows no prejudice from any error by counsel.

As to Smith's claims regarding lack of counsel on collateral review, post-conviction proceedings are civil in nature, not criminal, thus no constitutional right to counsel in a Rule 32 proceeding exists. *State v. Click*, 768 So. 2d 417, 419 (Ala. Crim. App. 1999). *See also Williams v. Pennsylvania*, __ U.S. __, 136 S. Ct. 1899, 1920-21 (2016) ("post-conviction petitioner has no constitutional right to counsel"); *Golston v. Att'y Gen'l of State of Ala.*, 947 F.2d 908, 911 (11th Cir. 1991 (same). Therefore, neither attorney error nor lack of an attorney in state collateral proceedings establishes "cause" to excuse a procedural default. *Coleman v. Thompson*, 501 U.S. 722, 757 (1991). Even if this claim was not procedurally defaulted, Smith is entitled to no relief on this ground.

4. The Life Sentences are Manifestly Unjust because the Crime of a Convicted Sex Offender Changing Residences without Notice was Repealed on July 1, 2011[23] (doc. 17 at 66)

At the time of his conviction, the relevant law in Alabama was the Alabama Community Notification Act of 1996. Under that Act, "[a] person convicted of a criminal sex offense" was considered an adult criminal sex offender under

[23] This ground relates solely to the charges in CC-07-41.

Alabama law subject to the registration, notification, residency and employment provisions. Ala. Code § 15-20-21(1). Effective July 1, 2011, Alabama replaced its prior sex offender registry law with ASORCNA, Ala. Code § 15-20A-1, *et seq.* ASORCNA sets forth those offenses considered sex offenses in Alabama, Ala. Code § 15-20A-5(1)-(39), and governs the registration and community notification requirements applicable to adult sex offenders. Ala. Code § 15-20A-7, § 15-20A-10 and § 15-20A-22. ASORCNA is "applicable to every adult sex offender convicted of a sex offense as defined in Section 15-20A-5, without regard to when his or her crime or crimes were committed or his or her duty to register arose." Ala. Code § 15-20A-3.

In considering this claim on its merits, the ACCA held the statute in effect at the time of the offense is the applicable penal statute. *Smith v. State*, CR 16-0782, at 19-20. "The fact that after Smith had committed and pleaded guilty to violating the Community Notification Act, it was repealed does not entitle him to relief." *Id.*, at 20. As previously stated, to be entitled to relief, a habeas petitioner must demonstrate that a state trial court's adjudication of an issue "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" the United States Supreme Court, or was "based on an unreasonable determination of the facts in light of the evidence presented" in state court. *Dunn v. Madison*, -- U.S. --, 138 S. Ct. 9, 11 (2017) (*quoting* 28 U.S.C. §

2254(d)). State court determinations of factual issues are presumed correct and the petitioner bears the burden of rebutting that presumption by "clear and convincing evidence." *Wood v. Allen*, 558 U.S. 290, 293 (2010) (*quoting* 28 U.S.C. § 2254(e)(1)). State court interpretations of state laws or rules do not raise questions of a constitutional nature and therefore are not an appropriate basis for federal habeas corpus relief. *Alston v. Dep't of Corr., Florida*, 610 F.3d 1318, 1326 (11th Cir. 2010).

Smith identifies no United States Supreme Court case which has held that the repeal and replacement of a statute voids all convictions under that statute. In particular, Smith points to no case which has found the language of Ala. Code § 15-20A-3, applying ASORCNA "to every adult sex offender convicted of a sex offense ... without regard to when his or her crime or crimes were committed ..." to be unconstitutional. Smith is entitled to no relief on this ground.

RECOMMENDATION

Accordingly, for the reasons stated above, the magistrate judge hereby **RECOMMENDS** that the petition for writ of habeas corpus under 28 U.S.C. § 2254 be **DENIED** and **DISMISSED WITH PREJUDICE**.

NOTICE OF RIGHT TO OBJECT

A petitioner may file specific written objections to this report and recommendation. The petitioner must file any objections with the Clerk of Court

within fourteen (14) calendar days from the date the report and recommendation is entered. Objections should specifically identify all findings of fact and recommendations to which objection is made and the specific basis for objecting. Objections also should specifically identify all claims contained in the petition that the report and recommendation fails to address. Objections should not contain new allegations, present additional evidence, or repeat legal arguments.

Failing to object to factual and legal conclusions contained in the magistrate judge's findings or recommendations waives the right to challenge on appeal those same conclusions adopted in the district court's order. In the absence of a proper objection, however, the court may review on appeal for plain error the unobjected to factual and legal conclusions if necessary in the interests of justice. 11th Cir. R. 3-1.

On receipt of objections, a United States District Judge will review *de novo* those portions of the report and recommendation to which specific objection is made and may accept, reject, or modify in whole or in part, the undersigned's findings of fact and recommendations. The district judge also may refer this action back to the undersigned with instructions for further proceedings.

The petitioner may not appeal the magistrate judge's report and recommendation directly to the United States Court of Appeals for the Eleventh

Circuit. The petitioner may only appeal from a final judgment entered by a district judge.

DATED this 7th day of May, 2019.

John E. Ott

JOHN E. OTT
Chief United States Magistrate Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

DANNY L. SMITH,	)	
	)	
Petitioner,	)	
	)	
v.	)	**4:17-cv-01223-RDP-JEO**
	)	
STATE OF ALABAMA, et al.,	)	
	)	
Respondents.	)	

MEMORANDUM OPINION

This is an action for a writ of habeas corpus filed by Petitioner Danny L. Smith, *pro se*. Smith filed his petition on July 19, 2017, and amended it on August 2, 2018. (Docs. 1, 17).[1] Smith challenges his state-court imposed life sentences for seven separate felony and misdemeanor charges. (Doc. 17). On May 7, 2019, the Magistrate Judge entered a report and recommendation pursuant to 28 U.S.C. § 636(b), which recommended that his habeas petition be denied. (Doc. 34). Smith has filed timely objections to that report and recommendation.[2] (Doc. 37).

[1] Citations herein to "Doc(s). ___" are to the document number, and page where specified, of the pleadings and other materials in the court file, as compiled by the clerk and reflected on the docket sheet. Unless otherwise noted, pinpoint citations are to the page of the electronically filed document, which may not correspond to the pagination on the original "hard copy."

[2] Smith's original objections contained 109 pages, with an additional 45 pages of exhibits attached. (Doc. 37). The majority of the exhibits were part of the state court record submitted to this court. The remaining exhibits concern Smith's denial of parole on June 14, 2017. (Doc. 37 at 149-152).

Thereafter, he filed an amended objection, followed by an addendum to his objections. (Docs. 38-39). Below, the court considers each of his objections.

I. PROCEDURAL HISTORY

On November 6, 2007, Smith pleaded guilty to third degree burglary and third-degree theft of property. (Doc. 7-6 at 25; Doc. 7-7 at 2). On August 7, 2008, Smith pleaded guilty to first degree burglary, second degree assault, first degree assault, second degree criminal mischief, and violation of the Community Notification Act. (Doc. 7-6 at 30; Doc. 7-7 at 3; Doc. 7-31 at 40).

Smith was sentenced on August 7, 2008, under the Habitual Offender Act to life imprisonment in five of these cases, with each of the life terms to run concurrently to all convictions. (Doc. 7-6 at 26-30; Doc. 7-7 at 2; Doc. 7-10 at 31-33). In the two misdemeanor cases (CC-07-785 and CC-07-787), Smith received 12-month sentences, which also ran concurrently with the five life sentences he received on the felony convictions. (Doc. 7-10 at 33). Smith did not file a direct appeal.

Smith filed his first motion for collateral review on July 20, 2009, in CC-07-786 and CC-07-787.[3] (Doc. 7-3 at 16). At some point in September 2009, Smith

[3] Those cases were the Burglary 3rd and Theft of Property 3rd, which Smith had pleaded guilty to on November 6, 2007. But not sentenced

amended his petition to include additional claims.[4] (Doc. 7-7 at 16-17). On May 14, 2012, the trial judge dismissed Smith's Rule 32 petition without prejudice, based on Alabama Rule of Criminal Procedure 32.1, which prohibits challenging multiple judgments in one petition. (*Id.*, at 34). Smith appealed that ruling and on December 7, 2012, the Alabama Court of Criminal Appeals affirmed the trial court's dismissal. (*Id.*, 7-7 at 36; Doc. 7-13). The Alabama Supreme Court denied certiorari on March 15, 2013. *See Ex parte Danny L. Smith*, No. 1120438, 162 So. 3d 952 (Ala. 2013) (table).

On April 5, 2013, Smith filed two new petitions for collateral review under Rule 32. (Doc. 7-17 at 29, doc. 7-18 at 5, 9). The state circuit court again dismissed these petitions, this time with prejudice, on September 24, 2013, citing Rule 32.1. (Doc. 7-17 at 2). Smith again appealed. (Doc. 7-18 at 11, 13). On January 12, 2015, the Alabama Court of Criminal Appeals affirmed the dismissal of the petitions based upon Smith's violation of Rule 32.1; however, the appeals court reversed and remanded the circuit court's judgment related to the dismissal of the petition without prejudice. (Doc. 7-21). On February 24, 2015, the Circuit Court of Etowah County complied with the appeals court order. (Doc. 7-23). Smith did not appeal that dismissal.

[4] The amendment is undated, and the Etowah County Clerk's Office stamp is illegible. (*See* doc. 7-7 at 16-17).

On March 12, 2015, Smith filed a third Rule 32 petition. (Doc. 7-24 at 4). The district attorney again moved to dismiss that petition, asserting Smith again challenged multiple judgments in a single petition. (Doc. 7-25 at 31). The trial court dismissed the third Rule 32 petition on May 18, 2015, noting Smith had reserved no issues for appeal and waived his right to petition for post-conviction relief. (Doc. 7-25 at 32-33). The trial court further advised Smith that the only grounds on which he could file post-conviction pleadings were those found in Rule 32.2(a)(3) and (5).[5] (*Id.*). Smith appealed that dismissal[6] and on October 16, 2015, the state criminal appeals court again affirmed the dismissal of his petitions for co-mingling multiple judgments in a single proceeding.[7] (Doc. 7-25 at 56; Doc. 27-28). Smith did not

Question: What is a "multiple-judgment" as a matter of law?
a). Is it more than "one-sentence proceeding"?
b). Or is it considered "multiple sentences" for multiple charges during a "single proceeding"?

[5] Rule 32.2 states in relevant part:

> (a) Preclusion of Grounds. A petitioner will not be given relief under this rule based on any ground:
> ...
> (3) Which could have been but was not raised at trial, unless the ground for relief arises under Rule 32.1(b); or
> ...
> (5) Which could have been but was not raised on appeal, unless the ground for relief arises under Rule 32.1(b).

In turn, Rule 32.1(b) allows a post-conviction petition for relief if "[t]he court was without jurisdiction to render judgment or impose sentence." Rule 32.1(b), Ala. R. Crim. P.

[6] Smith actually brought two separate, parallel petitions in his third round of filings seeking collateral review. (*See e.g.*, Doc. 7-25 at 20, 23, 57).

[7] The court delineated these judgments as "his November 2007 guilty plea proceedings, his August 2008 guilty plea proceedings, and a habeas corpus proceeding." (Doc. 7-28 at 3).

appeal to the Alabama Supreme Court and the Alabama Court of Criminal Appeals issued a Certificate of Judgment on November 4, 2015. (Doc. 7-29).

Smith brought a fourth round of Rule 32 proceedings in November 2015. (Doc. 7-30 at 10). On November 7, 2016, the state filed a response addressing each of the claims in cases CC-07-786 and CC-07-787 on the merits. (Doc. 7-33 at 26). In its December 5, 2016 order denying relief, the Rule 32 court addressed these claims and permanently enjoined Smith from filing any pleading with grounds previously raised or which could have been raised, unless he first showed good cause for his failure to raise such claims at an earlier time. (Doc. 7-33 at 58-65). On appeal (Doc. 7-34 at 5), the Alabama Court of Criminal Appeals held in pertinent part:

> First, Smith alleged in his petition that he was entitled to equitable tolling because the filing of his first Rule 32 petition was timely and was dismissed without prejudice. Smith maintains that, because all three of his previous petitions were dismissed without prejudice because his petitions challenged multiple judgments, he is entitled to equitable tolling.
>
> The Alabama Supreme Court has held that
>
> > "when a Rule 32 petition is time-barred on its face, the petition must establish entitlement to the remedy afforded by the doctrine of equitable tolling. A petition that does not assert equitable tolling, or that asserts it but fails to state any principle of law or any fact that would entitle the petitioner to the equitable tolling of the applicable limitations provision, may be summarily dismissed without a hearing. Rule 32.7(d), Ala. R. Crim. P."
>
> *Ex parte Ward*, 46 So. 3d 888, 897-98 (Ala. 2007). "[T]he threshold necessary to trigger equitable tolling is very high, lest the exceptions

> swallow the rule." *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000). "Equitable tolling is appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Sandvik v. U.S.*, 177 F.3d 1269, 1271 (11th Cir. 1999) ... *Irwin v. Department of Veteran Affairs*, 498 U.S. 89, 96 (1990) ("Federal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.").
>
> In the present case, although Smith alleges that he was entitled to equitable tolling in his petition and again on appeal, his assertion is unavailing. Each of his previous petitions were dismissed on the ground that his petition challenged multiple judgments. Smith maintains that, because his first petition was filed within the statutory period and he was actively seeking judicial remedies from that time, he should be entitled to equitable tolling. Based on his contention, Smith could have had a meritorious argument for equitable tolling when he filed his second petition after the court had explained that he could not file a petition challenging multiple judgments. However, Smith continued to file petitions with the same defect even after being told numerous times by this Court and the circuit court the reason that the petitions were defective. Thus, the circumstances in the instant case that Smith claims entitle him to equitable tolling were fully within Smith's control and were avoidable with diligence from Smith. Therefore, Smith has not pleaded sufficient facts in his Rule 32 petition to satisfy his high "burden of demonstrating in his petition that there are such extraordinary circumstances justifying the application of the doctrine of equitable tolling." *Ex parte Ward, supra.*

(Doc. 7-37 at 3-4). After determining that Smith was not entitled to equitable tolling, and in affirming the trial court's dismissal of the petition, the Alabama Court of Criminal Appeals addressed the specific procedural bars which applied to Smith's petition. (*Id.*, at 5-11). Smith filed a petition for writ of certiorari with the Alabama

Supreme Court, but it was denied without opinion, and a certificate of judgment was entered July 7, 2017. (Doc. 7-40; doc. 7-42).

On July 19, 2017, Smith filed the instant habeas petition in this court. In that petition, he only addressed his claims arising from cases CC-07-786 and CC-07-787. (Doc. 1). At the time, his claims based on his August 7, 2008, pleas were still pending in the Alabama appellate courts. When the Alabama Supreme Court denied certiorari in those cases, Smith brought a second habeas action in this court. *See* 1:18-cv-00688-MHH-JEO. Because all of the petitioner's claims arose out of one sentencing, this court consolidated the two habeas actions and provided the petitioner with the opportunity to file an amended habeas petition. He did so and that amended petition became the operative one for purposes of this court's review. (Doc. 17).

The Magistrate Judge received argument and, on May 7, 2019, entered his report and recommendation. (Doc. 34). Smith filed objections. (Docs. 37-39). The issues in this case are now ripe for decision, and the court has considered *de novo* all the parties' objections and arguments.

II. PROCEDURAL OBJECTIONS

Smith advanced several procedural objections to the report. The court considers them below.

A. Timeliness

Smith's first three objections, as well as his first amended objection, concern the timeliness of his petition in this court. (Doc. 37 at 3-29; doc. 38 at 3). Smith objects to the finding that he filed his first petition for collateral review in the state courts on July 20, 2009. (Doc. 37 at 3-15). Specifically, Smith asserts that his multiple motions to withdraw his guilty pleas, both before and after sentencing, should count as petitions for collateral review. (*Id.* at 3). Smith asserts these "petitions" make the instant petition timely based on equitable tolling. (*Id.* at 3-7). This argument has no basis in law.

Motions filed in state court prior to the time a judgment against a defendant was entered cannot toll that defendant's time limitation to file a petition for habeas corpus pursuant to 28 U.S.C. § 2254. *See e.g., McCloud v. Hooks*, 560 F.3d 1223, 1228 (11th Cir. 2009) (citing *Ferreira v. Secretary for the Department of Corrections*, 494 F.3d 1286, 1293 (11th Cir. 2007) ("AEDPA's statute of limitations begins to run from the date both the conviction and the sentence the petitioner is serving at the time he files his application *become final* because judgment is based on both the conviction and the sentence.") (emphasis added).[8] This objection is due to be overruled.

[8] In any event, the court notes that the Magistrate Judge did not make a finding as to the timeliness of the petition in this court. (*See* Doc. 34 at 10, n. 13)

B. Procedural Default[9]

To the extent Smith is challenging the Magistrate Judge's finding that some of his claims were not properly raised in state court, and thus the claims are unexhausted and therefore defaulted here (Doc. 37 at 7-8), a claim of equitable tolling does not assist him. A state court's finding of procedural default under Alabama Rule of Criminal Procedure 32.2(c) cannot be "cured" by this court applying equitable tolling to the filing of a petition. Under *Martinez v. Ryan*, 566 U.S. 1 (2012), this court may not review "the merits of a constitutional claim that a state court declined to hear because the prisoner failed to abide by a state procedural rule." *Id.* at 9. Smith's contention that the Magistrate Judge made "no finding on the timeliness of the petition filed in this court" creates a "genuine issue of material fact" (Doc. 37 at 9-10) has simply no basis in law. This objection is due to be overruled.

[9] Throughout his objections, Smith refers to the Magistrate Judge's findings regarding claims that are procedurally defaulted. (Doc. 34 at 9-18; Doc. 37 at 7-9, 10, 16-18, 28-29, 104). He objects to the Magistrate Judge's synopses of Respondents' arguments and the Alabama Court of Criminal Appeals' rulings. (*See e.g.*, Doc. 37 at 16 (citing Doc. 34 at 10-11)). Smith further objects to the legal standards recited by the Magistrate Judge. (Doc. 37 at 18 (citing doc. 34 at 11)). As these are neither "findings of fact" nor "conclusions of law," Smith's objections to a summary of what the Respondents' argue, to what the Alabama Court of Criminal Appeals held, and to statements of federal law, are due to be overruled. Smith also "averts [sic] this Court's attention here to the Respondents own admissions of Smith's claims in the 'amended document' that does establish Smith's actual claims were erroneously given import deference...." (Doc. 37 at 40) (emphasis in original). The court construes this argument as a claim that the Magistrate Judge misstated Smith's actual claims. However, a comparison of the claims set forth by Smith in his objections (Doc. 37 at 41-43) with those recited by the Magistrate Judge (Doc. 34 at 8-9), reflects the Magistrate Judge accurately summarized each of Smith's claims. In any event, if there are semantical differences, the court has reviewed Smith's claim *de novo* and will address each of them as he has presented them. The objection is due to be overruled.

Smith next argues that this court should apply equitable tolling to find his state court petitions timely because the state court's application of Alabama Rule of Criminal Procedure 32.1(f) is unconstitutional. (Doc. 37 at 15-33; Doc. 38 at 5, 7). As best the court can glean, Smith contends that the state court rule that requires a separate Rule 32 petition for each judgment violates his constitutional rights. (Doc. 37 at 15-17). He relies on *Carey v. Saffold,* 536 U.S. 214 (2002) in making this argument. But, that case does not support his position. *Carey* stands for the wholly unremarkable requirement that, even under the peculiar nomenclature used in California, "intervals between a lower court decision and a filing of a new petition in a higher court are within the scope of the statutory word 'pending,'" so long as the time for filing has not expired. *Carey,* 536 U.S. 214, 223 (2002); *see also Evans v. Chavis*, 546 U.S. 189, 191 (2006) (reaching the same conclusion). This objection is due to be overruled.

In Smith's next objection, he claims the state court improperly applied Rule 32.1(f), and this court must "de novo" determine whether Smith diligently pursued his state court remedies. (Doc. 37 at 19-28, 33-36). Smith bases this assertion on his belief that he did not have to file separate Rule 32 petitions for each judgment against him, as required by Rule 32.1(f), although multiple state courts told him he must do precisely that. (*See e.g.*, Doc. 37 at 36-38). However, ignoring repeated instructions from multiple courts does not demonstrate that Smith "pursu[ed] his

rights diligently." *Holland v. Florida*, 560 U.S. 631, 644 (2010). And, the only impediment to timely filing in state court was Smith himself. Under these circumstances, no reasonable jurist would agree that "extraordinary circumstances" prevented his timely filing. *Id.* This objection is due to be overruled.

Smith next asserts this court's instruction to him to file an amended petition containing all of his claims supports his actions in state court. However, Smith may not pick and choose between state and federal law to advance his arguments. Rather, he must comply with both state and federal procedural requirements, respectively, and those may differ. Smith's objections to the courts' requiring adherence to Rule 31.2(f) are due to be overruled.

To the extent Smith complains the Magistrate Judge improperly found some of Smith's claims unexhausted (Doc. 37 at 43), the court notes that the Magistrate Judge also considered all of Smith's non-procedural claims on their merits. (*See e.g.*, Doc. 34 at 18). Because Smith is not entitled to habeas relief on the merits of his claims, regardless of whether they were found to be exhausted, his objections to the findings of the Magistrate Judge concerning exhaustion are due to be overruled.

Finally, throughout his arguments related to equitable tolling, Smith asserts that he is entitled to an evidentiary hearing. (Doc. 37 at 9, 10, 12-13, 24, 33-35, 38). In a habeas corpus proceeding, "[t]he burden is on the petitioner . . . to establish the need for an evidentiary hearing." *Birt v. Montgomery*, 725 F.2d 587, 591 (11th

Cir.1984) (en banc). "In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). That means that if a habeas petition does not allege specific facts that, if they were true, would warrant relief, the petitioner is not entitled to an evidentiary hearing. *Allen v. Sec'y, Fla. Dep't of Corr.*, 611 F.3d 740, 763 (11th Cir. 2010) ("Having alleged no specific facts that, if true, would entitle him to federal habeas relief, Allen is not entitled to an evidentiary hearing."). Conclusory allegations are simply insufficient to warrant a hearing. *San Martin v. McNeil*, 633 F.3d 1257, 1271 (11th Cir. 2011). But, that is exactly what we have here. Because Smith's allegations, even if true, do not warrant equitable tolling, no evidentiary hearing is required.

III. SMITH'S MERITS OBJECTIONS

Smith directs the vast majority of his objections on the merits to the recommended findings of the Magistrate Judge. To the extent possible, the court has grouped Smith's objections by topic. They do not necessarily follow the groupings Smith used in his objections.

A. Guilty Pleas and Ineffective Assistance of Counsel

Smith challenges the Magistrate Judge's merits analysis in connection with his claim that his guilty plea was involuntary. (Doc. 37 at 45-85, 96-103). The first

set of these objections, advanced under the guise of ineffective assistance of counsel claims, asserts trial counsel did not do exactly as Smith instructed in certain areas, such as challenging evidence or calling his "alibi" witness.[10] (*Id.* at 45-48). However, Smith pleaded guilty to each of the charges. The Magistrate Judge addressed each of the complained-about shortcomings of Smith's counsel at the November 2007 plea hearing, as well as those at the August 2008 plea hearing and sentencing. As the Magistrate Judge correctly concluded, there is nothing in the record suggesting that counsel was ineffective and there is no dispute that Smith's plea was voluntary. (Doc. 34 at 21-40).

Moreover, Smith's claims based on the perceived shortcomings of counsel before the entry of his guilty plea are barred by *Tollett v. Henderson*, 411 U.S. 258 (1973) and its progeny. In *Tollett*, the Court concluded that:

> a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent

[10] The court notes that Smith submitted a hearsay-filled affidavit by Leroy H. Reynolds concerning the availability, or lack thereof, of witnesses for purposes of trial. (Doc. 37 at 138). Statements such as "I later learned that Mr. Clark appeared at the courthouse" (*id.* at 139) are rank hearsay. Statements such as "Mr. Clark told my daughter 'she's lying'" (*id.* at 140) are double or triple hearsay. Statements in the affidavit of Patricia R. Jarvis (*id.* at 144) concerning her father's questions to Heather Clark fare no better. She states "I then ask[ed] Jason Clark if Danny Smith was guilty of the criminal charges that Brandi Smith (Danny Smith's wife at the time), Mary Wilson (Danny Smith's mother-in-law at the time) and Shane Deerman (Brandi Smith's live in boyfriend at the time she was still married to Danny Smith), had filed against him. Jason Clark, again, shook his head indicating no." (*Id.* at 144-45). Even if these affidavits were admissible (and the court need not rule on that question), nothing in them demonstrates that Smith's guilty pleas were involuntary or improper.

> claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

Id. at 267; *see also Lefkowitz v. Newsome*, 420 U.S. 283, 289 (1975) ("a guilty plea represents a break in the chain of events which has preceded it in the criminal process.") (quoting *Tollett*, 411 U.S., at 267)). When he entered his pleas of guilty, Smith waived any right to subpoena witnesses and gather evidence, and also abandoned his right to re-litigate what he believes the facts would have been had he gone to trial.[11] Smith's objection to the factual findings concerning his guilty pleas, and his claims of ineffective assistance of counsel based thereon,[12] are due to be

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[11] Smith alleges his evidence would have shown a plot to murder him. (Doc. 37 at 65). He claims this was all part of a plan to entice him to a place where Smith's wife's live-in boyfriend (Deerman) could shoot him. (*Id.*). Of course, Smith's asserted plot would still be consistent with a finding that Smith indeed broke into the home in question, took Deerman's shotgun, and knocked Deerman unconscious with it. (*Id.*). Smith's murder theory thus depends on Deerman firing the shotgun at Smith (as Smith was attempting to flee the scene). (*Id.*). The question of whether separate charges could have been (or even should have been) brought against Deerman has no bearing on whether Smith committed assault and burglary. And again, to be clear he admitted he committed those crimes in his guilty pleas. (*See also, id.*, at 83-84). Certainly, nothing in Smith's factual claims establishes he is innocent of breaking into Mary Wilson's home and threatening its occupants.

[12] Woven throughout much of his objections are Smith's statements concerning the validity of his guilty plea and effectiveness of counsel. For instance, he argues that "[h]ad counsel not lied to Smith regarding his 'alibi' witness Smith would have had 'evidence' before the jury that 'Smith was not in the area on the date of the alleged burglary and theft, nor was Smith in jail on the date the alleged victim would testify to, by lying to Smith about his 'alibi witness's' whereabouts was by counsel's design to 'induce' Smith's mind to think he had no chance at trial with a jury, this made the plea confession involuntary." (Doc. 37 at 47). Smith's assertions are not sufficient to warrant habeas relief. *See e.g., Preetorius v. United States*, 2017 WL 4563085, at *13 (S.D. Ga. July 19, 2017) (quoting *Ross v. Estelle*, 694 F.2d 1008, 1011-12 (5th Cir. 1983) ("Absent evidence in the record, a court cannot consider a habeas petitioner's bald assertions on a critical issue in his pro se petition ... unsupported and unsupportable by anything else contained in the record, to be of probative evidentiary value."). Additionally, because there are serious questions about whether some (if not all) of the evidence Smith asserts should have been introduced at trial would have been inadmissible in the first place, there are also serious questions about whether any alleged failure to introduce such evidence would have violated Smith's Sixth Amendment right to effective

overruled.[13]

Smith next asserts that, but for counsel's ineffective assistance, he would not have pleaded guilty. (Doc. 37 at 50-52). As detailed by the Magistrate Judge in his recitation about the plea colloquies, Smith's claims about his supposedly involuntary pleas are directly refuted by the undisputed record. Smith's suggestion that his case falls within the rationale of *United States v. Cronic*, 466 U.S. 648 (1984), is way off target. As the Court has observed about its decision in *Cronic*:

> *Cronic* held that a Sixth Amendment violation may be found "without inquiring into counsel's actual performance or requiring the defendant to show the effect it had on the trial," *Bell v. Cone*, 535 U.S. 685, 695 (2002), when "circumstances [exist] that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified," *Cronic, supra*, at 658. *Cronic*, not *Strickland*, applies "when ... the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial," 466 U.S., at 659–660, and one circumstance warranting the presumption is the "complete denial of counsel," that is, when "counsel [is] either totally absent, or prevented from assisting the accused during a critical stage of the proceeding," *id.*, at 659, and n. 25.

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assistance of counsel, even if the case had gone to trial. *See e.g., Owen v. Sec'y of Dept. of Corr.*, 568 F.3d 894, 915 (11th Cir. 2009) (where underlying claim lacks merit, counsel is not deficient for failing to raise it); *Bolender v. Singletary*, 16 F.3d 1547, 1573 (11th Cir. 1994) ("[I]t is axiomatic that the failure to raise non-meritorious issues does not constitute ineffective assistance.").

[13] Smith's contends that his attorney's decision to file a motion to continue somehow denied him effective counsel. (Doc. 37 at 74-75). That contention is hard to understand. Smith's claim that his attorney had insufficient time prior to trial to serve subpoenas fails for two reasons (at least). First, a continuance would have given counsel more time, not less. Second, his plea of guilty to the offenses negated any need for witnesses at trial. *See Tollet*, 411 U.S. at 267.

Wright v. Van Patten, 552 U.S. 120, 124–25 (2008) (alterations in original). Simply put, *Cronic* is not applicable to Smith's claims.

Smith also objects to the application of the standard announced in *North Carolina v. Alford*, 400 U.S. 25, 31 (1970) to his claim that his guilty plea was not voluntary. (Doc. 37 at 53). *Alford* concluded that the proper standard for judging the voluntariness of a plea "was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." 400 U.S. at 31 (citing *Boykin v. Alabama*, 395 U.S. 238, 242 (1969)). Smith provides no support for his argument that, under *Alford*, his guilty pleas were involuntary or not knowingly offered. Smith's reliance on *McMann v. Richardson*, 397 U.S. 759 (1970), does not assist him. In *McMann*, the court held that "a defendant[s] [mere allegation] that he pleaded guilty because of a prior coerced confession [does] not, without more, entitle[] [him] to a hearing on his petition for habeas corpus."[14] *Id.* at 768. *See also Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) ("Solemn declarations in open court carry a strong presumption of verity" and this constitutes a "formidable barrier in any subsequent collateral proceeding."). For all these

[14] In *McMann*, the Court noted, "[f]or the defendant who considers his confession involuntary and hence unusable, tendering a plea of guilty would seem a most improbable alternative. The sensible course would be to contest his guilt, prevail on his confession claim at trial, on appeal, or if necessary, in a collateral proceeding, and win acquittal, however guilty he might be." 397 U.S. at 768.

reasons, Smith's objections based on the voluntariness of his pleas are due to be overruled.

Finally, Smith claims his plea was involuntary because neither his counsel nor the trial court ensured that Smith "knew the factual elements of the charges of 'serious physical' injury." (Doc. 37 at 96). And, in his amended petition, Smith contends the state could not prove "serious physical injury." (Doc. # 17 at 31). He now also claims that if his counsel had informed him of the proof requirements related to this element, he would not have pleaded guilty to first degree assault. (Doc. 17 at 31). The Magistrate Judge found Smith could not demonstrate prejudice based on his plea because even dismissal of this charge would not have impacted his life sentence. (Doc. 34 at 41). Smith objects to this finding, and cites *Rutledge v. United States*, 517 U.S. 292 (1996). But, Smith's reliance on *Rutledge* is misplaced. In *Rutledge*, the Supreme Court was concerned with a defendant receiving two separate sentences for the same conduct—specifically charges for conspiracy to distribute pursuant to 21 U.S.C. § 846 and a "continuing criminal enterprise" pursuant to 21 U.S.C. § 848. The Court did not address whether the trial court and/or counsel ensured the defendant understood every element of a crime. *Id.*, at 306. So, the actual holding in *Rutledge* provides no assistance to Smith.

In any event, Smith has admitted he knocked his wife's boyfriend, Deerman, unconscious. (Doc. 37 at 65). While Smith contends in general terms that

Deerman's injury was not particularly serious (*id.* at 102-103), his beliefs do not support a finding of any constitutionally deficient plea. Smith's plea colloquy demonstrated that Smith clearly understood the charges against him. And, the Alabama Court of Criminal Appeal's conclusion that Smith's plea was voluntary and intelligent was reasonable. *See Massey v. Warden*, 733 F. App'x 980, 989-91 (11th Cir. 2018). This objection is due to be overruled.

B. Strategic Choices of Counsel

Many of Smith's complaints about his trial counsel concern matters of strategy, such as what witnesses to call, or one counsel's assessment of the trial evidence as a "train wreck." (Doc. 37 at 45-48, 57-63). In relation to these complaints, Smith does not articulate any particular findings of the Magistrate Judge that he disagrees with. Instead, Smith rehashes arguments made to the Magistrate Judge. (*Id.*). *See Heath v. Jones*, 863 F.2d 815, 822 (11th Cir. 1989) ("In order to challenge the findings and recommendations of the magistrate, a party must [] specifically identify the portions of the proposed findings and recommendation to which objection is made and the specific basis for objection.").

In any event, '[a]n attorney's strategic choices made after thorough investigation of the law and facts 'are virtually unchallengeable.'" *Ledford v. Warden, Georgia Diagnostic & Classification Prison*, 818 F.3d 600, 647 (11th Cir. 2016) (quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984)). "'Which

witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess.'" *Ledford*, 818 F.3d at 647 (quoting *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir.1995) (en banc)). The fact that a particular approach or defense ultimately proved to be unsuccessful, or that habeas counsel (or even the habeas petitioner) would have approached a criminal action differently, does not demonstrate ineffective assistance of counsel. *Waters*, 46 F.3d at 1522; *Chandler v. United States*, 218 F.3d 1305, 1318 (11th Cir. 2000) ("Counsel's reliance on particular lines of defenses to the exclusion of others---whether or not he investigated other defenses---is a matter of strategy and is not ineffective unless the petitioner can prove the chosen course, in itself, was unreasonable.").

To reiterate, Smith waived his right to subpoena witnesses and gather evidence when he entered his pleas of guilty. His plea colloquies reflect that each of Smith's pleas of guilty were "intelligent and voluntary." He may not continue to re-litigate what he believes the facts would have been had he not pleaded guilty and gone to trial. Smith's objections based on his trial counsels' strategic decisions are therefore due to be overruled.

C. Double Jeopardy

Smith objects to the Magistrate Judge's finding that double jeopardy is not implicated by charges for both burglary and assault in one indictment. (Doc. 37 at

85-91). His objection is without merit.

The double jeopardy clause protects against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). In determining whether the crimes charged are "the same offense," the inquiry is not whether similar (or even largely identical) facts may support such charges; rather, the test is "whether each provision requires proof of a fact which the other does not." *Albernaz v. United States*, 450 U.S. 333 (1981) (quoting *Blockburger v. United States*, 284 U.S. 299, 305 (1932)). Under Alabama law, second degree assault and first-degree burglary require proof of different facts. *See Smith v. State*, CR 16-0782, Doc. 71 at 18-19 (Ala. Crim. App. 2017).[15] Specifically, to establish a conviction of second degree assault pursuant to § 13A-6-21(a)(1), the state must prove beyond a reasonable doubt that the defendant "caus[ed] serious physical injury to [the victim]" and the defendant acted "[w]ith intent to cause serious physical injury to another person."[16] For first degree burglary pursuant to § 13A-7-5(a)(2), the elements required are "(1)

[15] This court may take judicial notice of state court proceedings. *Keith v. DeKalb County, Georgia*, 749 F.3d 1034, 1041 n.18 (11th Cir. 2014) (judicial notice taken of an online judicial system similar to Alacourt.com) (citing Fed. R. Evid. 201); *Grider v. Cook*, 522 F. App'x 544, 546 n.2 (11th Cir. 2013) (citing *Lozman v. City of Riviera Beach, Fla.*, 713 F.3d 1066, 1075 n.9 (11th Cir. 2013)).

[16] Although unclear from his objections, Smith may be attempting to challenge the prosecution's decision to charge him with assault second degree, rather than misdemeanor assault. (Doc. 37 at 100). Regardless of whether Smith believes his crimes fit the charges to which he pleaded guilty, this is wholly a matter of state law. Smith failed to establish any basis for finding the charges against him were "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" the United States Supreme Court. *See e.g., Dunn v. Madison*, -- U.S. --, 138 S. Ct. 9, 11 (2017) (quoting 28 U.S.C. § 2254(d)).

[t]hat the defendant knowingly and unlawfully entered or remaining unlawfully in the dwelling of (victim); (2) [t]hat in doing so, the defendant acted with the intent to commit a crime namely therein ... and (3) [t]hat while in the dwelling or in effecting entry thereto, or in the immediate flight therefrom, the defendant ... caused physical injury to any person who was not a participant in the crime." *Id.* Because assault and burglary require proof of separate elements, no constitutional violation occurred when Smith was convicted of both. Smith's objection to the report and recommendation on this basis is due to be overruled.

D. Alabama Community Notification Act Repeal

Smith objects to the Magistrate Judge's finding that the repeal of the Alabama Community Notification Act ("ACNA") of 1996, and its subsequent replacement with the Alabama Sex Offender Registration and Community Notification Act ("ASORCNA"), did not relieve Smith of his duty to register (nor make his relevant conduct not criminal). (Doc. 37 at 92-95). In particular, Smith argues that the repeal of the ACNA means his prior conduct is no longer criminal. (*Id.* at 92). While this may be true, the problem with Smith's argument is that this claim arises solely under state law and therefore does not raise any claim of a constitutional nature. This objection is therefore due to be overruled.

E. Actual Innocence

Smith's assertion of "actual, factual innocence" (Doc. 37 at 62, 78-79) is also

off the mark. First, Smith failed to raise this claim in his amended petition. (*See* Doc. 34 at 14). But, even if he had raised it, "actual innocence" has never been held to be a stand alone basis upon which habeas relief may be granted.[17] Rather, it serves as a gateway through which a petitioner may pass," whether impeded by a procedural bar or a statute of limitations. *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). In *House v. Bell*, 547 U.S. 518 (2006), the Supreme Court made clear that a claim of actual innocence may excuse a procedural default by the failure to raise such claims in state court. *Id.* at 522. Here, however, the Magistrate Judge considered Smith's claims on their merits; therefore, Smith's arguments[18] about his actual innocence are off the mark, and this objection is due to be overruled.

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[17] The Supreme Court "ha[s] not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence." *McQuiggin*, 569 U.S. at 392. The Eleventh Circuit has assumed such a claim may be "brought in a *capital* case" where a demonstration of actual innocence "would render the *execution* of a defendant unconstitutional" and therefore merit habeas relief if no state avenues were available. *Magluta v. United States*, 660 F. App'x 803, 807 (11th Cir. 2016) (emphasis in original). However, "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding. *Herrera v. Collins*, 506 U.S. 390, 400 (1993). It is not a federal court's role "to make an independent determination of petitioner's guilt or innocence based on evidence that has emerged since trial," because the federal court's role in habeas claims is "to ensure that individuals are not imprisoned in violation of the Constitution – not to correct errors of fact." *Brownlee v. Haley*, 306 F.3d 1043, 1065 (11th Cir. 2002).

[18] Smith alleges that not only is he innocent of the charges to which he pleaded guilty, but also that had his attorney collected the evidence Smith instructed him too, a "reasonable jurist would have concluded Brandi Smith lied to get the [Protection from Abuse ("PFA") order], then apparently had a motive for obtaining that PFA, and that Brandi Smith was clearly 'enticing ' Smith by coming to his workplace just before this incident, and that Smith was indeed being set up to be murdered." (Doc. 37 at 64).

Smith also suggests that, but for threats made to his witnesses by Brandi Smith and Mark Wilson, he would have had witnesses to testify that he was innocent. (*See e.g.*, Doc. 37 at 76-80). For example, he asserts Jason Clark would have appeared to testify on his behalf, but threats from Smith and Wilson scared Clark away. (*Id.* at 77). But again, because he ultimately pleaded guilty, Smith's objections based on his "actual innocence" and his arguments about what may have happened at trial if he had not pleaded guilty are without merit and therefore due to be overruled.

F. Habitual Offender Act

In his addendum to his initial objections, Smith challenges the imposition of his sentence based on Alabama's Habitual Offender Act. (Doc. 39). Smith claims his stipulation that he had to his prior felony convictions did not waive the state's burden to prove those convictions, and therefore he is due habeas relief.[19] (*Id.* at 3-5). However, as the state court records demonstrate, after his first guilty plea, trial counsel refused to stipulate to Smith's prior convictions (Doc. 7-7 at 78-79); however, Smith later stipulated to these prior felonies. (Doc. 7-10 at 29).

State court determinations of factual issues are presumed correct and a habeas petitioner bears the burden of rebutting that presumption by "clear and convincing

[19] This claim, challenging the propriety of the waiver of the state's burden of proof to establish at least three prior felonies, is raised for the first time in Smith's addendum to his objections. (Doc. 39). He did, however, challenge other aspects of the application of the Habitual Offender Act to his sentence. (*See e.g.*, doc. 7-37 at 9-10).

evidence." *Wood v. Allen*, 558 U.S. 290, 293 (2010) (quoting 28 U.S.C. § 2254(e)(1)). Whether or not Smith had three prior felonies is a question of fact suitable to stipulation. *See* § 13A–5–10.1(a), Ala.Code 1975 ("Certified copies of case action summary sheets, docket sheets or other records of the court are admissible for the purpose of proving prior convictions of a crime."); *see also Hines v. Thomas*, 2016 WL 4492816, *19 (S.D. Ala. Feb. 1, 2016) (noting that "Alabama courts held that prior convictions could be proved by a certified minute entry, a certified judgment entry, or by the defendant's admission of the prior conviction.") (citations omitted); *Debardelaben v. Price*, 2015 WL 1474615, *6 (M.D. Ala. 2015) (gathering cases on the point of law). Had Smith refused to stipulate to the existence of these prior felonies, the state would have had the option of producing certified copies of the convictions. *See e.g., Jones v. White*, 992 F.2d 1548, 1555 n.4 (11th Cir. 1993). But, in light of his later stipulation, wherein he agreed that he did in fact commit the felonies at issue, that was unnecessary. For these reasons, Smith's objection is without merit and therefore due to be overruled.

IV. CONCLUSION

Having carefully reviewed and considered *de novo* all the materials in the court file, including the Magistrate Judge's Report and Recommendation and Smith's objections, amended objections and addendum, the court concludes that the Magistrate Judge's findings are due to be and are hereby **ADOPTED** and his

recommendation is **ACCEPTED**. Smith's objections are **OVERRULED**. Accordingly, the petition for writ of habeas corpus is due to be denied and dismissed with prejudice.

Further, the court concludes the petition does not present issues that are debatable among jurists of reason. Therefore, a certificate of appealability is due to be denied. *See* 28 U.S.C. § 2253(c); *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000); Rule 11(a), *Rules Governing § 2254 Proceedings*. A separate Final Order will be entered.

DONE and **ORDERED** this February 19, 2020.

R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

DANNY L. SMITH,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No.: 4:17-cv-01223-RDP-JEO**
	)	
STATE OF ALABAMA, et al.,	)	
	)	
Respondents.	)	

FINAL ORDER

For the reasons stated in the Memorandum Opinion entered contemporaneously herewith, this action for a writ of habeas corpus filed by petitioner Danny L. Smith is **DISMISSED WITH PREJUDICE**. A certificate of appealability under 28 U.S.C. § 2253(c) is **DENIED.**

DONE and **ORDERED** this February 19, 2020.

R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

DANNY L. SMITH,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No.: 4:17-cv-01223-RDP-JEO**
	)	
STATE OF ALABAMA, et al.,	)	
	)	
Respondents.	)	

MEMORANDUM OPINION

This is an action for a writ of habeas corpus filed by Petitioner Danny L. Smith, *pro se*, on or about July 19, 2017, as amended August 2, 2018. (Docs. 1, 17). After entry of a memorandum opinion and final judgment on February 19, 2020 (Docs. 40, 41), Petitioner filed a "Motion to Set Aside Judgment with Objection to the Judgment and Assignment of Error on Appeal Pursuant to Rule 59(e), Fed. R. Civ. P.". (Doc. 47). The facts underlying the habeas petition have been set forth in detail in the Magistrate Judge's Report and Recommendation (Doc. 34) and, unless otherwise necessary for context, will not be repeated here.

"A Rule 59(e) motion can be granted based only on "newly-discovered evidence or manifest errors of law or fact." *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) (quoting *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007)). A Rule 59(e) motion cannot be used "to relitigate old matters,

raise argument[s] or present evidence that could have been raised prior to the entry of judgment." *Michael Linet, Inc. v. Vill. of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005). The Eleventh Circuit has further directed that "a Rule 59(e) motion cannot be used simply as a tool to reopen litigation where a party has failed to take advantage of earlier opportunities to make [his] case." *Stansell v. Revolutionary Armed Forces of Colombia*, 771 F.3d 713, 744 (11th Cir. 2014).

Petitioner's motion fails to show that the court should reconsider the denial of his § 2254 petition. None of his arguments point to a manifest error of law or fact or newly discovered evidence.

Petitioner first claims the court erred by not addressing his statutory tolling arguments, and asserts this failure contravenes *Clisby v. Jones*, 960 F.2d 925 (11th Cir. 1992). (Doc. 47 at 2). But, *Clisby* only mandates that district courts address "all claims for relief raised in a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (1988), regardless whether habeas relief is granted or denied. … A claim for relief for purposes of this instruction is any allegation of a constitutional violation." *Id.*, at 936. Statutory tolling does not state an independent allegation of a constitutional violation. Because the court addressed all non-procedurally defaulted claims on their merits, statutory tolling provides no benefit to Petitioner. Further, and in any event, the court assumed Petitioner's petitions here were timely filed. (*See* Doc. 34 at 10, n. 13).

Petitioner next contends (in the context of his statutory tolling argument) that this court failed to properly address his motions to withdraw his state court guilty pleas. (Doc. 47 at 4). But, the court fully addressed this issue in its memorandum opinion of February 19, 2020. (*See* Doc. 40 at 8). A Rule 59(e) motion cannot be used "to relitigate old matters, raise argument[s] or present evidence that could have been raised prior to the entry of judgment." *Michael Linet, Inc.*, 408 F.3d at 763. To the extent Petitioner is attempting to state that his motions to withdraw his guilty pleas in state court should have been considered as timely petitions for collateral review by the state court (Doc. 47 at 6-9), that argument fails to raise a claim of constitutional proportion.[1]

Petitioner's reliance on *Artuz v. Bennet*, 531 U.S. 4, 8 (2000), which concerned the determination of when an application for habeas relief is properly filed, does not call for a different result. Nothing in *Artuz* suggests that a motion to withdraw a guilty plea can serve as a putative motion for collateral review. Further, Petitioner's attempts to raise new objections to the Report and Recommendation (Doc. 40 at 6) are similarly barred.

[1] Petitioner points to no precedent which could support an Alabama court considering a motion to withdraw a guilty plea as a petition for collateral review under Alabama Rule of Criminal Appellate Procedure 32. But even if he had done so, that remains a question of state law. This court may not re-examine state court determinations of state law questions. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

Petitioner's third and fourth bases for his motion to alter or amend each rely on statutory tolling. (Doc. 47 at 10, 11). He asserts he is entitled to a Certificate of Appealability pursuant to 28 U.S.C. § 2253 because the court chose to address his claims on their merits rather than consider whether they were statutorily barred. (*Id.*) A court may consider time-barred claims raised in habeas petitions on their merits when doing so serves the interests of justice. *See, e.g., Day v. McDonough*, 547 U.S. 198, 210 (2006). Indeed, the only effect that a finding that Petitioner's claims are not statutorily barred would have is to entitle Petitioner to a ruling on the merits of his claims. But, this court has already addressed the merits of his claims.

Petitioner further argues this court should have found the state court petitions timely filed, and thus the claims raised there not procedurally defaulted. However, decisions such as *Martinez v. Ryan*, 566 U.S. 1, 9 (2012), and *Atkins v. Singletary*, 965 F.2d 952, 956 (11th Cir. 1992), counsel against such a determination. Indeed, both these cases call for this court to respect state court determinations on state court rules. Moreover, this court considered whether any of Petitioner's claims demonstrated "a decision which was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), and concluded they did not. Revisiting the timeliness of Petitioner's state court petitions does not change any outcome.

Petitioner also asserts that the state court's reliance on Rule 32.1(f), to require separate collateral petitions for each of the judgments against him, was misplaced.[2] (Doc. 47 at 15-22). He points to *Burton v. Stewart*, 549 U.S. 147 (2007), in support of his claim. Specifically, Petitioner references *Burton's* citation to *Berman v. United States*, 302 U.S. 211, 212 (1937), which held that a "[f]inal judgment in a criminal case means sentence. The sentence is the judgment." *Id.*, at 156. (*See* Doc. 47 at 20). But *Burton*, which concerned federal review of petitions containing both exhausted and unexhausted claims, does not provide any help to him. Although Petitioner was sentenced in multiple cases at the same time, Rule 32.1(f) does not require separate petitions for each conviction. And, in any event, "federal habeas corpus relief does not lie for errors of state law[,]" *Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (quotation omitted); nor does "an alleged defect in a collateral proceeding [] state a basis for habeas relief." *Alston v. Dep't of Corr., Fla.*, 610 F.3d 1318, 1325 (11th Cir. 2010) (quoting *Quince v. Crosby*, 360 F.3d 1259, 1262 (11th Cir. 2004)). Regardless of whether the state courts were correct in their interpretation of Rule 32.1(f), Petitioner cannot rely on any such claimed error as a basis for *federal* habeas relief.

[2] Alabama Rule of Criminal Procedure 32.1 states in relevant part, "A petition that challenges multiple judgments entered in more than a single trial or guilty-plea proceeding shall be dismissed without prejudice."

Finally, Petitioner reasserts that his guilty plea was coerced. (Doc. 47 at 29). But, his motion merely rehashes his prior arguments concerning his counsel not conducting a thorough investigation (in a manner Petitioner deems appropriate) and claims that this court failed to consider new evidence in the form of an affidavit from his investigator. (*Id.*). Petitioner's disagreement with this court's findings merely reiterates his arguments that were rejected by the court. Of course, that is an insufficient basis for relief on a motion to alter or amend. *See e.g, Stansell*, 771 F.3d at 744.

For all these reasons, and after careful review, the court **DENIES** Petitioner's motion to alter or amend the judgment. (Doc. 47).

DONE and **ORDERED** this April 27, 2020.

R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

DANNY L. SMITH,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No.: 4:17-cv-01223-RDP-JEO**
	)	
STATE OF ALABAMA, et al.,	)	
	)	
Respondents.	)	

FINAL JUDGMENT

This case is before the court on Petitioner Danny L. Smith's "Motion to Set Aside Judgment With Objection to the Judgment and Assignment of Error on Appeal Pursuant to Rule 59(c)." (Doc. # 47). For the reasons discussed in the contemrpoaneously entered memorandum opinion, Petitioner's Motion (Doc. # 47) is **DENIED**. Final judgment is entered on behalf of Respondents. The Clerk of Court is **DIRECTED** to close this case.

DONE and **ORDERED** this April 27, 2020.

R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

DANNY L. SMITH,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No.: 4:17-cv-01223-RDP-JEO**
	)	
STATE OF ALABAMA, et al.,	)	
	)	
Respondents.	)	

ORDER REGARDING APPEAL IN HABEAS CASE

Petitioner has filed a Notice of Appeal and an application to proceed *in forma pauperis* on appeal. (Docs. 42, 48). This court certifies that this appeal is not taken in good faith and authorization to proceed on appeal *in forma pauperis* is therefore **DENIED**. The claims raised by Petitioner present no issues fairly debatable among reasonable jurists. Therefore, this appeal is frivolous.

Pursuant to 28 U.S.C. § 2253 (as amended), an appeal may not be taken in this action unless the court issues a certificate of appealability. This court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, a "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or that "the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotations omitted). Petitioner's claims do not satisfy either standard and therefore, a certificate of appealability is **DENIED**.

Petitioner is **ADVISED** that he may file an application to proceed on appeal *in forma pauperis* and a request for certificate of appealability directly with the Court of Appeals for the Eleventh Circuit.

DONE and **ORDERED** this April 27, 2020.

R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-10956-G

DANNY L SMITH,

Petitioner-Appellant,

versus

STATE OF ALABAMA,
LIMESTONE PRISON,
WARDEN,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

Before: WILSON and JILL PRYOR, Circuit Judges.

BY THE COURT:

Danny Smith has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's September 2, 2020, order denying a certificate of appealability and leave to proceed *in forma pauperis* in his appeal of the district court's denial of his *pro se* petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254. Upon review, Smith's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

APPENDIX

D

THE STATE OF ALABAMA - - JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

CR-14-1281

Danny L. Smith, Appellant

vs.

State of Alabama, Appellee

Appeal from Etowah Circuit Court No. CC-06-269.62;
CC-07-41.62; CC-07-784.62; CC-07-785.62

ORDER

Danny L. Smith appeals from the circuit court's summary dismissal, without prejudice, of his Rule 32 petition for postconviction relief. See Rule 32.1(f), Ala. R. Crim. P. The petition challenged Smith's August 7, 2008, guilty plea convictions to first-degree assault, case no. CC-06-269; to violating the Community Notification Act, case no. CC-07-410; to first-degree burglary, case no. CC-07-784.01; and, to second-degree assault, case no. CC-07-784.02. Smith was also sentenced on August 7, 2008, as a habitual offender to life imprisonment for each of the four convictions. All the sentences were ordered to be served concurrently. Smith did not appeal his convictions and sentences.

Smith included as an exhibit to his petition the guilty plea colloquy from August 7, 2008. The colloquy contains the following passage:

> "[The Court:] All right, then. Please state to the Court your plea to the crimes you're charged within this matter that are specifically being contemplated today as far as a plea. And that would be CC-07-784.01, burglary first; CC-07-410, violation of the Community Notification Act; CC-07-784.02, assault second; CC-07-785, criminal mischief; and CC-06-269, assault first."

(C. 61.)

Smith does not challenge his misdemeanor conviction in CC-07-785 for criminal mischief in the petition.

After the State responded, the circuit court entered an order dismissing the petition pursuant to Rule 32.1(f), Ala. R. Crim. P., which states in pertinent part:

"ORDER

"THIS MATTER coming before this Court on a successive Petition for Relief filed by the Defendant pursuant to the provisions of Rule 32, A.R.Cr.P.; and this Court, ex mero motu, having proceeded to review the same, and upon such review.

"IT APPEARING TO THE COURT that such Petition, on its face, shows that it is challenging multiple judgments entered in more than a single trial or guilty-plea proceeding; and

"IT FURTHER APPEARING TO THE COURT that such is specifically prohibited under the provisions of Rule 32.1, A.R.Cr.P. [see also Lucas v. State, 855 So.2d 1128 (2003)]; and

"The Court having considered the foregoing, and upon due consideration thereof, it is hereby

"ORDERED, ADJUDGED, AND DECREED BY THE COURT that the Defendant's Petition for Relief filed pursuant to the provisions of Rule 32, A.R.Cr.P. be, and the same hereby is, dismissed without prejudice in accordance with the provisions of Rule 32.1, A.R.Cr.P."

(C. 96.)

Smith's petition challenged multiple judgments entered in only a single guilty-plea proceeding, therefore, the circuit court erroneously dismissed his petition.

Therefore, the circuit court's judgment dismissing the petition is due to be, and is hereby, REVERSED and the cause is REMANDED to the Etowah Circuit Court for that court to set aside its judgment summarily dismissing Smith's Rule 32 petition and to consider the claims in Smith's Rule 32 petition.

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

Done this 4th day of February, 2016.

MARY BECKER WINDOM, PRESIDING JUDGE

FILED

FEB 04 2016

CASSANDRA "SAM" JOHNSON
CIRCUIT COURT CLERK

cc: Hon. David A. Kimberly, Judge
Hon. Cassandra Johnson, Clerk
Danny L. Smith, pro se
Christie O. Wilkerson, Office of the Attorney General
Office of the Attorney General

THE STATE OF ALABAMA - - JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS

CR-14-1281

Danny L. Smith v. State of Alabama (Appeal from Etowah Circuit Court: CC06-269.62; CC07-41.62; CC07-784.62; CC07-785.62)

CERTIFICATE OF JUDGMENT

WHEREAS, the appeal in the above referenced cause has been duly submitted and considered by the Court of Criminal Appeals; and

WHEREAS, the judgment indicated below was entered in this cause on February 4th 2016:

Reversed and Remanded.

NOW, THEREFORE, pursuant to Rule 41 of the Alabama Rules of Appellate Procedure, it is hereby certified that the aforesaid judgment is final.

**Witness.D. Scott Mitchell, Clerk
Court of Criminal Appeals, on this
the 24th day of February, 2016.**

D. Scott Mitchell

**Clerk
Court of Criminal Appeals
State of Alabama**

cc: Hon. David A. Kimberley, Circuit Judge
Hon. Cassandra "Sam" Johnson, Circuit Clerk
Danny L. Smith, Pro Se
Kristi O Wilkerson, Asst. Attorney General

EXHIBIT-2 pg. *1 of *1.

THE STATE OF ALABAMA - - JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS

CR-16-0782

Danny L. Smith v. State of Alabama (Appeal from Etowah Circuit Court: CC06-269.80; CC07-41.80; CC07-784.80; CC07-785.80)

CERTIFICATE OF JUDGMENT

WHEREAS, the appeal in the above referenced cause has been duly submitted and considered by the Court of Criminal Appeals; and

WHEREAS, the judgment indicated below was entered in this cause on December 8th 2017:

Affirmed by Memorandum.

NOW, THEREFORE, pursuant to Rule 41 of the Alabama Rules of Appellate Procedure, it is hereby certified that the aforesaid judgment is final.

Witness.D. Scott Mitchell, Clerk
Court of Criminal Appeals, on this
the 16th day of March, 2018.

D. Scott Mitchell

Clerk
Court of Criminal Appeals
State of Alabama

cc: Hon. David A. Kimberley, Circuit Judge
Hon. Cassandra "Sam" Johnson, Circuit Clerk
Danny Lewis Smith, Pro Se
Tracy Millar Daniel, Asst. Atty. Gen.

IN THE CIRCUIT COURT OF ETOWAH COUNTY, ALABAMA

STATE OF ALABAMA	*	
	*	
	*	**Case No.: CC-2006-269.62;**
v.	*	**CC-2007-41.62;**
	*	**CC-2007-784.62;**
DANNY L. SMITH	*	**CC-2007-785.62**

ORDER

COMES NOW the Court and pursuant to the Orders of the Court of Criminal Appeals, takes the following action:

The Order summarily dismissing the Rule 32 Petition is SET ASIDE. The petition is reinstated and the State shall now timely substantively respond to the claims in Petitioner's Rule 32 Petition.

Done this the 24th day of February, 2016.

DAVID A. KIMBERLEY, Circuit Judge

cc: Court of Criminal Appeals (CR-14-1281)

STATE OF ALABAMA,	:	IN THE CIRCUIT COURT OF
PLAINTIFF	:	ETOWAH COUNTY, ALABAMA
VS.	:	
		CRIMINAL DIVISION
DANNY L. SMITH,	:	
DEFENDANT	:	CASE NOS. CC-06-000269.62-DAK CC-07-000041.62-DAK CC-07-000784.62-DAK CC-07-000785.62-DAK

FEB 07 2017

...NSON
...IT CLERK

MOTION TO DISMISS

COMES NOW the State of Alabama, by and through the District Attorney's Office for the Sixteenth Judicial Circuit, and moves the Court for an Order dismissing the Defendant's successive Petition for Relief filed pursuant to the provisions of Rule 32, A.R.Cr.P.; and as grounds in support thereof, shows unto the Court as follows, to-wit:

(1) Without wasting any more of the State's or the Court's time in dealing with this matter, the State of Alabama would point out that this Petition, together with the Amendment filed to it, fail to allege any facts or matters addressing the jurisdiction of the Court. The matters contained in such Petition, and the same as amended, without more, are precluded under the provisions of Rule 32.2(c), A.R.Cr.P., due to the fact that the Defendant did not appeal his pleas of guilty and sentencings to the Alabama Court of Criminal Appeals; and more than one year from the time to take such an appeal lapsed before the Defendant filed his present Petition.

(2) The State would further point out to the Court that this is a successive Petition for Relief filed by the Defendant, none of which have shown to be of any merit, but are only fabrications of alleged fact and assignations of alleged court case citations, the sum and substance of which only amount to a waste of time in having to review the same; and the State of Alabama would further aver that it would be in the best interest of all parties and thic Court for the Defendant to be permanently enjoined and restrained from the filing of any further pleadings or motions in any of these causes unless such affirmatively show that they would qualify under the provisions of Rule 32.1(b) and 32.2(a)&(b), A.R.Cr.P..

WHEREFORE, PREMISES CONSIDERED, the State of Alabama moves the Court for an Order dismissing the Defendant's successive Petition for Relief, and such Petition as amended, for the grounds heretofore stated, separately and severally. And the State of Alabama moves the Court for such other general and special relief as it may be entitled to in the premises.

CC: Danny Smith

STATE OF ALABAMA

BY: Jody Willoughby
JOSEPH M. WILLOUGHBY
District Attorney
16th Judicial Circuit

CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the foregoing Motion to Dismiss upon Inmate Danny L. Smith, AIS #176952, c/o Limestone Correctional Facility, 28779 Nick Davis Road, Harvest, AL 35749 by lawful U.S. Mail, postage prepaid, on this the 7th day of February, 2017.

Jody Willoughby
JOSEPH M. WILLOUGHBY
District Attorney
16th Judicial Circuit

FILED

FEB 07 2017

JOHNSON
CIRCUIT CLERK

STATE OF ALABAMA,	:	IN THE CIRCUIT COURT OF
PLAINTIFF	:	ETOWAH COUNTY, ALABAMA
VS.	:	
		CRIMINAL DIVISION
DANNY L. SMITH,	:	
DEFENDANT	:	CASE NOS. CC-06-000269.80-DAK CC-07-000041.80-DAK CC-07-000784.80-DAK CC-07-000785.80-DAK

O R D E R

THIS MATTER coming before the Court on a successive Petition for Relief filed by the Defendant pursuant to the provisions of Rule 32, A.R.Cr.P.; and also coming before the Court on a Motion to Dismiss the same filed by the State of Alabama; and the Court having proceeded to review each of the aforestated pleadings, as well as the official court file and record in this cause; and, upon such review

IT APPEARING TO THE COURT that, as to the first ground alleging a plea of guilty unlawfully induced or not voluntarily made for failure to advise the Defendant as to the minimum and maximum ranges of punishments and to prove prior felony convictions for purposes of imposing the provisions of the Alabama Felony Habitual Offender Act, each of said grounds are found by the Court to be without any basis in law or in fact; and IT FURTHER APPEARING TO THE COURT that, as to failing to advise the Defendant as to the minimum and maximum ranges of punishment he was facing on a plea of guilty, exhibits in the Defendant's Petition as well as in the official court file and record, reflect that he was advised of

such and acknowledged the same in the Ireland form that he executed along with his counsel and on page 375 of the transcript attached to the same; and IT FURTHER APPEARING TO THE COURT that, as to the matter alleging failure to prove the Defendant's prior felong convictions, such ground is also refuted in the Plea Agreement and Ireland forms executed by the Defendant and a stipulation to the same by the Defendant evidenced at page 381 of the transcript, all of which are attached as exhibits to the Defendant's Petition for Relief; and, based upon the foregoing, such fail to provide any basis upon which to grant any relief to the Defendant; and

IT FURTHER APPEARING TO THE COURT that, as to the additional five grounds cited by the Defendant in his Petition, the same do not address themselves to the jurisdiction of the Court; and, as a result thereof, are therefore precluded under the provisions of Rule 32.2(c), A.R.Cr.P., inasmuch as the Defendant did not appeal his pleas of guilty and sentencings to the Court of Criminal Appeals, and more than one year from the time for taking such appeal lapsed before the Defendant filed his present Petition; and

IT FURTHER APPEARING TO THE COURT that the transcript attached by the Defendant as an Exhibit to his Petition for Relief shows at page 379 that the Defendant waived any right to file a Petition for Relief under the provisions of Rule 32, A.R.Cr.P., and further reserved no issues for appeallate review; and

IT FURTHER APPEARING TO THE COURT that the Defendant's entire Petition for Relief, as well as his prior Petitions, have served no purpose other than to vex the court system and the State of Alabama, such consisting only of fabrications and citing of alleged

court citations purporting to support the frivolous and false claims of the Defendant in his Petition; and IT FURTHER APPEARING TO THE COURT that it would be in the best interests of all parties and this Court for the Defendant to be permanently enjoined and restrained from filing any further pleadings or motions in any of these causes unless such affirmatively show that they would qualify under the provisions of Rule 32.1(b) and 32.2(a)& (b), A.R.Cr.P.; and

The Court having proceeded to review all of the foregoing, and upon due consideration of the same, it is hereby

ORDERED, ADJUDGED, AND DECREED BY THE COURT AS FOLLOWS:

(1) That the Motion to Dismiss filed by the State of Alabama in this cause be, and the same hereby is, GRANTED, for the grounds heretofore stated, separately and severally; and that the costs of these proceedings are hereby taxed against the Defendant, for the collection of which, let execution or other lawful process issue.

(2) That the State of Alabama Department of Corrections shall withhold and accumulate the sum of Two Hundred Forty-six and no/100 Dollars ($246.00), such amount to be collected at the rate of 50% from any income or asset presently available to, or in the future becomes available to, the Defendant; and said Department of Corrections shall immediately forward such sum to the Circuit Clerk of Etowah County as payment for such costs when the same has been collected in full.

(3) That the Defendant be, and he hereby is, permanently enjoined and restrained from filing any pleading or motion raising the same or similar ground presented or raised or which could have

been presented or raised in an earlier pleading unless the Defendant shows both that good cause exists why teh new ground or grounds were not known or could not have been ascertained through reasonable diligence when the prior Petition was decided, and that failure to entertain such Petition would result in a miscarriage of justice. Peoples v. State, 531 So.2d 323, 327-328 (1988).

(4) That any and all other relief sought by the parties be, and the same hereby is, DENIED.

(5) That the Circuit Clerk shall serve a copy of this Order upon the Defendant at his present place of incarceration; upon the District Attorney for the Sixteenth Judicial Circuit; and upon the State of Alabama Department of Corrections at its lawful address in Montgomery; and said Circuit Clerk shall further make due notation of the same upon the records of these causes at the time the same is done.

DONE this the 3rd day of April, 2017.

DAVID A. KIMBERLEY
Circuit Judge
16th Judicial Circuit

0269-785

IN THE SUPREME COURT OF ALABAMA

March 16, 2018

1170411

Ex parte Danny L. Smith. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Danny L. Smith v. State of Alabama) (Etowah Circuit Court: CC-06-269.80; CC-07-41.80; CC-07-784.80; CC-07-785.80; Criminal Appeals : CR-16-0782).

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 March 16, 2018:

Writ Denied. No Opinion. Sellers, J. - Stuart, C.J., and Bolin, Shaw, and Wise, 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 16th day of March, 2018.

Julia Jordan Weller

Clerk, Supreme Court of Alabama

UNITED STATES DISTRICT COURT
Office of the Clerk
Northern District of Alabama
Room 140
United States Courthouse
1729 5th Avenue North
Birmingham, Alabama 35203

This is to confirm that on 5/3/18, you filed a civil action in the U.S. District Court, Northern District of Alabama. The action was styled Smith v. State of Al, et al and was assigned case docket number 1:18-cv-00688-MHH-JEO. This case number must be included with all future pleadings and correspondence involving this action. All pleadings and correspondence must be sent to the address in the above left hand corner.

This office will keep you informed of the status of your action by sending you copies of all orders entered by the Court.

It is your responsibility to keep the Court informed of your current address, and failure to do so may result in dismissal of your action.

SHARON N. HARRIS
CLERK OF COURT

APPENDIX

E

IN THE CIR IT COURT OF ETOWAH COU Y, ALABAMA

STATE OF ALABAMA *

Vs. *

DANNY LOUIS SMITH, * CASE NO. CC2007-784.01 784.02, 785, 786, 787; CC2006-869, 416
Defendant.

FILED
AUG 8 2008
BILLY YATES
CLERK, CIRCUIT COURT

PLEA AGREEMENT

The State of Alabama, by and through its District Attorney, and the Defendant in the above-styled cause, by and through his/her Counsel of record, agree as follows:

1. Defendant withdraws all earlier pleas and enters a plea of GUILTY AS HIO W/ 3 PRIOR FELONY CONVICTIONS
✓ as charged in the complaint, information or indictment.
_____ to the charge of _____

2. Both the State and the Defendant waive pre-sentence report:
✓ yes _____ no.

3. Prosecutor recommends a sentence of LIFE, CC, COSTS, $300 TO CVCF (5 @ $50 + 2 @ $25) RESTITUTION OF [redacted] 1 $50.00 TO GENEVA PATTERSON IN CC07-786.01, RESTITUTION [redacted] DUE VICTIM JEFFREY SHANE DOTSMAN/RIVERVIEW REGIONAL/COMMUNITY ORTHOPEDICS BY AFFIDAVIT W/IN 60 DAYS IN CC07-784.02 AND A AFTER NOTICE OF AFFIDAVIT IN SAID CASE, THIS NOTE: Sentence includes payment of all restitution, Court Costs, attorneys' fees (where applicable), and fines, assessments, and Crime Victims Compensation Commission fees. 60 DAYS TO OBJECT TO SAME. $500.00 TO JIMMY BUTCHER IN CC07-785 IN ALL OTHER CASES AFFIDAVIT W/IN 60 DAYS AND A ARE NOT TO OBJECT W/IN 60 DAYS. IN

4. Defendant understands and acknowledges that probation is discretionary with the Court and is **not a condition** of this agreement. All supervised probations require the Defendant to **report at least one time per month** to _____ the probation office or to _____ Community Corrections.

5. Prosecutor will: **oppose** ✓, **not oppose** _____, **recommend** _____ probation. CC07-785 AND CC07-787, Δ SENTENCED TO 15 MONTHS, CONCURRENT W/ EACH OTHER AND CONCURRENT W/ FELONY LIFE SENTENCES AS WELL.

6. By pleading guilty the Defendant waives and agrees to waive any right to an appeal, his right to withdraw his plea of guilt, and his right to an appeal bond, or any challenges brought pursuant to Rule 32 of the *Alabama Rules of Criminal Procedure*. The Defendant waives any and all motions, defenses, objections, or requests which have been made, or which could have been made in this case. **The Defendant specifically reserves NO issues for appellate review.**

7. The Defendant agrees that he has discussed this case at length with Defendant's Counsel. The Defendant hereby agrees that he is satisfied with Counsel's investigation of the case, exploration and presentation of possible defenses, advice and all other representation. The Defendant agrees that he is pleading guilty freely and voluntarily having been adequately and satisfactorily represented by Counsel.

8. The Defendant understands that as part of his sentence, he is required to pay all fines, restitution, court costs, attorney's fees, and any other costs imposed against him as part of the Court Order in this case. Further he understands that if all such costs are not paid at sentencing, he shall be ordered to make minimum monthly payments, beginning on a specific date, set forth below.

9. The Defendant further understands that if he becomes delinque in the payment of said costs, an administrative fee of 30% of the unpaid balance will b costs, and the Defendant will be given ten (10) days to pay the balance; if at the end c ance is not paid in full, a writ will be issued for his/her immediate arrest.

Ex. 1

10. Other than ..nat is contained in this document, **NO PROMISES OR REPRESENTATIONS HAVE BEEN MADE BY THE PROSECUTOR, OR BY ANYONE ELSE, NOR HAVE ANY THREATS BEEN MADE OR FORCE USED, TO INDUCE THE DEFENDANT TO PLEAD GUILTY.** This Document is the sole agreement and understanding between the State of Alabama, the Defendant, and Defendant's Counsel.

11. The Defendant has not had any drugs, medications or alcohol within the past 48 hours, and is competent to enter the plea agreement stated above.

Should the Court reject this agreement, it is understood that neither the Defendant nor the State of Alabama are bound hereby, and the Defendant is free to withdraw his/her plea of guilt, and proceed to trial.

ACKNOWLEDGMENTS

1. I have READ this document, DISCUSSED it with my attorney, and UNDERSTAND and AGREE with all of its provisions, both individually and totally.

8/7/08
DATE

DEFENDANT

2. I have discussed this case with the Defendant in detail and have advised the Defendant of the Defendant's rights and all possible defenses. The Defendant has conveyed to me that the Defendant understands this document and consents to all of its terms. I believe the plea and dispositions set forth herein are appropriate under the facts of this case. I concur in the entry of the plea of guilt as indicated above, and on the terms and conditions set forth herein.

8/7/08
DATE

COUNSEL FOR DEFENDANT

FILED
AUG 08 2008
BILLY YATES
CLERK, CIRCUIT COURT

3. I have reviewed this document and agree to all of its provisions.

8/8/08
DATE

PROSECUTOR

THE COURT, HAVING REVIEWED THE PROPOSED AGREEMENT:

_____ ACCEPTS THE AGREEMENT OF THE PARTIES _____ REJECTS THE AGREEMENT OF THE PARTIES

MONTHLY PAYMENTS ARE HEREBY SET IN THIS CAUSE IN THE AMOUNT OF:

$_____ BEGINNING ON THE _____ DAY OF _____, 200__.
DEFENDANT IS ADVISED OF SAME ON THIS DATE ON THE RECORD IN OPEN COURT.

8/7/08
DATE

CIRCUIT JUDGE

RECEIVED
AUG 12 2008
CIRCUIT COURT CLERK

Ex-1

charged and the consequences of pleading guilty to those crimes, and that the defendant understandingly and voluntarily pled guilty and waived his constitutional rights in these matters, I hereby order the defendant's plea of guilt and waiver of his constitutional rights be accepted and entered into the record of the Court.

Let the record reflect that I considered the Sentencing Standards in this matter, but will sentence pursuant to the plea agreement entered into by the parties and also will sentence Mr. Smith as a habitual offender with three prior felony convictions stipulated to.

Pursuant to the plea agreement, Mr. Smith, I'm sentencing you to life in the state penitentiary in regards to CC-07-784.01, 784.02, CC-07-786, CC-2006-269 and CC-2006-416. I'm going to run all those sentences concurrent.

Ex-1

APPENDIX F

IN THE CIRCUIT COURT OF ETOWAH COUNTY, ALABAMA

STATE OF ALABAMA *
*
VS. * CASE NO.: CC-2006-269-DAK
*
DANNY LOUIS SMITH

SENTENCING ORDER

On the 25th day of April, 2006, the Defendant filed his Plea of Not Guilty and Waiver at Arraignment, and on the 7th day of August, 2007 the Defendant entered his plea of Guilty to the offense of Assault – First Degree as charged in the indictment.

On the 7th day of August, 2008, Defendant present in open Court with his/her attorney present and being asked by the Court if he/she has anything to say why the Judgment of the Court and the Sentence of the Law should not be pronounced upon him/her, Defendant made no response.

The Court has reviewed and considered the Sentencing Standards. It is therefore, CONSIDERED BY THE Court and it is the JUDGMENT AND SENTENCE of the Court that the Defendant be imprisoned in the State Penitentiary, as a habitual offender with at least three (3) prior felonies for a term of life. The Defendant's sentences are to run concurrently in CC-2006-269, CC-2007-41, CC-2007-784.01, CC-2007-784.02, CC-2007-785, CC-2007-786, and CC-2007-787.

Defendant is further Ordered to pay the court costs incurred herein, restitution by affidavit within sixty (60) days, and Defendant after notice of affidavit has sixty (60) days to object to same, and an Alabama Crime Compensation Commission Assessment of $50.00. Defendant's first payment in the amount of $100.00 is due and payable sixty (60) days from his release from prison and a like payment each and every thirty days thereafter until all court ordered monies are paid in full. It is further Ordered that the Defendant be credited with time spent in jail awaiting trial. Defendant is further Ordered placed on an 11:00 p.m. curfew.

The Defendant having waived his/her right of appeal as part of the plea agreement herein, the Court specifically finds:

1. Defendant has reserved no issues for appellate review. Defendant and the Court have entered into a colloquy wherein the Defendant was advised of the consequences of waiving his/her appeal right, his/her right to file a motion to withdraw his/her plea within (30) thirty days, and her/her right of appeal in the event the Court denies his/her motion to withdraw his/her plea.

DONE this the 7th day of August, 2008.

David A. Kimberley, Circuit Judge

cc: District Attorney
Dale Stracener, Esq.
Sheriff's Office
P.O.

FILED
JUL 20 2009
BILLY YATES
CLERK, CIRCUIT COURT

EXHIBIT
CC

PENGAD 800-631-6989

IN THE CIRCUIT COURT OF ETOWAH COUNTY, ALABAMA

STATE OF ALABAMA *
*
VS. * CASE NO.: CC-2007-41-DAK
*
DANNY LOUIS SMITH

SENTENCING ORDER

On the 31st day of January, 2007, the Defendant filed his Plea of Not Guilty and Waiver at Arraignment, and on the 7th day of August, 2007 the Defendant entered his plea of Guilty to the offense of Violation of Community Notification Act as charged in the indictment.

On the 7th day of August, 2008, Defendant present in open Court with his/her attorney present and being asked by the Court if he/she has anything to say why the Judgment of the Court and the Sentence of the Law should not be pronounced upon him/her, Defendant made no response.

The Court has reviewed and considered the Sentencing Standards. It is therefore, CONSIDERED BY THE Court and it is the JUDGMENT AND SENTENCE of the Court that the Defendant be imprisoned in the State Penitentiary, as a habitual offender with at least three (3) prior felonies for a term of life. The Defendant's sentences are to run concurrently in CC-2006-269, CC-2007-41, CC-2007-784.01, CC-2007-784.02, CC-2007-785, CC-2007-786, and CC-2007-787.

Defendant is further Ordered to pay the court costs incurred herein, restitution by affidavit within sixty (60) days, and Defendant after notice of affidavit has sixty (60) days to object to same, and an Alabama Crime Compensation Commission Assessment of $50.00. Defendant's first payment in the amount of $100.00 is due and payable sixty (60) days from his release from prison and a like payment each and every thirty days thereafter until all court ordered monies are paid in full. It is further Ordered that the Defendant be credited with time spent in jail awaiting trial. Defendant is further Ordered placed on an 11:00 p.m. curfew.

The Defendant having waived his/her right of appeal as part of the plea agreement herein, the Court specifically finds:

1. Defendant has reserved no issues for appellate review. Defendant and the Court have entered into a colloquy wherein the Defendant was advised of the consequences of waiving his/her appeal right, his/her right to file a motion to withdraw his/her plea within (30) thirty days, and her/her right of appeal in the event the Court denies his/her motion to withdraw his/her plea.

DONE this the 7th day of August, 2008.

David A. Kimberley, Circuit Judge

cc: District Attorney
Dale Stracener, Esq.
Sheriff's Office
P.O.

FILED
JUL 20 2009
BILLY YATES
CLERK, CIRCUIT COURT

FILED
AUG 08 2008
BILLY YATES
CLERK, CIRCUIT COURT

EXHIBIT
DD

PENGAD 800-631-6989

IN THE CIRCUIT COURT OF ETOWAH COUNTY, ALABAMA

STATE OF ALABAMA *
*
VS. * CASE NO.: CC-2007-784.01-DAK
*
DANNY LOUIS SMITH

SENTENCING ORDER

On the 18th day of July, 2007, the Defendant filed his Plea of Not Guilty and Waiver at Arraignment, and on the 7th day of August, 2007 the Defendant entered his plea of Guilty to the offense of Burglary – First Degree as charged in the indictment.

On the 7th day of August, 2008, Defendant present in open Court with his/her attorney present and being asked by the Court if he/she has anything to say why the Judgment of the Court and the Sentence of the Law should not be pronounced upon him/her, Defendant made no response.

The Court has reviewed and considered the Sentencing Standards. It is therefore, CONSIDERED BY THE Court and it is the JUDGMENT AND SENTENCE of the Court that the Defendant be imprisoned in the State Penitentiary, as a habitual offender with at least three (3) prior felonies for a term of life. The Defendant's sentences are to run concurrently in CC-2006-269, CC-2007-41, CC-2007-784.01, CC-2007-784.02, CC-2007-785, CC-2007-786, and CC-2007-787.

Defendant is further Ordered to pay the court costs incurred herein, restitution by affidavit within sixty (60) days, and Defendant after notice of affidavit has sixty (60) days to object to same, and an Alabama Crime Compensation Commission Assessment of $50.00. Defendant's first payment in the amount of $100.00 is due and payable sixty (60) days from his release from prison and a like payment each and every thirty days thereafter until all court ordered monies are paid in full. It is further Ordered that the Defendant be credited with time spent in jail awaiting trial. Defendant is further Ordered placed on an 11:00 p.m. curfew.

The Defendant having waived his/her right of appeal as part of the plea agreement herein, the Court specifically finds:

1. Defendant has reserved no issues for appellate review. Defendant and the Court have entered into a colloquy wherein the Defendant was advised of the consequences of waiving his/her appeal right, his/her right to file a motion to withdraw his/her plea within (30) thirty days, and her/her right of appeal in the event the Court denies his/her motion to withdraw his/her plea.

DONE this the 7th day of August, 2008.

David A. Kimberley, Circuit Judge

cc: District Attorney
Dale Stracener, Esq.
Sheriff's Office
P.O.

JUL 20 2009
BILLY YATES
CLERK, CIRCUIT COURT

EXHIBIT
EE
PENGAD 800-631-6989

IN THE CIRCUIT COURT OF ETOWAH COUNTY, ALABAMA

STATE OF ALABAMA *
*
VS. * CASE NO.: CC-2007-784.02-DAK
*
DANNY LOUIS SMITH

SENTENCING ORDER

On the 18th day of July, 2007, the Defendant filed his Plea of Not Guilty and Waiver at Arraignment, and on the 7th day of August, 2007 the Defendant entered his plea of Guilty to the offense of Assault - Second Degree as charged in the indictment.

On the 7th day of August, 2008, Defendant present in open Court with his/her attorney present and being asked by the Court if he/she has anything to say why the Judgment of the Court and the Sentence of the Law should not be pronounced upon him/her, Defendant made no response.

The Court has reviewed and considered the Sentencing Standards. It is therefore, CONSIDERED BY THE Court and it is the JUDGMENT AND SENTENCE of the Court that the Defendant be imprisoned in the State Penitentiary, as a habitual offender with at least three (3) prior felonies for a term of life. The Defendant's sentences are to run concurrently in CC-2006-269, CC-2007-41, CC-2007-784.01, CC-2007-784.02, CC-2007-785, CC-2007-786, and CC-2007-787.

Defendant is further Ordered to pay the court costs incurred herein, restitution by affidavit within sixty (60) days, and Defendant after notice of affidavit has sixty (60) days to object to same, and an Alabama Crime Compensation Commission Assessment of $50.00. Defendant's first payment in the amount of $100.00 is due and payable sixty (60) days from his release from prison and a like payment each and every thirty days thereafter until all court ordered monies are paid in full. It is further Ordered that the Defendant be credited with time spent in jail awaiting trial. Defendant is further Ordered placed on an 11:00 p.m. curfew.

The Defendant having waived his/her right of appeal as part of the plea agreement herein, the Court specifically finds:

1. Defendant has reserved no issues for appellate review. Defendant and the Court have entered into a colloquy wherein the Defendant was advised of the consequences of waiving his/her appeal right, his/her right to file a motion to withdraw his/her plea within (30) thirty days, and her/her right of appeal in the event the Court denies his/her motion to withdraw his/her plea.

DONE this the 7th day of August, 2008.

David A. Kimbetley, Circuit Judge

cc: District Attorney
Dale Stracener, Esq.
Sheriff's Office
P.O.

FILED

JUL 20 2009

BILLY YATES
CLERK, CIRCUIT COURT

EXHIBIT
FF

PENGAD 800-631-6989

IN THE CIRCUIT COURT OF ETOWAH COUNTY, ALABAMA

STATE OF ALABAMA *

VS. * CASE NO.: CC-2007-785-DAK

DANNY LOUIS SMITH *

SENTENCING ORDER

On the 7th day of August, 2008, the Defendant entered his plea of guilty to the offense of Criminal Mischief - Second Degree, as charged.

On the 7th day of August, 2008, Defendant present in open Court with his/her attorney present and being asked by the Court if he/she has anything to say why the Judgment of the Court and the Sentence of the Law should not be pronounced upon him/her, Defendant made no response.

It is therefore, CONSIDERED BY THE Court and it is the JUDGMENT AND SENTENCE of the Court that the Defendant be imprisoned for twelve (12) months to be served at the same location as his current felony cases. The Defendant's sentences are to run concurrently in CC-2006-269, CC-2007-41, CC-2007-784.01, CC-2007-784.02, CC-2007-785, CC-2007-786, and CC-2007-787.

Defendant is further Ordered to pay the court costs incurred herein, restitution in the amount of $500 to Mary Butcher, and an Alabama Crime Compensation Commission Assessment of $25.00. Defendant's first payment in the amount of $100.00 is due and payable sixty (60) days from his release from prison and a like payment each and every thirty days thereafter until all court ordered monies are paid in full. It is further Ordered that the Defendant be credited with time spent in jail awaiting trial. Defendant is further Ordered placed on an 11:00 p.m. curfew.

The Defendant having waived his/her right of appeal as part of the plea agreement herein, the Court specifically finds:

1. Defendant has reserved no issues for appellate review. Defendant and the Court have entered into a colloquy wherein the Defendant was advised of the consequences of waiving his/her appeal right, his/her right to file a motion to withdraw his/her plea within (30) thirty days, and her/her right of appeal in the event the Court denies his/her motion to withdraw his/her plea.

DONE this the 7th day of August, 2008.

David A. Kimberley, Circuit Judge

cc: District Attorney
Dale Stracener, Esq.
Sheriff's Office
P.O.

FILED

JUL 20 2009

BILLY YATES
CLERK, CIRCUIT COURT

EXHIBIT
GG

PENGAD 800-631-6989