No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

WILLIE R. BURGESS, JR.,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

_____

On Petition for Writ of Certiorari
to the Alabama Court of Criminal Appeals

_____

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

_____

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INDEX TO APPENDICES

APPENDIX A

IN THE SUPREME COURT OF ALABAMA

September 27, 2024

SC-2024-0158

Ex parte Willie R. Burgess, Jr. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Willie R. Burgess, Jr. v. State of Alabama) (Morgan Circuit Court: CC-93-421.60; Criminal Appeals: CR-19-1040).

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 September 27, 2024:

Writ Denied. No Opinion. Cook, J. -- Parker, C.J., and Shaw, Wise, Bryan, Sellers, Mendheim, Stewart, and Mitchell, 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, Megan B. Rhodebeck, certify that this is the record of the judgment of the Court, witness my hand and seal.

Megan B. Rhodebeck

Clerk, Supreme Court of Alabama

APPENDIX B

ALABAMA COURT OF CRIMINAL APPEALS

March 15, 2024

CR-19-1040
Willie R. Burgess, Jr. v. State of Alabama (Appeal from Morgan Circuit Court: CC-93-421.60)

NOTICE

You are hereby notified that on March 15, 2024, the following action was taken in the above-referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

D. Scott Mitchell, Clerk

APPENDIX C

Rel: June 23, 2023

Alabama Court of Criminal Appeals

OCTOBER TERM, 2022-2023

CR-19-1040

Willie R. Burgess, Jr.

v.

State of Alabama

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

MINOR, Judge.

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

did not, and we affirm.

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

FACTS AND PROCEDURAL HISTORY

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

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

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

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

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

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

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

In July 2003, Burgess timely filed a postconviction petition under

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

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

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

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

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

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

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

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

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

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

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

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

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

STANDARD OF REVIEW

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

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

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

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

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

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

> "'"'Rule 32.6(b) requires that the petition itself disclose the facts relied upon in seeking relief.' Boyd v. State, 746 So. 2d 364, 406 (Ala. Crim. App. 1999). In other words, it is not the pleading of a conclusion 'which, if true, entitle[s] the petitioner to relief.'

> Lancaster v. State, 638 So. 2d 1370, 1373 (Ala. Crim. App. 1993)[, overruled on other grounds by Robey v. State, 950 So. 2d 1235 (Ala. Crim. App. 2006)]. It is the allegation of facts in pleading which, if true, entitle a petitioner to relief. After facts are pleaded, which, if true, entitle the petitioner to relief, the petitioner is then entitled to an opportunity, as provided in Rule 32.9, Ala. R. Crim. P., to present evidence proving those alleged facts."

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

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

> "'"[A] circuit court may, in some circumstances, summarily dismiss a postconviction petition based on the merits of the claims raised therein. Rule 32.7(d), Ala. R. Crim. P., provides:
>
> > "'"'If the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle

> the petitioner to relief under this rule and that no purpose would be served by any further proceedings, the court may either dismiss the petition or grant leave to file an amended petition. Leave to amend shall be freely granted. Otherwise, the court shall direct that the proceedings continue and set a date for hearing.'
>
> "'"'"Where a simple reading of the petition for post-conviction relief shows that, assuming every allegation of the petition to be true, it is obviously without merit or is precluded, the circuit court [may] summarily dismiss that petition."' Bishop v. State, 608 So. 2d 345, 347-48 (Ala. 1992) (emphasis added) (quoting Bishop v. State, 592 So. 2d 664, 667 (Ala. Crim. App. 1991) (Bowen, J., dissenting)). See also Hodges v. State, 147 So. 3d 916, 934 (Ala. Crim. App. 2007) (a postconviction claim is 'due to be summarily dismissed [when] it is meritless on its face')[, rev'd on other grounds, Ex parte Hodges, 147 So. 3d 973 (Ala. 2011)]."
>
> "'Bryant v. State, 181 So. 3d 1087, 1102 (Ala. Crim. App. 2011).'

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

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

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

DISCUSSION

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

I. DENIAL OF MOTION FOR LEAVE TO AMEND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. SUMMARY DISMISSAL OF THE PETITION

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

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

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

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

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

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

III. TRIAL COUNSEL'S INVESTIGATION OF THE CRIME

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

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

these principles:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

have no relevant or material mitigating testimony to present."

(C. 1383.)

The circuit court correctly noted that Burgess's trial counsel

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

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

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

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

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

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

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

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

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

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

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

The circuit court also noted that the record showed

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

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

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

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

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

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

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

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

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

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

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

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

(C. 1389.)

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

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

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

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

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

"The narrative continues with a description of head

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

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

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

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

(C. 1390-92.)

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

V. TRIAL COUNSEL'S PRETRIAL PREPARATION AND LITIGATION

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

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

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

And, although

> "[i]n Ex parte Taylor[] the Alabama Supreme Court held that 'a determination on direct appeal that there has been no plain error does not automatically foreclose a determination of the existence of the prejudice required under Strickland [v. Washington, 466 U.S. 668 (1984),] to sustain a claim of ineffective assistance of counsel[,]' 10 So. 3d at 1078, ... Ex parte Taylor applies only to the prejudice prong of Strickland, not to the deficient-performance prong."

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

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

A. MOTIONS TO CONTINUE

Burgess argues that his trial counsel were ineffective for not

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

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

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

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

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

> "'[W][e] have to recognize that not only is the defendant entitled to a speedy trial, but the State or the people of the State are entitled to a speedy trial or a trial as quickly as can be accomplished .... I think that the Court owes an obligation to move as quickly and as rapidly as it reasonably can do so to get to the trial of the case, giving reasonable notice to everybody to get ready. And I think that further delay is unreasonable to the State and to the defendant, and I suspect that there's always something toward the end of the preparation stage that the State finds that it could have done ... and the defense finds [that] "there's something else I wish I could do." ... I'm satisfied that Mr. Burgess and his counselors have had ample opportunity to prepare. I'm also satisfied that he has very trained and competent and diligent lawyers.'
>
> "….
>
> "… Burgess never indicated a specific relevant witness or any specific relevant evidence that would have been available to him if a continuance was granted. Counsel's belief that they would have been better prepared with more time is a belief shared by every trial judge and lawyer who has ever been involved in a trial."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. MOTION FOR A CHANGE OF VENUE

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

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

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

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

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

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

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

"(C.R. 36-37.)

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

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

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

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

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

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

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

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

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

"We also agree with the trial court that the period

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

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

"_____

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

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

1. EVIDENCE ABOUT PREJUDICE

Burgess argues that his "trial counsel unreasonably failed to

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

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

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

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

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

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

2. SOCIAL-SCIENCE EXPERT

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

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

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

3. PUBLIC-OPINION POLL

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

In dismissing this claim, the circuit court stated:

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

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

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

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

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

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

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

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

(C. 1407-09.)

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

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

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

upon in seeking relief.").

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

4. SAMPLE JURY PROCEEDING

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

In dismissing this claim, the circuit court found:

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

instructions and questions to the sample jury.

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

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

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

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

5. "ACTUAL" PREJUDICE

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

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

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

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

6. VOIR DIRE

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

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

The circuit court thoroughly addressed this claim:

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

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

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

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

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

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

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

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

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

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

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

insufficiently pleaded and lacking merit.

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

Finally, Burgess argues that

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

(Burgess's brief, p. 46.)

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

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

Crim. P.

E. ALLEGED INEFFECTIVENESS DURING JURY SELECTION

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

1. ALLEGED SYSTEMATIC EXCLUSION OF BLACK JURORS

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

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

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

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

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

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

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

This Court on direct appeal rejected the claim underlying this

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

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

3. FAILURE TO CHALLENGE CERTAIN JURORS FOR CAUSE

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

The circuit court accurately addressed this claim:

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

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

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

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

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

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

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

(C. 1421-23.)

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

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

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

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

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

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

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

Burgess, 827 So. 2d at 150.

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

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

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

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

In Woodward, this Court stated:

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

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

Woodward, 276 So. 3d at 751.

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

showing deficient performance.

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

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

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

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

F. SELECTION OF GRAND-JURY FOREPERSON

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

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

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

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

(C. 1427.)

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

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

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

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

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

G. MOTION TO SUPPRESS

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

On direct appeal, this Court held:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

J. ALLEGEDLY DEFECTIVE INDICTMENT

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

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

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

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

K. FAILURE TO MOVE TO WITHDRAW

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

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

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

A. BURGESS'S STATEMENTS TO THE MEDIA

Burgess argues that the circuit court erred in dismissing his claim

that his trial counsel were ineffective

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

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

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

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

Burgess, 827 So. 2d at 177.

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

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

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

As for the first issue, Burgess identifies only one specific statement: "Mr. Burgess's repeated use of the word "n*****." (Burgess's brief, p. 64 n.5.) Cf. Morris, 261 So. 3d at 1194 ("The mere repetition of the claims alleged in the Rule 32 petition does not provide any analysis of the circuit court's judgment of dismissal."); State v. Mitchell, ___ So. 3d at ___ ("[A] 'laundry-list approach'—and trying to incorporate arguments by reference—does not comply with Rule 28(a)(10), Ala. R. App. P., which requires an argument to include 'the contentions of the appellant/petitioner with respect to the issues presented, and the reasons therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on.'"). The circuit court found that the words " 'black nigger' …. appear[ed] to flow seamlessly from Burgess's earlier written statement to the investigators in which he quoted the victim as calling him … a 'damn nigger' and a 'poor ass nigger.'" (C. 1449.) The circuit court found:

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

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

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

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

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

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

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

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

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

The circuit court thoroughly addressed this claim and all its

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

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

C. NOT CHALLENGING ALLEGED VICTIM-IMPACT EVIDENCE

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

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

p. 67.)

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

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

D. NOT SUBMITTING JURY INSTRUCTIONS

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

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

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

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

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

A. NOT OBJECTING TO INSTANCES OF ALLEGED PROSECUTORIAL MISCONDUCT

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

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

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

defense counsel."). The circuit court found:

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

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

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

B. NOT CHALLENGING ALLEGED VICTIM-IMPACT EVIDENCE

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

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

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

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

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

C. NOT OBJECTING TO JURY INSTRUCTIONS

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

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

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

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

The circuit court correctly rejected this claim as lacking merit:

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

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

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

A. ALLEGED FAILURE TO INVESTIGATE AND PRESENT MITIGATING EVIDENCE

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

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

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

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

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

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

(Footnote omitted.)

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

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

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

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

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

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

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

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

C. PRESENTENCE REPORT

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

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

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

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

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

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

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

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

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

D. EVIDENCE OF REMORSE

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

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

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

IX. ALLEGATION THAT ATTORNEY BIGGS HAD A CONFLICT OF INTEREST

Burgess's entire argument in this section is that

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

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

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

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

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

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

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

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

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

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

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

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

The circuit court continued its analysis:

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

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

(C. 1484-85.)

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

X. COMPENSATION OF APPOINTED ATTORNEYS

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

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

XI. INTERNATIONAL LAW

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

XII. CLAIMS ALLEGING INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

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

turn.

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

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

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

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

(C. 1491.)

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

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

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

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

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

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

(Burgess's brief, p. 83.)

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

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

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

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

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

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

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

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

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

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

Burgess has not shown that the circuit court erred in summarily

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

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

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

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

XIII. JUROR-MISCONDUCT CLAIM

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

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

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

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

App. 2014).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

833 So. 2d at 8-9.

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

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

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

182 So. 3d at 618.

The circuit court then rejected Burgess's claim:

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

(C. 1505.)

On appeal, Burgess contends that the jurors conducted an

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

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

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

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

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

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

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

interpose a contemporary objection."

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

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

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

XIV. BRADY CLAIMS

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

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

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

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

(C. 1506.)

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

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

(C. 1507.)

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

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

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

(C. 1507-08.)

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

XV. ALLEGATION THAT THE STATE PRESENTED FALSE AND MISLEADING TESTIMONY

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

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

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

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

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

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

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

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

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

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

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

XVIII. ANOTHER CLAIM BASED ON INTERNATIONAL LAW

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

XIX. MOTION TO DISQUALIFY

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

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

filed by [Burgess].

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

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

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

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

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

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

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

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

Burgess's entire argument on this point is:

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

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

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

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

Burgess is due relief on this issue.

XX. REQUESTS FOR DISCOVERY

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

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

postconviction discovery. Ex parte Land, supra.

XXI. CUMULATIVE-ERROR CLAIM

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

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

CONCLUSION

The judgment of the circuit court is affirmed.

AFFIRMED.

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

APPENDIX D

IN THE CIRCUIT COURT OF MORGAN COUNTY, ALABAMA

WILLIE R. BURGESS, JR.,	)	
	)	
PETITIONER,	)	
	)	
VS.	)	CASE NO. CC 1993-421.60
	)	
STATE OF ALABAMA,	)	
	)	
RESPONDENT.	)	

FINAL ORDER

The above styled case is before the Court for its review and consideration of the claims presented by Willie R. Burgess, Jr. ("Burgess") in his Second Amended Rule 32 Petition for Post-Conviction Relief ("Second Amended Petition"). The Court has reviewed the Second Amended Petition, the State's Answer to Burgess's Second Amended Rule 32 Petition, Burgess's Reply to State's Answer to Second Amended Petition and State's Reply to Burgess's Response to the State's Answer to His Second Amended Rule 32 Petition. In addition, the Court has taken judicial notice of the pleadings, orders, exhibits and transcribed testimony contained in the direct appeal record; the opinion of the Alabama Court of Criminal Appeals in *Burgess v. State*, 827 So.2d 134 (Ala.Crim.App. 1999); the opinion of the Supreme Court of Alabama in *Ex parte Burgess*, 827 So.2d 193 (Ala. 2002); and the pleadings, orders and other records in the Morgan County Circuit Clerk's electronic file for Case No. CC 1991-670, *State of Alabama v. Timothy Lynn Cox*. Finally, after considering the arguments of counsel and applicable legal authorities, the Court renders the following findings, conclusions and orders:

FACTS AND PROCEDURAL BACKGROUND

The Morgan County grand jury indicted Burgess for capital murder pursuant to § 13A-5-40(a)(2), Ala. Code, arising from the robbery and killing of Louise Crow on January 26, 1993. At the end of the guilt phase trial, the jury on June 27, 1994 returned a verdict finding Burgess guilty of intentionally murdering Mrs. Crow during a first-degree robbery. Following the penalty phase trial, the same jury voted 11-1 for Burgess to be sentenced to death. At the later sentencing hearing on August 24, 1994, the now-deceased Morgan County Circuit Judge who presided over Burgess's trial, agreed with the jury and sentenced Burgess to death.

After his post-trial motions were denied, Burgess appealed his capital conviction and death sentence. The Alabama Court of Criminal Appeals affirmed his conviction and death sentence and denied his application for rehearing on February 5, 1999. After granting Burgess's petition for writ of certiorari, the Supreme Court of Alabama affirmed the decision of the Court of Criminal Appeals and denied his rehearing application on February 8, 2002. The Supreme Court of the United States denied certiorari on October 21, 2002. *Burgess v. Alabama*, 537 U.S. 976, 123 S.Ct. 468 (2002).

On the direct appeal the Alabama Court of Criminal Appeals set out the facts of the crime:

> On the morning of January 26, 1993, Burgess rode his bicycle to the Decatur Bair and Tackle Shop located at 214 Sixth Avenue, S.E., Decatur, Alabama, with the intention of committing a theft. He entered the shop and had a dialogue with the owner, Mrs. Louise Crow. The defendant then left the shop, returned home, changed clothes and walked back to the shop. The defendant again entered the shop, pulled out a .25 caliber semi-automatic pistol, demanded money from the cash drawer and ordered the owner to enter the shop's bathroom. Once the victim had entered the bathroom, the defendant shot her in the face at close range, killing her. He then stole the victim's car, picked up his girlfriend and her child and headed toward Huntsville, Alabama. The defendant was arrested in route to Huntsville, and at the time of arrest he was in possession of the victim's car, a .25 caliber semi-automatic pistol and a quantity of currency.

> After being returned to the custody of the Decatur police, Burgess made an admission to police detectives. Then, as he was walked through the parking lots between the Decatur City Hall and the Morgan County Jail, Burgess, while being video-taped by a cameraman for a local television station, made another admission in response to questions from reporters in which he admitted killing Mrs. Crow.

827 So.2d at 146.

Burgess timely filed on July 29, 2003 his original Petition for Relief from Conviction and Sentence of Death Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. He filed amendments to add claims for post-conviction relief on October 19, 2004 and December 27, 2006. Then he filed his First Amended Petition for Relief from Conviction and Sentence of Death Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure on August 18, 2008. Most recently, Burgess filed on November 17, 2016 his Second Amended Petition that incorporates all of his previously filed amendments.

STANDARDS APPLICABLE TO CIRCUIT COURT REVIEW

Under Rule 32.3, *Ala.R.Crim.P.*, a petitioner bears the burden of pleading and proving by a preponderance of the evidence the facts necessary to support his claims. A petition must plead specific facts that, if true, would entitle him to relief. Conclusions in the petition, if unsupported by specific facts, will not satisfy the requirements for post-conviction relief under Rule 32. *Madison v. State*, 999 So.2d 561 (Ala. Crim. App. 2006).

To overcome a motion to dismiss at the pleading stage of a Rule 32 proceeding, a petitioner's claim must not be procedurally barred under any provision of Rule 32.2, *Ala.R.Crim.P.* When the State pleads any ground of preclusion, a petitioner must plead facts that disprove its existence by a preponderance of the evidence. Rule 32.3, *Ala.R.Crim.P.*

Each claim or ground for relief in a Rule 32 Petition must contain a clear and

specific statement of the grounds, including full disclosure of the facts supporting those grounds, upon which a petitioner seeks relief. Bare allegations that constitutional rights have been violated and mere conclusions of law are not sufficient to require any further proceedings. Rule 32.6(b), *Ala.R.Crim.P.*

> The burden of pleading under Rules 32.3 and 32.6(b), *Ala.R.Crim.P.* is a heavy one. Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b). The full factual basis for the claim must be included in the petition itself. If, assuming every factual allegation in a Rule 32 petition to be true, a court cannot determine whether Burgess is entitled to relief, Burgess has not satisfied the burden of pleading under Rule 32.3 and Rule 32.6(b). See *Bracknell v. State*, 883 So.2d 724 (Ala. Crim. App. 2003).

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

Rule 32.7(d), *Ala.R.Crim.P.*, authorizes a circuit court to summarily dismiss a Rule 32 Petition

> "[i]f the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle Burgess to relief under this rule and that no purpose would be served by any further proceedings …."

DISCUSSION OF BURGESS'S CLAIMS

Burgess asserts a total of seventeen principal claims, including numerous subclaims within most of the principal claims, in his Second Amended Petition. In Claims I, II, III, IV, V, VI and IX he contends that his trial counsel provided ineffective assistance that violated his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, parallel provisions of the Alabama Constitution and other applicable state, federal and international law. Although he had earlier appointed counsel who withdrew from representing him, Burgess was represented from late July 1993 through his June 1994 trial and August 24, 1994 judicial sentencing hearing by Decatur attorneys, Wesley Lavender and Gregory Biggs (referred to herein

collectively as "trial counsel").

To state a facially sufficient ineffective assistance of trial counsel claim, Burgess is required first to show that his trial counsel's performance was deficient. To sufficiently plead a claim of ineffective assistance of counsel, his Second Amended Petition "must identify the specific acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To satisfy this first requirement, he must plead facts establishing that trial "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 80 L.Ed.2d. at 688. The Court's performance evaluation must determine "whether counsel's assistance was reasonable, considering all the circumstances." *Ex parte Lawley*, 512 So.2d 1370, 1372 (Ala. 1987). Courts must avoid using "hindsight" to evaluate the performance of counsel. This means that the circumstances surrounding the case at the time of counsel's actions must be examined before deciding whether counsel rendered ineffective assistance. *Lawhorn v. State*, 756 So.2d 971, 979 (Ala. Crim. App. 1999).

Moreover, in reviewing trial counsel's performance, courts must be highly deferential. "It is important to note that judicial scrutiny of an attorney's performance is appropriately highly deferential because the craft of trying cases is far from an exact science; in fact, it is replete with uncertainties and obligatory judgment calls." *Chandler v. United States*, 218 F.3d 1305, 1314 (11th Cir. 2000) (en banc), citing *Bolender v. Singletary*, 16 F.3d 1547, 1557 (11th Cir. 1994). As the United States Supreme Court observed:

> [I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Strickland, 466 U.S. at 689. This requires courts to apply "a strong presumption" that counsel's representation was "within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* "Because counsel's conduct is presumed reasonable, for a petitioner to show that the conduct was unreasonable, a petitioner must establish that no competent counsel would have taken the action that his counsel did take." *Chandler*, 218 F.3d at 1315.

The second prong of an ineffective assistance claim requires that Burgess "must plead specific facts indicating that he or she was prejudiced by the acts or omissions, i.e., facts indicating that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Ricter,* 562 U.S. 86, 112 (2011). "A bare allegation that prejudice occurred without specific facts indicating how the petitioner was prejudiced is not sufficient." *Hyde*, 950 So.2d at 356.

Finally, it is worth noting up front that Burgess, in many of his extensive ineffective assistance claims that condemn the reasonableness of his trial counsel's guilt and penalty phase investigations and presentations, relies on the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases that were published in 2003 ("2003 ABA Guidelines"). The 2003 ABA Guidelines did not exist in 1993 when Burgess committed the crime or in 1994 when his case was tried. Such guides can be useful only to the extent that "they describe the professional norms prevailing when the representation took place." *Bobby v. Van Hook*, 558 U.S. 4, 8, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009), citing *Strickland*, 466 U.S. at 688. Judging the representation of Burgess's trial counsel in the 1990's on the basis of the 2003 ABA Guidelines would be error.

Moreover, the ABA's guidelines at any point in time do not legally establish inexorable performance requirements or define the standard of reasonableness with which all capital defense counsel must comply. The United States Supreme Court in *Bobby*, 558 U.S. at 8, reiterated that "American Bar Association standards and the like" are "only guides" to what reasonableness means, not its definition. The Supreme Court in a footnote further opined that the ABA's Guidelines must not be so detailed and rigid that they "interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Strickland*, 466 U.S. at 689.

I

TRIAL COUNSEL WERE INEFFECTIVE IN THEIR INVESTIGATION OF THE CRIME.

In Paragraphs 33 through 113 (pages 9 through 58) of his Second Amended Petition, Burgess argues that his trial counsel provided ineffective assistance by failing to investigate and develop evidence that would corroborate the defense theory that his shooting of Mrs. Crow was an unintentional accident. He does not deny that he robbed and killed Mrs. Crow. On his direct appeal from his capital conviction and sentence, the Court of Criminal Appeals of Alabama determined that "[t]he evidence was overwhelming that Burgess robbed and shot Mrs. Crow." When Burgess was apprehended, he was driving Mrs. Crow's car and was in possession of the weapon used to shoot Mrs. Crow. "He confessed to the police and to the news media that he was the person who had committed the robbery and murder." *Burgess*, 827 So.2d at 171.

A. Trial Counsel Performed Deficiently by Unreasonably Failing to Investigate the Crime.

Paragraphs 38 through 40 of the Second Amended Petition are mere statements of law and legal conclusions that warrant no discussion or further proceedings. One of

Burgess's initial allegations is that "[t]rial counsel also failed to speak with Mr. Burgess about the circumstances of the crime or the defense." This alleged fact is clearly contradicted by the later admission of Burgess's post-conviction counsel in Paragraph 49 that trial counsel actually did meet with their client. While it may be true that Burgess complained to the trial court that his counsel were not communicating with him as he desired, such complaints from defendants sitting in jail without bond are typical. Burgess's subjective complaints about trial counsel's communications with him do not support his conclusion that they failed to investigate or neglected the multitude of other trial preparation responsibilities to be performed outside his presence.

Burgess contends that his appointed trial counsel postponed their preparation of his case due to the then-existing statutory limitations on their compensation for out-of-court services. This inference is based on mere speculation about the mental operations of each of his trial counsel and is not supported by specifically pleaded facts. To the extent that he claims the billing statement of one of his counsel, standing alone, provides a specific factual basis for this allegation, Burgess is legally incorrect. Billing statements by themselves do not suffice to establish that counsel provided ineffective assistance. *Martin v. State*, 62 So.3d 1050, 1068 (Ala. Crim. App. 2010). Without more, it is just as reasonable to infer that they were poor time keepers or that they were not focused on maintaining detailed time records as they hustled through a limited amount of time to get Burgess's case prepared.

Although he admits that his trial counsel obtained funds and hired an investigator to assist them, Burgess alleges that the investigator did little work on the case. This conclusion is supported neither by any identified witness who would have personal knowledge about what the investigator did or did not do, nor by other specific facts. That his trial counsel delegated investigatory work to a hired professional is not proof that they were ineffective in representing Burgess. *Hall v. State*, 979 So.2d 125 (Ala. Crim. App. 2007) (finding that counsel is not ineffective for delegating to a subordinate the

responsibility of investigating). Moreover, Burgess's allegation about substandard work by an investigator, even if true, it does not satisfy his burden to plead specific facts showing that his trial counsel failed to render reasonable professional assistance in preparing and presenting his defense.

Burgess argues that his trial counsel were on notice that unintentional murder was a potential meritorious theory of defense, but did not adequately prepare and present that defense. This allegation is not factually supported by the record from Burgess's trial. Confronted with the wealth of undisputed evidence that Burgess robbed and shot Mrs. Crow, trial counsel clearly demonstrated their commitment to preparing and presenting the theory of an unintentional or accidental shooting and arguing for a non-capital felony murder conviction. As noted above, they did in fact confer directly with Burgess. They had the benefit of his statements to the police and the media. It is beyond dispute that they pursued the unintentional/accidental death strategy during the trial. In its opinion on Burgess's direct appeal, the Alabama Court of Criminal Appeals observed:

> Although his theory of defense may have been affected by the evidence admitted at trial, Burgess focused on whether he had the intent to kill; his lawyers argued to the jury that he had committed only a felony murder, because, they argued, the shooting was committed during the robbery and was accidental.

Burgess v. State, 827 So.2d at 171. The fact that this defense ultimately proved unsuccessful does not support a claim for ineffective assistance of counsel. See *Chandler v. United States*, 218 F.3d 1305, 1314 (11th Cir. 2000) (en banc). Trial counsel could not cover up the fact, as the Court of Criminal Appeals noted, that there was overwhelming evidence that supported the jury's guilty verdict on the charge of capital murder. The United States Supreme Court observed in *Strickland* that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." 104 S.Ct. at 2069.

Burgess asserts the following additional conclusions about trial counsel's alleged

deficient representation without pleading specific facts to support them: that trial counsel did not obtain the file from his prior counsel, did not speak with any of the State's forensics experts, such as the pathologist, Dr. Joseph Embry, and did not seek the assistance of forensics experts on the subjects of ballistics, autopsy results, and condition of the crime scene. Since he was incarcerated without bond at the time, Burgess does not allege specific facts showing how he knows or identifying a witness having personal knowledge that his trial counsel did not obtain his prior counsel's file. Even if his trial counsel did not obtain the file, Burgess fails to specify what information or evidence stored in the file was unknown to his counsel, unavailable from other sources and material to his defense Nor does Burgess allege specific facts that explain how he knows or that identify a witness who has personal knowledge that trial counsel never spoke to Dr. Embry or other forensics experts before they testified or how his defense was prejudiced, especially since trial counsel had the written reports of the experts.

In support of his conclusion that trial counsel failed to seek the assistance of forensics experts, Burgess alleges no facts that would tend to prove that he personally knew about every phone call or personal contact that his counsel had with potential expert witnesses. He also fails to plead facts that identify the forensics experts his counsel should have called, that specify what admissible opinions they would have given, that describe the factual bases for such opinions and that establish the availability of such forensics experts in 1993-1994. See *Smith v. State*, 71 So.3d 12, 33 (Ala. Crim. App. 2008) (A "petitioner fails to meet the specificity requirements of Rule 32.6(b), Ala.R.Crim.P., when the petitioner fails to identify an expert by name or plead the contents of that expert's expected testimony."). Even if the Court assumes as true Burgess's vague allegations described above, they fail to create a material issue of fact as to whether his trial counsel's performance was deficient.

Although Burgess stands convicted of a capital crime and has received the death sentence, the pleading standards set forth in Rules 32.6(b), 32.3 and 32.7(d),

Ala.R.Crim.P. are not relaxed. See *Thompson v. State*, 615 So.2d 129, 131 (Ala.Crim.App. 1992). Before a petitioner becomes entitled to an evidentiary hearing, his Rule 32 petition must state a facially meritorious claim. As stated by the Alabama Supreme Court:

> A petition is "meritorious on its face" only if it contains a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the facts relied upon (as opposed to a general statement concerning the nature and effect of those facts), *Thomas v. State*, 274 Ala. 531, 150 So. 2d 387 (1963)]; *Ex parte Phillips*, 276 Ala. 282, 161 So.2d 485 (1964); *Stephens v. State*, 420 So.2d 826 (Ala. Crim. App. 1982), sufficient to show that the petitioner is entitled to relief if those facts are true.

Ex parte Clisby, 501 So.2d 483, 486 (Ala. 1986).

Burgess's claim I.A. fail to satisfy his burden to plead specific facts that, if true, would entitle him to relief, does not satisfy the pleading requirements of Rule 32.6(b), fails to present a material issue of fact or law that would entitle him to relief and is due to be summarily dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

B. Trial Counsel's Unreasonable Failure to Investigate the Crime Prejudiced Mr. Burgess.

i. Trial Counsels' Unreasonable Failure to Investigate the Crime Prejudiced Mr. Burgess in the Guilt Phase Because Counsel Were Unable to Challenge the State's Case and to Present Evidence in Support of an Unintentional Shooting.

Burgess alleges in Paragraphs 60 through 65 on pages 20 through 23 of his Second Amended Petition that trial counsel pursued an unintentional shooting defense, but conducted no investigation to gather corroborating or independent evidence. His conclusion that trial counsel conducted no investigation is supported by no disclosure of specific facts. Moreover, Burgess fails to plead facts that specifically describe what

corroborating evidence his trial counsel should have found. Trial Counsel cannot manufacture evidence where there is none. Even if counsel uncovered little or no evidence to corroborate Burgess's description of an accidental or unintentional shooting, it is just as probable that such evidence did not exist as it is that trial counsel failed to conduct a reasonable investigation. Burgess fails to plead substantial facts that, if true, would tend to show otherwise.

Burgess states the bare conclusions that, if his trial counsel had performed a reasonably adequate guilt phase investigation, they would have been able to conduct cross-examination creating a reasonable doubt by showing the jury that the State's evidence did not support an intentional murder and that crime scene evidence supported the defense theory of an unintentional shooting. Other than offering these conclusions, Burgess does not plead any specific facts describing what evidence trial counsel should have found that would have equipped them to convince the jury that the shooting was unintentional.

Burgess contends that qualified expert witnesses were available to testify that the killing was unintentional. The initial problem with this claim is the doubtful admissibility of such opinion testimony because "[t]he question whether a defendant intentionally caused the death of another person is a question of fact for the jury." *Ex parte Carroll*, 627 So.2d 874, 878 (Ala. 1993). Counsel cannot be found to be ineffective for failing to offer evidence for which there is no legal basis. *Boyd v. State*, 746 So.2d 364 (Ala. Crim. App. 1999).

Even assuming that such opinion testimony would be admissible, Burgess does not identify by name who the experts would have been in 1994 and does not plead with specificity the contents of their expected testimony and whether they were available to testify in his June 1994 trial. The specificity requirements of Rule 32.6(b) are not satisfied when a petitioner alleges that trial counsel should have retained and called hypothetical experts to testify, but does not identify them by name or plead the contents

of their expected testimony. See *Smith v. State*, 71 So.3d 12, 33 (Ala. Crim. App. 2008); and *Mashburn v. State*, 148 So.3d 1094, 1151 (Ala.Crim.App. 2013) ("To sufficiently plead a claim that counsel was ineffective for not calling witnesses, a Rule 32 petitioner is required to identify the names of the witnesses, to plead with specificity what admissible testimony those witnesses would have provided had they been called to testify, and to allege facts indicating that had the witnesses testified there is a reasonable probability that the outcome of the proceeding would have been different."). The remaining allegations in Paragraph 65 amount to bare, speculative conclusions, are devoid of factual support and do not create material issues of fact or law that would entitle Burgess to relief.

Accordingly, claim I.B.i fails to satisfy the pleading requirements of Rule 32.6(b), *Ala.R.Crim.P.*, fails to allege specific facts that, if true, would entitle Burgess to relief, fails to present a material issue of fact or law that would entitle Burgess to relief and is due to be dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

a. Had Trial Counsel Investigated the Firearms Evidence, They Would Have Presented Evidence of the Titan .25's Design Defect.

This ineffective assistance claim is set forth in Paragraphs 66 through 69 at pages 23 through 25 of Burgess's Second Amended Petition. He accuses trial counsel of failing to obtain a firearms expert who would have testified that the handgun used by Burgess to kill Mrs. Crow had a design defect that made it prone to accidental discharge.

This claim fails, however, because Burgess pleads no specific facts showing that his counsel knew or explaining why they should have known of a possible defect in the gun's firing mechanism. See *Alderman v.* State, 647 So.2d 28, 33 (Ala. Crim. App. 1994) (recognizing that a petitioner alleging a claim of ineffective assistance must plead that counsel had knowledge of specific facts giving rise to the claim asserted.). Burgess does not allege that he informed his counsel that the gun had a trigger or firing pin

problem that caused it to accidentally discharge The only fact within the knowledge of his counsel was Burgess's statements to the police and the news reporters in which he blamed Mrs. Crow's striking his arm – not a defect in the gun – as the cause of its accidental and unintentional discharge. Trial counsel cannot reasonably be expected to retain a guilt phase expert on the issue of causation unless there is some objective fact or circumstance brought to counsel's attention that requires expert evaluation. Burgess has alleged no such fact or circumstance. The alleged facts proffered in support of this ineffective assistance claim, even if true, would not entitle Burgess to relief. This claim is not facially meritorious and is due to be dismissed pursuant to Rule 32.7(d), *Ala.R.Crim.P.*

Also, this claim fails to satisfy the specific pleading requirement of Rule 32.6(b), as discussed above, because it does not identify by name the firearms expert who would have been willing, available and qualified in 1994 to testify in Burgess's trial and fails to specify the contents of the expert's testimony. *Smith*, 71 So.3d at 33.

Burgess further contends that his trial counsel performed an ineffective firearms investigation because a juror made a request for a gun expert during the jury's guilt phase deliberations. While some jurors apparently felt they needed to be educated in general about a gun's readiness to be fired, the record does not show that they wanted an opinion about any design defect for which Burgess claims his trial counsel should have retained a firearms expert. The juror's question seeking information about preparing a handgun to fire provides neither a logical nexus nor material factual support for Burgess's conclusion that his trial counsel failed to perform a reasonable firearms investigation.

Accordingly, Burgess's subpart I.B.i.a. ineffective assistance claim does not create a material issue of fact or law that would entitle him to relief, is facially without merit, fails to satisfy the pleading requirements of Rule 32.6(b) and is due to be summarily dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

b. Had Trial Counsel Investigated the Autopsy, They Would Have Presented Evidence that Corroborated Mr. Burgess's Account of an Unintentional Shooting.

In this claim found in Paragraphs 70 through 78 at pages 25 through 29 of his Second Amended Petition, Burgess contends that trial counsel should have retained an independent forensic pathologist who would have testified that the autopsy findings supported the defense theory of an unintentional shooting. In the first instance, this contention fails to satisfy the pleading specificity requirements of Rule 32.6(b), *Ala.R.Crim.P*, because the name of the purported pathologist who would have been available to testify in June 1994 and the specific content of the expert's expected testimony are not disclosed by Burgess. See *Smith*, 71 So.3d at 33.

Burgess further alleges that a forensic pathologist would have given opinions that Mrs. Crow was rendered immediately unconscious upon being struck by the bullet, that Mrs. Crow was standing when she was shot and that the shooting occurred unintentionally. Burgess pleads these opinions without a full and specific disclosure of the factual basis for each. Also, such opinions about whether the shooting was intentional and the position of the victim at the time of the shooting, as discussed above, would have been inadmissible because they invaded the jury's exclusive province to determine whether Burgess intentionally caused Mrs. Crow's death. *Ex parte Carroll*, 627 at 878. Likewise, expert witness testimony about the position of a victim or defendant at the time of a shooting "has historically been held to be inadmissible." See *Taylor v. State*, 808 So.2d 1148, 1161-1162 (Ala. Crim. App. 2000).

Finally, it is true, as alleged by Burgess, that the prosecutor in his guilt phase opening statement and closing argument told the jury that the evidence would show that Mrs. Crow was shot "point blank" in the head. Burgess's trial counsel during cross examination obtained the opinion of the State's firearms expert that the gunshot wound did not occur at point blank range and emphasized this fact to the jury in his closing

argument. This concession from the State's expert was consistent with Burgess's contention that Mrs. Crow struck his arm, causing the handgun to discharge accidentally at some distance from her head. Counsel's performance is not unreasonable if he does not retain an independent expert to address a particular subject for which he expects to elicit – and does elicit – favorable opinions from the opposing side's expert witness on the same subject. "The decision … whether to present counter expert testimony, to rely upon cross-examination, … and/or to forego development of certain expert opinion, is a matter of trial strategy which, if reasonable, cannot be the basis for a successful ineffective assistance of counsel claim." *Thomas v. State*, 284 Ga. 647, 650, 670 S.E.2d 421, 425 (2008).

Burgess's subpart I.B.i.b. claim that his trial counsel provided unreasonable assistance is not pleaded with specificity as required by Rule 32.6(b), *Ala.R.Crim.P.*, fails to create a material issue of fact or law that would entitle him to relief, is facially meritless and is due to be dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

c. Had Trial Counsel Performed an Adequate Investigation of the Crime Scene, They Would Have Presented Evidence that, Contrary to the State's Assertion, Mrs. Crow Was Standing When She Was Shot.

In this claim set out in Paragraphs 79 through 85 on pages 30 through35 of his Second Amended Petition, Burgess argues that because the toilet tank was broken in the bathroom where Mrs. Crow was shot, his trial counsel were ineffective for failing to retain a "plumbing engineer" who would have given an opinion that the broken tank supported the theory that the victim was standing when she was shot. According to Burgess, proof that she was standing was essential to his defense of an unintentional shooting caused by her striking his arm.

In support of this claim Burgess provides a long list of scientific, manufacturing and engineering standards that he contends a plumbing engineer would have known and

applied to establish that Mrs. Crow was standing when Burgess shot her. He fails, however, to identity the name of the purported plumbing engineer and to specify the content of the expert's expected testimony. See *Smith*, 71 So.3d at 33 ("We have held that a petitioner fails to meet the specificity requirements of Rule 32.6(b), Ala.R.Crim.P., when the petitioner fails to identify an expert by name or plead the contents of that expert's expected testimony."). Having failed to plead the name of the expert and the contents of that particular expert's testimony, Burgess's claim of ineffective assistance of trial counsel is deficiently pleaded under Rule 32.6(b).

Moreover, testimony from a purported plumbing expert for the purpose of giving opinions about the relative positions of Mrs. Crow and Burgess when the gun fired would not have been admissible. Such an opinion would be essentially the same as asking an expert to give an opinion about the position of the victim when the fatal shot was fired based on the expert's examination of the victim's body and wounds. "The courts of this state have long held that it is not competent for a witness, expert or non-expert, to draw conclusions for the jury, from examination of the body of the deceased and wounds thereon, as to the relative positions of the parties when the fatal shot was fired." *Crawford v. State*, 78 So.2d 291, 292 (Ala. 1954). "Counsel is not ineffective for failing to present inadmissible evidence." See *Daniel v. State*, 86 So.3d 405, 438 (Ala. Crim. App. 2011). Under the circumstances with which Burgess's trial counsel were faced, they did not perform unreasonably by failing to retain a plumbing engineer whose opinions would have been inadmissible at trial.

In this same claim Burgess contends that trial counsel were ineffective because they did not question Decatur Police Investigator Gary Walker about the portion of his report wherein he stated that Mrs. Crow was standing up when she was shot. This remark clearly was Walker's opinion, as he did not witness the shooting. The opinion of a police officer "as to the relative position of the parties at the time the fatal wound was inflicted" is not admissible. *Padgett v. State*, 269 So.2d 147, 153 (Ala. Crim. App.

1972). Trial counsel cannot be found to have acted unreasonably in failing to present inadmissible evidence. *Daniel*, 86 So.3d at 438.

Finally, Investigator Walker's opinion about whether Mrs. Crow was standing did not coincide with Burgess's own statement that he told the victim to sit down when he put her in the shop's bathroom. It would not have been unreasonable strategy for trial counsel to avoid soliciting an opinion that might create the appearance that their client's statements about the gun's accidental discharge were fabricated. Burgess's claim fails to overcome the presumption that, under the circumstances, trial counsel's failure to ask for Walker's opinion might be considered sound trial strategy. *Strickland v. Washington*, 466 U.S. at 689. Nor does his claim establish a reasonable probability that, but for counsel's failure to ask Walker his opinion about whether the victim was standing at the time of the shooting, the outcome of his guilt phase trial would have been different.

Accordingly, because Burgess's subpart I.B.i.c. claim is not sufficiently pleaded in compliance with Rule 32.6(b), fails to present a material issue of fact that would entitle him to relief, and is facially without merit, it is due to be summarily dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

d. Had Trial Counsel Investigated the Gunshot Wound, They Would Have Presented Evidence that the Distance from the Muzzle to the Entry Wound was Consistent with Mr. Burgess's Account of an Unintentional Shooting.

In Paragraphs 86 through 90 at pages 35 and 36 of his Second Amended Petition, Burgess argues that his trial counsel were ineffective because they failed to consult a crime scene investigator, firearms expert or forensic pathologist to get corroboration for his statement that the shooting was unintentional.

Burgess in this subclaim pleads bare conclusions that are not supported by specific facts. He fails to identify by name the firearms expert, crime scene investigator or forensic pathologist who would have been available in June 1994 to give such opinions

and to plead specifically the content of the expected testimony of any expert witness. See *Smith v. State*, 71 So.2d at 33. A claim lacking the factual specificity required by Rule 32.6(b) is subject to summary dismissal pursuant to Rule 32.7(d), *Ala.R.Crim.P.*

A further part of this subclaim is Burgess's contention that testimony from a crime scene investigator, firearms expert or forensic pathologist would have established that Mrs. Crow was not shot "point blank," as argued by the prosecutor, and would have furnished the jury with a reasonable doubt about whether Burgess intentionally killed her. No expert witness is competent to give a testimonial opinion that the accused intentionally or unintentionally shot the victim. *Ex parte Carroll*, 627 So.2d at 878. Even if Burgess's trial counsel had retained an expert described this subclaim, the expert's opinions about whether the shooting was intentional would not have been admissible in the trial. Counsel is not ineffective for failing to offer inadmissible testimony. See *Daniel v. State*, 86 So.3d at 438.

Finally, contrary to Burgess's argument, the jury received expert testimony during the trial that Mrs. Crow was not shot point blank in the face. Brent Wheeler, a firearms expert who also served as the director of the Huntsville laboratory of the Alabama Department of Forensic Sciences, gave the following testimony during his direct examination:

> "Q. [Prosecutor]: Do you see evidence of this soot or stippling, whatever effect your term is for it there, in the face of the person depicted in those photographs?
>
> A. [Wheeler]: Yes, sir.
>
> Q. Just describe for us what that is, then.
>
> A. Well, it appears to me that there is, of course, a bullet hole entry there just to the left of the bridge of the nose, and some small spots on the skin that look to me like gunpowder tattooing or stippling.
>
> Q. [The Court]: Do you have a judgment based upon your experience

and your expertise in this subject?

A. [Wheeler]: Yes, sir.

[The Court]: I'm going to overrule and let the witness give his judgment.

A. [Wheeler]: This particular type of pictorial evidence, absent of any soot or flame effect would give me the impression that this particular distance was about between one and two feet, in that general range. That is from muzzle to target. That is, from the end of gun barrel to the face of the individual.

Q. [Prosecutor]: In other words, your judgment would be, if I understand it and tell me if I've got it wrong, that the end of the barrel out of which the bullet comes would have been between a foot away and two feet away from the lady depicted there in the photograph?

A. [Wheeler]: Something in that range, yes, sir.

(Trial Transcript 1453, 1455-56). Later on cross examination by defense counsel Lavender, the following occurred:

Q. [Lavender]: You were talking about the distance of the barrel from where you saw the stippling, it that what you called it?

A. [Wheeler]: Yes, sir.

Q. [Lavender]: Used to call it tattooing?

A. [Wheeler]: Same, yes, sir, interchangeable term.

Q. [Lavender]: And you said one to two feet?

A. [Wheeler]: Yes, sir.

Q. [Lavender]: Could have been farther than that?

A. [Wheeler]: Could have been farther?

Q. [Lavender]: Farther than two feet?

A. [Wheeler]: Well, again, in my judgment, it would not have been, mainly because of the pattern of the stippling being so close and there being some gunpowder still stippling. Possibly after two feet, the pattern would be larger and possibly not even see any stippling at two feet. That's what I base my judgment on. It could have been but my judgment is one to two.

Q. [Lavender]: Now, pointblank, you're talking about burning?

A. [Wheeler]: Pointblank, I guess probably means to me contact. That is, with the muzzle against the body.

Q. [Lavender]: Right.

A. [Wheeler]: We would not see any external evidence except for a charring effect around the hole.

Q. [Lavender]: Fire?

A. [Wheeler]: Well, due to fire, yes, sir. Charring, actually burning of the skin. It would be very crusty and the hole would be larger normally.

Q. [Lavender]: How far from the skin would the barrel be before there wouldn't be any burning?

A. [Wheeler]: Well, normally on a caliber like this, once you remove the barrel, there is no burning. You can see some soot and that will be the next thing, and that's the reason I came out as far as a foot. There is no soot, according to the picture, nor in Dr. Embry's report, so that would indicate to me a few inches of distance in order for that soot to fall off. It's usually the first after the fire to fall off.

Q. [Lavender]: What got you to one to two feet?

A. [Wheeler]: Well, again, you're going to have gunpowder immediately upon moving the barrel from the target. It will be in a very tight pattern at that point and be very dense, and as the barrel distance is increased, it will be just like a shotgun spread. That powder will spread out.

> So we're still – with this particular scenario, we still have a fairly tight stippling pattern. Although it's not too dense, we still have a fairly tight pattern, but we don't have any soot. Past two feet, as I said, we probably would – may not even see any stippling. If so, it would be less dense and in a wider pattern, maybe a few pieces here rather than all shown in and around the nose. In other words, it's like ruling out everything under a foot and ruling out everything over two feet, is basically the way I came up with it.

(Trial Transcript 1462-65).

Burgess claims that because his trial counsel did not adequately investigate by retaining certain experts, they were unable to show the jury through expert testimony that the shot to Mrs. Crow's face came from a distance of two feet or less – not from point blank range. This contention has no merit, as the undisputed testimony of Brent Wheeler established that the shot was fired from a distance of one to two feet. While the prosecutor in his argument may have described the shooting as "point blank," Burgess's trial counsel countered that argument with Wheeler's testimony and a reasonable and compelling final argument that the handgun discharged one to two feet from the victim in the unintentional manner Burgess had explained since the day of the homicide. Burgess's conclusory allegations fail to overcome the presumption that trial counsel used a reasonable strategy to establish an unintentional shooting. Moreover, Burgess's bare allegations of prejudice, i.e., that trial counsel's failure to call certain experts prevented counsel from creating a reasonable doubt that the shooting was intentional, is not supported by specifically pleaded facts, is based on speculation and is facially lacking in merit.

Accordingly, Burgess's subpart I.B.i.d. ineffective assistance claim is due to be dismissed pursuant to Rule 32.7(d).

e. Had Trial Counsel Investigated Mr. Burgess's Account of the Shooting, They Would Have Presented Evidence that

his Reflexive Reaction was Consistent with an Unintentional Use of Lethal Force.

In Paragraphs 91 through 93 (pages 37-39) of his Second Amended Petition, Burgess argues that his trial counsel were ineffective because they failed to retain a lethal force expert who would have rendered an opinion about whether the circumstances of the shooting were consistent with the unintentional discharge of a firearm. He cites no authority wherein the scientific reliability of reflexive reaction analysis has been recognized or that explains the factual circumstances or factors that must be shown to establish a foundation for the admission of such opinion testimony. He does not explain why such an opinion would have been admissible under Rule 702(a), *Ala.R.Evid.*, inasmuch as the subject of a person's reaction to being struck appears to be a matter of common knowledge that would make jurors just as qualified to draw their own conclusions. Moreover, this subclaim is not sufficiently pleaded because Burgess does he identify by name the lethal force expert who would have been qualified and available to testify during the 1993-94 time period. A petitioner who fails to identify a purported expert by name and to plead the contents of that expert's testimony does not satisfy the specificity required for pleading a claim under Rule 32.6(b), *Ala.R.Crim.P.* See *Smith v. State*, 71 So.3d at 33.

Finally, putting the foregoing obstacles aside, Burgess's hypothetical expert would not have been allowed to give an opinion that embraced the ultimate issue – intentional or unintentional shooting – to be decided by the jury. See Rule 704, *Ala.R.Evid.* The Supreme Court of Alabama has recognized that:

> "The question whether a defendant intentionally caused the death of another person is a question of fact for the jury. Intent may be inferred from the use of a deadly weapon or from other attendant circumstances. Furthermore, circumstantial evidence, in conjunction with other evidence, may be sufficient to prove intent."

Ex parte Carroll, 627 So.2d at 878. Burgess's trial counsel cannot be found ineffective

for failing to develop and present inadmissible expert testimony on the ultimate issue to be decided by the jury. See *Tompkins v. Moore*, 193 F.3d 1327, 1334 (11th Cir. 1999).

Accordingly, Burgess's I.B.i.e. ineffective assistance claim is not sufficiently pleaded, fails to present a material issues of fact or law that would entitle him to relief, is facially meritless and is due to be dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

f. Had Trial Counsel Investigated the Police Department's Mishandling of the Firearms Evidence, They Would Have Presented Evidence of Failure to Follow Proper Procedures and Contamination that Would Have Cast a Reasonable Doubt on the State's Theory of an Intentional Shooting.

Burgess further contends that his trial counsel's unreasonable failure to consult with a firearms expert and a crime scene investigator prevented them from creating a reasonable doubt about the State's theory of an intentional shooting. He alleges that law enforcement officers mishandled the firearms evidence, failed to document the condition of the firearms evidence, destroyed trace evidence and contaminated the crime scene – all of which would have created a reasonable doubt about whether the murder was intentional and probably would have resulted in a non-capital murder conviction.

As to the contention that the law enforcement officers mishandled firearms evidence consisting of the handgun, magazine and live cartridges seized from him, Burgess argues that it was excessively handled in an unprofessional manner by at least four police officers or investigators, who failed to document the condition of the firearms evidence throughout the chain of custody, before it reached the Alabama Department of Forensic Sciences where it was examined for the presence of latent fingerprints and put through ballistics testing. The case record discloses that immediately after the robbery and murder, Burgess left the scene with his loaded handgun, except for one spent shell casing, in Mrs. Crow's car, picked up his girlfriend and drove toward Huntsville, Alabama when they were intercepted by City of Madison police officers. Madison

Officer Danny Moore seized the gun, magazine and cartridges from Burgess and locked them in his patrol car. Moments later, he handed them to Sgt. Dawson Long of the Decatur Police Department. Long then immediately handed them to Decatur Police Sgt. Jep Tallent who was standing beside Long. Tallent unloaded the gun, placed it, the magazine and unfired cartridges in his coat pocket for transport to the Decatur Police Department and then locked them in his private investigator's locker until later that same day when he turned them over to Gary Walker, the lead Decatur investigator on the case. The next day Walker delivered the handgun, magazine and live cartridges to John Kilbourne at the Huntsville office of the Alabama Department of Forensic Sciences. (Trial Transcript 973-983; 1285-1296; 1308-1310, 1314).

From the time that the firearms evidence was removed from Burgess until it arrived at the Department of Forensic Sciences took about 24 hours. The four officers who touched the handgun, magazine and ammunition all testified that they made no changes to them. The evidence is undisputed that Burgess had taken the gun and ammunition with him to Mrs. Crow's shop and that it is the gun that fired and killed her. According to Burgess's own signed statement: "I told her to go to the bathroom and sit down. I got to the bathroom and she said somebody coming. I turned my head but my gun was still pointed at her and she hit my hand. The gun went off and shot her dead in the head." Other than the general allegations that the law enforcement officers mishandled the firearms evidence, Burgess pleads no specific facts showing what any particular officer did to mishandle or fail to use care while the evidence was in his possession or establishing how any particular officer caused a change in the condition of the gun, magazine or live cartridges that would have disturbed, contaminated or destroyed trace evidence. "Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and 32.6(b). The full factual basis of the claim must be included in the petition itself." *Hyde v. State*, 950 So.2d at 356. The underlying basis of Burgess's ineffective assistance claim – that law enforcement officers mishandled the

firearms evidence – is insufficiently pleaded and lacks merit. His trial counsel cannot be found ineffective for failing to investigate and uncover a circumstance that did not exist.

Burgess next contends that law enforcement officers failed to document and photograph the condition of the firearms evidence and that trial counsel should have brought this to the jury's attention. He refers to the failure to document and photograph the firearms evidence as unprofessional and incompetent law enforcement work that supports his theory that the shooting was unintentional. This portion of Burgess's ineffective assistance claim is unsupported by specific facts and does not satisfy the pleading requirements of Rule 32.3 and 32.6(b). Moreover, except for speculation that his trial counsel would have successfully impeached the officers if counsel had consulted with a firearms expert and a crime scene investigator, Burgess pleads no specific facts indicating there is a reasonable probability that the result of the guilt phase trial would have been different. The handgun, magazine and cartridges seized from Burgess constituted actual physical exhibits that were admitted, unchanged and untainted according to the officers' testimony, for the jury's consideration. His argument that trial counsel would have convinced the jury that the shooting was unintentional had they investigated and attacked the law enforcement officers' failure to document and photograph may look attractive on paper, but is nothing more than fanciful speculation in view of the particular circumstances of the case.

Burgess's claim that trial counsel were ineffective because they failed to show that the law enforcement officers destroyed trace evidence lacks merit for the same reasons discussed above concerning the alleged mishandling of the firearms evidence. In addition, Burgess's trace evidence argument assumes that Mrs. Crow touched the handgun, leaving her fingerprints or DNA, when he has alleged no facts that support his theory. According to Burgess's own signed statement, Mrs. Crow hit his hand, not the gun, causing it to discharge. He does not allege that she touched the gun in some other manner that was sufficient to leave trace evidence. In the absence of specifically

pleaded facts showing that the victim left fingerprints or DNA on the handgun, the law enforcement officers who possessed the gun could not have destroyed trace evidence that did not exist. Consistent with Burgess's statement that Mrs. Crow hit his hand, not the gun, trace examiner John Kilbourne of the Alabama Department of Forensic Sciences found no fingerprints or other trace evidence when he examined the handgun. Burgess's claim that his trial counsel were ineffective for failing to show that law enforcement officers destroyed trace evidence has not been sufficiently pleaded, creates no material issue of law or fact, is devoid of merit and is due to be dismissed pursuant to Rule 32.7, *Ala.R.Crim.P.*

Burgess's last argument presented under his I.B.i.f. ineffective assistance claim is that his trial counsel were not prepared to discredit the testimony of the State's witness, Decatur Police Officer Sheila Moore, who found the spent .25 caliber casing that had ejected from Burgess's handgun at the crime scene. The trial record discloses that at about 8:00 A.M. the next day after the crime, she went to the Bait and Tackle Shop to look specifically for the shell casing. She quickly found it in the bathroom to the right of the broken toilet, placed the shell casing in a sealed envelope, did not alter or change the casing's condition in any way and delivered it to the lead investigator, Gary Walker. (Trial Transcript 1297-1303).

Burgess makes the conclusory allegation that Moore's testimony was false, misleading and unreliable. Because his trial counsel did not attempt to discredit her testimony, he says that she was able to create the false impression that the firearm evidence found at the crime scene was properly handled and preserved. There is no merit to this argument. In the first place, Burgess alleges no specific facts showing that there had been material changes before Moore arrived to the portion of the shop where she found the spent shell casing. He identifies no witness who saw the scene immediately before her arrival and would provide credible, admissible testimony that Moore misrepresented the location of the casing and her preservation of it.

Second, the State's investigation of Burgess's crime neither was complicated nor extended over a long period of time. The evidence was overwhelming that Burgess committed the robbery and homicide. Attempts to shift a jury's focus from the accusations against the defendant to alleged inadequacies in the law enforcement investigation are generally improper and inadmissible. Such efforts by defense counsel often result in a waste of time, lead to more speculation than fact finding and create a real danger of unfair prejudice and jury confusion that outweighs the value of the offered evidence. *United States v. Carmichael*, 373 F.Supp.2d 1293, 1297 (M.D. Ala. 2005); see also *United States v. Patrick*, 248 F.3d 11, 23 (1st Cir. 2001).

Furthermore, defense counsel invariably, as a matter of trial strategy, have to weigh the anticipated benefit or gain from challenging police officers' competency and professionalism against the antagonism and loss of credibility their client may suffer in the eyes of the court and jury. Under the particular circumstances his trial counsel had to deal with, Burgess's ineffective assistance claim based on counsels' failure to challenge Sheila Moore's testimony does not overcome the strong presumption that their decision represented sound trial strategy. *Strickland*, 466 U.S. at 689, 694. Burgess fails to plead specific facts indicating that his trial counsels' strategy was constitutionally deficient and that there is a reasonable probability the result of his guilt phase trial would have been different except for his trial counsel's decision.

Accordingly, Burgess's I.B.i.f. ineffective assistance claim fails to satisfy the specific pleading requirements of Rule 32.6(b), is facially lacking in merit and is due to be dismissed pursuant to Rule 32.7(d), *Ala.R.Crim.P.*

g. Had Trial Counsel Investigated the Police Department's Mishandling of the Crime Scene, They Would Have Presented Evidence of Failure to Follow Proper Procedures and Of Contamination that Would Have Cast a Reasonable Doubt on the State's Theory of an Intentional Shooting.

In Paragraphs 104 through 108 on pages 47-55 of his Second Amended Petition, Burgess argues that had his trial counsel consulted with a crime scene investigator, they would have been able to adequately cross-examine police witnesses about the crime scene investigation so as to create a reasonable doubt about an intentional shooting.

Many of Burgess's contentions and theories raised in this ineffective assistance subclaim, such as his arguments that an expert witness would have established that the victim was standing when shot, would have determined that Burgess's .25 caliber handgun had a design defect, would have shown that law enforcement officers destroyed trace evidence and would have enabled his trial counsel to discredit the testimony of Investigator Sheila Moore, are cumulative, have been previously addressed and will not be further discussed. Burgess further alleges a litany of investigation principles, practices and opinions that he says a crime scene investigator would have presented to his jury had his trial counsel called the investigator as a witness. Burgess fails, however, to plead the name of the crime scene investigator, whether he or she would have been available to investigate and testify in the 1993-94 time frame and specifically what admissible testimony the investigator would have provided. See *Smith v. State*, 71 So.3d at 33 ("We have held that a petitioner fails to meet the specificity requirements of Rule 32.6(b), Ala.R.Crim.P., when Burgess fails to identify an expert by name or plead the contents of that expert's expected testimony."). Because all grounds asserted by Burgess in this ineffective assistance subclaim I.B.i.g. rely on the testimony and opinions of an unnamed crime scene investigator, the subclaim is insufficiently pleaded as required by Rule 32.6(b) and is due to be dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

Moreover, in dealing with Burgess's various ineffective assistance arguments that are based on alleged inadequate or improper law enforcement investigation and evidence handling, the Court is mindful that "in most cases, ..., evidence questioning the adequacy of various aspects of the government's investigation itself – as opposed to the adequacy of the evidence gathered as a *result* of that investigation – is either irrelevant or of very

little probative value, as it improperly shifts the jury's focus from the accusations against the defendant to accusations against the police." *United States v. Carmichael*, 373 F.Supp.2d at 1297. Similarly, as observed by the First Circuit Court of Appeals, "speculative evidence of the inadequacy of the police investigation would have shifted the jury's focus from the accusations against [the defendant] to accusations against the police, thus creating a real danger of unfair prejudice and jury confusion that 'substantially outweighed' the evidence's probative value." *United States v. Patrick*, 248 F.3d at 23. Burgess fails to cite authority or allege facts establishing that, had his trial counsel proffered extensive evidence and cross-examination attacking various aspects of the Decatur police officers' investigation of his case, his counsel would have succeeded over the prosecutor's objections that such evidence and cross-examination were irrelevant, immaterial, a waste of time, misleading or invasive of the jury's responsibility to decide ultimate issues of fact. Counsel is not ineffective for failing to offer inadmissible testimony. See *Daniel v. State*, 86 So.3d at 438.

Clearly, the primary issue of concern to Burgess's trial counsel was whether the jury would accept that their client unintentionally shot Mrs. Crow. Facing overwhelming and undisputed evidence that Burgess robbed and killed the victim by shooting her in the face at close range, counsel had strategic decisions to make about where to focus the jury's attention and how to avoid alienating them or making their client's statements about an accidental shooting unbelievable. In contrast, Burgess's present ineffective assistance claims elevate form over substance and condemn his trial counsel for not pursuing a strategy that focused the jury's attention on allegedly deficient police compliance with preferred investigative practices, policies and principles. Taking into consideration the circumstances faced by Burgess's trial counsel and that the craft of trying cases is far from an exact science, the Court does not find that trial counsel performed unreasonably or pursued an unsound trial strategy that fell outside the wide range of constitutionally reasonable professional assistance. See *Strickland*, 466 U.S. at

689.

Burgess contends that he was prejudiced because, had his trial counsel consulted with and retained a firearms expert and a crime scene investigator, they would have effectively challenged the Decatur police officers' mishandling of the crime scene, thereby creating a reasonable doubt about whether the shooting was intentional. To plead a sufficient showing of prejudice, a petitioner must plead specific facts indicating that there is a reasonable probability that, but for counsel's alleged deficient act or omission, the result of the proceeding would have been different. A reasonable probability must be sufficient to undermine confidence in the outcome. *Strickland v. Washington*, 466 U.S. at 694. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Ricter*, 562 U.S. at 112.

Other than stating bare conclusions, Burgess fails to allege specific facts establishing a reasonable probability that the outcome of his guilt phase trial would have been different. He does not allege that the law enforcement officers deliberately or intentionally destroyed or withheld evidence that was critical to his defense, Therefore, even assuming that his trial counsel had presented evidence and had effectively cross-examined the law enforcement witnesses, the net impact of that evidence and cross-examination would have been to impeach the competency of the officers' investigative practices or skills – not to establish that the shooting of Mrs. Crow was accidental or unintentional. Burgess fails to make a specific factual showing why the police officers' alleged investigative deficiencies probably would have created a reasonable doubt about whether the shooting was intentional. He must plead facts showing more than a changed outcome was merely conceivable; the likelihood of the different result must be substantial. *Id.* Given the overwhelming evidence of Burgess's guilt as charged, his allegations of investigative deficiencies on the part of the Decatur police does not undermine the Court's confidence in the jury's verdict finding him guilty of capital murder. Accordingly, his subclaim I.B.i.g. fails to satisfy the specific pleading

requirements of Rule 32.6(b), fails to present a material issue of fact or law that would entitle him to relief, is devoid of merit and is due to be summarily dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

ii. Trial Counsels' Unreasonable Failure to Investigate the Crime Prejudiced Mr. Burgess in the Penalty Phase.

In his previous ineffective assistance subclaims, Burgess has made extensive allegations about what his trial counsel would have been able to show during the guilt phase trial had they consulted with and retained a plumbing engineer, a crime scene investigator, a firearms expert and a forensic pathologist. He argues in the present subclaim that his trial counsel's failure to consult and retain such forensic experts prejudiced his ability to respond to various arguments advanced by the prosecutor during the State's penalty phase arguments.

In this ineffective assistance subclaim Burgess does not identify the experts by name and fails to give the complete contents of each expert's expected testimony. For this reason he has failed to satisfy the pleading specificity requirements of Rule 32.6(b), and this subclaim is due to be dismissed. See *Smith v. State*, 71 So.3d at 33. Rules 32.6(b) and 32.7, *Ala.R.Crim.P.*

Burgess argues that his trial counsel's unreasonable failure to investigate the crime by consulting and retaining the various forensic experts allowed the prosecutor during penalty phase arguments to use false information to present aggravated portrayals of how Mrs. Crow was shot and died. These arguments, he says, prejudiced him by significantly increasing the probability that the jury would sentence him to death. This argument is both procedurally barred and not facially meritorious. In the first instance, Burgess has failed to sufficiently plead the names and complete expected testimony of each alleged expert witness that trial counsel should have consulted and retained. Rule 32.6(b), *Ala.R.Crim.P.* His present ineffective assistance claim based on the testimony

that such experts would have provided is precluded from further consideration and is due to be dismissed.

Even if not precluded, this subclaim lacks merit. During their closing arguments the prosecutor and defense counsel are not constrained to limit what they argue solely to undisputed evidence. Rather, as long as the prosecutor's arguments are based on actual evidence presented during the trial, whether disputed or undisputed, it is not improper. See *Wilson v. State*, 777 So.2d 856, 893 (Ala. Crim. App. 1999) ("The prosecution ... has the right to present its impressions from the evidence, and may argue every matter of legitimate inference that can be reasonably drawn from the evidence."). Assuming that trial counsel had presented evidence from the experts he specifies in this subclaim, the jury would have heard the evidence but also would have heard the prosecutor's prejudicial arguments based on his reasonable impressions and inferences from the evidence presented during the trial. Because the prosecutor could have made the same arguments to the jury of which Burgess complains, regardless of the evidence presented by Burgess's unnamed experts, he has failed to establish a reasonable probability that the outcome of the sentencing phase trial would have been different.

Burgess repeats his contentions that, had the unnamed experts been called to testify by his trial counsel, some of their expert testimony would have established that Mrs. Crow was standing when shot, thereby disputing the prosecutor's argument of an intentional, point blank shooting. Those repeated contentions have no merit. As addressed in prior subclaims, the question whether an accused intentionally caused the death of another person is a question of fact within the exclusive province of the jury to decide. Likewise, expert witness testimony about the relative positions of the defendant or victim at the time of the shooting is generally inadmissible. Therefore, Burgess's trial counsel cannot be found to be ineffective for failing to present inadmissible evidence. See *Daniel v. State*, 86 So.3d at 438. Finally, the Court has previously found that instead of calling an expert witness, Burgess's trial counsel effectively cross-examined the

State's firearms expert and established that the shooting did not occur at point range. This evidence created the opportunity for Burgess's counsel to make the plausible closing argument that the shooting had occurred unintentionally, just as his client had said in his statements to the police and news media.

Lastly, Burgess argues that if trial counsel had performed an adequate investigation of the crime and presented testimony from the unnamed forensic experts, then they would have presented evidence in the guilt phase trial from which they could have argued in the penalty phase that the jury and court should have residual doubt about Burgess's guilt on the capital murder charge. This argument also lacks merit because the concept of "residual doubt" is not recognized as a sentencing consideration under Alabama law. See *Ex parte Lewis*, 24 So.3d 540, 544 (Ala. 2009) (Holding that "[r]esidual doubt is not a mitigating circumstance" for sentencing purposes.).

Accordingly, Burgess's I.B.ii. ineffective assistance claim is due to be dismissed because it is insufficiently pleaded under Rule 32.6(b), fails to present a material issue of fact or law that would entitle him to relief and lacks facial merit. Rule 32.7(d), *Ala.R.Crim.P.*

II

TRIAL COUNSEL WERE INEFFECTIVE IN THEIR INVESTIGATION, PREPARATION AND PRESENTATION OF THE PENALTY PHASE OF THE TRIAL.

A. Trial Counsel Unreasonably Failed to Investigate Mr. Burgess's Social History and to Present Reasonably Available and compelling Mitigating Evidence.

i. Trial Counsel Performed Deficiently by Unreasonably Failing to Conduct a Mitigation Investigation.

This first subpart of Claim II is set out in Paragraphs 114 through 132 at pages 58 through 67 of Burgess's Second Amended Petition. He contends that his trial counsel's

representation during the penalty phase of the trial was deficient because they did not investigate all possible avenues leading to the discovery of mitigating evidence relevant to his social and family history; they did not witnesses who would have provided mitigating social and family history; they failed to obtain the assistance of physical and mental health professionals; they failed to obtain or review records or documents that would have provided mitigating evidence; they waited until the trial began before preparing their mitigation defense; they failed to have Burgess evaluated by independent medical and mental health professionals; and they failed to retain a mitigation specialist. For the most part, this first portion of Claim II consists of bare legal arguments and conclusions that are unsupported by clear and specific statements of fact.

First, Burgess's allegation that trial counsel waited until the trial began to start their preparation of a mitigation defense is not supported by specifically pleaded facts, is contradicted by the trial record and facially lacks merit. Trial counsel on the day when the trial was scheduled to begin made their second motion to continue, arguing that they felt they were not prepared to proceed with a penalty phase if it became necessary. One of his trial counsel emphasized that Burgess had told them about sentencing witnesses, including some family members, but his investigator had not been able to locate some of those potential witnesses or could not convince them to come forward and cooperate. See *Burgess v. State*, 827 So.2d at 177-78. It is clear that Burgess's counsel had undertaken the investigation and preparation of a sentencing defense that included family or social history; they simply needed more time to overcome what defense attorneys routinely encounter when witnesses cannot be found, refuse to cooperate, hide from the service of subpoenas or ultimately have no relevant or material mitigating testimony to present.

Second, contrary to Burgess's assertion throughout this first subpart of Claim II, his trial counsel had no constitutional duty to uncover every fact and circumstance about his family and social history that might have been considered mitigating. See *Wiggins v.*

State, 539 U.S. 510, 533 (2003) ("Strickland does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing."). The principles contained in guidelines and trial manuals cited by Burgess are not binding and do not have the force or effect of law. In presenting a defendant's penalty phase case, "[c]ounsel does not necessarily render ineffective assistance simply because he does not present all possible mitigating evidence." *Boyd v. State*, 913 So.2d 1113, 1139 (Ala. Crim. App. 2003), quoting *Williams v. State*, 783 So.2d 108, 117 (Ala. Crim. App. 2000).

Third, Burgess's argument that trial counsel should have called additional witnesses in mitigation is not sufficient to establish prejudicial ineffective assistance of counsel. To sufficiently plead a claim that trial counsel were ineffective for not calling witnesses, Burgess must identify the names of the witnesses, must plead with specificity what admissible testimony those witnesses would have provided and must allege facts establishing that had the witnesses testified there is a reasonable probability that the outcome of the penalty phase would have been different. *Mashburn*, 148 So.3d at 1151. While Burgess lists a multitude of people in Paragraph 128 of his Second Amended Petition, he simply alleges that they "were readily available and willing to testify" and does not plead specifically what admissible testimony they would have provided. In the end, the deciding factor, which must be established by specifically alleged facts, is whether the listed witnesses would have made any difference in the penalty phase of the trial. *Hunt v. State*, 940 So.2d 1041, 1067-68 (Ala. Crim. App. 2005). This portion of Burgess's ineffective assistance argument based on counsel's failure to call additional family and social history witnesses is not specifically and fully pleaded as required by Rule 32.6(b), *Ala.R.Crim.P.*, and fails to allege facts that, if true, would entitle him to relief.

Fourth, Burgess further contends that his trial counsel should have had him examined by medical or mental health experts and should have called these experts to

testify during all phases of his trial. Initially, this claim fails to satisfy the specific pleading requirements of Rule 32.6(b) because Burgess fails to provide the names of any medical or mental health experts who were qualified and available to examine him and testify in the June 1994 trial and also fails to state the content of the expected testimony of each unnamed expert. See *Smith v. State*, 71 So.3d at 33.

Moreover, the case record reflects that Burgess underwent a forensic mental evaluation in July 1993, about seven months after the crime. According to the evaluation report dated July 21, 1993 (Clerk's Record 216-221), which was prepared by Dr. Lawrence R. Maier, a certified forensic psychologist, Burgess gave no history of having a mental illness, brain tumor or brain cancer. Upon completing his evaluation, Dr. Maier found that Burgess demonstrated no symptoms of a mental illness. Dr. Maier concluded that he was competent to stand trial and that he was suffering from no major mental illness at the time of the crime. Nothing in the report suggested that Burgess needed a further independent medical or mental health evaluation. His trial counsel would have had access to Dr. Maier's mental evaluation report and were entitled to rely on his opinions. *McMillan v. State*, 258 So.3d 1154, 1177 (Ala.Crim.App. 2017) (holding that defense counsel is entitled to rely on the evaluation conducted by a qualified mental health expert, even if in retrospect the evaluation may not have been as complete as others may desire.).

None of the findings and opinions provided by Dr. Maier would have been beneficial to Burgess had they been presented to the jury. His trial counsel were not obliged to shop around for a mental health diagnosis that was more favorable than the diagnosis given by Dr. Maier. See *White v. State*, 2019 WL 1592492, *18 (Ala.Crim.App. 4/12/2019). As a matter trial strategy, his trial counsel decided to abandon a defense of not guilty by reason of mental disease or mental defect. The Court cannot say that under the circumstances faced by his trial counsel, they pursued an unreasonable strategy by not obtaining and presenting independent mental health or

medical evaluations. This subclaim fails to allege specific facts that satisfy the pleading requirements of Rule 32.6(b), fails to allege facts that, if true, would entitle Burgess to relief and is facially devoid of merit.

Fifth, Burgess complains that his trial counsel rendered ineffective assistance by failing to retain a mitigation specialist. While he states in general terms what a mitigation specialist would have done, he does not identify by name the mitigation specialist who would have assisted with or testified in his mitigation defense, nor does he plead with specificity the beneficial opinions or other testimony that the unnamed mitigation specialist would be provided had he or she been called to testify. As such, this particular argument fails to meet the pleading specificity requirements of Rule 32.6(b), *Ala.R.Crim.P.* See *Smith v. State*, 71 So.3d at 33 ("We have held that a petitioner fails to meet the specificity requirements of Rule 32.6(b), Ala.R.Crim.P., when the petitioner fails to identify an expert by name or plead the contents of that expert's expected testimony.") It also is facially without merit because "hiring a mitigation specialist in a capital case is not a requirement of effective assistance of counsel." *Daniel*, 86 So.3d at 437.

Lastly, Burgess contends that his trial counsel should have obtained medical records from his family physician, social service agency records and life history records. He concludes that such records would have afforded mitigating evidence for sentencing purposes, but he does not plead specific beneficial facts that would have been shown by such records and that would have served to mitigate his sentence. A claim is facially meritorious on its face only if it presents a clear and specific statement of the ground upon which relief is sought and includes a full disclosure of the facts relied upon "as opposed to a general statement concerning the nature and effect of those facts." *Ex parte Clisby*, 501 So.2d at 486. Burgess's subclaim that his trial counsel were ineffective because they did not obtain records fails to satisfy the specificity and full factual pleading requirement of Rule 32.6(b), fails to present a material issue of fact or law that would

entitle him to relief and is not facially meritorious.

Accordingly, Burgess's II.A.i. ineffective assistance claim does not warrant further proceedings and is due to be dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

ii. Trial Counsels' Unreasonable Failure to Investigate and Present Mitigating Evidence at the Penalty Phase of the Trial Prejudiced Mr. Burgess.

a. Counsel's Inadequate, Inaccurate and Damaging Penalty Phase Presentation.

In Paragraphs 133 through 154 of his Second Amended Petition, Burgess states that his trial counsel's failure to investigate and prepare for the penalty phase trial resulted in a presentation to the jury and judge that was inadequate, inaccurate and damaging to him. He contends that, if his counsel had been adequately prepared, they would have presented other evidence about his life history of economic and emotional deprivation, physical and psychological trauma and years of homelessness.

The trial record reflects that in addition to making penalty phase opening and closing statements, trial counsel called four witnesses to testify on Burgess's behalf: his mother, Maggie Burgess; his father, Willie "Bill" Burgess, Sr.; his teacher and friend, Maxine Ellison; and another friend, Danielle Douglas. These witnesses effectively portrayed Burgess as a kindhearted and good person; a child who was neglected by his father; a child who lived in a crowded one parent home; a young man who shortly before the crime was living on the streets from place to place; a person who was not violent or cruel toward others; a teenager who was eager to please and was planning on getting a job, taking care of his children, going back to school and getting his GED; a student who was quiet, didn't cause problems at school and did his assignments; and an accused who admitted the wrong that he had committed. The mitigating evidence presented by his trial counsel tended to show that the crime was not indicative of Burgess's character; that

he was not a vicious, cold-blooded killer; and that he had the disposition and potential to help others. "[W]hen, as here, counsel has presented a meaningful concept of mitigation, the existence of alternate or additional mitigation theories does not establish ineffective assistance." See *Daniel v. State*, 86 So.3d at 437.

Even if additional witnesses could have presented mitigation evidence in his behalf, Burgess fails to identify by name each mitigation witness that his counsel should have called to testify and fails to plead with specificity what beneficial and admissible testimony each witness would have provided. *Mashburn*, 148 So.3d at 1151 ("To sufficiently plead a claim that counsel was ineffective for not calling witnesses, a Rule 32 petitioner is required to identify the names of the witnesses, to plead with specificity what admissible testimony those witnesses would have provided had they been called to testify...."). This claim, therefore, does not plead specific facts and make the full factual disclosures required by Rule 32.6(b), *Ala.R.Crim.P.* While Burgess does not specify what testimony each additional witness would have provided had they been called in the penalty phase, it is reasonably inferable that much or all of the testimony would have been cumulative to the testimony provided by the four witnesses who did testify. Burgess's trial counsel cannot be deemed ineffective for failing to present cumulative evidence. *White*, 2019 WL 1592492, at *11.

In its findings set forth in the sentencing order dated August 24, 1994, the trial court determined that two statutory mitigating circumstances existed for sentencing purposes: Burgess did not have a significant history of prior criminal activity, as was stipulated by the prosecutor; and Burgess was 18 years old when the crime was committed. In discussing the statutory mitigating circumstances, the trial court specifically noted that it had ordered a mental evaluation to determine Burgess's competency to stand trial and his mental state at the time of the crime. The report from the evaluation indicated that he was competent to stand trial and suffered from no mental illness or impairment when he committed the offense. After recognizing the four

witnesses who had testified during the penalty phase trial, the trial court considered and found the following:

- A mitigating circumstance DOES EXIST with regard to the defendant's character based on evidence that described him as having a quite, compliant and kind disposition; that indicated he had concern for his children; that indicated that his desire to learn more about God; that he had not engaged in any violent behavior in the past; and that the defendant had said that he was sorry that the victim had died.

- A mitigating circumstance DOES EXIST with regard to the defendant's home life based on family history testimony that his home life was not ideal; that he lacked the presence of a father figure; and that while there was no evidence of physical abuse, there was evidence of neglect.

- A mitigating circumstance DOES EXIST based on the antisocial personality disorder with which the defendant was diagnosed in the court-ordered mental evaluation and testimony presented during the penalty phase trial that would not be inconsistent with that diagnosis.

(Clerk's Record 46-48).

The proper standard by which to determine the effectiveness of counsel's performance is not whether they should have done more; rather, it requires the Court to assess what they did in fact. *Chandler v. United States*, 218 F.3d at 1320. Even though the trial court, after weighing the aggravating circumstance and mitigating circumstances, followed the jury's recommendation and imposed a death sentence, its findings about the statutory and non-statutory mitigating circumstances refute Burgess's contention that his trial counsel's penalty phase investigation and presentation were inadequate and damaging because they did not present more witnesses and evidence. Also, given the nature and extent of the aggravating evidence in this case, Burgess's factual allegations, even if true, fail to establish a reasonable probability that the outcome his sentencing hearings would have been different had trial counsel presented additional penalty phase witnesses and evidence.

Accordingly, Burgess's II.A.ii.a. ineffective assistance claims do not satisfy the

specific and full disclosure pleading requirement of Rule 32.6(b), *Ala.R.Crim.P.*, do not plead facts that, if true, would entitle him to relief, are facially without merit and are due to be dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

b. The Penalty Phase Case in Mitigation that a Reasonably Competent Investigation Would Have Uncovered.

Burgess in paragraphs 157 through 318 covering 45 pages of his Second Amended Petition presents a lengthy third person narrative without identifying the narrator or the persons or other sources of the purported facts stated therein. This narrative begins with a discussion of the remote histories of ancestors with whom Burgess would have had little or no contact. It then moves to a discussion of Burgess's parents, Bill Burgess, Sr. and Maggie Burgess, both of whom testified as mitigation witnesses in the penalty phase, and their children. Much of this discussion is cumulative of the actual testimony presented in mitigation, while other portions, had they been presented to the jury, would have impeached some of the favorable testimony given by the four mitigation witnesses who testified.

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

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

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

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

Likewise, Burgess's long narrative is interlaced with opinions about mental illness, cognitive deficits, housing and environmental toxicity, education system deficiencies, social agency failures and physical health problems and their causes. Most, if not all, of these opinions would have to be provided by expert witnesses, but Burgess fails identify any expert by name or to plead with specificity the underlying factual basis for the expert opinions. The specificity requirements of 32.6(b) are not satisfied when a petitioner alleges the opinions of experts, but does not identify them by name or plead the contents of their expected testimony. See, *Smith v. State*, 71 So.3d at 33.

Even assuming that Burgess's narrative statement is sufficiently pleaded, this subpart II.A.ii.b. is facially lacking in merit. As discussed above, the record discloses that Burgess's trial counsel chose to show during the penalty phase that the killing of Mrs. Crow was not indicative of his character, that he was not a vicious, cold-blooded killer and that he had the disposition and potential to help others. They also presented evidence that Burgess came from a dysfunctional home, that he was neglected by his father, that his single parent family lived in poverty and that he was essentially homeless from age 17 until the occurrence of the crime. Much of the additional testimony and evidence that Burgess contends his trial counsel should have investigated and presented would have been the same as or similar to the mitigation evidence of which the jury was aware. "Counsel does not necessarily render ineffective assistance simply because he does not present all possible mitigating evidence." *Boyd v. State*, 913 So.2d 1113, 1139 (Ala. Crim. App. 2003) (quoting *Williams v. State*, 783 So.2d 108, 117 (Ala. Crim. App. 2000). "[A] claim of ineffective assistance of counsel for failure to investigate and present mitigation evidence will not be sustained where the jury was aware of most aspects of the mitigation evidence that the defendant argues should have been presented." *Frances v. State*, 143 So.3d 340, 356 (Fla. 2014). See also *Daniel v. State*, 86 So.3d 405, 429-430 (Ala. Crim. App. 2011) ("[T]he failure to present additional mitigating evidence that is merely cumulative of that already presented does not rise to the level of a

constitutional violation… [T]his Court has held that even if alternate witnesses could provide more detailed testimony, trial counsel is not ineffective for failing to present cumulative evidence.").

In his closing argument during the penalty phase, defense counsel Lavender argued that the jury should consider in mitigation that Burgess had no significant history of prior criminal activity; that he was only 18 years old at the time of the crime; that he exhibited favorable character traits, as shown by evidence that he was kindhearted and generally a good person who was not violent or cruel; that his family history showed that he was raised under difficult circumstances that caused him to be emotionally disturbed; and that he was remorseful, as stated in his letter to Maxine Ellison, for having killed Mrs. Crow. At least one juror believed that the mitigating circumstances outweighed the aggravating circumstance. The trial court found from the evidence that two statutory mitigating circumstances existed, together with three non-statutory mitigating circumstances that included multiple components.

When prejudicial ineffective assistance of counsel is based on the claim that additional witnesses and evidence should have been presented in mitigation, the deciding factor is whether the additional witnesses and evidence would have made any difference in the mitigation phase of the trial. *Hunt v. State*, 940 So.2d 1041, 1067068 (Ala. Crim. App. 2005) (citations omitted). That the mitigation theories and evidence presented by trial counsel ultimately proved unsuccessful does not establish a claim for ineffective assistance of counsel. To establish prejudice, the additional testimony or evidence "must differ in a substantial way – in strength and subject matter – from the evidence actually presented at sentencing." *Foust v. Houk*, 655 F.3d 524. 539 (6th Cir. 2011), citing *Hill v. Mitchell*, 400 F.3d 308, 319 (6th Cir. 2005), cert. denied 546 U.S. 1039 (2005).

In conclusion, Burgess's II.A.ii.b. ineffective assistance claims are not sufficiently pleaded under Rule 32.6(b), are not facially meritorious, do not present a material issue of fact or law that would entitle him to relief and are due to be dismissed. Rule 32.7(d),

Ala.R.Crim.P.

B. Trial Counsel Unreasonably Failed to Retain and Present Any Expert Witnesses in Support of the Case in Mitigation.

i. Trial counsel Performed Deficiently by Unreasonably Failing to Consult with and Present the Testimony of Qualified Experts Who Would have Explained the Impact of Mr. Burgess's Life History on his Psychosocial Development.

In Paragraphs 319 and 320 of his Second Amended Petition, Burgess claims that his trial counsel rendered ineffective assistance because they did not retain or have him examined by qualified mental health professionals and a sociologist whose assistance was necessary to present a constitutionally adequate penalty phase defense. Notably, he does not argue in these paragraphs that, had his trial counsel obtained the assistance of such professionals, the outcome of the penalty phase probably would have been different.

In his subpart II.A.i, ineffective assistance claims presented in Paragraphs 116 and 130 (pages 60, 66-67 of his Second Amended Petition), Burgess essentially made the same arguments that he advances here in this subpart. The Court adopts by reference its findings and conclusions set forth on Pages 35 through 39 of this Final Order. In sum, Burgess's subpart II.B.i. fails to satisfy the specific fact and full disclosure pleading requirements of Rule 32.6(b), in that Burgess does not identify the names of the mental health professionals and sociologist who should have been called to provide mitigating testimony in the penalty phase and does not describe with specificity the content of their expected testimony. Rule 32.6(b); see *Smith v. State*, 71 So.3d at 33. Even if this subclaim II.B.i. is adequately pleaded, it nonetheless is due to be summarily dismissed because it is based on incorrect material facts, fails to present material issues of fact and law that would entitle Burgess to relief and is facially without merit. Rule 32.7(d), *Ala.R.Crim.P.*

ii. Trial Counsel's Unreasonable Failure to Consult with and Present the Testimony of These Experts Prejudiced Mr. Burgess.

Burgess in Paragraphs 321 through 353 at pages 121 through 137 of his Second Amended Petition again argues that his trial counsel performance in the penalty phase was deficient and prejudiced him because they failed to retain unnamed mental health professionals and sociologists and to present their opinions. Most of the paragraphs of this subclaim set forth a condensed version of the third person narrative statement that covers 45 pages in Paragraphs 155 through 318 (subpart II.A.ii.b.) of his Second Amended Petition and that has been previously addressed at length by the Court.

In the present subpart II.B.ii., Burgess again fails to satisfy the specific pleading requirements for a Rule 32 Petition because it consists of a third person narrative that does not identify the person or persons who composed the narrative or the persons who would testify to the alleged facts, opinions and conclusions set forth therein. Burgess likewise fails to identify by name the expert witnesses that his trial counsel should have retained, who would have applied the theories and principles described in the narrative and who would have been qualified and available to testify in the 1994 trial, and fails to plead with specificity the contents of their expected testimonies. 32.6(b), *Ala.R.Crim.P.*; see *Smith v. State*, 71 So.3d at 33.

Even if not deficiently pleaded, Burgess's II.B.ii. ineffective assistance claim is facially devoid of merit for the reasons discussed above on pages 44 and 45 of this Final Order.

Accordingly, subclaim II.B.ii. is due to be summarily dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

III

TRIAL COUNSEL WERE INEFFECTIVE IN THEIR PRETRIAL PREPARATION AND LITIGATION.

A. Trial Counsel's Litigation of Their Motions for Continuance Was

Ineffective Because Counsel Unreasonably Failed to Apprise the Court that They Were Wholly Unprepared for Trial.

In Paragraphs 354 through 356 on pages 137 and 138 of his Seconded Amended Petition, Burgess contends that, had his counsel in their motions to continue the trial clearly disclosed how unprepared they were to try the capital case, it is reasonably probable that the trial court would have granted their motions and the results of the guilt and sentencing phase trial would have been different. The trial court's refusal to grant trial counsel's motions to continue was raised by Burgess on his direct appeal and addressed by the Court of Criminal Appeals. *Burgess v. State*, 827 So.2d at 177-78.

Trial counsel argued that although the trial court had stated in March 1994 that it was considering setting Burgess's trial on June 20, they did not receive actual notice of the trial setting until May 25. They filed a Motion to Continue the trial on June 7, 1994 and among other grounds, they alleged that they could not properly prepare for trial by June 20 and that Burgess would be denied due process of law if he was required to go to trial on that date. The trial court denied the Motion to Continue on June 10, 1994.

Burgess's counsel filed another Motion to Continue on the June 20 trial date in which they alleged that they had tried to properly prepare, but had been unable to do so, that Burgess did not object to a continuance, that he would be denied due process of law if he was required to proceed as scheduled and that they were unaware whether the District Attorney objected to a continuance. During the hearing on counsel's renewed Motion to Continue, defense counsel Lavender reiterated to the trial court that he did not feel comfortable proceeding with the trial, especially because his investigator was having trouble getting some sentencing witnesses and some of Burgess's family members to cooperate. The trial court denied the renewed Motion to Continue because he believed that adequate notice of the trial date had been given, that he was obligated by Burgess's speedy trial request and the interests of the State to proceed with the scheduled trial, that Burgess and his trial counsel had had ample time to prepare and that Burgess "has very

trained and competent and diligent lawyers."

At the end of the guilt phase trial, Burgess's counsel asked the trial court to continue the penalty phase trial to a later date and strike a new jury for sentencing or at least to the next morning so they could finish interviewing the sentencing witnesses that their investigator had rounded up. The trial court gave them until the next morning to begin the sentencing phase trial.

As pointed out by the Court of Criminal Appeals, the long-standing law in Alabama is that a trial court is entitled to exercise its sound discretion in deciding whether to grant or deny a motion to continue. Its decision will not be reversed absent a clear showing that the trial court abused its discretion. *Burgess v. State*, 827 So.2d at 178. The Court of Criminal Appeals held that the trial court had not abused its discretion in denying trial counsel's motions to continue.

In this subpart Burgess cites no authority supporting his argument that trial counsel had a constitutional duty to do more than they already had done in prosecuting their motions for a continuance. While trial counsel would have preferred to have more time to prepare, they were not wholly unprepared to try Burgess's case. He apparently believes that it would have been appropriate for his trial counsel to have made a misrepresentation about their preparedness to the trial court irrespective of their ethical duty to refrain from making a false statement of material fact to the court. Rule 3.3(a)(1), *Ala. Rules of Professional Conduct.* Burgess's argument is meritless. Considering the circumstances surrounding the case at the time of his trial counsel's actions and applying the strong presumption that counsel's presentation of the motions to continue fell within the wide range of reasonable professional assistance, as required by *Strickland,* 466 U.S. at 689, Burgess fails to present a material issue of fact or law supporting his contention that his trial counsel's performance was unreasonable.

Moreover, Burgess must plead specific facts showing that he was prejudiced by his counsel's failure to convince the trial court to grant a continuance. He alleges solely

that, had counsel provided effective representation, the trial court probably would have granted the continuance and the results of the guilt and penalty phases probably would have been different. This conclusory allegation is based solely on speculation, as Burgess has specified no facts indicating that the trial court would have backed off from its clear determination to prevent the trial from being delayed. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Ricter*, 562 U.S. 85, 112 (2011). A bare allegation of prejudice without specific facts showing a reasonable probability of prejudice is not sufficient to establish ineffective assistance. See *Hyde v. State*, 950 So.2d at 356. Burgess's attack on how his counsel presented their Motions to Continue fails to show a probability of prejudice sufficient to undermine confidence in the outcomes of the guilt and penalty phase proceedings.

Accordingly, Burgess's subpart III.A. ineffective assistance claim fails to satisfy the specific factual pleading requirement of Rule 32.6(b), fails to create a material issue of fact or law that would entitle him to relief, is facially meritless and is due to be dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

B. Trial Counsel Unreasonably Failed to Assemble a Constitutionally Adequate Defense Team.

Burgess in Paragraphs 357 through 360 on pages 138 through 140 of his Second Amended Petition criticizes his trial counsel because the investigator they retained allegedly did very little work and they did not retain a mitigation specialist. This criticism is based in part on suggested guidelines that were published in 2003 by the American Bar Association. Suffice it to say, guidelines that were published nine years after Burgess's trial have no application to the 1994 performance of his trial counsel and will not be relied upon by the undersigned in deciding whether his counsel's performance was reasonable.

Burgess's allegations about the "very little work" allegedly performed by the

retained investigator has been addressed previously in pages 8 and 9 of this Final Order and will not be repeated here. This repetitive claim condemning the performance of the investigator does not plead specific facts showing that his trial counsel's performance was deficient or that they caused him to be prejudiced. Burgess fails to satisfy the pleading requirements of Rule 32.6(b), *Ala.R.Crim.P.*, and is also without merit. *Hall v. State*, 979 So.2d 125 (Ala. Crim. App. 2007) (finding that counsel is not ineffective for delegating to a subordinate the responsibility of investigating).

Burgess's additional repetitive claim that his trial counsel rendered unconstitutional representation by failing to retain a mitigation specialist likewise fails to plead the specific factual support required by Rule 32.6(b), in that he does not identify by name a mitigation specialist who his trial counsel should have retained and does not plead specifically the beneficial and admissible evidence the specialist would have discovered and what beneficial and admissible testimony the specialist who would have provided had he or she been retained and called at trial. See *Smith v. State*, 71 So.3d at 33. In addition, Burgess's mitigation specialist claim is without merit because "hiring a mitigation specialist in a capital case is not a requirement of effective assistance of counsel." *Daniel v. State*, 86 So.3d at 437.

Accordingly, Burgess's III.B. claim is not pleaded sufficiently per the requirements of Rule 32.6(b), facially lacks merit, and is due to be dismissed.

C. Trial Counsel Unreasonably Failed to Withdraw Mr. Burgess's Plea of Not Guilty by Reason of Mental Disease or Defect Prior to the Commencement of Jury Selection.

This ineffective assistance of trial counsel claim is presented in Paragraphs 361 through 366 on pages 140 and 141of Burgess's Second Amended Petition. On his direct appeal to the Alabama Court of Criminal Appeals, Burgess argued that the trial court committed reversible error by instructing the jury before they retired to deliberate that he

had withdrawn his plea of not guilty by reason of mental disease or defect. *Burgess v. State*, 827 So.2d at 152. Portions of the trial court's instructions to the jury included the following:

> During the voir dire process when we were asking you or all the jurors – prospective jurors – various questions – the voir dire process, we call it – you heard some discussion then of the not guilty by reason of mental disease or defect --- plea. This plea was entered in the alternative and the defendant had decided prior to the commencement of trial – he decided to proceed only on the plea of not guilty… Later, at the appropriate time, he withdrew the plea of not guilty by reason of mental disease or defect. I instruct you that you are not to hold the defendant's withdrawal of the alternate plea against him. I mention this only so that you do not or that you are not confused, … so I mention that only so you'll not be confused. The case is presented [on] the defendant's plea of not guilty.

Id. at 152-53. The Court of Criminal Appeals held that all of Burgess's arguments as to why the trial court's instructions constituted error were "wholly without merit." *Id.*

Burgess now argues that his trial counsel rendered deficient performance because they did not formally withdraw his plea of not guilty by reason of mental disease or defect before the jury venire heard discussion and questions about a mental state defense. Because of their delay, he contends that the prosecutor told the jurors that he had the burden to prove his mental state defense, that the jurors expected to hear evidence about a mental state defense, that the jurors were left with the impression that he was relying solely on a mental state defense and that his actual defense theory of an unintentional killing was undermined.

It is true that Burgess's trial counsel failed to withdraw his guilty plea before the selection of a jury began and that the prosecutor referred to the mental state defense while questioning the prospective jurors, some of whom became the actual jurors for Burgess's trial. On the other hand, Burgess pleads no specific facts that support his conclusions about what the jury expected to hear, what impressions they formed and how he knows that his actual defense theory was undermined in the minds of the jurors. Burgess fails

to plead specific facts that, if true, would entitle him to post-conviction relief. His conclusions about the jurors' expectations, impressions and disregard of his actual defense at trial are not supported by specifically pleaded facts and do not satisfy the specific pleading and full factual disclosure requirements of Rule 32.6(b), *Ala.R.Crim.P. Madison v. State*, 999 So.2d 561 (Ala. Crim. App. 2006).

Moreover, even if his trial counsel performed deficiently by failing to timely withdraw his plea of not guilty by reason of mental disease or defect, the prejudice prong of Burgess's ineffective assistance claim facially lacks merit. His argument ignores the trial court's instructions to the jury that he had properly withdrawn his mental state plea at the appropriate time, that he had decided to proceed solely on his plea of not guilty and that the jurors were not to hold Burgess's withdrawal of his mental state plea against him. Jurors are presumed to follow the trial court's instructions. *Holland v. State*, 588 So.2d 543, 549 (Ala.Crim.App. 1991). Burgess has not overcome that presumption by pleading specific facts indicating that his jury failed to comply with the instructions. He also disregards the Court of Criminal Appeals' findings that the trial court had properly instructed the jury and had not prejudiced him by improperly commenting on his failure to prove an insanity defense, destroying the presumption of innocence or creating an impression in the jurors' minds that they could hold his withdrawal of the mental state defense against him in their deliberations. *Burgess*, 827 So.2d at 153.

Burgess bears the burden to plead specific facts showing there is a reasonable probability that, but for his counsel's unprofessional error, the result of the guilt phase and penalty phase proceedings would have been different. The likelihood of a different result must be substantial, not just conceivable. *Harrington v. Richter*, 562 U.S. at 112. Given the trial court's instructions to the jury, the findings of the Court of Criminal Appeals and the speculative conclusions stated by Burgess in this subclaim, he has failed to establish a probability of a different result that is sufficient to undermine the Court's confidence in the actual outcome of his trial.

Accordingly, Burgess's III.C. ineffective assistance claim fails to satisfy the specific pleading requirements of Rule 32.6(b), fails to present a material issue of fact or law that would entitle him to relief, is facially without merit and is due to be dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

D. Trial Counsel Unreasonably Failed to Investigate, Prepare and Litigate the Change of Venue Motion.

i. Trial Counsel Unreasonably failed to Present Reasonably Available and Overwhelming Evidence that Mr. Burgess Could Not Receive a Fair Trial in Morgan County.

This claim is presented in Paragraphs 368 through 391 at pages 142 through 150 of Burgess's Second Amended Petition. In his direct appeal to the Alabama Court of Criminal Appeals, Burgess argued that the trial court erred in denying his motion for change of venue. After an extensive review, the Court of Criminal Appeals upheld the trial court's denial of a change of venue. *Burgess,* 827 So.2d at 160-61.

The trial court proceedings concerning Burgess's motion for change of venue took place on February 21 and 25 and March 9, 1994. His trial counsel presented testimony and documentary evidence relating to the crime, Burgess's arrest and the subsequent court proceedings through three representatives of six radio stations with major coverage in the Morgan County area; representatives of the three local television stations that broadcast in Morgan County; and a representative of The Decatur Daily, the only daily newspaper of general circulation in Morgan County. These presentations included televised newscast videos and newspaper articles that depicted or quoted Burgess's admissions to news reporters as he was being escorted from the Decatur Police Department to the Morgan County Jail. Burgess's trial counsel also presented evidence of news stories about the crime and Burgess's arrest that were published in the Huntsville Times. They called four Morgan County residents, who had been contacted by Decatur police investigators to get their signatures on a pre-printed affidavit, for the purposes of

discrediting the affidavits and successfully objecting to the State's offer to admit them during the change of venue hearing.

Before ruling on the motion for change of venue, the trial court randomly called twelve Morgan County jurors, who had been summoned for another court session, and conducted a mock voir dire to gather information about the jurors' exposure to different types of pretrial publicity or discussion about Mrs. Crow's murder, Burgess's alleged involvement and his televised admission to news reporters and the juror's opinions about Burgess's guilt or innocence. All twelve jurors knew about the murder from some source; eight had seen Burgess's televised admission; and seven had formed opinions about his guilt. Only one mock juror felt that she had been so influenced by news reports or broadcasts that she could not follow her juror's oath; the other eleven indicated that they could set aside their opinions and return a fair and impartial verdict.

In support of this ineffective assistance claim, Burgess does not allege or identify the specific items of relevant and reasonably available pretrial publicity that he contends his trial counsel failed to obtain and present to the trial court. In paragraphs 373 through 382 and 384 through 388, he merely provides conclusory statements or opinions about alleged inflammatory and prejudicial media coverage without specifying who broadcast or published the coverage, when it was broadcast or published and how or why it was substantially different from the testimony and evidence presented by his trial counsel in the hearing on the motion for change of venue.

Moreover, other than his bare conclusion that the trial court would have granted the motion and the outcome of the guilt and penalty phases of his trial probably would have been different had his trial counsel had obtained and presented unspecified radio or television broadcasts, newspaper articles or stories or other media, Burgess pleads no specific facts establishing that he was prejudiced by his counsel's alleged deficient performance. Conclusions in a Rule 32 petition, if unsupported by specific facts, will not satisfy the requirements for post-conviction relief. *Madison v. State*, 999 So.2d 561

(Ala. Crim. App. 2006). Burgess's claim that counsel's unreasonable performance prejudiced him must contain a clear and specific statement of the grounds, including the full disclosure of the facts supporting those grounds. Rule 32.6(b), *Ala.R.Crim.P.* Failing to set forth specific facts supporting both the deficient performance and prejudice prongs of his part III.D.i. ineffective assistance claim, Burgess has not satisfied the specific pleading requirements of Rule 32.

This particular claim also is not facially meritorious. The subject matter of the alleged inflammatory and prejudicial media coverage, which Burgess claims that his trial counsel failed to obtain and present to the trial court, actually were included in the evidence presented by his trial counsel during the hearing on the motion for change of venue. This presentation covered the period from January 26, 1993 up to the date of the hearing and included the extensive media coverage of the crime itself and Mrs. Crow's death; news broadcasts and published stories that quoted Burgess's statements and admissions to news reporters as he was being escorted from the Decatur Police Department to the Morgan County Jail; published articles about Mrs. Crow's reputation, her family and the feelings of some of her family members; and news broadcasts and publications about the number of murders in Morgan County in 1993, some of which associated Burgess together with his cousin, Roy Burgess, who was charged with capital murder in August of that year. Burgess fails to plead specific facts that, if true, would establish that the actual representation of his trial counsel concerning the motion to change venue fell below an objective standard of reasonableness under the circumstances and that it is reasonably probable that the outcome of his trial would have been different had his counsel presented more evidence.

Accordingly, Burgess's III.D.i. claim is due to be dismissed for the reasons discussed above. Rule 32.7(d), *Ala.R.Crim.P.*

ii. Trial Counsel Unreasonably Failed to Retain and Consult with a Social Science Expert Who Would have Presented a Content Analysis

of the Pretrial Publicity in Support of the Motion for Change of Venue.

This claim is presented in Paragraphs 392 through 408 at pages 150 through 155 of Burgess's Second Amended Petition. While Burgess argues that his trial counsel should have retained a social scientist to analyze the pretrial publicity, conduct a public opinion survey and give opinions about jury bias, he does not identify by name the social scientist who would have been ready, available and willing to provide these services had he or she been contacted by his counsel in 1993-1994 and does not describe with specificity the particular content of the social scientist's expected testimony. See *Smith v. State*, 71 So.3d at 33 ("We have held that a petitioner fails to meet the specificity requirements of Rule 32.6(b), Ala.R.Crim.P., when the petitioner fails to identify an expert by name or plead the contents of that expert's expected testimony."). Burgess's III.D.ii. ineffective assistance claim fails to satisfy the specific pleading and full disclosure requirements of Rule 32.6(b), *Ala.R.Crim.P.*

On Burgess's direct appeal the Alabama Court of Criminal Appeals found that his evidence presented during the hearing on the motion to transfer venue met the "saturation of the community" standard for showing inherent prejudice. However, the appellate court further determined that, except for the news stories showing and describing Burgess's televised conversation with the news reporters, "the pretrial reporting was factual, and did not contain inflammatory or prejudicial commentary. Pretrial publicity that is purely factual in nature is acceptable and will not support a change of venue." *Burgess*, 827 So.2d at 160-61, citing *Heath v. Jones*, 941 F.2d 1126, 1135 (11th Cir. 1991). Burgess fails to specifically plead what particular evidence or testimony a social scientist would have provided that would have convinced the trial court to change venue despite the factual pretrial reporting of Burgess's case.

Burgess contends that a social scientist would have testified about the overriding inflammatory impact of Burgess's statements to reporters as the police investigators escorted him to the Morgan County jail. He cites *Rideau v. Louisiana*, 373 U.S. 723, 83

S.Ct. 1417, 10 L.Ed.2d 663 (1963) for the proposition that publicizing a televised confession is prejudicial *per se*. On his direct appeal, Burgess likened his videotaped statements to the news reporters to the televised confession in *Rideau* which depicted the defendant confessing in response to the Louisiana sheriff's leading questions while flanked by two state troopers. The extreme situation in *Rideau*, said the Alabama Court of Criminal Appeals, did not exist in Burgess's situation because there was no evidence that his admissions to the reporters resulted from a police setup or conspiracy between the police and reporters. Rather, his admissions to the reporters with the cameras rolling "was publicity of his own making. And it was [Burgess's] conversation with the media that sensationalized what was otherwise straightforward, purely factual reporting of a murder investigation and subsequent arrest." *Burgess*, 827 So.2d at 160. The Court of Criminal Appeals concluded that Burgess was unable to show that the pretrial publicity, "much of it of his own making," was so inflammatory as to require a finding of inherent prejudice that warranted a change of venue. Burgess fails to plead specific facts that, if true, would establish a reasonable probability that the outcome of the hearing on his motion to change venue and the outcome of his trial would have been different solely by the inclusion of a social scientist in the proceedings. The likelihood of a different result must be substantial, not merely conceivable. *Harrington v. Richter*, 562 U.S. at 112. Burgess's present ineffective assistance claim lacks facial merit that would entitle him to relief.

Accordingly, Burgess's III.D.ii. ineffective assistance claim fails to satisfy the specific factual pleading requirements of Rule 32.6(b), fails to create a material issue of fact or law that would entitle him to relief, is facially without merit and is due to be dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

iii. Trial Counsel Unreasonably Failed to Conduct a Public Opinion Poll or Survey to Assess the impact of the Pretrial Publicity on Whether Mr. Burgess Could Receive a Fair Trial in Morgan County.

This claim is presented in Paragraphs 409 through 412 on pages 155 and 156 of Burgess's Second Amended Petition. He alleges that had his trial counsel conducted a public opinion poll or survey to determine the impact of publicity on his right to receive a fair trial in Morgan County, the poll or survey would have shown that adverse pretrial publicity had saturated the community and caused it residents to form the opinion that he was guilty of capital murder.

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

Similarly, Burgess concludes that, had his counsel conducted a public opinion poll or survey, it would have shown that he could not receive a fair trial in Morgan County. He does not allege that he has conducted an opinion poll or survey that supports his conclusion. Burgess further fails to plead specific facts that show a number or percentage of Morgan County residents who had formed the opinion that he was guilty of capital when his motion to change venue was heard in February 1994; that reflects whether their opinions were fixed and immovable; that shows whether they could lay aside the opinions about his guilt that were based on what they had seen, read or heard; or that discloses whether they could render a fair and impartial verdict based on the

evidence presented in court and the court's instructions about the applicable law. See *Ex parte Fowler*, 574 So.2d 745, 749 (Ala. 1991).

Additionally, his claim that he was prejudiced by his trial counsel's failure to conduct an opinion poll or survey is without merit. Even if a poll or survey showed that all residents in Morgan County had formed the opinion that he was guilty based on pretrial publicity, that result would not have mandated a change of venue. Burgess's speculation and conclusions are based on the incorrect legal premise that, because prospective jurors have read, seen or heard something about a case and have formed impressions or opinions about a defendant's guilt, then actual prejudice exists that is sufficient to move the case to another venue. It has long been recognized that jurors do not have to be totally ignorant about the facts and issues involved in a particular case in order to reach an unbiased verdict. *Nelson v. State*, 440 So.2d at 1131. Many years ago the United States Supreme Court reasoned:

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

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

Had Burgess's trial counsel obtained a public opinion poll or survey as he suggests, the results of such poll or survey, in and of itself, would not have established whether the trial should have been moved from Morgan County. The usual method for establishing the existence of inflammatory publicity and actual juror prejudice is through an extensive and thorough *voir dire* examination of prospective jurors. *Hart v. State*, 612 So.2d 520 (Ala. Crim. App. 1992). To show that he was prejudiced, Burgess must

establish a reasonable probability that the results of such poll or survey would have caused the trial court to change venue and would have caused the outcomes of his trial to have been different. He fails to do so by pleading specific supporting facts that, if true, would entitle him to relief.

Accordingly, Burgess's III.D.iii. ineffective assistance claim is insufficiently pleaded under Rule 32.6(b), is facially without merit and is due to be dismissed pursuant to Rule 32.7(d), *Ala.R.Crim.P.*

iv. Counsel Were Ineffective with Regard to the Sample Jury Proceeding in Unreasonably Failing to Participate in the Proceeding and Show How the Outcome Supported Mr. Burgess's Motion for Change of Venue.

This claim is found in Paragraphs 413 through 423 at pages 156 through 160 of Burgess's Second Amended Petition.

Before adjourning the second hearing day on Burgess's motion for change of venue, the trial court advised the prosecutor and defense counsel that he had a jury term scheduled to begin March 7, 1994 that did not include Burgess's case and that he was thinking about empaneling a mock or sample jury from the actual jurors summoned for that week to ask them questions that might assist him in ruling on the change of venue issue. The trial court stated that after he determined whether a legal basis existed for this information gathering process, he would be back in touch with the attorneys.

On March 9, 1994, with Burgess, his trial counsel and the prosecutor present, the trial court had a randomly selected panel of twelve jurors brought to his courtroom. After explaining that he wanted to ask them questions pertaining to some legal decisions that he would have to make in a case set for trial in the next few months, the trial court administered the jurors' oath and identified the case set for a future trial as being Burgess's case.

The judge then began an extensive examination of the sample jurors about their

news viewing and reading habits, their acquaintance with Mrs. Crow, their exposure to media coverage and general conversations about the robbery of her business and her death, their knowledge about Burgess being linked to her murder, their viewing of the televised statements made by Burgess to news reporters, their recollections of what he said, their feelings and opinions about his guilt or innocence, whether they could presume Burgess innocent at the start of his trial before any evidence was presented, and their ability to comply with their jurors' oath regardless of their opinions about his guilt or innocence. At the end of his questions, the trial court asked the attorneys if they had "any other written notes" for him to look at and stated that he would "be glad to look at them." (Trial Transcript at 236). Burgess's trial counsel responded "No, sir," and the trial court took the motion for change of venue under advisement.

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

Moreover, Burgess does not specifically plead the questions, instructions, comments and arguments that he contends his legal counsel should have injected into the sample jury proceeding. Nor does he allege what the sample jurors' responses would have been, how those responses would have differed from the responses that were actually elicited through the trial court's extensive examination and how the sample jurors' responses to his counsel' questions, arguments or comments would have caused a different ruling on the change of venue issue. Burgess fails to satisfy his burden of

pleading and showing by a preponderance of the evidence the facts necessary to establish that his trial counsel rendered constitutionally inadequate assistance in the sample jury proceeding. His conclusions, which are not based on specifically pleaded facts, do not satisfy the requirements of Rule 32.6(b), *Ala.R.Crim.P.*

Although Burgess claims he was prejudiced because his trial counsel's failure "to effectively litigate the issues with respect to the sample jury" resulted in the denial of his motion for change of venue, he does not plead specific facts indicating why, had his trial counsel done something more, the trial court would have been required to grant the change of venue and why it is reasonably probable that the outcomes of his guilt and penalty phases would have been different. The likelihood of a different result must be substantial, not just conceivable. *Harrington v. Richter*, 562 U.S. at 112. The facts pleaded by Burgess, even if true, would not establish prejudice at an evidentiary hearing.

Accordingly, his subclaim III.D.iv. ineffective assistance claim does not satisfy the specific factual pleading and full disclosure requirements of Rule 32.6(b), fails to plead facts that, if true, would entitle him to relief, is facially without merit and is due to be dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

v. Trial Counsel Unreasonably Failed to Raise "Actual Prejudice" as a Separate Ground for Change of Venue.

In his claim presented in Paragraphs 424 through 428 on pages 160 and 161 of the Second Amended Petition, Burgess states that "[a]s a separate, additional basis for the motion for change of venue, counsel unreasonably failed to argue that the results of the sample jury showed 'actual prejudice' under *Irvin v. Dowd*, 366 U.S. 717, 723-28 (1961)." He then ends this claim with the conclusory statements in Paragraph 428 that "[h]ad counsel based their motion and/or renewed their motion for change of venue based on a showing of 'actual prejudice,' it is reasonably probable that the court would have granted the motion for change of venue" and that the results of the guilty and penalty

phases would have been different.

It appears that trial counsel in their change of venue motion captioned "Motion to Change Place of Trial" raised "actual prejudice" as a ground, stating:

> 4. It is reasonably certain that it will be impossible to strike a jury for the trial of this cause so as to exclude persons who have read, seen or heard the media accounts of the event and as a result have been extremely prejudiced against the Defendant and thus incapable of rendering an unbiased verdict.
>
> 5. The news accounts of the event made the basis of the indictment; including newspaper articles, television telecasts and radio broadcasts, were so biased and prejudiced against the Defendant that he cannot receive a fair and impartial trial and an unbiased verdict cannot be rendered in Morgan County, Alabama.

(Clerk' Record 116-118).

Further, in his argument after presenting evidence to the trial court, lead counsel Lavender emphasized the importance of changing venue by pointing out how much time and preparation defense counsel would have to invest in selecting "a jury that has been subjected to the publicity that these people have." He also addressed the highly publicized statements that Burgess had made to news reporters while being escorted to the Morgan County jail, arguing to the trial court: "It's really whether or not my client has been tried and convicted by the media coming across the street... But he was subjected to that on T.V. with one police officer on each side... Four of the people they [the State] had affidavits from said 'I believe he is guilty but I can give him a fair trial'." (Court Reporter's Transcript 206-207).

Burgess's contention that his trial counsel failed to assert "actual prejudice" in litigating his motion for a change of venue is clearly misplaced. Likewise, his argument that the results of the trial court's sample jury proceeding showed "actual prejudice" that required his trial counsel to renew the motion for change of venue is meritless. The generally accepted method to establish the existence of actual jury prejudice is through voir dire examination of the prospective jurors who are summoned to try the case. *Hart*

v. State, 612 So.2d 520 (Ala. Crim. App. 1992). See *Arthur v. State*, 472 So.2d 650 (Ala. Crim. App. 1984) (describing the method for showing actual jury prejudice to support a change of venue as "an extensive and thorough voir dire examination of prospective jurors"). The sample jurors did not constitute part of the actual jury venire that was summoned for the trial of Burgess's case; therefore, since they were not actual prospective jurors, the sample jurors' impressions and opinions were merely informational and not an infringement of Burgess's due process rights.

Accordingly, Burgess's III.D.v. claim raises no material issue of fact or law that would entitle him to relief, is facially without merit and is due to be dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

vi. Trial Counsel Unreasonably Failed to Conduct an Adequate Voir Dire Regarding the Pretrial Publicity and to Renew the Change of Venue Motion Prior to and During Jury Selection.

Burgess makes this claim in Paragraphs 429 through 435 at pages 161 through 164 of his Second Amended Petition.

The jury selection record (Trial Transcript 121-604) reflects that 54 prospective jurors were randomly selected from a larger venire to be questioned for the trial of Burgess's case. For the purposes of voir dire, they were divided into four panels containing 12 prospective jurors and one panel of six. In *Haney v. State*, 603 So.2d 368, 402 (Ala. Crim. App. 1991), aff'd 603 So.2d 412 (Ala. 1992), cert. denied 507 U.S. 925 (1993), the Alabama Court of Criminal Appeals recognized that questioning prospective jurors in panels satisfied due process requirements and assured the discovery of any prejudice on the part of the jurors. Burgess's counsel participated in questioning prospective jurors on all five of the panels and challenged nine for cause due to bias arising from what they had read, seen or heard about the case. The trial court granted seven of those nine challenges.

Burgess argues that "with few exceptions," his trial counsel did not question

prospective jurors who had read, seen or heard pretrial publicity about the sources of their information, the frequency of their exposure or the content of what they learned. His argument, however, is not supported by almost 500 transcript pages. In many instances the prosecutor's questions to prospective jurors about their exposure to pretrial publicity eliminated the need for Burgess's trial counsel to go back over the same subject matter. His counsel did, in fact, ask many, many questions of the prospective jurors about their exposure to various types of pretrial publicity; how they were affected by what they read, heard or saw; opinions they had formed; whether they would require Burgess to prove his innocence; whether they could decide the issues solely on the evidence presented at trial and the law; and many other probing questions dictated by the prospective jurors' individual responses.

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

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

> Your Honor, we had earlier in this trial filed a motion for change

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

(Trial Transcript 717-720). To the extent that Burgess claims his counsel did not ask sufficient questions, he must allege specific facts to overcome the presumption that the challenged omissions might be considered sound trial strategy. *Strickland*, 466 U.S. at 689. He has failed to do so and this claim does not satisfy the specific pleading and full disclosure requirements of Rule 32.6(b), *Ala.R.Crim.P.*

Burgess further contends that his trial counsel performed deficiently by failing to renew the motion for change of venue during or after voir dire of the venire. In this contention ignores the long standing principle that jurors do not have to be totally ignorant about the facts and issues involved in a particular case in order to reach an unbiased verdict. *Nelson v. State*, 440 So.2d at 1131; *Snyder v. State*, 893 So.2d 488, 511 (Ala. Crim. App. 2003). Also, that some of the prospective jurors had preconceived impressions or opinions about his guilt based on pretrial publicity, without more, does not rebut the presumption of the prospective jurors' impartiality. A change in venue is not warranted if the jurors put aside their impressions or opinions and render a verdict based on the evidence presented in court. *Id.* Burgess's trial counsel removed for cause the prospective jurors who had fixed opinions about his guilt. He fails to identify one or more specific jurors who were biased against him and were not removed from the jury by

his counsel. He also does not plead specific facts showing either actual prejudice that tainted the entire venire or a reasonable probability that the trial court would have granted a renewed motion for change of venue. This portion of his claim is insufficiently pleaded under Rule 32.6(b) and also lacks facial merit.

Accordingly, Burgess's III.D.vi. ineffective assistance claim is due to be dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

E. Trial Counsel's Performance During Jury Selection was Ineffective.

i. Trial Counsel Unreasonably Failed to Adequately Challenge the Systematic Exclusion of African Americans from Morgan County Juries and to Preserve the Challenge for Review.

Burgess alleges in Paragraphs 436 through 442 on pages 164 through 167 of his Second Amended Petition that his trial counsel rendered deficient assistance because they did not provide their own independent statistics and did not call witnesses to prove the underrepresentation of African Americans on the venire from which his jury was drawn.

The Alabama Court of Criminal Appeals addressed on Burgess's direct appeal his argument that African Americans were systematically excluded from the jury rolls of Morgan County in violation of his constitutional right to a petit jury selected from a fair cross section of the community. The Court of Criminal Appeals recognized that a *prima facie* violation of the fair cross-section requirement is established when a defendant shows:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under-representation is due to systematic exclusion of the group in the jury selection process.

Burgess, 827 So.2d at 185, quoting from *Duren v. Missouri*, 439 U.S. 357, 364, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979).

The only witness to testify during the hearing on Burgess's motion to quash the jury venire was the Clerk of the Morgan County jury commission. She testified about how the venire was summoned for the week when Burgess's trial began, the total number of potential jurors who were summoned, how many African Americans were deferred or excused from the venire before the trial term, how many of the potential jurors actually reported for that term of court and how many additional potential jurors, including African Americans, were excused or deferred after reporting. The Clerk of the jury commission further testified to the percentages of whites and African Americans who composed the jury venire, the percentages of whites and African Americans in the entire population of Morgan County and the percentage of African Americans over 19 years old (the minimum age for jury eligibility) in relation to the county population. After considering this evidence and the applicable law, the trial court denied Burgess's motion to quash the venire.

He contends that, had his counsel obtained and presented accurate demographic data concerning the population of African Americans aged 19 and older, the evidence presented to the trial court would have shown that African Americans were underrepresented on the venire in relation to the number of such persons in the community. Assuming for the sake of argument that the percentages he alleges in this claim are correct according to the Census Bureau, "[t]he mere recitation of the percentage disparity between the population of blacks in [Morgan] County and the number of blacks on the jury venire is not sufficient" to support a conclusion that blacks were not fairly represented. *Burgess*, 827 So.2d at 185, quoting from *Stewart v. State*, 730 So.2d 1203, 1238 (Ala. Crim. App. 1996). Burgess's allegation that African Americans were underrepresented on his jury venire amounts to a bare conclusion of a constitutional violation, does not plead specific admissible facts that, if true, would entitle him to relief and does not satisfy the pleading requirements of Rule 32.6(b), *Ala.R.Crim.P*

Finally, other than arguing that his trial counsel were deficient because they failed

to obtain documents and call witnesses from the Alabama Administrative Office of Courts relating to its procedures for creating Morgan County's 1993 and 1994 master jury lists, Burgess pleads no facts indicating that African Americans were underrepresented "due to systematic exclusion of the group in the jury selection process." *Duren v. Missouri*, 439 U.S. at 364. Nor does he specifically plead what documents or witnesses his counsel should have obtained and presented and what particular facts the documents and witnesses would have provided to prove the systematic exclusion of African Americans in the Morgan County jury selection process. Therefore, Burgess's argument that his trial counsel provided ineffective assistance and prejudiced him by failing to adequately challenge the systematic exclusion of African Americans does not satisfy the specific factual pleading and full disclosure requirements of Rule 32.6(b), *Ala.R.Crim.P.*

Additionally, Burgess's III.E.i. claim fails to present a material issue of law or fact that would entitle him to relief, is facially devoid of merit and is due to be dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

ii. Counsel Unreasonably failed to Object to the Reduction of the Venire in Mr. Burgess's Absence.

Burgess contends in Paragraphs 443 through 446 at pages 167 and 168 of his Second Amended Petition, contends that his trial counsel provided ineffective assistance by failing to object when the trial court directed the Clerk of the Morgan County jury commission to randomly select 54 prospective jurors from the 84-member jury pool that remained after the court excused 15 who had various problems with being sequestered for the capital trial. This selection process outside his presence, says Burgess, denied his right to be present during all critical stages of his trial.

Addressing the underlying basis for this claim on Burgess's direct appeal, the Alabama Court of Criminal Appeals first found that the Clerk of the jury commission

merely performed a purely ministerial function that was delegated to her by the trial court. Based on *Windsor v. State*, 683 So.2d 1021, 1026 (Ala. 1994), it was not error for the trial judge to delegate to another court official the authority to excuse potential jurors outside the defendant's presence. The Court of Criminal Appeals further noted that "due process requires that the defendant be personally present 'to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.'" *Burgess*, 827 So.2d at 186, quoting *Finney v. Zant*, 709 F.2d 643, 646 (11th Cir. 1983). The random reduction of the venire by the Clerk of the county jury commission did not constitute such a situation where due process required Burgess to be present. The Court of Criminal Appeals concluded that the trial court committed no error by allowing the random culling of the venire to be conducted outside his presence.

In a more recent case, *Jackson v. State*, 791 So.2d 979 (Ala. Crim. App. 2000), the defendant argued for the reversal of his capital murder conviction on the ground that he was not present during the initial portion of the striking of his jury. The Court of Criminal Appeals pointed out that a defendant's right to be present at all stages of a criminal trial is not absolute, stating:

> This right extends to all hearings that are an essential part of the trial – i.e., to all proceedings at which the defendant's presence 'has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'

Id. at 1004, quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-106, 54 S.Ct. 330, 78 L.Ed. 674 (1934). Although it recognized that jury selection was a critical stage of Jackson's trial, he had made no showing that the striking process would have been different or the outcome of his trial might have changed if he had been present during the initial strikes by the State and his trial counsel. His absence, therefore, did not constitute error.

Burgess cites no binding or persuasive authority for his claim that the jury commission Clerk's random process of selecting 54 prospective jurors for Burgess's trial

was legally improper. He pleads no specific facts showing that the process was tainted by fraud or conducted in a purposeful or systematic manner to exclude all but two African Americans from Burgess's actual venire. Burgess's pleadings fail to make a showing that, had his trial counsel objected, the trial court would have been obligated to sustain the objection and to reduce the venire in his presence. According to the Alabama Court of Criminal Appeals, he had no right to be present during this exercise of a purely ministerial function. *Burgess*, 827 So.2d at 186. Counsel cannot be found to be ineffective for failing to make an objection for which there is no legal basis. *Boyd v. State*, 746 So.2d 364 (Ala. Crim. App. 1999).

Finally, even if reasonable assistance required his trial counsel to object to the trial court's order for the Clerk to randomly reduce of the venire, Burgess pleads no specific facts that show he was prejudiced. Specifically, he alleges no specific fact indicating that, had he been present during the random reduction process, different prospective jurors would have been selected and more than two would have been African Americans. Nor does he allege facts showing that the Clerk used a process other than random selection or engaged in a process to systematically exclude African Americans from the venire. Lastly, Burgess pleads no specific facts establishing that, but for his counsel's failure to object to the trial court's order for the jury commission Clerk to randomly select a 54-member venire for his trial, the outcomes of his trial probably would have changed.

Accordingly, Burgess's III.E.ii. is both insufficiently pleaded under Rule 32.6(b) and facially meritless and is due to be dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

iii. Trial Counsel Unreasonably Failed to Challenge Jurors for Cause.

Burgess in Paragraphs 447 through 449 at page 168 of his Second Amended Petition claims that his trial counsel performed unreasonably by failing to challenge for

cause jurors identified as "P" and "Ch" on the ground that they were biased against him. "To justify a challenge of a juror for cause there must be … some matter which imports absolute bias or favor, and leaves nothing to the discretion of the trial court." *Nettles v. State*, 435 So.2d 146, 149 (Ala. Crim. App.), aff'd. *Ex parte Nettles*, 435 So.2d 151 (Ala. 1988). If a "juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court, he is not subject to challenge for cause." *Daily v. State*, 828 So.2d 340, 343 (Ala. 2001).

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

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

newspaper or had seen on television concerning the case, Juror Ch did not respond "yes." (Trial Transcript at 362-65).

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

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

Moreover, Burgess has failed to plead specific facts establishing a reasonable probability that the trial court would have granted challenges for cause directed by his

trial counsel at Jurors P and Ch or that, if the trial court had granted the challenges, the outcomes of his trial probably would have been different. Given the "overwhelming" evidence that Burgess robbed and shot Mrs. Crow, *Burgess*, 827 So.2d at 171, the likelihood of a different outcome resulting from a change in the composition of the jury was not substantial.

Accordingly, Burgess's III.E.iii. ineffective assistance claim fails to satisfy the specific factual pleading and full disclosure requirements of Rule 32.6(b), is meritless on its face and is due to be dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

iv. Trial Counsel Unreasonably Failed to Object to the Prosecution's Unconstitutional Discriminatory Peremptory Challenges Against Women.

In Paragraphs 450 through 468 (pages 169-184) of his Second Amended Petition, Burgess contends that his trial counsel performed unreasonably because they did not make a motion or objection under *J.E.B. v. Alabama*, 511 U.S. 127, 129 (1994) on the ground that the prosecutor exercised discriminatory peremptory strikes to remove women from the jury venire.

On his direct appeal to the Alabama Court of Criminal Appeals, Burgess argued that the State had used its peremptory challenges to discriminate against women in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) and *J.E.B. Burgess*, 827 So.2d at 149-150. In his argument to the Court of Criminal Appeals, Burgess pointed to the same facts that he highlights in his current ineffective assistance claim: that the State used 11 of its 15 peremptory strikes to remove 11 of 21 women from the venire, resulting in a jury composed of eight men and four women. He requested that the case be remanded to the trial court for a hearing to require the prosecutor to give race-neutral reasons for striking the women. After reviewing the trial record in light of the factors set out in *Ex parte Branch*, 526 So. 609 (Ala. 1987), the Court of Criminal Appeals opined:

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

Burgess, 827 So.2d at 150.

Burgess now appears to argue that the Court of Criminal Appeals' decision on his *J.E.B.* issue should be disregarded because it is merely a finding of no "plain error" under Rule 45A, *Ala.R.App.P.* He reasserts the contention that the prosecutor's use of his peremptory strikes to exclude women from his petit jury supports a *prima facie* showing of discrimination that his trial counsel could not have reasonably ignored. However, the failure of counsel in a capital case to raise any particular objection or claim does not *per se* fall below an objective standard of reasonableness. *Horsley v. State*, 527 So.2d 1355, 1359 (Ala. Crim. App. 1988). While Burgess cites *Yelder v. State*, 575 So.2d 137 (Ala. 1991) for the principle that trial counsel's failure to make a timely *Batson* objection is presumptively prejudicial to the defendant, our Supreme Court has ruled that the "holding in Yelder does not relieve the defendant of his burden of meeting the first prong of the Strickland test – a showing of deficient performance by counsel." *Ex parte Frazier*, 758 So.2d 611, 615 (Ala. 1999). Recently in *Woodward v. State*, 276 So.3d 713, 751 (Ala. Crim. App. 2018), the Alabama Court of Criminal Appeals specifically held that counsel's failure to make a *Batson* objection in a capital case when there is a *prima facie* case of discrimination by the State is not *per se* deficient performance.

In support of his present claim Burgess fails to plead specific facts indicating that his trial counsel's failure to make a *J.E.B.* motion or objection was not a sound strategic or tactical decision based on their satisfaction with the selected jury or their feelings that they had seated a jury that would favor their client. See *Carruth v. State*, 165 So.3d 627, 639 (Ala. Crim. App. 2014) (holding that the Rule 32 petitioner had failed to plead sufficient facts showing that counsel's decision not to make a *Batson* motion or objection was unsound strategy and did not reflect counsel's satisfaction with the composition of the jury that was selected); and *Woodward*, 276 So.3d 713, 751 ("we cannot say that counsel's strategic decision [to forego a Batson objection because they believed they had seated a jury favorable to their client given the circumstances of the case] was unreasonable."). Burgess's counsel were dealing with a case in which there had been extensive pretrial publicity, their client had made statements and admissions against his interests in a televised interview with media reporters, they were facing strong evidence that he had robbed and shot the victim, they hoped to convince jurors that the shooting was accidental and as a last resort, if their client was found guilty of the capital offense, they had jurors who would be more inclined to vote for a life sentence rather than death. In the face of a multitude of concerns and considerations, counsel's choice to not make a *J.E.B.* motion or objection and to go to trial with the selected jury was not *per se* unreasonable assistance.

Finally, before Burgess's trial counsel may be determined to have acted unreasonably, they must have had a valid legal basis for making a *J.E.B.* motion or objection. That the Court of Criminal Appeals on direct appeal reviewed Burgess's *J.E.B.* gender discrimination claim under the plain error standard does not open a legal door for Burgess to relitigate that issue under the guise of ineffective assistance of counsel in a post-conviction proceeding. See *Williams v. State*, 783 So.2d 108, 133 (Ala. Crim. App. 2000) ("Because we determined that the remarks did not constitute plain error even if objectionable, appellant cannot relitigate the issue under the guise of

ineffective assistance of counsel in a post-conviction proceeding."). The express findings and opinion of the Alabama Court of Appeals that no prima facie case of gender discrimination was shown by the prosecutor's striking of 11 women from the venire belies any legal basis that Burgess's trial counsel had for making a *J.E.B.* motion or objection. "Counsel cannot be said to be ineffective for not filing a motion for which there is no legal basis." *Boyd v. State*, 746 So.2d at 397.

Accordingly, Burgess's III.E.iv. ineffective assistance claim fails to plead specific facts and make the full disclosures required by Rule 32.6(b), is not facially meritorious and is due to be dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

F. Counsel Unreasonably Failed to Move to Quash the Indictment Based on Discrimination in the Selection of Grand Jury Forepersons.

This claim is set out in Paragraphs 469 through 477 at pages 184 through 186 of Burgess's Second Amended Petition.

While it is true that his trial counsel did not file a motion to quash or dismiss the indictment returned against Burgess by the Morgan County grand jury in March 1993, this omission did not foreclose Burgess from seeking review on direct appeal of his claim that African Americans were discriminated against in the selection of grand jury forepersons in Morgan County. See *Pace v. State*, 714 So.2d 332, 335 (Ala. 1997) ("[B]ecause Pace was sentenced to death following his conviction on the charge of capital murder, his failure to make a timely motion to dismiss his indictment does not preclude our review of this issue – in death penalty cases, both the Court of Criminal Appeals and this Court take notice of any 'plain error.' Rules 39(k), 45A, Ala.R.App.P."). In view of Burgess's failure to seek direct appellate review of the substantive ground underlying his ineffective assistance claim – that African Americans were discriminated against in the selection of the foreperson of the grand jury that indicted him – he is procedurally barred from obtaining post-conviction relief upon a

ground which could have been but was not raised on appeal. Rule 32.2(a)(5), *Ala.R.Crim.P.*

Assuming that this ineffective assistance claim is not procedurally barred, Burgess must plead specific facts, not mere conclusions, that would entitle him to relief. He has failed to do so in several respects. Although he concludes that his grand jury was unlawfully constituted, Burgess does not plead specific facts showing the total number of persons on the venire from which the grand jury was chosen, the racial composition of the venire, the process by which the grand jurors were selected, the racial composition of the grand jury that indicted him and the race or gender of the grand jury foreperson. He makes the bare assertion that the master jury list from which his grand jury was drawn excluded age-eligible African Americans, but pleads no specific facts showing the discriminatory and systematic exclusion of age-eligible African Americans or identifying witnesses who would give testimony concerning to the process that was used to create Morgan County's 1993 master jury lists. Rather, he merely alludes to percentages taken from "the United States Census Bureau" without specifying the applicable year of the census and without authenticating through a Census Bureau representative the racial demographics of Morgan County in March 1993 and the comparative percentages he quotes in Paragraph 472. Even if the disparity percentages are correct, "[t]he mere recitation of the percentage disparity between the population of blacks in [Morgan] County and the number of blacks on the jury venire is not sufficient" to support the argument that African Americans were excluded from his grand jury chosen from that venire. *Stewart*, 730 So.2d at 1238.

Additionally, except for alleging that African Americans historically were excluded through racial discrimination from service as grand jury forepersons in Morgan County, he pleads no facts that make a *prima facie* showing that the foreperson of his grand jury was selected pursuant to a procedure "that [was] susceptible of abuse or [was] not racially neutral," thereby supporting a presumption of racial discrimination. *Ex*

parte Drinkard, 777 So.2d 295, 303 (Ala. 2000), citing *Rose v. Mitchell*, 443 U.S. 545, 565 (1979). *Drinkard* is a Morgan County case in which the defendant was indicted for capital murder in 1993, the same year as Burgess. The Alabama Supreme Court expressly noted that Morgan County had changed its method of selecting grand jury forepersons: "Before 1993, the trial court appointed grand-jury forepersons, based on the recommendation of the prosecutor. Since that time, grand-jury forepersons have been selected by the members of the grand jury itself." *Id.* at 304. Given the new method for choosing grand jury forepersons that was in existence when the grand juries indicted Drinkard and Burgess, that method "forecloses a question of discrimination in the judicial process." *Id.*

However, even if it is assumed that discrimination in the selection of the foreperson of Burgess's grand jury did occur, there would be "no invasion of the 'distinctive interests of the defendant protected by the Due Process Clause'." *Hobby v. United States*, 468 U.S. 339, 346 (1984). In short, Burgess could not have suffered any prejudice because his allegations fail to establish that the grand jury itself was improperly constituted and because the role of an Alabama grand jury foreperson is so ministerial that Burgess was not deprived of a fundamentally fair grand jury hearing or a subsequent fair trial. See *Pace*, 714 So.2d at 337.

Burgess's III.F. ineffective assistance claim does not satisfy the specific factual pleading requirements of Rule 32.6(b), fails to present a material issue of fact or law that would entitle him to relief, is facially without merit and is due to be dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

G. Trial Counsel Were Ineffective in Unreasonably Failing to Investigate and Properly Litigate the Motion to Suppress Mr. Burgess's Statements and the Evidence Seized Upon his Unlawful Arrest.

i. Trial Counsel Failed to Investigate and Adequately Litigate the Motion to Suppress Mr. Burgess's Statement to Police.

This ineffective assistance claim is presented in Paragraphs 478 through 495 on pages 187 through 193 of Burgess's Second Amended Petition. He initially suggests that his trial counsel performed unreasonably by failing to obtain rulings on their suppression motion in advance of the trial. While Burgess alleges that the "jury would never have heard that Mr. Burgess had 'confessed' to the shooting or that police had found the murder weapon in the car Mr. Burgess was driving" (Second Amended Petition at Paragraph 479) had his counsel obtained suppression rulings before the trial began, that allegation is not correct for two reasons.

First, the trial record actually shows that Burgess's counsel and the trial court discussed before trial when to take up the suppression issues. At that time the trial court directed Burgess's counsel to raise their various suppression issues outside the jury's presence when the confession and physical evidence seized from Burgess were about to be offered. To assure that Burgess's confession to the police and the discovery of the weapon in the car he was driving would not be disclosed to the jury during voir dire and opening statements, his trial counsel obtained a concession from the prosecutor that he would not mention anything about the disputed evidence before the suppression issues were ruled on by the trial court. (Trial transcript at 751-754).

Second, to the extent that Burgess suggests his trial counsel should have prevented the jurors from learning before evidence was presented about his televised statements to news reporters, that suggestion is misplaced. As a part of voir dire of the venire to determine if prospective jurors had seen or read anything about the case, some venire members necessarily disclosed that they had seen Burgess's televised statements to the news media after his arrest. There is nothing that Burgess's counsel could have done to prevent those revelations during voir dire. On the other hand, the record discloses that the jury actually heard nothing about Burgess's statement to the police and the seizure of the murder weapon until after the trial court held an extensive suppression hearing and

made its rulings. Burgess clearly suffered no prejudice resulting from his trial counsel's decision to not seek rulings on his motions to suppress in advance of the trial. This portion of his ineffective assistance claim is facially meritless.

The hearing on defense counsel's motions to suppress began outside the jury's presence before the prosecutor called his first of several witnesses whose testimony would pertain to the suppression issues. (Trial transcript at 932). As to Burgess's claim that trial counsel ineffectively presented the motion to suppress his written statement to the police investigators, he specifically contends that his trial counsel unreasonably failed to introduce evidence about the Decatur police investigators' interrogation practices, techniques and strategies. In support of this contention he recites portions on his own testimony and the investigators' testimony presented during the hearing which, in many critical respects, were conflicting and required the trial court to make credibility determinations. Burgess discusses literature on the subject of established interrogation techniques, but pleads no specific facts showing a reasonable probability that his trial counsel would have been successful in suppressing his statement to the police had they used the literature during the suppression hearing.

In its ruling that admitted into evidence Burgess's statement to the police, the trial court acknowledged that he had invoked his right to counsel at the beginning of the investigators' interview. However, the trial court was reasonably satisfied that Burgess himself – not an investigator – initiated a subsequent conversation that led to his knowing and intelligent waiver of his right to counsel and his consent to make a statement which was neither coerced nor elicited by the police. *Burgess v. State*, 827 So.2d at 174-75.

Moreover, the Alabama Court of Criminal Appeals performed an in-depth examination of both the applicable constitutional principles and the suppression hearing testimony in the trial record, including the specific testimony about "small talk" that had occurred after Burgess invoked his right to counsel. The Court of Criminal Appeals expressly found that the "small talk" that continued between the investigator and

Petitioner did not amount "to the functional equivalent of an interrogation" and then concluded that "Burgess initiated further conversation about the murder/robbery investigation;" that the investigator in his responses did not use "compulsion, ploy or artifice" to obtain an incriminating statement; and that Burgess's subsequent decision to make an incriminating statement did not result from continued police interrogation after he requested an attorney. *Id.* at 175-76.

While Burgess contends that his trial counsel could have established during the suppression hearing that the investigator to whom he confessed followed a planned investigation strategy, the investigator's alleged illegal or overreaching strategy was reviewed and decided adversely to Burgess by both the trial court and the Court of Criminal Appeals. He pleads neither specific facts nor applicable law establishing either that the investigator's strategy, if followed, was improper or illegal under the circumstances or that the trial court and Court of Criminal Appeals failed to correctly find the facts and apply the law existing at the time. Burgess ineffective assistance allegations consist primarily of bare conclusions that are unsupported by specific facts and that fail to establish that his trial counsel's representation on the suppression issues fell below an objective standard of reasonableness or probably prejudiced him as to the outcomes of the suppression hearing and his trial.

Accordingly, Burgess's III.G.i ineffective assistance claim fails to satisfy the specific pleading requirements of Rule 32.6(b), *Ala.R.Civ.P.*, is not facially meritorious and is due to be summarily dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

ii. Trial Counsel Unreasonably Failed to Investigate and Adequately Litigate the Motion to Suppress Mr. Burgess's Statements to the Media.

Burgess makes this claim in Paragraphs 496 through 503 set on pages 193 through 196 of his Second Amended Petition. Burgess argues that his trial counsel performed unreasonably by failing to present available evidence in support of the motion to suppress

his statements made to news reporters during his transfer from the Decatur Police Department to the Morgan County Jail. Such available evidence, he contends, would have established that Decatur police officers planned to parade him before the news media, contacted members of the media before commencing the transfer and deliberately paraded him along the most visible of three routes they could have taken during the transfer.

In support of this claim, Burgess recites portions of actual evidence presented to the trial court during the suppression hearing – none of which consists of specific facts that logically and reasonably support his allegations that the Decatur police consciously planned in advance of the transfer to subject him to questions from news reporters and contacted news outlets to have their reporters available during Burgess's transfer to the Morgan County Jail. Moreover, Burgess pleads no specific facts that identify what "reasonably available evidence" his trial counsel could have presented to establish a plan or conspiracy by the Decatur police to have the news media elicit a public, videotaped statement-against-interest from him.

Burgess's present claim is closely akin to his direct appeal argument that the trial court erred in failing to suppress the statements he made to the news media because the police "knowingly subjected [him] to the highly charged and provocative atmosphere of the media circus" which resulted in his incriminating remarks. *Burgess v. State*, 827 So.2d at 176-77. After examining the record and viewing the videotape of Burgess's statements to the news reporters, the Alabama Court of Criminal Appeals found no facts that supported his contention that the police were complicit with the news reporters, no evidence of a relationship in which the media was acting as an agent for the police, no evidence of police coercion that persuaded Burgess to speak to the reporters and no evidence of a "media circus" or a "highly charged and provocative atmosphere." Rather, the Court of Criminal Appeals determined that after one reporter asked Burgess if he had anything to say, he very calmly and articulately talked and answered the reporters'

questions until he went inside the Morgan County Jail. *Id.* at 177.

Burgess's last argument – that his trial counsel should have introduced evidence that there were two other routes by which the Decatur police could have transferred him to the Morgan County Jail without exposing him to the news media – fails to create a material issue of fact or law that would entitle him to relief. Burgess testified during the suppression hearing that after his arrest, the investigators transported him to the Decatur Police Department by driving into an underground garage, a route that never exposed him to the public. (Trial Transcript at 1127). He further stated that the investigators later made no effort to transport him to the Morgan County Jail by going back through the garage. (Trial Transcript at 1138). Also, the trial judge's office and courtroom for many years before January 1993 were located on the third floor hallway of the Morgan County Courthouse that connected to a secure walkway leading from the courthouse to the county jail. Burgess's conclusions that the trial court did not know about the two other possible transfer routes, despite Burgess's own testimony about one during the suppression hearing and the court's judicial knowledge of the other, and that his trial counsel's failure to present evidence of these alternate routes was unreasonable and prevented the trial court from granting the motion to suppress his statements to the news media, are facially without merit.

Burgess's III.G.ii. ineffective assistance claim fails to meet the specific pleading requirements of Rule 32.6(b), *Ala.R.Crim.P.*, fails to create a material issue of fact or law that would entitle him to relief and is due to be dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

H. Counsel Unreasonably Failed to Challenge Unconstitutional and Improper Race-Based Practices.

In Paragraphs 504 through 512 on pages 196 through 203 of Burgess's Second Amended Petition, he makes general allegations that the Morgan County District Attorney chose to bring the capital charge and to seek the death penalty based on

Burgess's socioeconomic status, his race and the race of the victim, Mrs. Crow; that the death penalty was sought and imposed in Morgan County and the State of Alabama in an arbitrary and capricious fashion and pursuant to a racially discriminatory pattern in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, parallel provisions of the Alabama Constitution and other applicable state, federal and international law; and that, had his trial counsel been reasonably competent, they would have challenged his capital prosecution and the imposition of a death sentence based on the prosecutor's racial motives.

In support of this ineffective assistance claim, Burgess asserts that his trial counsel could have presented reasonably available evidence showing a statistical disparity in the prosecutor's charging decisions that could only be explained by race and could have consulted with a statistical expert who would have testified that racial disparities in the prosecutor's decision to seek the death penalty in Morgan County cases were too great to be the product of chance. Burgess fails, however, to comply with the specific factual pleading requirements of Rule 32.6(b) because he does not identify the name of such statistical expert who his trial counsel should have consulted and fails to plead with specificity the admissible testimony that the expert would have provided.

Burgess further asserts the bare conclusion that the prosecutor's refusal to agree on negotiated dispositions of capital charges, choosing instead to pursue them to verdict and sentencing, was motivated by race. But he again fails to plead specific facts establishing that the prosecutor's sentencing practices and decisions in capital cases resulted solely from improper racial factors to the exclusion of other sentencing considerations. Except for conclusory statements that do not satisfy the specific factual pleading requirements of Rule 32.6(b), *Ala.R.Crim.P.*, Burgess has not identified any witness or specific documentary evidence that would support his argument that the prosecutor chose to charge him capitally and to seek the death penalty based solely on his race.

Moreover, to establish that his trial counsel owed a constitutional duty to attack

the prosecutor as a purveyor of racial discrimination in Morgan County capital cases, Burgess must plead specific facts – not just conclusions – showing that the prosecutor's charging decisions in his particular case arose not from the actual facts of the case, but solely from racially motivated selective prosecution. A charge of selective prosecution requires a court to exercise judicial power over a "special province" of the executive. *Heckler v. Chaney*, 470 U.S. 821, 832, 105 S.Ct. 1649, 84 L. Ed.2d 714 (1985). "A prosecutor is not subject to judicial supervision in determining what charges to bring" … and "is protected from judicial oversight by the doctrine of separation of powers… [T]he acts of a prosecuting attorney are not purely ministerial acts, but involve in a large measure learning and the exercise of discretion." *Doster v. State*, 72 So.3d 50, 95 (Ala. Crim. App. 2010), citing *Piggly Wiggly No. 208, Inc. v. Dutton*, 601 So.2d 907, 910 (Ala. 1992). For these reasons, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decisions whether or not to prosecute, and what charge to bring before a grand jury, generally rests entirely in his discretion. *Bordenkircher v. Hayes*, 434 U. S. 357, 364, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978).

As found by the Alabama Court of Criminal Appeals in its review of Burgess's case on direct appeal, there was overwhelming evidence that he robbed and killed Mrs. Crow. *Burgess*, 827 So.2d at 171. Regardless what charging and sentencing decisions he may have made in other cases, the prosecutor had much more than probable cause to charge Burgess with capital murder and to seek the death penalty on the sole aggravating circumstance (murder committed during an armed robbery). Given the prosecutor's discretion and the particular facts and circumstances of their client's case, his counsel owed him no duty to undertake a legally futile attack against the prosecutor for allegedly practicing racial discrimination in his decision to prosecute Burgess for a capital offense and to seek a death sentence. His contentions in the present claim that his trial counsel did not provide reasonable assistance fail to present material issues of law or fact that

would entitle him to relief.

Alternatively, even if his trial counsel should have challenged the prosecutor's alleged racially motivated charging and sentencing decisions, Burgess has failed as a matter of law to show that he was prejudiced. At the close of the evidence and arguments of counsel, the trial court gave the jury instructions and authorized them to consider the lesser included charge of felony murder which, if they found it to be applicable, removed the death penalty from the consideration of the jury and the trial court. As the factfinders in the case, the jury had an alternative to what the prosecutor had chosen to charge whatever his motivation might have been.

While the jury did not find in Burgess's favor on the lesser included offense and the trial court imposed the death penalty, his capital conviction and death sentence could still be tempered by the opinions of the Alabama Supreme Court or Court of Criminal Appeals on direct appeal. His sentence of death was automatically reviewed by the Court of Criminal Appeals. When it was affirmed, the sentence was then automatically reviewed by the Alabama Supreme Court on his petition for writ of certiorari. The existing law required both appellate courts to determine "whether the crime was in fact one properly punishable by death, whether similar crimes throughout the state are being punished capitally and whether the sentence of death is appropriate in relation to the particular defendant." *Ex parte Tarver*, 553 So.2d 633, 635 (Ala. 1989). These extra layers of review insured that a death sentence was not imposed arbitrarily or capriciously or as the result of some "freakish imposition." *Beck v. State*, 396 So.2d 645, 666 (Ala. 1981), (Adams, J. concurring specially).

Burgess's III.H. ineffective assistance claim fails satisfy the specific factual pleading and full disclosure requirements of Rule 32.6(b), fails to present a material issue of law or fact that would entitle him to relief and is due to be dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

I. Trial Counsel Unreasonably Failed to Challenge Alabama's Death Penalty Statute and Advisory Jury System.

i. Trial Counsel Unreasonably Failed to Object to Alabama's Death Penalty Scheme.

The underlying basis for Burgess's ineffective assistance claim in Paragraphs 514 through 521 at pages 203 through 205 of his Second Amended Petition is that Alabama's capital sentencing scheme is unconstitutional because the jury's verdict is advisory only and allows a judge, sitting without a jury, to find aggravating circumstances necessary for the imposition of the death penalty.

The State charged Burgess with murder made capital because the murder was committed during a robbery in the first degree. § 13A-5-40(a)(2), Ala. Code, 1975. The capital offense included the element of robbery as an aggravating circumstance the jury was required to find, unanimously, beyond a reasonable doubt before it could convict him of capital murder. This aggravating circumstance clearly corresponded to the sentencing aggravator in § 13A-5-49(4), Ala. Code, 1975, which was required to exist for Burgess to be sentenced to death: "the capital offense was committed while the defendant was engaged … [in a] rape, robbery, burglary or kidnapping." If a defendant is found guilty of a capital offense, "any aggravating circumstance which the [jury's unanimous] verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentencing hearing." This is known as "overlap," and Alabama courts "have repeatedly upheld death sentences where the only aggravating circumstance supporting the death sentence overlaps with an element of the capital offense." *Ex parte Trawick*, 698 So.2d 162, 178 (Ala. 1997); *Ex parte Waldrop*, 859 So.2d 1181, 1188 (Ala. 2002).

Burgess's allegations that his "jury was not required to find the existence of any aggravating circumstances" and that the trial "judge, not the jury, found the existence of

an aggravating circumstance" necessary for the imposition of a death sentence (Second Amended Petition at 204) is factually and legally without merit and does not present a material issue of law or fact that entitles him to relief. Burgess and his trial counsel entered the guilt phase trial with knowledge beyond any doubt that, if the jury found him guilty of the capital crime, its verdict would necessarily establish the factual existence of the overlapping § 13A-5-49(4) aggravating circumstance which would expose him to a death sentence. The jury's guilt phase verdict, which unanimously determined beyond a reasonable doubt the existence of the § 13A-5-40(a)(2) aggravating circumstance (intentional murder committed during a robbery in the first degree), made him death eligible. The factual finding of that element of the capital crime clearly was made by the jury, not the trial judge, and it was the only aggravating circumstance considered by the trial judge in his sentencing decision and order. (Clerk's Record 45-46).

Likewise, Burgess's contention that "[a] jury did not unanimously find all of the elements of Mr. Burgess's alleged offense, which made him eligible for a death sentence, by proof beyond a reasonable doubt" (Second Amended Petition at 204), has no factual or legal merit and fails to create a material issue of law or fact that would entitle him to relief. The trial record affirmatively establishes that the jurors found Burgess guilty beyond a reasonable doubt of all elements of the capital offense, including the aggravating circumstance that the murder occurred during the commission of a robbery, which made him eligible for death penalty consideration. This guilt phase finding by the jury was, alone, sufficient to expose Burgess to a range of punishment that had as it maximum the death penalty. See *Lewis v. State*, 889 So.2d 623, 703 (Ala. Crim. App. 2003).

Finally, Burgess argues that "the requirement that aggravating circumstances outweigh mitigating circumstances should be deemed an element of a capital offense." (Second Amended Petition at 204). This argument has no facial merit, as it has long been consistently rejected by the Alabama Supreme Court of Alabama. In *Waldrop v.*

State, the Supreme Court followed the lead of the United States Court of Appeals for the Eleventh Circuit in *Ford v. Strickland*, 696 F.2d 804, 818 (11th Cir. 1983), holding that the process of weighing aggravating and mitigating circumstances in not an element of an offense or a factual determination that is susceptible to proof under a reasonable doubt or preponderance standard. Rather, it is a "moral or legal judgment" that guides the trial court's discretion in determining "whether a defendant eligible for the death penalty should in fact receive that sentence." *Waldrop*, 859 So.2d at 1189; *Ex parte State*, 223 So.3d 954, 966 (Ala. 2016).

Alabama's scheme of vesting the ultimate sentencing authority in the trial court and placing the jury in an advisory role for sentencing purposes has not been held to be illegal or unconstitutional as alleged by Burgess. He fails to allege specific facts establishing that his trial counsel's failure to challenge Alabama's death penalty scheme constituted an unreasonable omission that no competent counsel would have allowed to occur. Generally, "the failure by counsel in a capital case to raise any particular claim or claims does not *per se* fall below an objective standard of reasonableness." *Horsley v. State*, 527 So.2d 1355, 1359 (Ala. Crim. App. 1988). Also, Burgess cites no legal authority that existed in 1994 that would have provided his trial counsel with a valid basis for attacking the constitutionality of Alabama capital sentencing statutes. "Counsel cannot be said to be ineffective for not filing a motion for which there is no legal basis." *Miller v. State*, 1 So.3d 1073, 1077 (Ala. Crim. App. 2007). Nor has Burgess alleged facts that show a substantial likelihood that the results of his trial would have been different except for his trial counsel's failure to object to Alabama's death penalty scheme.

Accordingly, Burgess's subpart III.I.i. ineffective assistance claim is not sufficiently pleaded under Rule 32.6(b), lacks facial merit, fails to create a material issue of fact or law that would entitle him to relief and is due to be summarily dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

ii. Trial Counsel Unreasonably Failed to Object to the Use of an Advisory Jury and a Trial in Front of an Elected Judge as Unconstitutional.

This claim is found in Paragraphs 522 through 526 on pages 205 and 206 of Burgess's Second Amended Petition.

The first portion of this ineffective assistance claim is that his trial counsel provided constitutionally deficient representation by failing to challenge Alabama's scheme of using an advisory jury during capital sentencing. Burgess supports this claim solely with the bare assertion that the Eighth and Fourteenth Amendments required that a jury, not a judge, decide whether he should be sentenced to death. This portion of his subpart III.I.ii. claim fails to comply with the specific pleading requirement of Rules 32.6(b), *Ala.R.Crim.P.* Bare allegations of constitutional violations and mere conclusions of law are not sufficient to require any further proceedings. Rule 32.6(b).

Although Alabama's capital sentencing statutes provide for a jury to render an verdict recommending a sentence of either life imprisonment without parole or death after a bifurcated sentencing phase hearing, the Alabama Supreme Court has consistently held that the jury must unanimously find beyond a reasonable doubt the existence of one or more aggravating circumstance listed in § 13A-5-49, Ala. Code, 1975, before a capital defendant becomes eligible for the death penalty. This holding "forecloses the trial court from imposing a death sentence unless the jury has unanimously found beyond a reasonable doubt the existence of at least one § 13A-5-49 aggravating circumstance." *Ex parte State*, 223 So.3d at 965, quoting *Ex parte McGriff*, 908 So.2d at 1037. Because it is the jury rather than the trial court that makes the critical finding which exposes a defendant to the imposition of the death penalty, Alabama's capital-sentencing scheme is constitutional. *Ex parte State,* 223 So.3d at 970. Burgess alleges neither specific facts nor then-existing legal authority showing why no competent trial counsel in 1994 would

have failed to contest the use of an advisory jury in Alabama's capital sentencing scheme. Likewise, he pleads no specific facts or legal authority establishing a reasonable probability that, had his trial counsel challenged the use of an advisory jury, a different system would have been used and the outcome of his trial would have been different. This portion of Burgess's subpart III.I.ii. fails to satisfy the specific pleading requirements of Rule 32.6(b), *Ala.R.Crim.*P., is facially without merit and presents no material issue of law or fact that would entitle him to relief.

The ground upon which Burgess's next ineffective assistance claim is based is his argument that the federal Constitution forbids the trial of a capital case in front of an elected judge. He fails to plead, however, references to any specific legal precedent or authority except for bare alleged violations of the United States Constitution. His claim that his trial counsel provided deficient representation because they did not object to his trial taking place before an elected judge is insufficiently pleaded, as it is supported by no specifically pleaded facts that, if true, would entitle him to relief and is based on a mere legal conclusion. Rule 32.6(b), *Ala.R.Crim.P.*

Moreover, Burgess makes general allegations about partisan judicial electoral races in Alabama, political pressure placed on judges and judicial candidates and the threat to a judge's ability to preside over capital cases in a neutral and impartial manner. In *Barbour v. State*, 673 So.2d 461 (Ala. Crim. App. 1994), the defendant made similar allegations, arguing that the trial judge who sentenced him to death was elected and was more likely to impose the death penalty to appear tough on crime and thereby preserve his judicial office and salary. The Court of Criminal Appeals rejected his claim of bias on the part of the trial judge, stating "[T]here is a presumption that a judge is qualified and unbiased, and … one alleging to the contrary has a substantial burden of proof." 673 So.2d at 470 (internal citations omitted).

Other than his broad condemnation of all elected trial judges in Alabama, Burgess pleads no specific facts showing that the elected judge who presided over his trial failed

to do so in a neutral and impartial manner or establishing that his trial counsel knew or should have known that the elected judge assigned to his case was biased or more likely than any other judge to impose the death penalty in the event of a capital conviction. Nor does he allege specific facts indicating a reasonable probability that, but for his counsel's failure to object to Alabama's system of electing judges and to the specific judge who presided over his trial, a non-elected judge would have been assigned to his case and the outcomes of his guilt and penalty phase trials would have been different. From its own review of the trial transcript and other official records pertaining to Burgess's case, the Court finds no indication whatsoever that the trial judge treated Burgess or his counsel in a biased manner that deprived him of a fundamentally fair trial.

Accordingly, Burgess's subpart III.I.ii. ineffective assistance claim does not satisfy the specific pleading requirements of Rule 32.6(b), fails to create a material issue of fact or law that would entitle him to relief, is facially devoid of merit and is due to be summarily dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

J. Trial Counsel Unreasonably Failed to Challenge Mr. Burgess's Indictment on the Grounds that It Neither Alleged all of the Elements of the Offense nor Provided Fair Notice of the Charge.

This claim of ineffective assistance of trial counsel is located in Paragraphs 527 through 531 on pages 206 through 208 of Burgess's Second Amended Petition.

A Morgan County Grand Jury returned an indictment on April 5, 1993, charging Burgess in pertinent part as follows:

> Willie Burgess Jr., … did intentionally cause the death of Louise Thompson Crow by shooting her with a pistol and Willie Burgess, Jr., caused said death during the time that Willie Burgess Jr., was in the course of committing or attempting to commit, a theft of a quantity of money in lawful currency of the United States of America, … the property of James Crow doing business as Decatur Bait & Tackle, by the use of force against the person of Louise Thompson Crow with the intent to overcome her physical resistance or physical power of resistance, while the said Willie Burgess Jr., was armed

> with a deadly weapon, or dangerous instrument, to-wit: a pistol, in violation of Section 13A-5-40 of the Code of Alabama, ...

(Clerk Record at 58-60).

Burgess maintains that his trial counsel unreasonably failed to challenge the following alleged deficiencies in the indictment: it did not allege all the elements of the capital offense, did not contain the word "robbery," did not refer to the relevant subsection of § 13A-5-40, did not state that Burgess could not be sentenced to death unless aggravating circumstances outweighed any factors in mitigation and did not provide him with fair notice of the capital charge.

At the time when the indictment was returned, Alabama's capital offense statute, §13A-5-40, Ala. Code, 1975, contained subsection (a)(2) which made the following a capital offense: "Murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant." Sections 13A-8-41(a) and 13A-8-43(a), Code, defined robbery in the first degree as occurring when, in the course of committing a theft, a person (1) "uses force against the person of the owner or any person present with intent to overcome his physical resistance or physical power of resistance;" or (2) "threatens the imminent use of force against the person of the owner or any person present with intent to compel acquiescence to the taking of or escaping with the property;" and (3) "is armed with a deadly weapon or dangerous instrument."

Rule 13.2(a), *Ala.R.Crim.P.*, required in pertinent part that the "indictment ... shall be a plain, concise statement of the charge in ordinary language sufficiently definite to inform a defendant of common understanding of the offense charged and with that degree of certainty which will enable the court, upon conviction, to pronounce the proper judgment. Rule 13.2(b) required that the "indictment ... shall state for each separate offense, ... the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated."

Although the word "robbery" or the phrase "robbery in the first degree" is not

expressly stated in the indictment returned against Burgess, the indictment substantially follows the language that sets forth the elements of robbery in the first degree under §§ 13A-8-41(a) and 13A-8-43(a), Ala. Code, 1975, is not vague and gave him sufficient notice of the charge against him. See *Harrison v. State*, 869 So.2d 509, 522-524 (Ala.Crim.App. 2002). Similarly, while the indictment against Burgess cited § 13A-5-40 as the violated statute without any reference to a particular subsection, he cites no rule, statute or other provision of law that required the indictment to state a particular subsection of the operative statute. He was entitled to a plain and concise statement of the elements of the charge against him, not to an indictment containing the specific words or references that he contends were required to give him fair notice. An indictment is sufficient which substantially follows the language of the applicable statutes so long as those statutes prescribe with definiteness the elements of the offense. *Ex parte Alred*, 393 So.2d 1030, 1032 (Ala. 1981).

As discussed above, the indictment adequately charged Burgess with committing a murder that occurred during a robbery in the first degree. This was the aggravating circumstance that made the crime a capital offense. His contention that the indictment failed to allege an aggravating circumstance is without merit. See *Crosslin v. State*, 540 So.2d 98 (Ala.Crim.App. 1988).

Burgess appears to contend that the indictment against him was defective because it failed to state as an additional element of the capital offense that he could be sentenced to death if an aggravating circumstance outweighed mitigating circumstances. The Court previously addressed above in subpart III.I.i. Burgess's argument that "the requirement that aggravating circumstances outweigh mitigating circumstances should be deemed an element of a capital offense." Suffice it to say without repeating the Court's prior discussion, the process of weighing aggravating and mitigating circumstance is not an element of a capital offense. There is no merit, therefore, to this ground of Burgess's contention that his indictment was defective.

Burgess's present ineffective assistance subclaim is based on the invalid premises that that his indictment failed to allege all elements of the capital offense and failed to provide him with fair notice of the charge. He pleads neither specific facts nor applicable legal authorities that would have given his trial counsel a valid legal basis to challenge the indictment. Counsel cannot be deemed to have been ineffective for failing to file a motion for which there is no legal basis. *Miller v. State*, 1 So.3d at 1077. Nor has Burgess established that he was prejudiced by counsel's failure to challenge the indictment, as there is no reasonable probability that their challenge would have been granted by the trial court and that the outcome of his trial would have been different.

Accordingly, Burgess's subpart III.J. ineffective assistance claim fails to plead specific facts that, if true, would entitle him to relief, is facially meritless and is due to be summarily dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

K. Trial Counsel Unreasonably Failed to Move to Withdraw from Mr. Burgess's Case When it Became Apparent that They Could Not Competently Represent Him.

In Paragraphs 532 through 534 on pages 208 through 209 of his Second Amended Petition, Burgess claims that his trial counsel rendered ineffective assistance because they failed before trial to move to withdraw from representing him. Burgess suggests that his trial counsel were not prepared to try his case and that after their multiple motions to continue the trial were denied by the trial court, they simply could have moved to withdraw and the trial court would have appointed new counsel and continued the trial to give them time to prepare. These allegations ignore the applicable law.

Whether to grant or deny a counsel's motion to withdraw rests within the sound discretion of the trial judge. *Ex parte Bell*, 511 So.2d 519, 522 (Ala. 1987); *Scott v. State*, 937 So.2d 1065, 1081 (Ala.Crim.App. 2005) ("A trial court has broad discretion in considering whether to grant defense counsel's motion to withdraw. Unless defense counsel establishes an actual conflict of interest or an irreconcilable conflict between

counsel and the defendant, the trial court's denial of a motion to withdraw will not be overturned."). In *Baker v. State*, 906 So.2d 210, 226-27 (Ala.Crim.App. 2001), reversed on other grounds, 906 So.2d 277 (Ala. 2004), and *Scott*, the Court of Criminal Appeals quoted with approval the following statements of the Florida Appellate Court in *Wilson v. State*, 753 So.2d 683, 688 (Fla.Dist.Ct.App. 2000):

> [T]rial courts are given broad discretion to determine whether a motion to withdraw should be granted.... The primary responsibility of the Court is to facilitate the orderly administration of justice.... In doing so, the Court must consider the timing of the motion, the inconvenience to the witnesses, the period of time elapsed between the date of the alleged offense and trial, and the possibility that any new counsel would be confronted with the same conflict. As long as the trial court has a reasonable basis for believing that the attorney-client relation has not deteriorated to a point to where counsel can no longer give effective aid in the fair presentation of a defense, the Court is justified in denying a motion to withdraw. The decision of a trial court to deny a motion to withdraw will not be disturbed absent a clear abuse of discretion.

Burgess's trial counsel on June 7, 1994 filed a motion to continue the June 20 trial. It was denied. They filed another motion to continue before the trial began on June 20. They argued that they had tried to properly prepare, but had been unable to do so. Burgess's lead counsel Lavender reiterated to the trial court that he did not feel comfortable going forward with the trial, especially because their investigator was having trouble getting sentencing witnesses and some of Burgess's family members to cooperate. The trial court again denied a continuance of the trial, explaining that adequate notice had been given, that he was obligated to honor Burgess's speedy trial request and the interests of the State, that Burgess and his trial counsel had ample time to prepare and that Burgess was being represented by "very trained and competent and diligent lawyers." On his direct appeal, the Court of Criminal Appeals held that the trial court had not abused its discretion in denying trial counsel's motions to continue. *Burgess v. State*, 827 So.2d at 178.

Burgess's conclusory argument that his trial counsel rendered deficient representation by failing to withdraw wholly disregards that they could not withdraw without the trial court's approval. In light of the trial court's determination to proceed with the trial as expressed in its rulings on their motions to continue, it was not unreasonable for his trial counsel to infer that attempting to withdraw would be an exercise in futility. Burgess has not pleaded specifically what his trial counsel could have said or done within ethical bounds that would have required the trial court to grant their withdrawal from the case. Considering the circumstances with which they were faced, Burgess's trial counsel neither had a duty to withdraw nor acted outside the wide range of professional assistance by failing to file a motion to withdraw.

Moreover, Burgess makes a bare allegation that had his trial counsel withdrawn from the case, there is a reasonable probability that the outcome of the guilt, penalty and sentencing phases would have been different. This allegation is based not on specifically pleaded facts, but on the suppositions that the trial court would have granted their withdrawal and would have appointed new trial counsel who would have been more experienced, competent and prepared to present his case and would have obtained some different outcome. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Ricter*, 562 U.S. at 112. Burgess has not pleaded facts that show a probability of prejudice sufficient to undermine confidence in the outcomes of the guilt and penalty phases of his trial.

Accordingly, his subpart III.K. ineffective assistance claim is not sufficiently pleaded under Rule 32.6(b), fails to present an issue of material fact or law that would entitle him to relief and is due to be summarily dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

IV.

TRIAL COUNSEL WERE INEFFECTIVE AT THE GUILT PHASE OF THE TRIAL.

A. Trial Counsel Unreasonably Failed to Move to Exclude State's Exhibit 101 in its Entirety to Ensure that Inadmissible Portions Would Not Be Heard by the Jury, to Make an Adequate Record and to Move for a Mistrial.

In Paragraphs 535 through 549 of his Second Amended Petition (pages 210 through 219), Burgess alleges that his trial counsel's performance was deficient because they failed to get State's Exhibit 101, the edited videotape of the statements he made in response to news media questions after his arrest, excluded in its entirety from the jury's consideration; failed to seek the exclusion of allegedly inadmissible portions of State's Exhibit 101; and failed to assure that State's Exhibit 101 was properly edited before it was shown to the jury.

The trial record reflects that Burgess's counsel filed and prosecuted a motion to suppress the videotape made by the news media as Decatur police investigators escorted him from the police department to the Morgan County Jail. At the beginning of the suppression hearing, his counsel told the trial court that the videotape included Burgess's statements about two other crimes he committed which were inadmissible and should be excluded. The prosecutor agreed that his reference to other crimes should be edited out of the videotape. (Trial Transcript 936-947). Later during the hearing, trial counsel again requested that, if the trial court overruled the motion to suppress, Burgess's statements on the videotape about committing other crimes should be edited out. The trial court agreed and directed that the videotape to be received into evidence would have that part edited out. (Trial Transcript 1158-59).

After the trial court denied their motion to suppress the entirety of Burgess's videotaped statements to the news media, his trial counsel again argued that portions were inadmissible, including his statements about a Holiday Inn robbery and another robbery that he had gotten away with; statements about a pending felony theft case; statements that he had sold cocaine to make money; a statement made to Burgess by a man in the Athens correctional facility; Burgess's statements about not liking his clothes

and buying clothes for a job interview with robbery proceeds; and the news anchor's commentary at the beginning of the video tape. (Trial Transcript 1225-31; 1331-39; 1486-87). The trial court granted defense counsel's exclusionary requests with exception of Burgess's statements about selling cocaine, what the man in the Athens correctional facility told him, his dislike of his clothes and buying clothes for a job with robbery proceeds. Burgess's trial counsel's performance in attempting to exclude the entirety of State's Exhibit 101, as well as the portions of the videotape that were denied by the trial court, did not fall below an objective standard of reasonableness.

Burgess further contends that his trial counsel should have obtained the exclusion from the news media videotape of his references to himself as a "black nigger" and the depiction of him in a Morgan County Jail jumpsuit. As to his use of the words "black nigger," Burgess points to no facts showing that a police officer or a member of the news media used the words to describe him, question him or bait him into using those words to describe himself. Rather, those words appear to flow seamlessly from Burgess's earlier written statement to the investigators in which he quoted the victim as calling him as a "damn nigger" and a "poor ass nigger." In the context of all evidence presented in the case, it would not have been unreasonable for Burgess's trial counsel to believe that their client's repeated use of the word "nigger" demonstrated his insecurity and lack of self-esteem that the jurors might accept as mitigating against a death sentence. Given that counsel's decisions are "replete with uncertainties and judgment calls," and require a highly deferential level of judicial scrutiny, the Court cannot say that Burgess's trial counsel provided deficient performance by failing to seek the exclusion from State's Exhibit 101 of their client's description of himself. See *Chandler v. United States*, 218 F.3d at 1314.

On direct appeal the Alabama Court of Criminal Appeals found that the videotape did not portray a media circus or a highly charged and provocative atmosphere in which Burgess was coerced into speaking to the press. As described by the Court of Criminal

Appeals from its review of State's Exhibit 101, Burgess "very calmly and articulately talked and answered reporters' questions nonstop until the door closed behind him at the jail." *Burgess v. State*, 827 So.2d at 177. Burgess pleads no specific facts showing that he was unaware that "Morgan County Jail" was printed on his jail clothing, that he did not realize he was being videotaped by the news media or that he did not understand that he could refuse to talk and answer the reporters' questions.

Contrary to Burgess's assertion that the police officers put him before the jury in prison garb (Second Amended Petition at Paragraph 539), Burgess himself caused the reporters to focus their cameras on him by reason of his willingness to volunteer his own thoughts and answers all the way to the Morgan County Jail. Had he said nothing to the reporters during this transfer, State's Exhibit 101 would not have been relevant and would not have provided anything probative for the jury to view. Having effectively prejudiced himself, Burgess pleads no specific facts or law that would have provided his trial counsel with a reasonable basis for arguing that State's Exhibit 101 should be excluded because it depicted him in jail clothing. Counsel cannot be deemed to have been ineffective for failing to file a motion for which there is no legal basis. *Miller v. State*, 1 So.3d at 1077. Moreover, Burgess does not plead specific facts indicating a reasonable probability that, had his counsel moved to suppress State's Exhibit 101 on the ground that it showed him in prison garb, the outcome of his trial would have been different.

Having considered Burgess's edited statements to the news media that he quotes on pages 213 through 217 of his Second Amended Petition, the Court finds that the exclusion of the words "it went off" from State's Exhibit 101 was harmless. In other portions of the videotape Burgess stated "I'm sorry that I did what I did but I didn't mean to shoot the lady. She just went for the gun and the gun went off;" and "It's just when she hit the gun, the gun went off because it was already cocked back." "Harmless error does not rise to the level of the prejudice required to satisfy the Strickland test." *State v.*

Kerley, 260 So.3d 891, 902 (Ala.Crim.App. 2017) (internal citation omitted).

Finally, Burgess pleads no specific facts that, if true, support his contention that his trial counsel did not review State's Exhibit 101 after it was edited to assure that the edits complied with the trial court's orders. While it included references to Burgess's use of criminal proceeds generally to purchase clothing, the trial court had earlier denied trial counsel's requests to edit out those references from the videotape to be presented to the jury.

Accordingly, Burgess's subpart IV.A. ineffective assistance claim fails to satisfy the specific factual pleading requirements of Rule 32.6(b), is facially devoid of merit and is due to be dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

B. Trial Counsel Unreasonably Failed to Object to Prosecutorial Misconduct in the Guilt Phase Trial.

i. Trial Counsel Unreasonably Failed to Object When the Prosecutor Knowingly, and in Bad Faith, Argued Facts Not in Evidence, Gave his Personal Opinions, and Appealed to Emotion.

Burgess contends in Paragraphs 550 through 551 (pages 219 through 222) that his trial counsel were ineffective for not objecting to numerous instances of what he alleges was prosecutorial misconduct during his guilt phase closing arguments.

On the issue of making objections, "effectiveness of counsel does not lend itself to measurement by picking through the transcript and counting the places where objections might be made." *Brooks v. State*, 456 So.2d 1142, 1145 (Ala.Crim.App. 1984). That is because counsel's "decisions of when and how to raise objections are generally matters of trial strategy." *Washington v. State*, 95 So.3d 26,66 (Ala.Crim.App. 2012) (internal citations omitted). The United States Supreme Court observed many years ago that "[I]nterruptions of arguments, either by opposing counsel or the presiding judge, are matters to be approached cautiously." *United States v. Young*, 470 U.S. 1, 13 (1985). "A decision not to object to a closing argument is a matter of trial strategy." *Benjamin v.*

State, 156 So.3d 424, 454 (Ala.Crim.App. 2013) (internal citations omitted).

Moreover, both prosecutors and defense counsel are given wide latitude in making their arguments to juries. Their statements to a jury must be viewed as made in the heat of debate, are usually valued at their true worth and are not expected to become significant factors in the jury's verdict. *Bankhead v. State*, 585 So.2d 97, 105-07 (Ala.Crim.App. 1989), remanded on other grounds, 585 So.2d 112 (Ala. 1991). "Whatever is in evidence is subject to legitimate comment by the prosecutor." *Stewart v. State*, 601 So.2d 491, 506 (Ala.Crim.App. 1992). In addition, "[a] prosecutor has a right based on fundamental fairness to reply in kind to the argument of defense counsel." *DeBruce v. State*, 651 So.2d 599, 609 (Ala.Crim.App. 1993), aff'd, 651 So.2d 624 (Ala. 1994). "Prosecutors are given wide latitude during rebuttal argument to respond to assertions and statements made by defense counsel." A prosecutor is entitled during jury arguments to express opinions concerning "inferences, deductions and conclusions drawn from the evidence" without such opinions constituting the impermissible injection of the prosecutor's personal opinions. *Burgess v. State*, 827 So.2d at 163-64.

Burgess specifically claims that the prosecutor in his guilt phase closing argument made the following impermissible and objectionable statements:

(1) "I don't pretend to be an expert on firearms, but to me, somebody got one of these things no more than two feet from my face, that's pretty pointblank, and he [Burgess] walks over there to her as she sits there helpless on the toilet, points this thing two feet from her face, on purpose, and now for the first time in anything he's done this whole morning, now we've got a horrible accident." There was nothing improper about this argument, as the prosecutor was responding to Burgess's written and oral statements about how the shooting was accidental and to defense counsel's argument that the shooting did not occur at point blank range. "Counsel cannot be ineffective for failing to raise an issue that has no merit." *Bush v. State*, 92 So.3d 121, 140 (Ala.Crim.App. 2009).

(2) "How likely do you believe – you heard the pathologist testify and he drew a side angle of the head and the path of the bullet, that I would submit to you, that I don't' think he shot her like this. I think the reasonable thing to assume, as he testified to, is that she was sitting on the toilet." During the trial the evidence was disputed as to whether the victim was standing in a small bathroom or seated on the toilet when the fatal shot was fired. In the allegedly improper statements quoted above, the prosecutor clearly was responding to Burgess's and his counsel's theory that the shooting occurred unintentionally when the victim was standing and slapped Burgess's arm, causing the pistol to discharge accidentally. The prosecutor also was expressing his view that the victim was shot while seated based on inference from photographs that were placed in evidence and the pathologist's depiction of the bullet's trajectory in a downward direction from her face to the point where it was located in her skull. Such argument was not improper; therefore, Burgess's counsel were not ineffective for failing to raise an issue that had no merit. *Bush*, 92 So.3d at 140.

(3) "Now, if somebody has got a gun pointed between a foot and two feet from your nose or from anybody's nose, and you slap at it and it goes off, if you hit it, what's going to happen? You're going to move it It's not going to go right where it was, if it goes off it's going to be moving." The prosecutor again made these statements in response to Burgess's and his counsel's assertions that the victim slapped at his arm and the gun fired accidentally with the bullet's point of entry being near the bridge of her nose. The prosecutor's statements were based on what had been placed in evidence, his appeal for the jurors to apply their common sense and were not improper. "Counsel cannot be ineffective for failing to raise an issue that has no merit. *Id.*

(4) "In order to load this clip, what you've got to do, and I'm not going to pull the bullets out that are in the envelope that came out of the gun, but you pick up a bullet. That's how it has to be done, and you over here and you mash this thing down and you push that one bullet in there, and he did that. He picked up – in order to have that gun in

the state he says it was in, he had to have individually picked up eight bullets and one by one put them in this clip on purpose, and then he had to intentionally take this magazine and put it in the butt of that gun, then he had to – in order to get one of these, he had to put eight in here, in order to get one of them in the barrel, he's got to take the gun and intentionally pull the slide back and that's what puts one in the chamber, and then unless he's completely crazy he's not going to carry it around like this, he's going to let that hammer down. He did all that intentionally."

As a prelude to this argument, the prosecutor read portions of Burgess's written statement to the police investigators in which he claimed that the gun already had one bullet in the chamber when he picked it up to go rob the victim. This argument and demonstration by the prosecutor clearly was a response to defense counsel's argument and Burgess's statements that he did not intentionally kill Mrs. Crow. The Alabama Court of Criminal Appeals on Burgess's direct appeal found that this portion of the prosecutor's argument was based on a legitimate inference, deduction or conclusion drawn from the evidence and was in response to defense counsel's closing argument. *Burgess*, 827 So.2d at 163-64. "Counsel cannot be ineffective for failing to raise an issue that has no merit." *Bush*, 92 So.3d at 140.

(5) "Read this statement, if you will. I can't tell you what to do and you know that… He talks about these things that she said to him in there about using the word nigger, a couple of times in there, she said that to him… I don't believe that. You saw him on television, and you saw what a chip he had on his shoulder, about yesterday nobody wanted to know me, now today everybody wants to know me. You saw what a chip he had." The Court of Criminal Appeals considered whether these comments amounted to improper argument and found that they did not. *Burgess*, 827 So.2d at 164. Rather, the comments clearly constituted a permissible direct response by the prosecutor to Burgess's statement that the victim had twice addressed him with racial slurs while he was in her store on the day of the robbery and murder.

The prosecutor also urged the jury to return a verdict of guilt as to capital murder, which Burgess says was a request during the guilt phase argument for the jury "to take his life." Burgess contends that this argument improperly appealed to the jurors' emotions. It is not an improper appeal to emotion, however, for the prosecutor to urge "the jury to render a verdict in such a manner as to punish the crime, protect the public from similar offenses and deter others from committing similar crimes." *Wilson v. State*, 777 So.2d 856, 893 (Ala.Crim.App. 1999). "Counsel cannot be ineffective for failing to raise an issue that has no merit." *Bush,* 92 So.3d at 140.

(6) "And then the shot comes. And she sits in there long enough – and you saw the pictures. What must go through her mind there before her life finally runs out. He didn't shoot her but one time? If somebody is going to shoot me, I think I'd just assume [sic] they be sure about it." Burgess argues that the prosecutor misrepresented the pathologist's testimony in this part of his penalty phase closing argument in an effort to inflame the jurors' emotions. Dr. Embry, the pathologist, testified that Mrs. Crow survived for several minutes after the shooting and that her death ultimately resulted from the single gunshot. During his penalty phase closing, defense counsel Lavender argued that imposing the death penalty on Burgess was not justified, stating: "The lady was killed during the course of a robbery. She was shot one time. She wasn't tortured. That we know of. They offered no evidence to tell you anything other than she was shot one time." Contrary to Burgess's contentions, the prosecutor in the above quoted portion of his penalty phase argument replied to defense counsel's contention that the death penalty was not justified and based his argument, in part, on evidence presented to the jury by the pathologist that Mrs. Crow lived for several minutes after being shot. Such argument was not improper; but even if it was borderline, whether to object was a matter of trial strategy. Counsel's decision not to object under the circumstances was not objectively unreasonable. Burgess fails to plead specific facts that, if true, would establish that he was prejudiced by counsel's failure to object.

Moreover, at the end of the prosecutor's closing argument, the trial court instructed the jurors that the prosecutor's comment about Mrs. Crow's long walk down the hall to the bait and tackle shop's bathroom or any other comments that evoked in them feelings of passion or prejudice should be disregarded and not considered by them. Jurors are presumed to follow the court's instructions. *Holland v. State*, 588 So.2d 543, 549 (Ala.Crim.App. 1991). Burgess pleads no specific facts indicating that the jurors failed to comply with the trial court's instructions.

Lastly, Burgess says that the prosecutor repeatedly argued his own personal beliefs because on six or seven occasions during his guilt phase closing he used the words "believe" or "belief." After reviewing the prosecutor's guilt phase and penalty phase closing arguments, the Alabama Court of Criminal Appeals observed that "[w]hile it is never proper for the prosecutor to express his personal opinion as to the guilt of the accused during closing argument, reversible error does not occur when the argument complained of constitutes mere expression of opinion concerning inferences, deductions and conclusions drawn from the evidence." *Burgess v. State*, 827 So.2d at 163-64, quoting *Sams v. State*, 506 So.2d 1027, 1029 (Ala.Crim.App. 1986). When examined in the context of the entire arguments of the prosecutor and defense counsel, the prosecutor's comments beginning with "I believe," Í think" or "my belief" or some similar expression did not constitute the injection of his personal opinions and did not render the comments improper. See *Burgess v. State*, 827 So.2d at 164. "Counsel cannot be ineffective for failing to raise an issue that has no merit." *Bush*, 92 So.3d at 140.

Issues about the propriety of the attorneys' closing arguments are committed largely to the trial court's discretion. That court is given broad discretion in determining what is permissible argument. *McCullough v. State*, 357 So.2d 397, 399 (Ala.Crim.App. 1978); *Hurst v. State*, 397 So.2d 203, 208 (Ala.Crim.App. 1981). The alleged prosecutorial misconduct pleaded by Burgess in his subpart IV.B.i. ineffective assistance

claim is supported by bare conclusions and does not establish a reasonable likelihood that, had his counsel objected or filed a motion for mistrial as to each of Burgess's cited instances of improper argument, the trial court in the exercise of its broad discretion would have granted their objections or motion. Burgess's allegations do not show that his trial counsel's performance was objectively unreasonable or that he was prejudiced. The prosecutor's comments about which Burgess complains did not infect the guilt phase trial with such unfairness as to deny him due process.

Accordingly, his subpart IV.B.i. ineffective assistance claim is insufficiently pleaded in part as required by Rule 32.6(b), presents no material issue of fact or law that would entitle him to relief, facially lacks merit and is due to be summarily dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

ii. Trial Counsel Unreasonably Failed to Object to the Prosecutor's Misleading Statement to the Jury About the Law.

This ineffective assistance claim is found in Paragraphs 552 and 553 on pages 222 and 223 of Burgess's Second Amended Petition. He claims specifically that the prosecutor during his guilt phase closing argument misstated the law pertaining to felony murder and thereby misled the jury to believe that their only verdict choices were either faultless, non-negligent or non-accidental murder or capital murder.

As earlier noted, the trial court at the beginning of the guilt phase closing arguments instructed the jury that the statements and arguments of the attorneys did not constitute evidence and that they should disregard any remark, statement or argument which was not supported by the evidence or by the law given by the court. Burgess's jury is presumed to have followed the court's instructions. *Holland v. State*, 588 So.2d at 549. He pleads no specific facts that overcome this presumption.

Burgess quotes in Paragraph 552 the prosecutor's argument about the meaning of felony murder that he contends misstated the law. He argued on his direct appeal, just as

he argues in this subpart IV.B.ii. claim, that the prosecutor's quoted comments misled the jury into believing that felony murder meant a no-fault killing. *Burgess v. State*, 827 So.2d at 162. The Alabama Court of Criminal Appeals found that the prosecutor's quoted argument would not have caused the jury to reject felony murder as an alternative to capital murder and that the prosecutor was entitled to respond to Burgess's contention that he could be guilty only of felony murder because he accidentally shot Mrs. Crow during the robbery. The Court of Criminal Appeals further noted that the trial court correctly instructed the jury on the elements of felony murder after the prosecutor finished his guilt phase arguments and concluded that there was no merit in Burgess's argument that the prosecutor misled the jury about the meaning of felony murder. *Id.* His trial counsel could not "be ineffective for failing to raise an issue that has no merit." *Bush*, 92 So.3d at 140.

Burgess pleads no specific facts or applicable law establishing that his counsel's failure to object to the prosecutor's comments about felony murder fell below an objectively reasonable performance standard. Also, in view of the unrebutted presumption that his jury rendered its guilt phase verdict in accordance with the trial court's correct felony murder instructions, Burgess's allegations do not show a reasonable probability that, had his counsel objected to the prosecutor's felony murder argument, the jury's guilt phase verdict would have been different.

Accordingly, Burgess's subpart IV.B.ii. ineffective assistance claim is not sufficiently pleaded as required by Rule 32.6(b), creates no material issue of fact or law that would entitle him to relief, is facially without merit and is due to be dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

C. Trial Counsel Failed to Challenge Impermissible Victim Impact Evidence.

Burgess's ineffective assistance claim in Paragraphs 554 through 567 on pages

223 through 226 of his Second Amended Petition is not clear, as he initially contends his trial counsel should have objected to unspecified victim impact evidence and then vacillates from condemning the admission of crime scene photographs to charging the prosecutor with obtaining misleading testimony and opinions and making improper closing arguments.

The State called as a witness Detective Sergeant John Boyd, a 13-year investigator for the Decatur Police Department, whose primary duty was to take photographs at the crime scene. Sergeant Boyd authenticated the photographs that he took of the outside and inside of the Decatur Bait and Tackle Shop crime scene. During his testimony Boyd was allowed to describe what each photograph showed as he went through the crime scene. Petitioner's counsel objected to the investigator's narrative testimony on the grounds that the photographs showed what they showed and that the narration served no purpose. The trial court overruled. (Trial Transcript at 822). Some of the crime scene photographs showed the deceased victim's body as it was found on a toilet in the shop's small bathroom.

Photographic evidence is admissible in a criminal prosecution if it tends to prove or disprove some disputed or material issue, to illustrate some relevant fact or to corroborate or dispute other evidence in the case. Such evidence, if relevant, is admissible even if it has a tendency to inflame the minds of the jurors. *Gaddy v. State*, 698 So.2d 1100, 1148 (Ala.Crim.App. 1995). Photographs that depict a crime scene are relevant and admissible even if they are cumulative or demonstrate undisputed facts. *Ex parte Siebert*, 555 So.2d 780, 783-84 (Ala. 1989). Moreover, photographs that depict the victim, including the character and location of wounds are generally relevant and admissible. *Id.*; *Ex parte Bankhead*, 585 So.2d 112 (Ala. 1991).

Victim-impact evidence has been described variously as evidence that offers "a quick glimpse of the life" of the homicide victim; evidence that demonstrates the loss to the victim's family; a form or method of informing the sentencer about the specific harm

caused by the crime; evidence showing that the victim's death represents a unique loss to her family; and evidence about the living victim and the impact of the murder on the victim's family. *Payne v. Tennessee*, 501 U.S. 808, 822, 825-27 (1991). Contrary to Burgess's suggestion, the photographs depicting the scene and the deceased victim at the scene, which were admitted through the testimony of the crime scene photographer, Sergeant Boyd, did not constitute improper victim-impact evidence, as that term has been variously described. See *Reynolds v. State*, 114 So.3d 61, 148 (Ala.Crim.App. 2010).

It necessarily follows that the failure of Burgess's trial counsel to object to the photographs on the ground that they constituted improper victim-impact evidence was not deficient performance. "Counsel cannot be ineffective for failing to raise an issue that has no merit." *Bush*, 92 So.3d at 140. Accordingly, Burgess's subpart IV.C. ineffective assistance claim fails to plead facts, that if true, would entitle him to relief, is facially devoid of merit and is due to be dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

D. Trial Counsel Unreasonably Failed to Submit Guilt Phase Instructions that Were Necessary to Ensure that Mr. Burgess Received a Fair Trial.

In Paragraphs 568 through 572 on pages 226 and 227 of his Second Amended Petition, Burgess asserts that his trial counsel unreasonably submitted a guilt phase jury instruction stating that intent to kill could be "presumed" by the use of a deadly weapon. The trial court initially told the jury in its general charge that the intent to commit murder may be presumed from Burgess's use of a deadly weapon. Almost immediately, however, the court correctly further instructed the jury that while intent to kill may be inferred from Burgess's use of a deadly weapon, "the intent to kill necessary to convict him of capital murder cannot be inferred merely from his use of a deadly weapon." (Trial Transcript at 1596).

Burgess nonetheless asserts that his counsel's submission of the "presumption" instruction caused the burden of proof to shift to him on the key issue of intent to kill and

prejudiced him. This argument ignores the trial court's almost instant correction of the "presumption" instruction and its repeated use of the word "inferred" in directing the jury about how to determine whether Burgess intended to kill Mrs. Crow. Burgess also gives no consideration to either the trial court's strong admonition that the jury could not infer the intent to kill necessary for them to convict him of capital murder merely based on his use of a deadly weapon or its correct instructions about the State's burden of proof.

Moreover, the "presumption" instruction requested by Burgess's trial counsel constituted a valid statement of the law as it existed in Alabama in 1994. See *Ex parte Bayne*, 375 So.2d 1239, 1244 (Ala. 1979) (holding "[t]he use of a deadly weapon, under proper circumstances, gives rise to the permissible legal presumption of both malice and intent."). While the Alabama Supreme Court in 2000, six years after Burgess's trial, overruled *Bayne* to the extent that it "allows an instruction that intent may be *presumed*," *Ex parte Burgess*, 827 So.2d at 199-200, Burgess's trial counsel would not be ineffective for submitting a requested jury instruction based on the law then existing.

Even if his trial counsel erred by submitting the requested "presumption" instruction, Burgess pleads no specific facts showing that the trial court used that instruction, rather than its own independent research and judgment, in formulating its instruction that intent to kill could be "presumed." Additionally, Burgess pleads no specific facts indicating that the jury rendered its verdict in accordance with the initial incorrect "presumption" instruction, rather than based on the corrected "inference" instruction given by the trial court. To establish that he was prejudiced by his counsel's requested "presumption" instruction, Burgess must plead specific facts indicating there is a reasonable probability that, but for his counsel's error, the result of his guilt phase trial would have been different. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. at 112 (2011).

Burgess further argues that his trial counsel performed deficiently because they failed to redraft and resubmit a corrected theory of defense instruction. In support of this

claim he does not identify the specific requested instruction that he contends was deficient. Nor does he plead specifically what counsel should have stated in a redrafted and corrected theory of defense instruction that would have been acceptable to the trial court. The Alabama Court of Criminal Appeals on Burgess's direct appeal found that "[t]he trial court fairly instructed the jury on the consideration of evidence and the elements necessary to convict Burgess of capital murder or felony murder. The jury was therefore properly informed as to how to consider the defense theory of the case in its deliberations." *Burgess v. State*, 827 So.2d at 190. Burgess pleads no specific facts that dispute these findings by the Court of Criminal Appeals or that explain how his trial counsel's failure to redraft and resubmit a theory of defense instruction prejudiced him.

Accordingly, Burgess's subpart IV.D. ineffective assistance claim is not sufficiently pleaded as required by Rule 32.6(b), is facially devoid of merit, creates no material issue of law or fact that would entitle him to relief and is due to be summarily dismissed. Rule 32.7(d), *Ala.R.Crim.P.*.

V

TRIAL COUNSEL WERE INEFFECTIVE AT THE PENALTY PHASE OF THE TRIAL.

A. Trial Counsel Unreasonably Failed to Object to Prosecutorial Misconduct in the Penalty Phase Argument.

i. Trial Counsel Unreasonably Failed to Object When the Prosecutor Knowingly, and in Bad Faith, Argued Facts Not in Evidence, Gave his Personal Opinions, and Appealed to Emotion.

In Paragraphs 573 through 574 of his Second Amended Petition, Burgess first claims that his trial counsel should have objected to the prosecutor's alleged misconduct when he "asked the jury not to hold anything against the Crow family." This claim is insufficiently pleaded under Rule 32.6(b), *Ala.R.Crim.*P. and is facially devoid of merit.

For example, Burgess does not plead specific facts or legal authority establishing how or why this statement constituted misconduct or improper argument. He likewise does address the entire remarks made by the prosecutor and the context in which those remarks were made when the alleged misconduct occurred. The prosecutor told the jury specifically that he wanted to address something that defense counsel Lavender had raised in his opening statement ("If you don't like my haircut, don't like my tie, don't like the way I act, don't hold it against Willie Burgess." Trial Transcript at 780). The prosecutor then explained to the jurors that if he had said or done anything during the trial that offended them, then hold it against him personally – not "against the police department or the Crow family or something else… Don't let it have any effect on the verdict in the case." These introductory remarks by the prosecutor did not constitute misconduct or improper argument or ask the jury to show favor to the Crow family. "Counsel cannot be ineffective for failing to raise an issue that has not merit." *Bush*, 92 So.3d at 140.

Burgess next contends that his counsel should have objected when the prosecutor allegedly engaged in misconduct by arguing "the comparative worth of Mr. Burgess and Mrs. Crow." Exactly what comments of the prosecutor this claim pertains to are not specifically pleaded. Starting on page 1722 of the trial transcript, the prosecutor began addressing defense counsel's arguments about mitigating circumstances and why the use of a firearm and the killing of a person during a robbery were not enough for the jury to give Burgess the electric chair. The prosecutor explained that it would be up to the jurors to weigh the aggravating circumstance and mitigating circumstances they found to exist and to decide what the appropriate punishment should be. He challenged the jury to focus on the mitigating circumstances and to weigh them against the aggravating circumstance that a human life was taken in the course of a robbery. Contrary to Burgess's assertion, the prosecutor did not ask the jury to determine the comparative worth of Burgess and the victim. Rather, he was rebutting defense counsel's arguments

about the weight of the mitigating circumstances and why the circumstances of Mrs. Crow's death did not justify the death penalty. Petitioner's counsel had no valid basis for objecting to the prosecutor's argument on the ground that it encouraged a comparative valuation. "Counsel could not be ineffective for failing to raise a baseless objection." *Bearden v. State*, 825 So.2d 868, 872 (Ala.Crim.App. 2001). Burgess fails to plead specific facts that, if true, would create material issues of law or fact that entitle him to relief, does not satisfy the Rule 32.6(b) full disclosure pleading requirements and lacks merit.

Burgess next complains that his trial counsel should have objected when the prosecutor commented that Mrs. Crow had become evidence in the case. He does not plead, however, specifically why this comment was improper, the ground on which his counsel should have based an objection or why the trial court, in its discretion, would have been bound to grant the objection. On Burgess's direct appeal the Court of Criminal Appeals found that the prosecutor's comment reminded the jurors to view the evidence of Mrs. Crow's murder seriously, was not improper and did not constitute plain error. *Burgess*, 827 So.2d at 166. "The fact that an argument has emotional overtones does not independently indict it as improper...." *Id.*, citing *Rutledge v. State*, 523 So.2d 1087, 1101 (Ala.Crim.App. 1987), rev'd on other grounds, 523 So.2d 1188 (Ala. 1988). The prosecutor has the right to present its impressions from the evidence and may argue every matter of legitimate inference that can be reasonably drawn from the evidence, including that the victim was an individual worthy of as much consideration as the accused. *Burgess*, 827 So.2d at 188; *Payne v. Tennessee*, 501 U.S. at 824.

Contrary to Burgess's bald conclusion, the prosecutor was entitled to comment that Mrs. Crow, a homicide victim depicted in crime scene photographs, drawings, autopsy reports and photographs and other evidence, should not be de-humanized as just another piece of evidence in the case. Burgess has failed to sufficiently plead why his trial counsel's failure to object was unreasonable or how he was prejudiced. This

particular claim fails to present a material issue of law or fact that entitles Burgess to relief and is facially without merit.

Burgess contends that his trial counsel should have objected when the prosecutor allegedly injected his personal experiences and vouched for the State's case by attempting to persuade the jury not to consider Burgess's age as a mitigating factor and comparing his capital case with other capital cases involving drug dealers. The Alabama Court of Criminal Appeals on Burgess's direct appeal addressed his contention that the prosecutor's comments about his age as a mitigating factor and the drug deal comparison constituted improper and misleading argument. After examining each comment in the context of the entire closing argument, the Court of Criminal Appeals found that the prosecutor did not use his office or vouch for the State's case as being more appropriate for the imposition of the death penalty than other capital murder cases he had tried. Rather, he was rebutting defense counsel's argument concerning the weight to be given to evidence of mitigating circumstances. The Court of Criminal Appeals held that even if the prosecutor's comments were to be considered as expressions of his personal opinions, they would not constitute reversible error. *Burgess*, 827 So.2d at 162, 164.

Other than stating the conclusion that the foregoing arguments by the prosecutor were improper, Burgess fails to plead specifically what his trial counsel should have stated as the ground of an objection and why the trial court would have been required to grant the objection. Burgess's claim that his trial counsel were ineffective for failing to object to the subject arguments does not satisfy the specific pleading requirements of Rule 32.6(b), *Ala.R.Crim.P.*, fails to present an issue of material fact or law that would entitle him to relief and is facially without merit.

Accordingly, Burgess's ineffective assistance claims in subpart V.A.i. are due to be summarily dismissed pursuant to Rule 32.7(d), *Ala.R.Crim.P.*

ii. Trial Counsel Unreasonably Failed to Object to the Prosecutor's Efforts to Mislead the Jury About the Law.

In Paragraphs 575 through 578 on pages 229 and 230 of his Second Amended Petition, Burgess contends that his trial counsel performed unreasonably by failing to object to the prosecutor's penalty phase arguments that age was not a mitigating factor, that the mitigating circumstance of no significant criminal history did not excuse a later crime, that the mitigating circumstances argued by Burgess's trial counsel did not rise to the level of true mitigation and that the jury should consider the circumstances under which Mrs. Crow was shot and died as aggravating factors.

As to the prosecutor's alleged attempt to disparage and mislead the jury about mitigating circumstances in general, Burgess raised this same issue on his direct appeal. The Alabama Court of Criminal Appeals found no merit in Burgess's argument, noting that the jury received correct instructions from the trial court on mitigating circumstances, including the mitigating circumstance of age, and its responsibility to weigh those circumstances against the sole aggravating circumstance. Nothing said by the prosecutor in his penalty phase closing misled the jury or urged them to disregard the trial court's instructions. *Burgess*, 827 So.2d at 162, 164. Likewise, the Court of Criminal Appeals quoted the prosecutor's comments about age as a mitigating circumstance, which Burgess claims to be improper, and found no plain error. The comments were made to rebut the argument of defense counsel about the weight to be accorded to the evidence of mitigating circumstances. "Prosecutors are given wide latitude during rebuttal argument to respond to assertions and statements made by defense counsel." *Id.* at 164.

Burgess neither alleges specific facts nor cites applicable law that reasonably required his trial counsel to object to the prosecutor's arguments about mitigating circumstances generally or age as a mitigating circumstance in particular. Decisions about when and how to raise objections are generally matters of trial strategy. *Washington v. State*, 95 So.3d at 66. Whether to interrupt a prosecutor's arguments to

the jury is a matter for defense counsel to approach cautiously. Burgess fails to allege specific facts that show otherwise. Moreover, he alleges no specific facts that support his bare conclusions that had trial counsel objected, it is reasonably probable that the trial court would have sustained the objections and that the jury would not have recommended a sentence of death. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Ricter*, 562 U.S. at 86. Burgess's ineffective assistance claims arising from the prosecutor's arguments about mitigating circumstances have not been sufficiently pleaded, create no genuine issue of material fact or law and are devoid of merit.

Burgess also contends that his counsel should have objected when the prosecutor argued "factors in aggravation;" i.e., that Mrs. Crow was shot only one time and that she endured psychological torment before and after she was shot. This contention is insufficiently pleaded, in that Burgess does not explain what he means by the term "factors in aggravation." The trial court correctly instructed the jurors that they were allowed to consider only one aggravating circumstance – murder committed during a first degree robbery – and that it was their responsibility to weigh that aggravating circumstance against the mitigating circumstances in deciding the appropriate sentence to recommend. When viewed in the context of his entire penalty phase rebuttal argument, the prosecutor's statements that Mrs. Crow was shot once and how she must have felt with the gun pointed at her face and during the minutes she continued to live after the shooting clearly were intended to rebut defense counsel's arguments that a one-shot killing was not the same as a killing accompanied by many wounds or torture and did not justify the death penalty. As a matter of fundamental fairness, a prosecutor has the right to reply in kind to the arguments of defense counsel. *DeBruce v. State*, 651 So.2d at 609.

Moreover, the prosecutor's comments properly were based on the evidence or reasonable inferences or conclusions drawn from the evidence. He did not argue any

improper aggravating circumstances to the jury, nor did he encourage them to disregard the court's instructions about the sole aggravating circumstance to be considered during their sentence deliberations. Had his trial counsel objected as advocated by Burgess, their objection would have been baseless. "Counsel could not be ineffective for failing to raise a baseless objection." *Bearden v. State*, 825 So.2d 868, 872 (Ala.Crim.App. 2001). The absence of such objections by Burgess's trial counsel did not affect the outcome of the penalty phase trial. Burgess's ineffective assistance claim based on the underlying assertion that the prosecutor argued "factors in aggravation" is not pleaded sufficiently under Rule 32.6(b), creates no material issue of fact or law that would entitle him to relief and is facially without merit.

Accordingly, Burgess's ineffective assistance claims in subpart V.A.ii. are due to be summarily dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

B. Trial Counsel Unreasonably Failed to Challenge Impermissible Victim Impact Argument.

In Paragraphs 579 through 583 of his Second Amended Petition, Burgess continues to pick through the prosecutor's penalty phase rebuttal argument, repeating some of the claims argued in earlier subparts, for the purpose of alleging the ineffectiveness of his trial counsel for not making objections. For example, he argues in subpart V.A.i. above that his counsel should have objected when the prosecutor allegedly engaged in misconduct by arguing "the comparative worth of Mr. Burgess and Mrs. Crow." He repeats the comparative worth argument in this subpart V.B. Having previously determined that the prosecutor was rebutting defense counsel's comments about the weight of the mitigating circumstances and did not ask the jury to determine the comparative worth of Burgess and the victim, no further discussion of this claim is warranted.

Burgess further argues in this subpart that his trial counsel should have objected

when the prosecutor allegedly suggested that the jury could give Mrs. Crow's death some meaning by taking Burgess's life and characterized him as someone who was not entitled to ask that his life be spared. When the prosecutor's remarks to which Burgess alludes are examined in the context of the entire penalty phase closing arguments, they were not improper. The prosecutor asked the jury to take Burgess's life in response to defense counsel's request for the jury to save Burgess's life because the death penalty was not justified under the circumstances. A prosecutor has a right to reply in kind to the argument of defense counsel and is accorded wide latitude during rebuttal argument. *DeBruce v. State*, 651 So.2d at 609; *Burgess*, 827 So.2d at 163-64. The prosecutor further argued that if the jury imposed a death sentence, then Mrs. Crow's death would not be meaningless because others might be deterred from killing someone to steal money for better clothes. These comments clearly were a call for justice, not statements about Burgess's worth or a comparison of the value of his life with the victim's. It is within the latitude allowed prosecutors to argue that the jury should "discharge their duties in such a manner as, not only to punish crime, but protect the public from like offenses and as an example to deter others from committing like offenses." *Ingram v. State*, 779 So.2d 1225, 1262-63 (Ala.Crim.App. 1999), aff'd 779 So.2d 1283 (Ala. 2000); *Johnson v. State*, 120 So.3d 1130, 1171 (Ala.Crim.App. 2009).

While the prosecutor stated that Burgess had "forfeited the right to ask for anything better than that," the meaning of this statement is ambiguous at best. It did not characterize Burgess as having no right to ask that his life be spared, nor did it encourage the jury to ignore the evidence or the trial court's instructions about their sentencing responsibilities. The law in Alabama is well established that the statements of counsel "in argument to the jury must be viewed as made in the heat of debate, are usually valued at their true worth and are not expected to become significant factors in the jury's verdict." *Bankhead*, 585 So.2d at 105-107. Burgess fails to sufficiently plead specific facts establishing that this particular statement by the prosecutor constituted improper

argument.

At pages 188 and 189 of its opinion on Burgess's direct appeal, the Court of Criminal Appeals quoted a lengthy portion of the prosecutor's penalty phase closing argument that Burgess challenges herein as improper. In Paragraph 581 on page 232 of his Second Amended Petition, Burgess sets out the same quote and contends that his counsel should have objected because the argument was based on speculation and supported by no victim impact evidence. The Court of Criminal Appeals rejected Burgess's contention that the prosecutor was arguing facts not in evidence. Rather, he was merely reminding the jury of the impact that any person's death has on the family members left behind. In this regard, "the State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and, in particular, [her] family." *Burgess*, 827 So.2d at 188, citing *Payne v. Tennessee*, 501 U.S. at 824, citing *Booth v. Maryland*, 482 U.S. 496, 517 (White, J., dissenting). There being nothing improper about the quoted portion of the prosecutor's argument, his trial counsel had no basis on which to make a valid objection. Counsel is not ineffective if they fail to make a baseless objection. *Bearden*, 825 So.2d at 872.

Contrary to Burgess's foregoing claims in this subpart V.B., the prosecutor did not make improper arguments during his penalty phase rebuttal closing. Burgess does not plead specific facts or law establishing that his trial counsel performed unreasonably or that it is reasonably probable that the outcome of his trial would have been different had his counsel objected as he contends. Accordingly, he fails to plead specific facts that, if true, would entitle him to relief; fails to present a material issue of fact or law that would entitle him to relief; and his ineffective assistance claims in subpart V.B. facially lack merit. His subpart V.B. claims are due to be summarily dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

C. Trial Counsel Unreasonably Failed to Object to the Court's Erroneous and Unconstitutional Penalty Phase Instructions.

i. Trial Counsel Unreasonably Failed to Object to the Court's Charge to the Jury During the Penalty Phase.

Burgess in Paragraphs 584 through 588 on pages 234 and 235 of his Second Amended Petition asserts that because his trial counsel failed to object, "the trial court never told the jury that Alabama law permits a death sentence recommendation only when it finds that the aggravating circumstances outweigh the mitigating circumstances" (Emphasis added). This assertion is misplaced, both factually and legally.

The trial court at the end of the penalty phase trial included the following correct instructions to the jury in its general charge:

> The law also provides that whether death or life in prison without parole should be imposed upon the defendant, depends on whether any aggravating circumstances exists and if so whether the aggravating circumstances outweigh the mitigating circumstances. (Emphasis added) (Trial transcript at 1734).
>
> This means that before you can even consider recommending that the defendant's punishment be death, each and every one of you must be convinced beyond a reasonable doubt based on the evidence that at least – that this aggravating circumstance does exist. (Trial Transcript at 1738).
>
> If you do find beyond a reasonable doubt that the aggravating circumstance, upon which I've instructed you does exist in this case, then you must proceed to consider the mitigating circumstances. (Trial Transcript at 1739). If after a full and fair consideration of all of the evidence in the case you're convinced beyond a reasonable doubt and to a moral certainty that at least one aggravating circumstance does exist and that the aggravating circumstance outweighs the mitigating circumstances, your verdict would be, we the jury recommend that the defendant, Willie Burgess, Jr., be punished by death, the vote is as follows." (Emphasis added) (Trial Transcript at 1748).

The trial court clearly instructed the jury using essentially the same terminology that Burgess says it should have used.

Burgess further argues that the trial court's penalty phase instructions "virtually mirror" the instructions that the Alabama Supreme Court found to be erroneous in *Ex parte Bryant*, 951 So.2d 724 (Ala. 2002). In *Bryant* the Supreme Court explained that the trial court's jury instructions erroneously allowed the jury to find that the death penalty was appropriate even if the aggravating circumstances did not outweigh the mitigating circumstances so long as the mitigating circumstances did not outweigh the aggravating circumstances. Moreover, the trial court implicitly told the jurors that they might recommend death even if they did not find that an alleged aggravating circumstance was proved at all. The trial court's instructions in *Bryant* clearly are distinguishable from those of the trial court in the instant case. In later cases, *Ex parte McNabb*, 887 So.2d 998, 1001 (Ala. 2004) and *Ex parte Mills*, 62 So.3d 574, 599 (Ala. 2010), the Alabama Supreme Court approved trial court instructions that were the same as or substantially identical to the trial court's instructions in Burgess's case.

Burgess's argument that the trial court's penalty phase instructions misstated the weighing process that the jury must follow in considering a death sentence is facially without factual or legal merit. His further contention that his trial counsel should have objected is likewise devoid of merit. "Counsel cannot be ineffective for failing to raise an issue that has no merit." *Bush*, 92 So.3d at 140. Accordingly, Burgess's subpart V.C.i. ineffective assistance claim is due to be summarily dismissed pursuant to Rule 32.7(d), *Ala.R.Crim.P.*

ii. Trial Counsel Unreasonably Failed to Request an Instruction that Mr. Burgess's Age at the Time of the Shooting Constituted a Mitigating Circumstance.

In Paragraphs 589 through 592 on pages 235 through 237 of his Second Amended Petition, Burgess argues that the trial court failed to instruct the jury that his age was a

mitigating circumstance and that his trial counsel unreasonably failed to request an instruction telling the jury that it must consider his age as a mitigating circumstance.

In his penalty phase closing argument, defense counsel Lavender told the jury that that their finding of a mitigating circumstance did not have to be by unanimous agreement. He specifically argued that Burgess's age when the crime was committed would be a mitigating circumstance even if they all didn't agree it should be considered as mitigating. (Trial Transcript at 1711, 1714).

Before the jury retired to deliberate its penalty phase verdict, the trial court instructed the jurors that they must consider the mitigating circumstances and provided the jurors with a list of the statutory mitigating circumstances. As the seventh statutory mitigating circumstance, the trial court specified Burgess's age at the time of the crime. The trial court continued by instructing the jurors that, in addition to the mitigating circumstances that he had previously specified, they could consider as mitigating circumstances any aspect of Burgess's character or record or any circumstances of the crime that offered a basis for a life without parole sentence. (Trial transcript at 1739-42). In its later sentencing order, the trial court found and considered Burgess's age at the time of the crime as a mitigating circumstance. (Clerk's Record at 47).

Regardless what the prosecutor may have argued about Burgess's age at the time of the trial, both his trial counsel's closing comments and the trial court's penalty phase final instructions clearly informed the jury that it was Burgess's age at the time of the crime, not at the time of the trial, that mattered in determining whether his age mitigated against the death penalty. His argument that the trial court's instruction failed to follow the law because it did not tell the jury that they *must* consider Burgess's age as a mitigating circumstance is misplaced. On Burgess's direct appeal the Alabama Court of Criminal Appeals considered his argument that the prosecutor disparaged age as a mitigating circumstance and misled the jury on the law regarding the mitigating circumstance of age. Rejecting this argument, the Court of Criminal Appeals found that

"[t]he trial court correctly instructed the jury on mitigating circumstances, *including the mitigating circumstance of age*, and its responsibility to weigh those circumstances against the aggravating circumstances." *Burgess*, 827 So.2d at 162. While § 13A-5-51, Ala. Code, 1975, included a list of mitigating circumstances for the trial court to explain to the jury, the statute did not require the trial court either to comment about whether any one or more existed in a particular case or to instruct the jury that they must find that a certain listed circumstance is mitigating based on the evidence presented. Counsel could not be ineffective for failing to request an instruction that was baseless. *Bearden*, 825 So.2d at 872.

Accordingly, Burgess's subpart V.C.ii. ineffective assistance claim fails to state a cognizable claim, fails to present a material issue of fact or law that would entitle him to relief, is facially without merit and is due to be dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

VI

TRIAL COUNSEL WERE INEFFECTIVE AT THE SENTENCING HEARING.

A. Trial Counsel Unreasonably Failed to Investigate and Present Evidence in Mitigation at the Sentencing Hearing.

In Paragraphs 593 through 602 at pages 237 through 241 of his Second Amended Petition, Burgess claims that his trial counsel were ineffective because they failed to gather and present mitigation evidence during the August 24, 1994 judicial sentencing hearing before the trial court. As to this claim, the Court first notes that Burgess argued in his earlier ineffective assistance claims spanning Paragraphs 114 through 353 of the Second Amended Petition that his trial counsel were ineffective for failing to investigate and present alleged mitigating evidence during the penalty phase hearing before the jury. He now incorporates the same alleged mitigating evidence in this subpart VI.A. with the

only difference being his contention that his counsel should have investigated and presented the same evidence during the judicial sentencing hearing. The Court's prior findings and conclusions as to Burgess's subparts II.A.i. through II.B.ii. ineffective assistance claims are incorporated and will not be repeated herein. Based on those incorporated findings and conclusions, Burgess's present ineffective assistance claim arising from trial counsel's alleged unreasonable failure to present mitigation at the judicial sentencing hearing are due to be dismissed without further proceedings.

As an additional reason for dismissing this subpart VI.A. ineffective assistance claim, no established Alabama caselaw specified in 1994 what evidence in mitigation, if any, a defendant could present during a § 13A-5-47(c) sentencing hearing. *Jackson v. State*, 133 So.3d 420, 448 (Ala.Crim.App. 2009) (Opinion on Return to Remand May 25, 2012). The scope of the evidence allowed during a capital murder sentencing hearing before the trial judge was first addressed five years after Burgess's trial in *Boyd v. State*, 746 So.2d 364, 399 (Ala.Crim.App. 1999), wherein the Court of Criminal Appeals held that "[s]ection 13A-5-47, Ala. Code 1975, does not provide for the presentation of additional mitigation evidence at the sentencing by the trial judge. Therefore, trial counsel did not err in failing to do so." Thirteen years later the Court of Criminal Appeals observed in *Jackson* that its ruling concerning the presentation of mitigation at a judicial sentencing conflicted with other legal authority, but concluded: "Nonetheless, at the time of Jackson's 1998 trial, there was no established caselaw concerning the scope of what evidence a defendant could present at the judicial sentencing hearing pursuant to § 13A-5-47(c), Ala. Code 1975… 'We will not hold [trial] counsel ineffective for failing to forecast changes in the law.' *Nicks v. State*, 783 So.2d 895, 923 (Ala.Crim.App. 1999)." *Jackson v. State*, 133 So.3d at 448.

At the time of Burgess's 1994 trial, it was not established that his counsel could present additional mitigating evidence to the trial judge. Five years later in *Boyd*, the Alabama Court of Criminal Appeal expressly held that the presentation of such evidence

at the judicial sentencing hearing was not authorized. While the law may have since changed, Burgess's trial counsel were not ineffective for failing to forecast changes in the law and not attempting to present additional mitigation evidence at the August 1994 judicial sentencing before the trial court.

Accordingly, Burgess's subpart VI.A. ineffective assistance claim fails to satisfy the specific pleading and full disclosure requirements of Rule 32.6(b), fails to present a cognizable claim that would entitle him to relief, fails to present material issues of fact or law, and is facially devoid of merit. It is due to be dismissed pursuant to Rule 32.7(d), *Ala.R.Crim.P.*

B. Trial Counsel Unreasonably Failed to Object to the Court's Consideration of Dr. Maier's Forensic Mental Health Evaluation.

On June 3, 1993, the trial court appointed Dr. Lawrence Maier, a licensed clinical psychologist and certified forensic examiner under contract with the Alabama Department of Mental Health, to conduct a mental health evaluation of Burgess. Dr. Maier interviewed Burgess on July 21, 1993 and completed his Forensic Evaluation Report on the same date. Pursuant to Rule 11.5(a), *Ala.R.Crim.P.* a copy of the Report was sent to the trial judge, prosecutor and Burgess's original appointed counsel. The trial judge was required to promptly review the Report to determine if any reasonable grounds existed to doubt Burgess's mental incompetency. Rule 11.6(a), *Ala.R.Crim.P.*

After the guilt and penalty phase trials, but before making its sentence determination, the trial court was required to order and receive a written presentence investigation report containing the information prescribed by law or by court rule for felony cases generally. § 13A-5-47(b), Ala. Code, 1975. A state probation officer prepared the presentence report and was authorized pursuant to Rule 26.3(b), *Ala.R.Crim.P.* to include a statement of the offense and the circumstances surrounding it; Burgess's prior criminal and juvenile record; his educational background; his

employment background, financial status and military record; Burgess's social history, including family relationships, marital status, interests, activities, residence history and religious affiliations; statements or records of his medical and psychological history; victim impact statements; and any other information requested by the court. Section 13A-5-47(b), Code, expressly provided that no part of the presentence report would be kept confidential. The statute further required that the presentence report and any evidence submitted in connection with it be made a part of the record in the case. *Id.*

Burgess argues that the submission of Dr. Maier's Forensic Evaluation Report with the presentence report was objectionable and prejudiced him for three reasons: first, because Maier's opinions were based in part on documents or information provided by the prosecutor that were not disclosed to him or his trial counsel. Burgess correctly discloses in Paragraph 610 at least nine documents or records that Maier likely received from the prosecutor. Burgess pleads no specific facts, however, that identify what documents or information the prosecutor allegedly provided to Maier that were not provided to him or his counsel. He likewise does not plead specifically which of Maier's opinions were based on documents or information that were improperly withheld from him and his counsel. Burgess fails to state the specific objection or objections his trial counsel should have made to prevent Maier's Forensic Evaluation Report from being received into evidence at the judicial sentencing. This first ground for relief fails to contain a clear and specific statement, including the full disclosure of the facts supporting it, that would entitle Burgess to relief. Rule 32.6(b), *Ala.R.Crim.P.* He pleads no specific facts showing that his counsel's failure to object fell below an objective standard of reasonableness or that, had his counsel objected on this first ground, the outcome of his judicial sentencing probably would have been different.

Secondly, Burgess contends that Maier's opinions about his mental status were erroneous and unreliable because he had no information about the charged offense or Burgess's social history. This contention is not correct. Dr. Maier included in the first

page of his Forensic Evaluation Report a brief, but accurate, summary of the alleged robbery and murder for which Burgess was arrested. He clearly prepared this summary from the incident reports, Burgess's confession, police investigation reports, witness statements and the grand jury indictment that had been provided to him. Burgess does not plead which of Dr. Maier's opinions were erroneous or unreliable specifically because he lacked information about the charged crime.

As to relevant social history, Burgess during the interview shared with Dr. Maier information about his poor family upbringing, his father's neglect, his difficult relationships with family members, his children, his marital status, his relationships with three women, his having been stabbed with a razor, his alcohol and marijuana use, his removal from the job corps, his prior arrests and his history of no assessments, hospitalizations, counseling or treatment for mental health issues. Burgess fails to plead specifically what missing aspects of his social history were relevant to Dr. Maier's evaluation and which of Dr. Maier's opinions were erroneous and unreliable specifically due to inadequate social history. This second ground does not satisfy the stringent pleading requirements of Rule 32.6(b) and fails to establish a reasonable basis for his counsel to object to the receipt of Dr. Maier's report.

Lastly, Burgess says that qualified mental health professional would have concluded that Burgess had impaired psychiatric, neuropsychological and/or psychological functioning. In support of this ineffective assistance claim, Burgess pleads no specific facts that support his conclusion that his psychiatric, neuropsychological and/or psychological functioning was impaired at the time of Dr. Maier's evaluation. He also fails to comply with the specific pleading requirements of Rule 32.6(b), *Ala.R.Crim.P.*, in that he does not identify by name the qualified mental health expert who, after interviewing and evaluating Burgess, would have concluded that he had impaired mental functioning and does not describe the contents of the expert's expected testimony. *Smith*, 71 So.3d at 33.

Nor does Burgess plead specific facts showing that Dr. Maier in 1993 was not qualified as a mental health professional to render valid opinions about his mental status and condition. His trial counsel were entitled to rely on the evaluation performed by Dr. Maier and would have had no reasonable basis for objecting to the receipt of Dr. Maier's Forensic Evaluation Report on this third ground. Counsel cannot be found to be ineffective for failing to make a baseless objection. *Bearden*, 825 So.2d at 872.

All of the grounds alleged by Burgess in support of his subpart VI.B. ineffective assistance claim have not been sufficiently pleaded pursuant to Rule 32.6(b), fail to state a material issue of law or fact that would entitle him to relief and are facially meritless. This claim is due to be dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

C. Trial Counsel Unreasonably Failed to Investigate the Accuracy of the Pre-Sentence Report and Failed to Object to its Consideration by the Trial Court.

In Paragraphs 616 through 620 Burgess criticizes the presentence investigation report ("PSI") that was submitted to the trial court because it allegedly contained an erroneous and incomplete personal and social history, an inadequate explanation of the circumstances of Burgess's record of arrests and inadequate information about his parents and siblings. Notably, Burgess omits from this ineffective assistance claim two critical facts: first, Burgess was given an opportunity to complete a personal history interview form for the Probation Officer who was preparing the PSI, but refused to do so. As a result, the Probation Officer had to gather personal, social and family information from Burgess's mother, his juvenile court records and the Parole & Probation Department's file on his brother who was serving a 20-year sentence for robbery. (Clerk's Record at 226). He was able to include in the PSI information about Burgess, his marital status, his children, his health, education, prior employment and family members. Burgess also refused to provide the Probation Officer with the names of persons who could be contacted about his character and reputation. Having intentionally blocked the Probation

Officer from obtaining needed personal and social background information to be included in the PSI, Burgess contributed to what he calls an alleged erroneous and inadequate personal and social history and alleged inadequate information about his parents and siblings and will not be heard to complain that his trial counsel unreasonably failed to investigate and object to those portions of the PSI.

Second, even assuming that the PSI contained errors or was incomplete, Burgess fails to plead any specific findings or conclusions of the trial court that were based solely on the PSI. For example, Burgess's criticism that the PSI failed to adequately explain the circumstances of his arrest history is wholly immaterial because the trial court did not rely on the "Record of Arrests" portion of the PSI; rather, the court found from the parties' stipulation the existence of the statutory mitigating circumstance that Burgess did not have a significant history of prior criminal activity. (Clerk's Record at 46). Moreover, while the trial court reviewed the PSI, the portion of its Sentencing Order captioned "Non-Statutory Mitigating Circumstances" clearly shows that the trial court relied solely on testimony presented during the penalty phase trial in finding mitigating circumstances based on Burgess's character, prior non-violent behavior, concerns for his children, family history, dysfunctional home life, paternal neglect and personality disorder. (Clerk's Record 47-48). No portion of the trial court's Sentencing Order reflects a finding or conclusion that resulted from its reliance on an error in or omission from the PSI.

In *Calhoun v. State*, 932 So.2d 923 (Ala.Crim.App. 2005), the defendant argued that he had been denied due process at sentencing because his PSI contained inaccuracies that were relied on by the trial judge. Finding that the defendant cited nothing in the trial court sentencing order indicating that it relied on the challenged inaccuracies of the PSI and that the trial court's sentencing order established that it relied on the evidence presented at trial as opposed to the PSI, the Court held that the inaccuracies were harmless. *Id.* at 977.

Burgess in this subpart VI.C. ineffective assistance claim fails to plead specific facts showing that the trial court sentenced him in reliance on erroneous information contained in the PSI. Likewise, he fails to plead specific facts establishing that, but for his trial counsel's failure to object to the PSI, there is a reasonable probability that the trial court would have imposed a different sentence. This claim fails to satisfy the specific pleading requirements of Rule 32.6(d), fails to present an issue of material fact or law that would entitle him to relief, is facially without merit and is due to be dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

D. Trial Counsel Unreasonably Failed to Present Evidence of Mr. Burgess's Remorse.

Burgess's claim in Paragraphs 621 through 622 at page 247 of his Second Amended Petition is that his trial counsel's representation in the judicial sentencing was deficient because they failed to present evidence of his remorse. This claim is insufficiently pleaded because, except for Burgess's videotaped statement which the trial court had viewed and listened to numerous times during the guilt phase proceedings, he fails to identify the specific "evidence of remorse," that was available and known to his trial counsel during the sentencing proceedings. A claim for relief in a Rule 32 Petition must include a full disclosure of the facts supporting the claim. Rule 32.6(b), *Ala.R.Crim.P.*

Moreover, Burgess himself had two opportunities to convey the sincerity of his remorsefulness directly to the trial court: first, by explaining his remorse to the Probation Officer for inclusion in the PSI and second, by apologizing and expressing his remorse when allowed to allocute during the judicial sentencing hearing. He declined on both occasions. In the absence of Burgess's own heartfelt expressions of remorse to the victim's family and the trial court, it is not reasonably probable that any evidence his trial counsel might have presented would have changed the outcome of the penalty phase and

judicial sentencing proceedings.

Accordingly, this subpart VI.D. ineffective assistance claim fails to plead specific facts that, if true, would entitle Burgess to relief, is facially devoid of merit and is due to be summarily dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

VII

TRIAL ATTORNEY GREGORY BIGGS'S ACTUAL CONFLICT OF INTEREST VIOLATED MR. BURGESS'S RIGHT TO COUNSEL AND HIS RIGHT TO A FAIR TRIAL.

This conflict of interest claim is set forth in Paragraphs 623 through 628 on pages 247 through 249 of Burgess's Second Amended Petition.

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

Biggs presented the rape charge against Cox to the Morgan County Grand Jury which returned an indictment for rape in the first degree on August 5, 1991. (Clerk's Record, State v. Cox, at 2-4). Cox appeared for arraignment on November 21, 1991. (Clerk's Record, State v. Cox, at 4). He filed a youthful offender application and appeared for the hearing on his petition on February 14, 1992. (Clerk's Record, State v. Cox, at 5). Except for two requests for trial continuances filed by Biggs, the Clerk's Record reflects no activity in the Cox case until May 26, 1995 when Biggs filed a Motion

to have Cox transferred from the Federal Corrections facility in Ashland, Kentucky where he was serving a 30-month sentence. (Clerk's Record, State v. Cox, at 24-29). The transfer occurred, and Cox appeared before the undersigned on June 26, 1995, at which time he entered a guilty plea to second degree assault and received a 20-month sentence to run concurrent with his federal sentences. (Clerk's Record, State v. Cox, at 14-15).

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

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

Contrary to Burgess's suggestion, Biggs was engaged in his own private law practice and was not a staff attorney in Burrell's office when the young girl's parents retained him and he received the appointment to prosecute Timothy Lynn Cox.

Likewise, during the entire time he served as special prosecutor, Biggs was not an employee of District Attorney Burrell. Burgess disregards the clear recorded fact that Burrell, as a condition to his appointment of Biggs, recused himself and his office from the Cox case and retained no authority over or responsibility for the case. Burgess pleads no specific facts showing that Burrell thereafter had any communication whatsoever with Biggs about the Cox case; that Burrell or any member of his staff thereafter participated, assisted, provided support or funding in Biggs' prosecution of Cox; that there was a nexus or substantial relationship between the Cox case and Burgess's case; that Biggs learned particular confidential information while prosecuting Cox that was relevant to Burgess's case; or that Biggs owed some duty to Burrell by reason of prosecuting the Cox case that was adverse to the interests of Burgess.

Moreover, the cases cited by Petitioner in support of his claim of an actual conflict of interest are inapposite. In *Pinkerton v. State*, 395 So.2d 1080 (Ala.Crim.App. 1980), the defendant's attorney had represented in a prior criminal proceeding a client who pleaded guilty, agreed to act as an informant in exchange for sentencing consideration and engaged in subsequent activities as an informant that led to the defendant's arrest. By representing the defendant with knowledge that his former client would be a prosecution witness, the defendant's attorney clearly was representing actual conflicting interests that denied the defendant's Sixth Amendment right to effective assistance of counsel. Similarly, the criminal defendant's attorney in *Zuck v. Alabama*, 588 F.2d 436 (5th Cir. 1979), simultaneously in a separate legal matter represented the prosecutor who was prosecuting the defendant's criminal case. The defendant's attorney clearly had placed himself in a situation that was inherently conducive to divided loyalties.

Burgess further argues that Biggs had an actual conflict of interest because Decatur police officers, Gary Walker and Richard Crowell, testified before the grand jury in the Cox case and were on the prosecution's list of witnesses in Burgess's case. In actuality, Biggs called Walker as a defense witness in the hearing on Burgess's motions

to suppress, and Walker then testified as a prosecution witness and was cross examined by defense co-counsel Lavender. Crowell did not testify in Burgess's trial. In support of this actual conflict claim, Burgess fails to allege specific facts establishing that the Cox case was in any way related to Burgess's case; that Biggs learned particular confidential information from Walker or Crowell while prosecuting Cox that was relevant to Burgess's case and could have been used to cross-examine Walker; that Biggs owed a duty of loyalty to Walker and Crowell simply based on their involvement as potential prosecution witnesses in the Cox case; or that Biggs' appointment to represent Burgess two years after becoming the special prosecutor in the Cox case created a situation inherently conducive to divided loyalties.

Mere proof that a criminal defendant's attorney is prosecuting a case that involves witnesses who may become witnesses in the trial of the defendant's case is insufficient in and of itself to establish conflicting interests. Alleged facts that "present only a possible, speculative, or merely hypothetical conflict" of interest do not establish a Sixth Amendment violation. See *Williams v. State*, 574 So.2d 876, 878 (Ala.Crim. App. 1990) (No Sixth Amendment violation where the defendant's attorney, who had represented the family of a prosecution witness, did not actively represent conflicting interests in the defendant's capital case.).

Burgess's subpart VII ineffective assistance claim neither is sufficiently pleaded to establish that one of Burgess's trial attorneys, Greg Biggs, had an actual conflict of interest that adversely affected his representation of Burgess, nor is facially meritorious. Accordingly, it is due to be summarily dismissed pursuant to Rule 32.7(d), *Ala.R.Crim.P.*

VIII

ALABAMA'S STATUTE FOR APPOINTMENT AND COMPENSATION AND THE TRIAL COURT'S RELATED RULINGS VIOLATED MR. BURGESS'S RIGHT TO EFFECTIVE COUNSEL AND HIS RIGHT TO A FAIR TRIAL.

A. The Alabama Statutes Governing the Appointment of Counsel in Death Penalty Cases Violated Mr. Burgess's Constitutional Rights.

In Paragraphs 629 through 638 at pages 249 through 252 of his Second Amended Petition, Burgess first argues that Alabama's statute providing for a $1,000.00 cap on the compensation of appointed counsel for out-of-court work in capital cases deprived him of effective assistance of counsel in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, parallel provisions of the Alabama Constitution, other unspecified state, federal and international laws, the separation of powers doctrine, the prohibition against a taking without just compensation and the Due Process and Equal Protection of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, the Alabama Constitution and Alabama State law.

In *Ex parte Grayson*, 479 So.2d 76 (Ala. 1985), cert. denied 474 U.S. 865, 106 S.Ct. 189, 88 L.Ed.2d 157 (1985), the Alabama Supreme Court addressed whether § 15-12-21(d), Ala. Code, 1975, providing for a maximum compensation of $1,000.00 for appointed counsel, denied Grayson due process and equal protection of laws in his capital murder case. The Court held that the compensation statute with a cap of $1,000.00 in both non-capital and capital cases did not deprive Grayson of due process and equal protection of laws.

The Alabama Court of Criminal Appeals more recently in *Ingram v.* State, 779 So.2d 1225, 1279 (Ala.Crim.App. 1999), aff'd. 779 So.2d 1283 (Ala. 2000), observed: "The Alabama Supreme Court, as well as this court, has addressed these same contentions in a number of previous cases and has consistently rejected them." The Alabama appellate courts' rejection of the compensation-of-counsel arguments raised by Burgess in this subpart VIII.A. have remained consistent. See, e.g., *Stallworth v. State*, 868 So.2d 1128 (Ala.Crim.App. 2003); *McGowan v. State*, 990 So.2d. 931 (Ala.Crim.App. 2003).

Burgess's second contention is that Alabama's statute providing for the

appointment of counsel in capital cases, § 13A-5-54, Ala. Code, 1975, deprived him of qualified counsel and a fundamentally fair trial in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, parallel provisions of the Alabama Constitution and other unspecified state, federal and international laws. In support of these bare legal conclusions, Burgess pleads no specific facts explaining precisely why the provisions of § 13A-5-54 are constitutionally deficient. He does not identify a single qualification that either of his appointed trial counsel lacked as a result of deficiencies in § 13A-5-54. He alleges no specific facts indicating that his trial counsel committed errors or omissions in his case that are solely or directly attributable to their lack of qualifications to represent him in a capital case. He cites no case from any jurisdiction that stands for the proposition that § 13A-5-54 or a substantially similar statute is unconstitutional for the reasons that he alleges.

Accordingly, Burgess's subpart VIII.A. claim fails to satisfy the specific pleading requirements of Rule 32.3 and 32.6(b), *Ala.R.Crim.P.*, creates no material issue of fact or law that would entitle him to relief, is devoid of facial merit, and is due to be summarily dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

B. Alabama's System for Appointment of appellate Counsel violated Mr. Burgess's Right to Effective Counsel on Appeal.

Burgess in Paragraphs 639 through 641 at pages 252 and 253 of his Second Amended Petition asserts that because Alabama has no appellate defender system or a panel of trained and adequately-funded counsel who are available for appointment in capital cases and does not require appointed appellate counsel to have a minimum level of experience, he was denied effective counsel on his direct appeal.

Section 13A-5-54, Ala. Code, 1975, provides that a person indicted for a capital offense "who is not able to afford legal counsel must be provided with one court appointed counsel having no less than five years' prior experience in the active practice

of criminal law." The Alabama Supreme Court in *Ex parte Berryhill*, 801 So.2d 7, 12 (Ala. 2001), held that the experience requirement of § 13A-5-54 applied to appointed counsel representing a capital defendant, who has be sentenced to death, on the defendant's first appeal as of right. Burgess does not allege that his three appellate counsel did not have the requisite experience specified in the statute. Rather, he alleges generally that two of his appellate counsel had never before handled a homicide appeal and that his lead appellate counsel insisted that he would need support from other willing attorneys in preparing motions and briefs. Based on these allegations, Burgess then concludes that because Alabama's appointment system deprived him of qualified appellate counsel, he was unconstitutionally denied his rights to appeal and to a reliable determination of his appeal.

Rule 32.6(b), *Ala.R.Crim.P.*, provides that "[a] bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings." It is not the pleading of conclusions that entitles a petitioner to relief; rather, it is the allegation of specific facts which, if true, would support the granting of relief. Burgess fails to plead specific facts showing that one or more of his appointed appellate counsel lacked some required qualification to represent him on his direct appeal, showing how or why he was deprived of qualified appointed appellate counsel, showing what his appointed appellate counsel did or failed to do during their representation that qualified counsel would have done, showing what legally legitimate issues or arguments his appointed appellate counsel failed to present and establishing why the outcome of his appeal probably would have been different had he been represented by other appointed appellate counsel.

Accordingly, Burgess's subpart VIII.B. claim is not sufficiently pleaded in compliance with Rule 32.6(b), presents no material issue of law or fact that would entitle him to relief and is due to be dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

IX

TRIAL COUNSEL UNREASONABLY FAILED TO OBJECT TO MR. BURGESS'S CONVICTION AND SENTENCE ON THE GROUNDS THAT THEY VIOLATED INTERNATIONAL LAW.

As to this claim in Paragraphs 642 through 657 (pages 254 through 259) of his Second Amended Petition, Burgess primarily contends that his capital conviction and death sentence are tainted by racial discrimination, unequal application of law, and the imposition of torture or cruel, inhumane or degrading treatment or punishment in violation of Articles 6, 7 and 14 of the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 175 ("ICCPR"). The United States Senate ratified the ICCPR with certain reservations, understandings, declarations and a proviso, including the following:

> The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment....
>
> That the United States declares that the provisions of Articles 1 through 27 of the [ICCPR] are not self-executing.

A treaty is self-executing and creates an individual right of action when it expressly or impliedly creates that right. The United States Senate, however, expressly declared that the ICCPR was not self-executing and stated that its declaration was to "clarify that the Covenant will not create a private cause of action in U. S. Courts." *International Covenant on Civil and Political Rights*, S. Exec. Rept., No. 102-23, 102d Congress, 2d Session, 15 (1992).

The Alabama Supreme Court in *Ex parte Pressley*, 770 So.2d 143, 148-149 (Ala. 2000), found that the Senate's express reservation of this nation's right to impose the death penalty on a juvenile was valid and held that the death penalty imposed on a 16-year-old was legal irrespective of his argument that the sentence violated the ICCPR.

More recently, the Alabama Court of Criminal Appeals in *Sharifi v. State*, 993 So.2d 907, 920-921 (Ala.Crim.App. 2008), considered the same arguments based on the ICCPR that Burgess makes in this claim IX and found that they did not entitle Sharifi to have his capital conviction and death sentence overturned. The Court of Appeals agreed that the ICCPR was not self-executing and had not become operative by implementing legislation, relying on *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004) (ruling that the United States ratified the ICCPR on the express understanding that it was not self-executing and did not create enforceable obligations).

Burgess does not plead or make a specific showing that the above cited binding precedents have changed. Nor does he allege specific facts establishing that the other international treaties, reports, declarations and conventions that he relies upon are self-executing or have been implemented by Congressional or state legislation, thereby creating individual rights that are enforceable in the courts. Consequently, Burgess's subpart IX claim fails to present a material issue of fact or law supporting his argument that his conviction and sentence are void under international law, is facially without merit and is due to be summarily dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

X

APPELLATE COUNSEL FOR MR. BURGESS WERE CONSTITUTIONALLY INEFFECTIVE.

A. Appellate Counsel Unreasonably Failed to Obtain and Review State's Exhibits 100 and 101, the Tapes of Mr. Burgess's Statements, and Failed to Raise Meritorious Issues on Appeal.

This ineffective assistance claim in presented in Paragraphs 663 through 668 on pages 261 through 263 of Burgess's Second Amended Petition.

After Burgess was sentenced the trial court appointed three local counsel to represent him in presenting post-trial motions and prosecuting his direct appeal. One of

those appointed counsel was later replaced. Burgess's local counsel received assistance from attorneys affiliated with the Alabama Capital Representation Resource Center, which later became the Equal Justice Initiative of Alabama, as their client's appeals ran their full course through the appellate courts.

In the Alabama Court of Criminal Appeals Burgess's counsel raised approximately 25 major issues that included many subparts. Among the issues they presented, Burgess's appellate counsel claimed that the trial court erred in failing to suppress the videotaped statement that he made to news reporters while being escorted from the Decatur City Hall to the Morgan County Jail and in denying his motion to change venue. After reviewing the videotape and the record concerning Burgess's statement to the news reporters, the Court of Criminal Appeals concluded that the trial court properly admitted the statement into evidence. *Burgess*, 827 So.2d at 177. As to the change of venue issue, the Court of Criminal Appeals noted several times in its findings the evidence consisting of televised newscasts and printed news stories of Burgess's admissions to the news media, as well as the large number of mock jurors who had seen the televised admissions. The Court concluded that Burgess's videotaped admissions served as a basis "for all of the pretrial publicity," but was factual, did not create actual jury prejudice and did not support a change of venue. *Id.* at 158-162.

Burgess says in this subpart X.A. that his counsel failed to review copies of State's Exhibits 100 (the unredacted videotape that was not presented to the jury) and 101 (the videotape containing the redacted version of Burgess's statement that was admitted as evidence and played for the jury). As a consequence, Burgess further says that his appellate counsel did not argue on appeal that State's Exhibit 101 should have been excluded by the trial court because it was unduly prejudicial to him. He also says that because his appellate counsel failed to view Exhibits 100 and 101, they were unable to successfully argue that the trial court erred in denying a change of venue.

As to the change of venue issue, the Alabama Court of Criminal Appeals placed

extensive reliance on Burgess's videotaped admissions to the news reporters in considering whether he had presented sufficient evidence to justify a venue change. Burgess does not plead specific facts showing how he knows or identifying a person who has firsthand knowledge that his appellate counsel failed to view State's Exhibits 100 and 101 in preparing his appeal. Even assuming they did not view the videotapes, the Court of Criminal Appeals' opinion reflects that it actually reviewed the videotape and considered in substance every fact argued by Burgess in Paragraph 667 of his Second Amended Petition. Additionally, he fails to specifically plead facts that show what additional material information his appellate counsel could have explained to the Court of Criminal Appeals had they seen the content of the videotapes. Nor does Burgess allege specific facts establishing that, had appellate counsel provided additional information or argument about his videotaped statement, there is a reasonable probability that the outcomes of the change of venue issue and his appeal would have been different.

As to the exclusion of State's Exhibit 101, Burgess again does not plead specific facts showing how he knows or identifying a person who has firsthand knowledge that his appellate counsel failed to view State's Exhibits 100 and 101. Even assuming that counsel did not view the videotapes, Burgess disregards other portions of the extensive record pertaining to his videotaped admissions that certainly would have alerted his appellate counsel to the prejudicial impact of State's Exhibit 101. Whether Burgess's statement to the reporters is viewed on videotape or its substance is gleaned from the paper record on appeal, rocket science is not required to recognize that virtually everything Burgess said was incriminating and prejudicial. Finally, Burgess does not cite any case or other legal authority that would have compelled the appellate courts to hold, considering the context of his entire remarks to the news media, that Burgess's requests for the death penalty and reference to himself as a "black nigger" should have been excluded by the trial court from the jury as being substantially more prejudicial than probative. See Rules 401, 402 and 403, *Ala.R.Evid.*

Accordingly, Burgess's subpart X.A. ineffective assistance of appellate counsel claim does not satisfy the specific pleading requirements of Rules 32.3 and 32.6(b), *Ala.R.Crim.P.*, fails to present material issues of fact or law that would entitle him to relief and is due to be dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

B. Appellate Counsel Were Ineffective in the Circuit Court and on Direct Appeal.

i. Appellate Counsel Unreasonably Failed to Raise Meritorious Issues.

Burgess's ineffective assistance of appellate counsel claim in subpart X.B.i. is presented in Paragraphs 669 through 671 at pages 263 through 265 of his Second Amended Petition. He first argues that for the purpose of litigating his post-trial motions concerning the racial composition of the venire from which his jury was selected, appellate counsel obtained access to records of the Morgan County Jury Commission pursuant to a motion to supplement the record, but unreasonably failed to make sure that the records were preserved in their original condition for future review. Presumably, these records would have confirmed an alleged Census Bureau finding that African Americans constituted 9.15 percent of Morgan County's jury-eligible population rather than 7.2 percent as testified to by the Clerk of the Jury Commission. Burgess alleges that the higher percentage would have shown that venires drawn from the Morgan County master jury list violated his right to a fair cross-section under the Sixth and Fourteenth Amendments. This claim fails to present a material issue of fact or law that entitles Burgess to relief and facially lacks merit.

Burgess raised the issue of a fair cross-section violation in both the trial court and on his direct appeal. The Alabama Court of Criminal Appeals observed that a "percentage disparity between the population of blacks in [Morgan] County and the numbers of blacks on the jury venire is not sufficient to allow us to conclude that blacks

were not fairly represented on this jury venire." *Burgess*, 827 So.2d at 185, quoting *Stewart v. State*, 730 So. 1203, 1238 (Ala.Crim.App. 1996). Therefore, even if the alleged missing record would have shown a higher percentage disparity between the jury-eligible population of African Americans in Morgan County and the actual number of African Americans on his jury venire, Burgess still would not be entitled to relief. To establish that he was prejudiced, he must allege specific facts showing that but for his appellate counsel's deficient performance, his conviction would have been reversed on appeal. This he has not done and cannot do because, as found by the Court of Criminal Appeals, his fair cross-section claim lacks merit "[b]ecause Burgess has failed to prove that blacks were underrepresented on his jury venire due to a systematic exclusion of blacks in the jury selection process." *Burgess,* 827 So.2d at 185. See *Duren v. Missouri*, 439 U.S. 357, 364 (1979) (One of the three elements of a fair cross-section violation requires proof "that the under-representation is the result of systematic exclusions of the group in the jury selection process").

Burgess further alleges that his appellate counsel were ineffective because they did not raise the issue that his sentence was disproportionate to the crime. This claim is insufficiently pleaded and is meritless. As it was obligated to do, the Alabama Court of Criminal Appeals on Burgess's direct appeal performed a proportionality review pursuant to § 13A-5-53(b)(3), Ala. Code, 1975. The Court determined that "[t]he sentence of death in this case is neither excessive nor disproportionate to the penalty imposed in similar cases, considering both the crime and the appellant." *Burgess*, 827 So.2d. at 192-93. The Alabama Supreme Court affirmed, finding "no error in the discharge of its duty [to independently review the death penalty imposed on Burgess] by the Court of Criminal Appeals." *Ex parte Burgess*, 827 So.2d at 200.

"[A]ppellate counsel has no constitutional obligation to raise every nonfrivolous issue... Appellate counsel is presumed to exercise sound strategy in the selection of issues most likely to afford relief on appeal... One claiming ineffective appellate counsel

must show prejudice, i.e., the reasonable probability that, but for counsel's errors, the petitioner would have prevailed on appeal." *Moody v. State*, 95 So.3d 827, 836 (Ala.Crim.App. 2011) (internal citations omitted). Moreover, "[i]f a legal issue would in all probability have been found to be without merit had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." *Frances v. State*, 143 So.3d 340, 357 (Fla. 2014) (internal citation omitted). Burgess fails to plead specific facts showing that his appellate counsel exercised unreasonable strategy in failing to raise a meritless issue or showing a reasonable probability that the outcome of his appeal would have been different had his counsel raised an issue about the proportionality of his sentence

Burgess next contends that the trial court erred in denying his motion for a change of venue and that his appellate counsel provided unreasonable representation by failing to argue that the change of venue should have been granted on the ground of actual prejudice. This claim is facially without merit. On Burgess's direct appeal his appellate counsel argued that the trial court erroneously denied his motion for a change of venue. The Alabama Court of Criminal Appeals reviewed at length the evidence presented during the change of venue hearing and the results of the sample jury proceeding. The Court recognized that pretrial publicity saturated the community, but did not find that the existence of actual prejudice arising from publicity that was non-factual, prejudicial and inflammatory. *Burgess*, 827 So.2d at 158-161. Whether or not his appellate counsel raised the issue of actual prejudice, the Court of Criminal Appeals addressed actual prejudice and found that the evidence did not establish its existence.

Burgess's last argument in subpart X.B.i. is that his appellate counsel unreasonably failed to raise that issue that the foreperson of the grand jury that indicted him was selected in a racially discriminatory manner. This ineffective assistance claim is insufficiently pleaded and is facially lacking in merit. Burgess pleads no facts that make a *prima facie* showing that the foreperson of his grand jury was selected pursuant to

a procedure "that [was] susceptible of abuse or [was] not racially neutral," thereby supporting a presumption of racial discrimination. *Ex parte Drinkard*, 777 So.2d 295, 303 (Ala. 2000). Further, the Alabama Supreme Court in *Drinkard* noted that Morgan County changed its method of selecting grand jury forepersons in 1993: "Before 1993, the trial court appointed grand-jury forepersons, based on the recommendation of the prosecutor. Since that time, grand-jury forepersons have been selected by the members of the grand jury itself." That method "forecloses a question of discrimination in the judicial process." *Id.*, at 304. Burgess's grand jury indicted him in 1993 after the change in the method of selecting the foreperson foreclosed a question of discrimination. Appellate counsel cannot be ineffective for not raising on appeal an issue that has no merit. *Jones v. State*, 2019 WL 6243067, *31 (Ala.Crim.App. 11/22/19).

Accordingly, Burgess's subpart X.B.i. ineffective assistance claims either fail to satisfy the specific pleading requirements of Rule 32.6(b), fail to present material issues of fact or law that would entitle him to relief, or are facially without merit. For one or more of these reasons, all X.B.i. claims are due to be summarily dismissed pursuant to Rule 32.7(d), *Ala.R.Crim.P.*

ii. Appellate Counsel Were Ineffective for Unreasonably Failing to Raise Reasonably Ascertainable Claims.

Burgess contends in Paragraphs 672 and 673 on pages 265 and 266 of his Second Amended Petition that if it is determined that his claims of ineffective assistance of trial counsel and juror misconduct are procedurally barred because his appellate counsel could have presented them in their motion for new trial or on direct appeal, then appellate counsel performed deficiently and prejudiced him. In paragraph 54 of the "Defendants Post Trial Motions for New Trial, Motion in Arrest of Judgment and Motion for Judgment of Acquittal," Burgess's appellate counsel specifically and intentionally omitted any consideration or allegation of ineffective assistance of trial counsel as a

ground for post trial relief and stated their reasons for making that election. (Clerk's Supplemental Record at 031 and 032). Burgess fails to plead specific facts showing that his counsel's reasons did not constitute the exercise of sound strategy in the selection of issues most likely to afford post trial relief. "[A]ppellate counsel has no constitutional obligation to raise every nonfrivolous issue." "[F]ar from being evidence of incompetence," the process of winnowing out issues "is the hallmark of effective advocacy. Appellate counsel is presumed to exercise sound strategy in the selection of issues most likely to afford relief on appeal." *Moody*, 95 So.3d at 836 (internal citations omitted).

Moreover, Burgess fails to support this claim with specific alleged facts establishing that he was prejudiced by appellate counsel's election; i.e., that but for his counsel's omission, there is a reasonable probability that he would have prevailed on his appeal. This Final Order addresses the innumerable claims of ineffective assistance of trial counsel raised by Burgess in previous sections and subparts of his Second Amended Petition. None of those claims entitles Burgess to post-conviction relief, as they variously fail to satisfy the specific pleading and disclosure requirements of Rule 32.6(b), fail to allege specific facts that, if true, would entitle him to relief, fail to present cognizable claims that would entitle him to relief, fail to create material issues of fact or law that would entitle him to relief or lack facial merit. Given that Burgess's ineffective assistance claims have not been procedurally defaulted for purposes of post-conviction review, appellate counsel's decision to omit ineffective assistance of trial counsel claims from their post trial motions and direct appeal did not prejudice Burgess.

Accordingly, his subpart X.B.ii. ineffective assistance claim has no merit, presents no legally cognizable claim and is due to be dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

C. Appellate Counsel Unreasonably Failed to Marshal All the Readily Available Evidence in Support of Mr. Burgess's *J.E.B.* Claim.

In Paragraphs 674 through 681 at pages 266 through 269 of his Second Amended Petition, Burgess concedes that his appellate counsel on direct appeal raised the issue of whether the prosecutor used his peremptory strikes to purposefully discriminate against women during jury selection. He simply disagrees with the arguments asserted by his counsel, stating that they did not adequately argue that the struck female jurors were treated differently from the seated male jurors, that the struck female jurors shared only the characteristic of gender and that the prosecutor's manner of questioning the venire indicated an intent to discriminate against the females.

The Alabama Court of Criminal Appeals reviewed the entire record that included the extensive voir dire examination of the venire and peremptory strikes exercised by the prosecutor. Having considered the factors set out in *Ex parte Branch*, 526 So.2d 609 (Ala. 1987), the Court concluded that "we do not find that the number of strikes this prosecutor used to remove women from the venire is sufficient to establish a prima facie case of gender discrimination." *Burgess*, 827 So.2d at 150, citing *Ex parte Trawick*, 698 So.2d 162, 168 (Ala. 1997), cert.denied, 522 U.S. 1000, 118 S.Ct. 568, 139 L.Ed.2d 408 (1997). In reaching this conclusion, the Court of Criminal Appeals found specifically from the record that the female venire members who were struck did not share only the characteristics of gender, that the prosecutor's questions directed at the prospective female jurors did not constitute a lack of meaningful voir dire or indicate an intent to discriminate against them, and that the prosecutor did not treat the struck female venire members and the male jurors differently. *Burgess*, 827 So.2d at 150.

That the Court of Criminal Appeals made findings adverse to Burgess's *J.E.B.* claim does not mean that his appellate counsel performed unreasonably in their presentation and arguments to the appellate court. Other than providing his own hindsight analysis and conclusions about why the findings of the Court of Criminal Appeals were incorrect and concluding that his appellate counsel should have presented a more thorough and persuasive *J.E.B.* argument, Burgess does not identify the specific

acts or omissions of counsel that resulted from unreasonable professional judgment. *Strickland*, 466 U.S. at 690. Burgess fails to plead specific facts establishing that his counsel's representation fell below an objective standard of reasonableness; that is, that no competent counsel would have presented the *J.E.B.* claim as it was presented by his appellate counsel.

Burgess finally argues that his appellate counsel unreasonably failed to include his hindsight analysis and conclusions about the *J.E.B.* issue in their briefs filed in support of his petition for a writ of certiorari directed to the Alabama Supreme Court. While a petition for certiorari is required in a death penalty case, Burgess fails to recognize that the scope of the Supreme Court's review is limited to the facts stated in the opinion of the Court of Criminal Appeals and requires it to address only an error that has probably adversely affected the substantial rights of the petitioner. Rules 39(a)(2)(D) and 39(k), *Ala.R.App.P.* In preparing briefs, effective appellate counsel must be mindful of the limited scope of review and more stringent limits placed on the content and length of briefs in support of certiorari. "Counsel need not raise and address every possible issue on appeal to render effective assistance of counsel." *Bui v. State*, 717 So.2d 6, 26 (Ala.Crim.App. 1997) (citations omitted). Moreover, even though Burgess questions throughout his Second Amended Petition a multitude of strategic and tactical choices made by his appellate and trial counsel, he is entitled "not [to] errorless counsel, and not [to] counsel judged ineffective by hindsight, but [to] counsel reasonably likely to render and rendering reasonably effective assistance." *Id.*, citing *Thompson*, 615 So. 2d at 134.

Having examined the allegations in this subpart X.C. claim with the distorting effects of hindsight eliminated and having applied the strong presumption that appellate counsel's representation fell within the wide range of reasonable professional assistance based on their circumstances and perspective at the time in question, the Court finds no merit in Burgess's claim that his appellate counsel performed unreasonably in presenting the *J.E.B.* issue. He also fails to sufficiently plead facts establishing that, had his

appellate counsel argued the *J.E.B.* issue according to his specifications, there is a reasonable probability that he would have prevailed on appeal.

Accordingly, Burgess's subpart X.C. ineffective assistance of appellate counsel claim is insufficiently pleaded under Rule 32.6(b), fails to present a material issue of fact or law that would entitle Burgess to relief, is facially without merit and is due to be summarily dismissed pursuant to Rule 32.7(d), *Ala.R.Crim.P.*

D. Appellate Counsel Were Ineffective for Unreasonably Failing to Argue in the Application for Rehearing that the Court Erred in Affirming the Denial of a Change of Venue.

Burgess in Paragraphs 682 through 684 on pages 269 through 271 of his Second Amended Petition argues that the Alabama Court of Criminal Appeals wrongly affirmed the trial court's denial of his motion for a change of venue, wrongly determined that the pretrial publicity was not prejudicial and inflammatory, wrongly determined that the publicity from his videotaped statement to the news reporters was of his own making, wrongly found that any prejudice from the videotaped statement was cured by the edited version that was actually played to the jury, wrongly determined that there was a cooling off period between the heaviest pretrial publicity and the trial and wrongly determined that the content of the news reporting was primarily factual. He says that his appellate counsel in their application for rehearing performed unreasonably because they failed to demonstrate that the pretrial publicity was prejudicial and inflammatory and failed to convince the Court that its findings were erroneous.

This claim is essentially a rehash of the same arguments made by Burgess in subparts X.A. and X.B.i. above, as to which this Court addressed his contentions about the denial of his motion for a change of venue and the publicity generated by his videotaped statement to the news media. In this subpart X.D. claim, Burgess fails to plead facts that identify specific omissions by his appellate counsel on rehearing that resulted from unreasonable professional judgment. Likewise, other than expressing the

bare conclusion that the pretrial publicity was non-factual, prejudicial and inflammatory, Burgess does not plead specifically what arguments his appellate counsel should have presented on rehearing that would have caused the Court of Criminal Appeals to change its initial findings and conclusions. Finally, Burgess does not plead specific facts establishing a reasonable probability that, had his appellate counsel again argued that the pretrial publicity was non-factual, prejudicial and inflammatory, the Court of Criminal Appeals would have granted his rehearing application and reversed his conviction and sentence. A reasonable probability means that the likelihood of a different result is substantial, not just conceivable. See *Harrington v. Ricter*, 562 U.S. at 112.

Accordingly, Burgess's subpart X.D. claim insufficiently pleads specific facts showing that his appellate counsel performed deficiently and that he was prejudiced, fails to create a material issue of fact or law that would entitle him to relief and is due to be summarily dismissed. Rules 32.3, 32.6(b) and 32.7(d), *Ala.R.Crim.P.*

XI

JURORS WERE EXPOSED TO AND CONSIDERED EXTRINSIC EVIDENCE IN VIOLATION OF THEIR DUTY TO REACH GUILT AND PENALTY VERDICTS SOLELY ON THE EVIDENCE PRESENTED AT TRIAL.

This claim is presented in Paragraphs 685 through 696 on pages 271 through 275 of Burgess's Second Amended Petition. It is based substantially on the following allegations: that after the jury's deliberations began, they asked to be reinstructed on the elements of murder and capital murder. After the instructions were given by the trial court, an unidentified juror stated that one or more jurors had no knowledge of firearms and that there was some confusion about how a gun had to be prepared for firing. He then asked "is there a chance we might could get a gun expert to come in here and tell us these – educate someone of firearms." The trial judge denied the request. (Trial

Transcript at 1635).

Burgess further alleges that after the jury returned to deliberate, "a discussion took place in which individual jurors provided extrinsic knowledge and opinions about the operation of the .25 Titan semi-automatic and pistols in general;" that "Juror 12 conducted a demonstration with the .25 Titan semi-automatic, State's Exhibit 72, for the eleven other jurors," showing them "how, based upon his personal knowledge, the pistol operated, including how the safety, slide, and trigger functioned, and … how, in his view, the pistol could not have discharged unintentionally;" and that other jurors then "contributed their knowledge and opinions about the operation of firearms." After their discussions, the jurors voted to convict Burgess of capital murder. (Second Amended Petition at paragraph 690).

Under Rule 606(b), *Ala.R.Evid.*, jurors generally "may not testify in impeachment of the verdict … as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict … or concerning the juror's mental processes in connection therewith." Because the viability of this claim rests entirely on the admissibility of the testimony of one or more jurors about explanations and observations that occurred during the jury's deliberations, Burgess bears the burden to show that the Rule 606(b) exception applies. That is, he must plead specific facts demonstrating that the jury was subjected to "extraneous prejudicial information" that "was improperly brought to the jurors' attention" or to "any outside influence" that "was improperly brought to bear upon any juror." Rule 606(b), *Ala.R.Evid.*

Burgess apparently contends that the following constitute extrinsic evidence or facts or extraneous information that were improperly presented to and considered by the jurors in reaching their verdicts: discussions among the jurors during their deliberations in which individual jurors expressed their knowledge and opinions about the operation of

State's Exhibit 72, the .25 Titan semi-automatic handgun (Second Amended Petition, paragraph 690); the explanation of Juror 12 to the other jurors, "based upon his own personal knowledge," about various parts of State's Exhibit 72, how it operated and why in his opinion it did not discharge unintentionally (Second Amended Petition, paragraph 690); and the jurors' reliance during their deliberations on their own knowledge of firearms arising from their different and varied experiences (Second Amended Petition, paragraph 694).

The United States Supreme Court in *Warger v. Shauers*, 135 S.Ct. 521, 529 (2014), explained the meaning of "extraneous" information as follows:

> Generally speaking, information is deemed "extraneous" if it derives from a source "external" to the jury. "External" matters include publicity and information related specifically to the case the jurors are meant to decide, while "internal" matters include the general body of experiences that jurors are understood to bring with them to the jury room.

The Alabama Supreme Court addressed the legal concept of extraneous or extrinsic information in detail and in the context of the Rule 606(b) exception in *Sherrief v. Gerlach*, 798 So.2d 646 (Ala. 2001), a medical negligence case. The plaintiff, Sherrief, argued in his motion for new trial that some jurors had improperly discussed the medical standard of care during their deliberations. The Supreme Court noted the distinction between "extraneous facts" which, if considered by jurors may be sufficient to impeach their verdict, and the "debates and discussions of the jury" which are protected from inquiry. The Court noted examples of extraneous information, such as jurors defining terms by using a dictionary or encyclopedia or acquiring facts by making an unauthorized visit to the scene of a crime. For a matter to be extraneous in nature, it "must have been obtained by the jury or introduced to it by some process outside the scope of the trial. Otherwise, matters that the jurors bring up in their deliberations are simply not improper under Alabama law, because the law protects debates and discussions of jurors and statements they make while deliberating their decision." *Id.* at

653. The Supreme Court then held that all of the alleged statements made by certain jurors during their deliberations did not constitute "extraneous facts" because they related to evidence presented or information provided to the jury during the trial, there was no showing that the jury consulted outside sources of information, and nothing indicated that the jury or any particular juror was influenced by an outside source.

In *Bethea v. Springhill Memorial Hospital*, 833 So.2d 1 (Ala. 2002), the plaintiff, Bethea, claimed that her child had suffered injury from Pitocin, a drug used to induce labor. The trial court denied Bethea's motion for new trial in which she alleged that during the jury's deliberations, some of the female jurors discussed improper extraneous information based on their own personal knowledge about Pitocin and their opinions that the drug did not cause the child's health problems. Affirming the trial court's denial of a new trial, the Alabama Supreme Court stated:

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

Id. at 8. See also *Marshall v. State*, 182 So.3d 573, 614-15 (Ala.Crim.App. 2014), in which Marshall argued that a juror during the guilt-phase deliberation in his capital murder case introduced "extraneous information" when she stated that the victim's "vaginal tear could not have been caused by female masturbation." The juror later stated that the "vaginal tear was probably a key part of the evidence." Addressing the merits of Marshall's contention that the trial court had improperly excluded the juror's testimony pursuant to Rule 606(b) during the hearing on his motion for new trial, the Court of Criminal Appeals quoted extensively from *Bethea* and *Sherrief, supra.* It found that

Marshall had proffered no facts establishing that the juror's statement "was obtained through some process outside the scope of the trial." *Id.* at 618. The Court of Criminal Appeals thus held that the juror's statement "arose solely from within the 'debates and discussions' of the jurors during the process of deliberating" and did not constitute "extraneous information" under the Rule 606(b) exception. The juror's statement was a "matter that the jurors brought up in their deliberations" and was "simply not improper under Alabama law, because the law protects debates and discussions of jurors and statements they make while deliberating their decision." *Id.*

In support of his subpart XI claim that his jurors considered and relied on improper extraneous or extrinsic evidence in reaching their guilt and penalty phase verdicts, Burgess pleads no specific facts showing that the jurors' statements, explanations and opinions about State's Exhibit 72 during their deliberations were based on information that came from some external authority or through some process outside the scope of his trial. The statements, explanations and opinions that Burgess attributes to the jurors clearly related to the operation of State's Exhibit 72 and to Burgess's own statements that the .25 Titan semi-automatic fired accidentally and unintentionally when the victim struck him. Burgess alleges no facts showing that the jury consulted outside sources of information regarding the handgun's operation. Other than bare conclusions, Burgess pleads no facts showing that the jurors were influenced by any outside source or external authority.

The alleged prejudicial extrinsic evidence that Burgess relies on to support his claim constitutes protected discussions and debates of the jurors during their deliberations and is not extraneous information under the exception to Rule 606(b), *Ala.R.Evid.* The material facts alleged by Burgess would not be admissible during an evidentiary hearing and would not entitle him to relief. His claim XI fails to present a material issue of fact or law that would entitle him to relief, is facially without merit and it due to be summarily dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

XII

THE STATE BOTH WITHHELD AND BELATEDLY DISCLOSED EXCULPATORY EVIDENCE IN VIOLATION OF MR. BURGESS'S RIGHT TO A FAIR TRIAL AND A RELIABLE DETERMINATION OF GUILT AND SENTENCE.

This claim is found in Paragraphs 697 and 698 on pages 275 through 277 of Burgess's Second Amended Petition. He argues that (a) the Decatur Police Department withheld or belatedly disclosed a videotape and photographs of the crime scene that constituted purported exculpatory evidence; (b) the State withheld or belatedly disclosed reports, statement or other information pertaining to the photographic lineup that was purportedly used to induce Patricia Wallace to identify Burgess's presence at the crime scene; and (c) the State withheld or belatedly disclosed affidavits and information obtained by Decatur Police Department investigators Hale and Moore that reflected upon whether Burgess could get a fair trial in Morgan County.

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

To support his claim of a *Brady* violation, Burgess must plead facts that, if true, would establish that the prosecution suppressed evidence, that the evidence was favorable

to his defense and that the evidence was material. *Smith v. State*, 639 So.2d 543, 547 (Ala.Crim.App. 1993). His allegation that the Decatur Police Department suppressed unidentified photographs and videotape of the crime scene fails to satisfy the specific pleading and disclosure requirements of 32.6(b), *Ala.R.Crim.P.*, fails to create a material issue of fact or law that would entitle him to relief and is facially without merit.

As to Burgess's second argument, the Alabama Court of Criminal Appeals on his direct appeal stated that "even if [Patricia] Wallace's identification of Burgess was somehow tainted by ... the photographic array" that was shown to her by the Decatur police, it did "not affect the outcome of the trial or otherwise prejudice a substantial right of Burgess." Given that the identification of Burgess as the person who robbed and killed Mrs. Crow was never an issue during the trial, the Court of Criminal Appeals held that "there was no prejudice to Burgess at all that Ms. Wallace was allowed to identify him as the person she had seen near the bait shop" during the morning of the crime. *Burgess*, 827 So.2d at 170-71.

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

As to the last argument submitted by Burgess in support of his claim XII, the prosecution during the hearing on his motion to change venue attempted to introduce affidavits that two Decatur police investigators collected from Morgan County citizens or business owners. Each of the affidavits consisted of a pre-printed form and purported to

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

For the reasons stated above, Burgess's claim XII is due to be summarily dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

XIII

THE STATE PRESENTED FALSE AND MISLEADING TESTIMONY THAT DEPRIVED MR. BURGESS OF A FAIR TRIAL AND A RELIABLE DETERMINATION OF GUILT AND PENALTY.

Burgess claims in Paragraphs 699 and 700 at pages 277 through 279 of his Second Amended Petition that the prosecutor intentionally introduced false and misleading testimony for the purpose of obtaining a capital murder conviction and death sentence. To support this claim and its subparts, he incorporates by reference his ineffective assistance of trial counsel arguments that were presented in Paragraphs 71 through 108.

The arguments and issues raised by Burgess in claim XIII could have been presented in the trial court and on direct appeal from his conviction and sentence, but were not. He does not contend that his claim XIII arguments are based on newly discovered material facts as provided in Rule 32.1(e), *Ala.R.Crim.P.* As such, his claim XIII is procedurally barred from post-conviction review pursuant to Rules 32.2(a)(3) and (a)(5), *Ala.R.Crim.P.*

Even if Burgess's claim XIII is not precluded from post-conviction review, it fails to satisfy the pleading requirements of Rules 32.3 and 32.6(b), *Ala.R.Crim.P.* To sufficiently plead this claim for post-conviction relief, Burgess must plead specific facts establishing that one or more of the State's witnesses referred to in Paragraph 697 gave false testimony during his trial and that the prosecutor knew that the testimony was false, but allowed it to go uncorrected. See *Napue v. Illinois*, 360 U.S. 264, 272 (1959) (reversing the petitioner's conviction obtained through the use of false testimony that was known by the prosecutor to be false, but was not corrected).

Burgess fails to allege specific facts showing that false testimony was given during his trial by the officers who stopped and detained him in Madison County, the Decatur officers who took custody of both him and the gun and ammunition found with him in Mrs. Crow's car, Dr. Embry, Decatur Investigator Boyd, Decatur Investigator Moore and Decatur Investigator Long. Likewise, he alleges no specific facts establishing that the prosecutor knew that one or more of those witnesses had given false testimony, but did nothing to correct it.

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

Burgess further alleges the bare conclusions that the crime scene was contaminated, inadequately recorded and searched and not secure and that "the prosecutor knowingly introduced false and misleading evidence to show that the evidence obtained at the crime scene was uncontaminated." Again, however, he pleads no

specific facts establishing what evidence was false, contaminated or misleading and why the prosecutor would have known it to be such. He makes similar factually unsupported accusations that the prosecutor examined witnesses to lead the jury to conclude that Mrs. Crow was seated when she was shot and that she was conscious and suffering after the shooting; that by introducing the testimony of Investigator Sheila Moore, who described where she found a spent shell casing at the crime scene, the prosecutor misled the jury to believe that the shooting was intentional; and that by using the testimony of Investigator Long about Burgess's resumption of communication and waiver of rights during his custodial interrogation, the prosecutor misled the trial court to deny Burgess's motion to suppress. None of these accusations satisfy the specific pleading and disclosure requirements of Rule 32.6(b) and do not allege specific facts that, if true, would entitle Burgess to relief.

Accordingly, claim XIII does not sufficiently plead specific facts that satisfy the requirements of Rule 32.6(b), does not allege specific facts that, if true, would entitle Burgess to relief, fails to present a material issue of fact or law, is facially without merit and is due to be summarily dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

XIV

THE IMPOSITION OF A DEATH SENTENCE ON MR. BURGESS, WHO WAS EIGHTEEN YEARS OLD AT THE TIME OF THE CRIME, VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS.

A. Scientific Evidence Supports Extending *Simmons* to Individuals Who were Under Twenty-One Years of Age at the Time of Their Offenses.

In Paragraphs 701 through 711 on pages 279 through 290 of his Second Amended Petition, Burgess argues that the Court "should extend the constitutional prohibition of the execution of juveniles announced in *Roper v. Simmons* to individuals who were

between the ages of eighteen and twenty-one at the time of their offenses. See *Roper v. Simmons*, 543 U.S. 551, 573-74 (2005)." Burgess first supports this argument with what he calls new research demonstrating that the youthful deficits, characteristics and vulnerabilities of juveniles generally extend to age 21, if not beyond. As a result, he says that the execution of a person under age 21 at the time of his crime fails to serve "the constitutionally accepted purposes of capital punishment, which are retribution and deterrence." [citations omitted] (Second Amended Petition, Paragraphs 704 and 705). Burgess further contends that even if the Court does not extend *Roper's* execution prohibition to individuals who were between 18 and 21 years old at the time of their crimes, the prohibition should be applied nonetheless to him because he possessed characteristics that do not classify him among the worst offenders. See *Roper*, 543 U. S. at 569.

In *Thompson v. State*, 153 So.3d 84 (Ala.Crim.App. 2012), as modified on denial of rehearing, Thompson, who was 18 years of age at the time of his capital crime, argued generally that a death sentence imposed on an 18-year-old is cruel and unusual punishment in violation of the Eighth Amendment. He also argued that his death sentence was unconstitutional because he was a traumatized, abused and mentally ill 18-year-old with a "mental age" that warranted his treatment as a juvenile. Relying on *Roper's* establishment of 18 years of age as the line defining death eligibility and the reasoning of other courts that had considered Thompson's mental age argument, especially the Kentucky Supreme Court's opinion in *Bowling v. Commonwealth*, 224 S.W.3d 577, 582-584 (Ky. 2006), the Alabama Court of Criminal Appeals held that Thompson's death sentence complied with *Roper* and the Eighth Amendment and that it would not depart from *Roper's* bright-line rule based on a defendant's chronological age in order to consider Thompson's alleged "mental age." *Thompson*, 153 So.2d at 177-78. Likewise, in its opinion on return to remand in *Jackson v. State*, 133 So.3d 420, 466 (Ala.Crim.App. 2012), the Court of Criminal Appeals reiterated that *Roper* did not

authorize consideration of the mental age of a defendant, only the chronological age. Given that Jackson was 18-years-old at the time of the capital crime, the Court upheld his death sentence.

Accordingly, Burgess's XIV.A. claim is not supported by existing Alabama law, fails to present a material issue of law or fact that would entitle him to relief, is facially lacking in merit and is due to be summarily dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

B. A National Consensus Supports Extending *Simmons* to Individuals Who Were Under the Age of Twenty-One at the Time of Their Offenses.

Burgess alleges in Paragraphs 712 through 717 on pages 283 through 286 of his Second Amended Petition that 19 states and the District of Columbia have abolished the death penalty altogether; that 31 states still have the death penalty on their books; that in the last 15 years, 15 states have executed defendants who were between 18 and 21 years of age, while 10 states have not executed anyone in that age range; that 20 states prohibit the execution of offenders between 18 and 21 years of age; that individuals under the age of 21 constitute a legally protected class for many purposes, such as participation in certain activities; and that the international community treats offenders under age 21 differently from mature adults. Consequently, based on what he calls a national consensus, Burgess contends that the *Roper* exemption of juveniles from execution should be extended to persons under the age of 21 at the time of their crimes.

In *Townes v. State*, 253 So.3d 447, 499 (Ala.Crim.App. 2015), the Alabama Court of Criminal Appeals addressed the argument that "evolving standards of decency prohibit sentencing eighteen-year-olds to death." The Court of Criminal Appeals followed the United States Supreme Court's holding in *Roper*: "For the reasons we have discussed, however, a line must be drawn... The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest." *Roper*, 543 U.S. at 574. This holding

in *Roper* has remained in effect for 15 years without change and has been consistently followed by the Alabama appellate courts notwithstanding on-going debates about decency, national consensus and international norms. The *Townes* Court held that because he was 18 years old when he committed his capital offense, his sentence of death did not violate the Eighth Amendment and did not entitle him to relief.

Accordingly, Burgess's claim XIV.B. is not consistent with Alabama law, fails to create a material issue of law or fact that would entitle him to relief, is facially without merit and is due to be dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

C. In the Alternative, the Court Should Hold the Death Penalty Unconstitutional as Applied to Mr. Burgess Because He Manifested the Neurobiological Deficits Identified in *Simmons* at the Time of His Offense.

This claim in Paragraphs 718 through 729 at pages 286 through 290 of Burgess's Second Amended Petition is a repeat of the "mental age" argument for exempting 18-year-olds from the death penalty that was discussed above as to claim XIV.A. Based on the holdings in *Roper v. Simmons*, *Thompson v. State* and *Jackson v. State*, supra, it is clear that a defendant's chronological age, not his alleged "mental age," determines whether he is death sentence eligible. Because he was 18-years-old at the time of the 1993 robbery/murder, Burgess is legally entitled to no relief from the imposed sentence on the basis of a "mental age" exception.

Accordingly, claim XIV.C. is not consistent with Alabama law, fails to create a material issue of law or fact that would entitle Burgess to relief, is facially meritless and is due to be dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

XV

THE ALABAMA DEATH PENALTY STATUTE AND THE PROCEDURES RESULTING IN MR. BURGESS'S SENTENCE OF DEATH VIOLATE THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

A. Alabama Law Unconstitutionally Requires Trial Courts, Not Juries, to Impose the Ultimate Sentence of Death.

In Paragraphs 730 through 735 on pages 290 through 292 of his Second Amended Petition, Burgess contends that Alabama's Death Penalty Statute, §§ 13A-5-46 and 47, Ala. Code, 1975, under which he was sentenced is unconstitutional because "the 'findings necessary to impose the death penalty,' are made by the trial court and based on evidence and information not even presented to the jury." (Second Amended Petition, Paragraph 734). His legal authorities for this contention are *Ring v. Arizona*, 536 U.S. 584 (2002) and *Hurst v. Florida*, 577 U.S. __, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016).

The Alabama Supreme Court has consistently upheld Alabama's capital-sentencing scheme as constitutional under *Ring*. See, e.g., *Ex parte Waldrop*, 859 So.2d 1181 (Ala. 2002), *Ex parte Hodges*, 856 So.2d 936 (Ala. 2003); *Ex parte Martin*, 931 So.2d 759 (Ala. 2004); *Ex parte McNabb*, 887 So.2d 998 (Ala. 2004); and *Ex parte McGriff*, 908 So.2d 1024 (Ala. 2004). Burgess's argument fails to recognize the important difference between how a capital defendant in Alabama becomes *eligible for or exposed to* the death penalty and whether death is an *appropriate* sentence for a capital defendant who *is eligible* for the death penalty. See *Ex parte State*, 223 So.3d 954, 965 (Ala.Crim.App. 2016), cert. denied Nov. 18, 2016. Contrary to Burgess's contention, the Alabama Supreme Court and Alabama Court of Criminal Appeals have interpreted Alabama's death sentencing statutes to require that a jury must unanimously find beyond a reasonable doubt the existence of an aggravating circumstance as provided in § 13A-5-49 before a capital defendant is eligible for the death penalty. As construed by the Alabama appellate courts in light of *Ring*, Alabama's capital-sentencing scheme "forecloses the trial court from imposing a death sentence unless the jury has unanimously found beyond a reasonable doubt the existence of at least one § 13A-5-49 aggravating circumstance." *Ex parte McGriff*, 908 So.2d at 1037; *Ex parte State*, 223

So.3d at 965. Because the United States Supreme Court in *Hurst* neither announced a new rule of constitutional law nor expanded its holdings in *Ring*, Alabama's capital-sentencing scheme is also constitutional under *Hurst*. *Ex parte State*, 223 So.3d at 963.

Burgess pleads the additional misplaced contention that Alabama's capital sentencing statutes unconstitutionally allow the trial court to consider evidence and information not presented to the jury in deciding whether to impose a death sentence. See *Ex parte State*, 223 So.3d at 962, 966 ("The Court in Hurst also did not hold, as the respondents argue, that judicial sentencing in capital cases is unconstitutional or that it is unconstitutional to allow a trial court, in determining the appropriate sentence in a capital case, to consider evidence that was not presented to the jury... Additionally, nothing in Apprendi, Ring, or Hurst prohibits a trial court from finding the existence of additional aggravating circumstances beyond the circumstance or circumstances the jury finds to exist."). *Ring* and *Hurst* solely require that the existence of an aggravating circumstance that makes a capital defendant eligible for a death sentence must be found by a jury beyond a reasonable doubt. If the jury unanimously finds the fact or facts that expose a capital defendant to the imposition of the death penalty, then *Ring* and *Hurst* have no further application. *Id.* at 966. The trial court must then make the findings of fact required by § 13A-5-47(d) and (e), Ala. Code, 1975, weigh the mitigating and aggravating circumstances against each other and exercise its discretion in determining " 'whether a defendant eligible for the death penalty should in fact receive that sentence.' " *Ex parte Waldrop*, 859 So.2d at 1189 (quoting *Tuilaepa v. California*, 512 U.S. 967, 972 (1994)).

Because the jury, not the trial court, made the critical finding of an aggravating circumstance necessary for Burgess to be eligible for imposition of the death penalty, the statutes and scheme under which he was sentenced satisfy the constitutional requirements of *Ring* and *Hurst*. Burgess's claim XV.A. fails to establish a material issue of law or fact that would entitle him to relief, is facially without merit and is due to be dismissed.

Rule 32.7(d), *Ala.R.Crim.P.*

B. Alabama Law Unconstitutionally Requires Trial Courts, Not Juries, to Find Whether Any Aggravating Circumstances Outweigh Mitigating Circumstances.

This claim is set forth in Paragraphs 736 through 740 at pages 292 through 294 of Burgess's Second Amended Petition.

In support of this claim he seems to argue that because a jury is authorized by Alabama law to return a verdict recommending a sentence of death based on a non-unanimous vote of all twelve jurors, it violates the Sixth Amendment and *Hurst*. Again, Burgess blurs the distinction between the jury unanimity required for a capital defendant to be found death-penalty eligible and the separate determination of whether death is the appropriate sentence for a defendant who has been found to be death eligible.

As discussed extensively in subpart XV.A. above, Alabama's capital-sentencing statutes have been consistently interpreted to comply with *Hurst*, *Ring* and the Sixth Amendment. *Ring* and *Hurst* require that the existence of an aggravating circumstance which makes a capital defendant eligible for a death sentence must be found by a unanimous jury beyond a reasonable doubt. If the jury unanimously finds beyond a reasonable doubt during the guilt phase or sentencing phase the fact or facts constituting an aggravating circumstance that exposes a capital defendant to the imposition of the death penalty, then *Ring* and *Hurst* have no further application. *Ex parte State*, 223 So.3d at 965. At that point the jury undertakes to weigh the mitigating and aggravating circumstances in arriving at a recommended verdict of death or life without parole. Burgess's contention that the Sixth Amendment, *Ring* and *Hurst* require the jury's recommended verdict to be unanimous is simply an incorrect statement of the law.

He further contends that the Sixth Amendment and *Hurst* require that the jurors, not the trial court, make the ultimate determination as to whether the aggravating

circumstances outweigh the mitigating circumstances necessary for the imposition of a death sentence. In 1983 the United States Court of Appeals for the Eleventh Circuit held that the process of weighing aggravating and mitigating circumstances is not an element of a capital offense or a factual determination that is susceptible of proof under a reasonable doubt or preponderance standard. *Ford v. Strickland*, 696 F.2d at 818. The Alabama Supreme Court in 2002 followed the Eleventh Circuit's lead in rejecting the argument that the process of weighing the aggravating and mitigating circumstances required a jury, not the trial court, to make the finding. The Alabama Supreme Court held that the weighing process is a "moral or legal judgment" that guides the trial court's discretion in determining "whether a defendant eligible for the death penalty should in fact receive that sentence." *Waldrop v. State*, 859 So.2d at 1189. Given that *Waldrop* has not been overturned, Burgess's argument fails to state a cognizable claim that entitles him to relief.

Finally, Burgess says that he was sentenced under an unconstitutional capital sentencing statute because the jury's sentencing verdict was only advisory or a recommendation, thereby leading his "jury to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere" in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 328-329 (1985). Notably, Burgess does not allege that the trial judge or prosecutor in his case made specific remarks that minimized the jury's responsibility for determining whether a death sentence was appropriate and the jury's sense of the importance of its role. He likewise alleges no specific facts showing that the trial court or prosecutor led the jury to believe that the ultimate sentencing responsibility rested elsewhere.

The version of § 13A-5-46, Ala. Code, 1975, which was in effect at the time of Burgess's trial, provided in subsection (a) that the jury would return "an advisory verdict" and in subsection (e) that the jury would return "an advisory verdict recommending to the trial court" the penalty of either life imprisonment without parole or death. *Caldwell* did

not hold that the use of the words "advisory" or "recommend," including any of its derivatives, in the remarks made by a prosecutor or in the trial court's remarks and instructions to the jury were *per se* constitutionally impermissible. See *Matthews v. Commonwealth*, 709 S.W.2d 414, 421 (Ky. 1985). Rather, *Caldwell* prohibits any argument, remarks or instructions which lead the jury "to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell*, 472 U.S. at 328-29.

In *Hooks v. State*, 534 So.2d 329, 357 (Ala.Crim.App. 1987), aff'd. 534 So.2d 371 (Ala. 1988), Hooks argued that statements made to the jury by the trial court and the prosecutor, wherein they described the jury's sentencing role as making a recommendation as to death or life without parole and rendering an advisory verdict or opinion to the judge who would impose sentence, violated the holding in *Caldwell*. After examining cases from other jurisdictions that had addressed similar arguments, the Court of Criminal Appeals found that the remarks made by the trial judge and the prosecutor were not inaccurate statements of Alabama's capital sentencing law, did not diminish the jury's role in the capital sentencing scheme, could not have misled or confused the jury about their responsibility in the sentencing process and were not improper under *Caldwell*. *Id.* at 360.

Having reviewed each instance in which Burgess's trial judge used the word "recommendation" or its derivatives, both separately and in the context of his entire sentencing instructions to the jury, the undersigned finds that the trial court did not minimize the importance of the jury's role in determining Burgess's punishment and said nothing that could have led the jurors to believe that, if they returned a verdict of death, the appropriateness of their verdict would be determined elsewhere. The trial court's instructions were correct statements of the law and did not misinform the jury. Burgess's contention that he was sentenced in violation of *Caldwell* does not satisfy the pleading specificity required by Rule 32.6(b), *Ala.R.Crim.P.*, presents no material issue

of law or fact that would entitle him to relief and is facially without merit.

For the reasons explained above, Burgess's claim XV.B is due to be summarily dismissed pursuant to Rule 37(d), *Ala.R.Crim.P.*

C. Alabama Law Unconstitutionally Requires Trial Courts, Not Juries, to Make the Necessary Findings Regarding the Existence of Aggravating Circumstances.

This subpart of claim XV is presented in Paragraphs 742 through 744 on pages 294 through 296 of Burgess's Second Amended Petition. Once again, he unnecessarily engages in word play or a game of semantics that disregards the fundamental distinction between the determination of an aggravating circumstance that makes a capital defendant eligible for a death sentence and the process of weighing aggravating and mitigating circumstances to decide whether death, instead of life without parole, is the appropriate sentence to be imposed on a death-eligible defendant. Burgess's contentions in this subpart have been addressed at length in subparts III.I.i., III.I.ii., XV.A. and XV.B. of this Final Order and will not be repeated.

Suffice it to say that, contrary to Burgess's contentions in this claim XV.C., Alabama's statutory sentencing scheme for capital cases has been consistently interpreted and upheld by the Alabama Supreme Court and the Alabama Court of Criminal Appeals as being constitutional and non-violative of *Ring v. Arizona* and *Hurst v. Florida.* See *Ex parte Waldrop*, 859 So.2d 1181 (Ala. 2002), *Ex parte Hodges*, 856 So.2d 936 (Ala. 2003); *Ex parte Martin*, 931 So.2d 759 (Ala. 2004); *Ex parte McNabb*, 887 So.2d 998 (Ala. 2004); and *Ex parte McGriff*, 908 So.2d 1024 (Ala. 2004); *Ex parte State*, 223 So.3d 954 (Ala.Crim.App. 2016), cert. denied Nov. 18, 2016.

Accordingly, Burgess's claim XV.C. fails to create a material issue of law or fact that would entitle him to relief, is facially devoid of merit and is due to be dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

D. Alabama Law is Unconstitutional Because It Authorizes the Imposition of a Death Sentence by a Judge Rather Than by a Unanimous Jury.

Burgess in Paragraph 745 at pages 296 and 297 of his Second Amended Petition argues that Alabama's capital sentencing scheme violates the Eighth and Fourteenth Amendments because it permits a jury's verdict recommending death to be non-unanimous and allows the trial judge to impose the ultimate sentence. In support of this argument, Burgess cites *Hurst v. State*, 202 So.3d 40 (Fla. 2016), wherein the Florida Supreme Court ruled that before a sentence of death may be considered by a trial judge, "the jury must also unanimously find that the aggravating factors are sufficient for the imposition of death and unanimously find that the aggravating factors outweigh the mitigation." The Florida Supreme Court considered these unanimous jury findings to constitute elements of the capital offense and to be required by the Florida Constitution. *Id.* at 54. That Court further held that the Eighth Amendment required that a jury's verdict recommending a death sentence must be unanimous, even though it acknowledged that "the United States Supreme Court has not ruled on whether unanimity is required in the jury's advisory verdict in capital cases." *Id.* at 59.

Earlier this year the Florida Supreme Court in *State v. Poole*, 2020 WL 3116597 (Fla. 1/23/2020), revisited certain of its 2016 rulings in *Hurst v. State*. The *Poole* Court admitted that it clearly had erred in *Hurst v. State* by holding that the existence of an aggravating circumstance and the sufficiency of the aggravator are two separate findings, each of which the jury must find unanimously. *Poole* at *11. It likewise conceded that the Court had been wrong by requiring a jury to make any sentencing finding beyond the existence of one or more aggravating circumstances making a capital defendant eligible for death; by requiring a jury to determine that the aggravating factors outweigh the mitigating; and by ruling that the Eighth Amendment requires a unanimous jury recommendation of death. *Id.* at *11-12. The Florida Supreme Court receded from

those portions of its decision in *Hurst v. State* that it determined to be clearly erroneous.

While no opinion of the Florida Supreme Court is binding on an Alabama trial court, the two holdings in *Hurst v. State* upon which Burgess relies in claim XV.D. are in conflict with Alabama precedent and are not persuasive. In contrast, the Florida Supreme Court's withdrawal in *Poole* from its erroneous rulings in *Hurst v. State* gives recognition to important constitutional principles that Burgess refuses to accept; that is, there are two different aspects of the capital decision-making and sentencing process: the eligibility decision and the sentence selection decision. The *Apprendi-Ring-Hurst v. Florida* line of cases require only that the jury contribute to the eligibility decision by unanimously finding beyond a reasonable doubt the existence of an aggravating circumstance or circumstances that make a capital defendant eligible for the death penalty. Beyond that contribution, neither the Sixth nor the Eighth Amendment requires the jury to render a unanimous recommendation based on its weighing of aggravating and mitigating circumstances or in its verdict for death or life without parole. *Poole* at *11-12. Moreover, as the United States Supreme Court stated in *Harris v. Alabama*, 513 U.S. 504, 515 (1995), "[t]he Constitution permits the trial judge, acting alone, to impose a capital sentence."

The Alabama appellate cases that deal with the issues presented in claim XV.D. are consistent with *Poole* and constitute a clear rejection of Burgess's argument that Alabama's capital sentencing scheme violates the Eighth and Fourteenth Amendments. Accordingly, Burgess's present claim fails to create a material issue of law or fact that would entitle him to relief, is lacking in merit and is due to be dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

XVI

MR. BURGESS WAS CONVICTED AND SENTENCED IN VIOLATION OF INTERNATIONAL LAW APPLICABLE IN THE UNITED STATES.

Burgess presents this claim in Paragraphs 746 through 747 at pages 297 through 298 of his Second Amended Petition. He alleges that the specific facts supporting this claim were detailed in Paragraphs 642 through 657 (claim IX) wherein he argued that his capital conviction and death sentence are tainted by racial discrimination, unequal application of law, and the imposition of torture or cruel, inhumane or degrading treatment or punishment in violation of Articles 6,7 and 14 of the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 175 ("ICCPR").

Burgess's virtually identical argument in his previous claim IX has been addressed on its merits at pages 141-142 of this Final Order. For the reasons stated therein and on the authority of *Ex parte Pressley*, 770 So.2d 143, 148-49 (Ala. 2000) and *Sharifi v. State*, 993 So.2d 907, 920-21 (Ala.Crim.App. 2008), Burgess's claim XVI fails to present a material issue of fact or law that would entitle him to relief, facially lacks merit and is due to be summarily dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

XVII

THE CUMULATIVE EFFECT OF THE ERRORS DEPRIVED MR. BURGESS OF A FUNDAMENTALLY FAIR TRIAL AND RIGHTS GUARANTEED BY THE UNITED STATES CONSTITUTIONS.

This final claim is set forth in Paragraph 748 on page 298 of Burgess's Second Amended Petition. In one paragraph consisting of two sentences, he contends that cumulative error resulted in the denial of his right to a fundamentally fair trial and other rights guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States, parallel provisions of the Alabama Constitution and other applicable laws. Other than this bare conclusion, Burgess pleads no specific facts and cites no authority that supports a requirement for the Court to engage in a cumulative effect analysis.

Even though Burgess presents his Second Amended Petition for the review of his

capital murder conviction and sentence of death, he must still comply with the pleading requirements of Rule 32, *Ala.R.Crim.P.*. "Each claim in the petition must contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings." Rule 32.6(b), *Ala.R.Crim.P.* Burgess's section XVII cumulative errors claim fails to specify whether it is based on the alleged errors of his trial counsel, the alleged errors of his appellate counsel or all alleged errors that are set forth throughout the entirety of his Second Amended Petition. This claim does not warrant further proceedings because it makes a bare allegation of constitutional violations without clearly and fully disclosing the grounds upon which the claim is based.

Moreover, even assuming that the cumulative error alleged by Burgess in section XVII is limited solely to his individual ineffective assistance of trial and appellate counsel claims, he would not be entitled to relief.

> [W]hen a cumulative-effect analysis is considered, only claims that are properly pleaded and not otherwise due to be summarily dismissed are considered in that analysis. A cumulative-effect analysis does not eliminate the pleading requirements established in Rule 32, Ala.R.Crim.P. An analysis of claims of ineffective assistance of counsel, including a cumulative-effect analysis, is performed only on properly pleaded claims that are not summarily dismissed for pleading deficiencies or on procedural grounds. Therefore, even if a cumulative-effect analysis were required by Alabama law, that factor would not eliminate Taylor's obligation to plead each claim of ineffective assistance of counsel in compliance with the directives of Rule 32.

Taylor v. State, 157 So.3d 131, 140 (Ala.Crim.App. 2010).

Recently in *Stanley v. State*, 2020 WL 2820559, *42 (Ala.Crim.App. 5/29/2020), the Court of Criminal Appeals observed that some of Stanley's ineffective-assistance-of-counsel claims claim had been summarily dismissed because they were insufficiently pleaded. Because a cumulative-error analysis would not have encompassed all of

Stanley's claims of ineffective assistance of counsel, the circuit court was not required to engage in a cumulative effect analysis. Likewise, because some of Burgess's individual ineffective assistance claims are due to be summarily dismissed on the ground that they are facially meritless and the remainder are due to dismissed because they either fail to meet the pleading requirements of Rule 32.6(b), *Ala.R.Crim.P.*, fail to state a cognizable claim, fail to present a material issue of law or fact that that would entitle Burgess to relief, or fail to allege specific facts that, if true, would entitle Burgess to relief, he is due to receive no cumulative review of his claims of ineffective assistance of counsel cumulatively.

Accordingly, Burgess's XVII claim is insufficiently pleaded under Rule 32.6(b), fails to present a material issue of fact or law that would entitle him to relief and is due to be summarily dismissed. Rule 32.7(d), *Ala.R.Crim.P.*

RENDITION OF JUDGMENT

The Court has thoroughly and carefully reviewed each of Burgess's claims alleged in his Second Amended Rule 32 Petition for Post-Conviction Relief, as well as the other pleadings, records and materials described in the opening paragraph of this Final Order. As discussed extensively hereinabove, the Court concludes that the majority of his claims are insufficiently pleaded as required by Rule 32.6(b), *Ala.R.Crim.P.* and are not sufficient to warrant further proceedings. While there may be some insufficient pleading overlap in his other claims, the Court further concludes that those remaining claims are subject to summary dismissal pursuant to Rule 32.7(d), *Ala.R.Crim.P.*, because they either fail to state a cognizable claim, fail to allege sufficient specific facts that, if true, would entitle Burgess to relief, fail to present material issues of fact or law that would entitle him to relief or facially lack merit. No purpose would be served by further proceedings.

It is, therefore, **ORDERED AND ADJUDGED** by the Court as follows:

1. All of Burgess's claims and subparts of claims for which he seeks post-conviction relief, as set out in his Second Amended Rule 32 Petition for Post-Conviction Relief, are denied.

2. All of Burgess's requests for relief prayed for in his Second Amended Rule 32 Petition for Post-Conviction Relief, except leave for his Second Amended Petition to be filed, are denied.

3. Burgess's Second Amended Rule 32 Petition for Post-Conviction Relief is dismissed, with prejudice, in its entirety.

4. Any unpaid court costs that may be due in this post-conviction case remitted.

Copies of this Final Order shall be transmitted to Burgess's attorneys of record, the Assistant Attorneys General who have appeared in this case, and the Morgan County District Attorney, and shall be sent by regular mail to Burgess within the Department of Corrections.

DONE this 19th day of July, 2020.

/s/ STEVEN E. HADDOCK
SPECIAL CIRCUIT JUDGE

APPENDIX E

Appendix E

From 2015 to the present, the Alabama Court of Criminal Appeals has affirmed 45 capital post-conviction cases in which the state trial court denied relief. Of those 45 cases, the state trial court summarily dismissed 62.2% (28 cases) without granting an evidentiary hearing. In the remaining 37.8 % (17 cases), the state trial court granted some form of evidentiary hearing on at least one post-conviction claim before denying the petition.[1]

The following cases were identified through searches for all published and unpublished decisions of the Alabama Court of Criminal Appeals in capital post-conviction cases, utilizing Westlaw, Lexis, Bloomberg Law, and additional research.

[1] During this same time period, only four reported appellate cases involved grants of post-conviction relief. *See State v. Gissendanner*, 288 So. 3d 1036 (Ala. Crim. App. 2019); *State v. Lewis*, 371 So. 3d 863 (Ala. Crim. App. 2022); *State v. Mack*, 2024 WL 5181581 (Ala. Crim. App. Dec. 20, 2024); *State v. Petric*, 333 So. 3d 1063 (Ala. Crim. App. 2020).

Summary Dismissals of Capital Post Conviction Petitions Affirmed by the Alabama Court of Criminal Appeals, 2015-Present.

In each of the following cases, the trial court denied the capital post-conviction petition on the merits without granting an evidentiary hearing. In each of these cases, the Court of Criminal Appeals affirmed the ruling on appeal.[2]

1. *Bohannon v. State*, 2023 WL 5314631 (Ala. Crim. App. Aug. 18, 2023)
2. *Boyle v. State*, CR-16-0636 (Ala. Crim. App. Dec. 8, 2017) (unpublished)
3. *Burgess v. State*, 2023 WL 4146021 (Ala. Crim. App. June 23, 2023)
4. *Calhoun v. State*, 261 So. 3d 457 (Ala. Crim. App. 2016)
5. *Capote v. State*, 2023 WL 5316187 (Ala. Crim. App. Aug. 18, 2023)
6. *Doster v. State*, CR-15-0534 (Ala. Crim. App. Dec. 15, 2017) (unpublished)
7. *Harris v. State*, 365 So. 3d 1075 (Ala. Crim. App. 2021)
8. *Johnson v. State*, CR-20-0957 (Ala. Crim. App. Sept. 30, 2022) (unpublished)
9. *Jones v. State*, 322 So. 3d 979 (Ala. Crim. App. 2019)
10. *Lane v. State*, 2024 WL 5182373 (Ala. Crim. App. Dec. 20, 2024)
11. *Lindsay v. State*, CR-2022-0662 (Ala. Crim. App. Mar. 17, 2023) (unpublished)
12. *McMillan v. State*, 258 So. 3d 1154 (Ala. Crim. App. 2017)
13. *Morris v. State*, 261 So. 3d 1181 (Ala. Crim. App. 2016)
14. *Newton v. State*, 2024 WL 4312583 (Ala. Crim. App. Sept. 27, 2024)
15. *Saunders v. State*, 249 So. 3d 1153 (Ala. Crim. App. 2016)
16. *Scheuing v. State*, 2024 WL 4314860 (Ala. Crim. App. Sept. 27, 2024)
17. *Shanklin v. State*, CR-17-0416 (Ala. Crim. App. Oct. 5, 2018) (unpublished)
18. *Sharifi v. State*, 239 So. 3d 603 (Ala. Crim. App. 2016)
19. *Sharp v. State*, CR-15-0194 (Ala. Crim. App. Feb. 3, 2017) (unpublished)
20. *Spencer v. State*, 201 So. 3d 573 (Ala. Crim. App. 2015)
21. *Thompson v. State*, 310 So. 3d 850 (Ala. Crim. App. 2018)
22. *Van Pelt v. State*, 202 So. 3d 707 (Ala. Crim. App. 2015)
23. *Walker v. State*, 194 So. 3d 253 (Ala. Crim. App. 2015)
24. *White v. State*, 343 So. 3d 1150 (Ala. Crim. App. 2019)
25. *Wilson v. State*, 2024 WL 3218214 (Ala. Crim. App. June 28, 2024)
26. *Wimbley v. State*, 387 So. 3d 213 (Ala. Crim. App. 2022)
27. *Woods v. State*, 221 So. 3d 1125 (Ala. Crim. App. 2016)
28. *Young v. State*, 2023 WL 2623665 (Ala. Crim. App. Mar. 24, 2023)

[2] In the vast majority of these cases, the entire post-conviction petition was summarily dismissed on the merits. *See, e.g.*, *Bohannon*, 2023 WL 5314631, at *15; *Calhoun*, 261 So. 3d at 482. In a minority of the cases, one or more claims was denied on procedural grounds. *See, e.g., Newton*, 2024 WL 4312583, at *17. In each of these cases, the remaining post-conviction claims were summarily denied on the merits without the benefit of an evidentiary hearing.

Non-Summary Dismissals of Capital Post Conviction Petitions Affirmed by the Alabama Court of Criminal Appeals, 2015-Present.

In each of the following cases, the trial court denied the capital post-conviction petition after conducting an evidentiary hearing on at least one claim. In each of these cases, the Court of Criminal Appeals affirmed the ruling on appeal.

1. *Acklin v. State*, 266 So. 3d 89 (Ala. Crim. App. 2017)
2. *Brooks v. State*, 340 So. 3d 410 (Ala. Crim. App. 2020)
3. *Brownfield v. State*, 266 So. 3d 777 (Ala. Crim. App. 2017)
4. *Clark v. State*, 196 So. 3d 285 (Ala. Crim. App. 2015)
5. *George v. State*, 333 So. 3d 1022 (Ala. Crim. App. 2019)
6. *Johnson v. State*, 379 So. 3d 994 (Ala. Crim. App. 2022)
7. *Largin v. State*, 392 So. 3d 997 (Ala. Crim. App. 2022)
8. *Lewis v. State*, 333 So. 3d 970 (Ala. Crim. App. 2018)
9. *Lockhart v. State*, 354 So. 3d 1039 (Ala. Crim. App. 2021)
10. *Peraita v. State*, 386 So. 3d 799 (Ala. Crim. App. 2021)
11. *Reeves v. State*, 226 So. 3d 711 (Ala. Crim. App. 2016)
12. *Reynolds v. State*, 236 So. 3d 189 (Ala. Crim. App. 2015)
13. *Riley v. State*, 270 So. 3d 291 (Ala. Crim. App. 2018)
14. *Stanley v. State*, 335 So. 3d 1 (Ala. Crim. App. 2020)
15. *Travis v. State*, 2023 WL 2623895 (Ala. Crim. App. Mar. 24, 2023)
16. *Ward v. State*, 382 So. 3d 574 (Ala. Crim. App. 2020)
17. *Woodward v. State*, 276 So. 3d 713 (Ala. Crim. App. 2018)