No. 24-6472

In the Supreme Court of the United States

WILLIE R. BURGESS, JR.,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

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

BRIEF IN OPPOSITION

STEVE MARSHALL
Alabama Attorney General

Edmund G. LaCour Jr.
Solicitor General

Robert M. Overing
Deputy Solicitor General

Cameron G. Ball
Assistant Attorney General
Counsel of Record

OFFICE OF ALA. ATT'Y GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
Cameron.Ball@AlabamaAG.gov

March 7, 2025

CAPITAL CASE
QUESTIONS PRESENTED
(Restated)

Willie Burgess, Jr., shot Louise Crow in the face during a robbery. Multiple times, he admitted to robbing and shooting the victim, although he claimed that he just wanted to scare her and that she caused the gun to discharge by touching it.

In postconviction proceedings, Burgess alleged that his counsel should have presented expert testimony to support his accidental-shooting theory. The circuit court rejected the claims for several reasons, including that Burgess had refused to plead the names of any experts who would have been available at the time of his trial. Another reason was the fact that Burgess's theory relied largely on evidence that would have been inadmissible at trial.

The Alabama Court of Criminal Appeals found that Burgess's brief had failed to comply with appellate rules for the preservation of issues on appeal, so his claim was *waived*, and the court did not need to reach the merits.

The questions presented are:

1. Did Burgess waive his *Strickland* claim by expressly refusing to comply with pleading rules, failing on appeal to challenge alternative grounds for dismissal, and submitting an appellate brief that did not comply with appellate rules?

2. Was Burgess's *Strickland* claim properly denied where he failed to plead with any specificity the names of experts available to testify at trial, failed to plead why his case required experts, failed to plead how his counsel knew or should have known to investigate the murder weapon for a possible defect, and failed to plead why there was a reasonable probability of a different outcome?

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INTRODUCTION

In many jurisdictions, including Alabama, postconviction petitioners claiming ineffectiveness of counsel for failing to present expert testimony must plead the names of experts who were available to testify at the time of trial. Petitioner Willie Burgess expressly refused, insisting that he had no such burden, so the postconviction court properly dismissed the petition. Burgess could not allege deficient performance and prejudice owing to the absence of an expert because he had not identified any expert who could have testified at his trial. Even if the postconviction court had accepted his latest amendment to the petition, in it Burgess named only an expert that he consulted years later, not necessarily someone available at his 1994 trial. In such cases, dismissal for failure to satisfy the state pleading standards for postconviction petitions is appropriate.

Aside from the merits, the case is an exceptionally poor vehicle for many reasons ignored by the petition. *First*, the state appellate court affirmed denial of Burgess's *Strickland* claim because his briefing on appeal took a "laundry-list approach," listing claims and asserting error without analysis, which does not comply with Rule 28(a)(10) of the Alabama Rules of Appellate Procedure. Burgess's cert petition does not challenge Rule 28(a)(10). *Second*, the trial court had also dismissed Burgess's claim because much of the evidence that would have supported his misfire theory would have been inadmissible at trial. On appeal, Burgess did not challenge that reason for dismissing his claim, resulting in waiver. *Third*, application of the default pleading standards in Rule 32 proceedings was a state-law ground for denial, and

Burgess has not challenged the constitutionality of such standards in his certiorari petition. *Fourth*, Burgess's prospects for relief depend on whether his proposed amendment to his Rule 32 is ultimately granted. The appellate court reviewed the denial of Burgess's motion for leave to amend for harmless error only; if this Court were to grant certiorari and reverse the harmless-error analysis, the courts below would likely affirm denial of the amendment, and Burgess's unamended *Strickland* claim would fail. The denial was plainly reasonable: Burgess had already amended his petition in 2004, 2006, and 2016. There's no right to infinite amendments. Plus, Burgess had a 300-page petition with well over a dozen claims, which he had over a decade to refine; it cannot be gainsaid that he had a "meaningful opportunity" (Pet.10) to plead a plausible claim. The State would have strong arguments that it would be prejudicial and harmful to the public interest to permit such belated amendments. Thus, the certiorari petition poses only a hypothetical—*if* Burgess's amendment were accepted, *would* his "allegations, taken as true, unequivocally establish the elements of a *Strickland* violation"? Pet.10. Where there exist multiple grounds for rejecting a claim, review of any one of them would be futile and a waste of Court resources.

Burgess asks the Court to look past multiple defaults and procedural hurdles and then determine whether the trial court was right to reject his pleading for insufficient specificity. But there is no conflict of authority that warrants this Court's attention, nor did the state courts answer an important federal question in a way that conflicts with *Strickland* when they asked the petitioner to identify—in his petition—a single expert who actually could have supported his postconviction theory of the

case. *See* Sup. Ct. R. 10. Granting the case and deciding the matter in Burgess's favor would not only disrupt the postconviction procedures of several States; it would open the floodgates by entitling petitioners to evidentiary hearings despite noncompliance with common state pleading standards and procedural rules. Neither *Strickland* nor the Due Process Clause demands that result. The Court should deny certiorari.

STATEMENT OF THE CASE

A. Facts and Trial Proceedings

On Tuesday, January 26, 1993, Willie Burgess entered a bait-and-tackle store to see if it would be a good place to rob. *Burgess v. State*, 827 So. 2d 134, 146 (Ala. Crim. App. 1998). He left, rode his bike back home, changed clothes, and walked back to the store. *Id.* Brandishing a pistol, he demanded that the store's owner Louise Crow empty the cash register drawer. He ordered her to the bathroom, and he shot her in the face. *Id.*

Burgess then stole Crow's car, picked up his girlfriend and her child, and began driving toward Huntsville. *Id.* A regular of the shop, Billy Ryans, noticed that the cash register was out of place, there was loose change on the floor, and that Crow and her vehicle were nowhere in sight. TR.785-86, 792. Ryans alerted the owner of a nearby service station, Hoover Blackwood, who called the police at 11:18 a.m. TR.793, 798, 811. An alert was broadcasted to police with the make, model, and license plate number of Crow's vehicle. TR.949-50. Police spotted the vehicle around an hour later, and Burgess was arrested. TR.950, 979.

Burgess was taken to the police station and, though he initially denied involvement and stated that he obtained Crow's car from a "crack dealer," TR.1407, he later gave a written statement in which he admitted to the robbery and to pointing his gun at Crow, but he stated that Crow had "hit [his] hand" and "[t]he gun went off." C.15. In the course of being transported on foot to the county jail, Burgess made incriminatory statements to the media. TR.1485-86.

> The evidence was overwhelming that Burgess robbed and shot Mrs. Crow. Burgess was apprehended while driving Mrs. Crow's car and when he was apprehended he 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.

Burgess's trial began on June 20, 1994. At the close of trial, Burgess's counsel argued to the jury that the State's evidence was insufficient on the issue of intent and that, therefore, the facts fit a felony-murder verdict and not a capital-murder verdict. TR.1549. In support, defense counsel called the jury's attention to Burgess's statements that the victim "hit the gun," causing it to discharge. TR.1548. Defense counsel posited, "Do you think Willie Burgess knew the difference between murder and capital murder? Do you think he would have withheld that fact from you when he didn't withhold anything else?"[1] TR.1562. The prosecutor responded, in part, "There's not a way in the world that that woman knocked that gun off and that bullet hit where it did and tracked the way it did. That's nothing but a lie[.]" TR.1572-73. The

[1] In the instant petition, Burgess characterizes defense counsel's question to the jury as offering "a fact not in evidence." Pet.5. He says that this argument "represented the full extent of trial counsel's efforts to raise a reasonable doubt about whether the shooting was intentional." *Id.* This assertion is unsupported by the record.

prosecution presented testimony that Crow was shot at close range, one to two feet away, that there was gunpowder on her skin, and that the bullet traveled from the front of her face through her brain. TR.1369-70.

The jurors began deliberating and, after some time, returned with a request that the trial court repeat the elements of capital murder and murder. TR.1621-23. After the trial court gave its instruction defining the relevant offenses and mental states, the jury foreman asked another question:

> If we were to have a person in our group that has no knowledge of fire-arms whatsoever, they do not know the state of a gun ready to fire or not or the steps necessary to make a gun fire and et cetera … just totally, you know, confused as to whether a gun is in a state of fire ability or not then is there a chance we might could get a gun expert to come in here and tell us these – educate someone on firearms?

TR.1635. The court answered that there would be no further testimony. TR.1636.[2]

The jury found Burgess guilty of capital murder during a robbery. TR.1640-41. The penalty phase began on June 28, at which Burgess presented three witnesses in mitigation. TR. 1650, 1667-1704. The jury recommended by a vote of eleven to one that Burgess be sentenced to death. C.210; TR.1755. The trial court followed the jury's recommendation. C.44-52; TR.1755.

B. Direct Appeal

Burgess raised twenty-six claims on direct appeal to the Alabama Court of Criminal Appeals (CCA). The CCA rejected them all in a lengthy opinion affirming Burgess's conviction and sentence. *Burgess*, 827 So. 2d 134. The Alabama Supreme

[2] The prosecution had held and displayed the murder weapon to the jury—describing its operation step by step in service of an argument that Burgess intentionally loaded the magazine, intentionally inserted it into the gun, and intentionally chambered a round before shooting Crow. TR.1564-66.

Court also affirmed. *Ex parte Burgess*, 827 So. 2d 193 (Ala. 2000). This Court denied certiorari. *Burgess v. Alabama*, 537 U.S. 976 (2002) (mem).

C. Postconviction Proceedings and Appeal

In 2003, Burgess filed a postconviction petition challenging his conviction and sentence pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. *Burgess v. State*, CR-19-1040, 2023 WL 4146021, at *2 (Ala. Crim. App. June 23, 2023). Burgess amended his petition in 2004, 2006, and 2016. *Id.*

Burgess's petition alleged that trial counsel should have consulted experts for trial, including a firearms expert, a pathologist, and a plumbing engineer, to support a theory of an accidental shooting. PCR-C.759, 761, 766. In support, Burgess noted that counsel had filed a request for investigative expenses, which recognized that there was "a lot of forensic evidence in th[e] case." PCR-C.751 (quoting TR.21). Among other reasons to reject the claim, the State responded that Burgess had failed to allege the names of any experts who would have been available and willing to testify at his 1994 trial and failed to state what their testimony would have been. Burgess replied that he did not have to do so. PCR-C.1336 ("Mr. Burgess is not required to plead that the experts named in his petition were available to testify in 1994."); *Burgess*, 2023 WL 4146021, at *6 ("Burgess insisted, however, that he had to provide no names.").

In October 2017, Burgess moved for leave to amend once again, finally proposing the names of experts "with whom post-conviction counsel consulted in preparation of this petition." PCR-C.1300-05. Unsurprisingly, the circuit court denied the motion.

After all, Burgess had already amended his petition three times, as recently as 2016, and it had been well over a decade since the petition was first filed. Burgess also had notice that the court would not tolerate an indefinite number of amendments, for it had stated *years* earlier "that it would allow no more amendments." *Burgess*, 2023 WL 4146021, at *2 (citing PCR-C.699). And it had said so again in an order following a hearing in September 2017. PCR-C.1292. By the time the court ruled on the petition, Burgess had "had more than ample time and opportunities in his prior amendments to make those disclosures." *Id.* The State had also argued that further amendment at that point would have caused undue delay and prejudiced the State.

In a careful and thorough 100-page order, concluding that none of Burgess's claims were facially meritorious, the circuit court finally dismissed the petition in July 2020. *Burgess*, 2023 WL 4146021, at *2-3. As to the alleged design defect, the circuit court ruled as follows:

> 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 requirements 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*[*v. State*] 71 So. 3d [12, 33 (Ala. Crim. App. 2008)].
>
> 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.*

PCR-C.1361-62.

On appeal to the CCA, Burgess again insisted that "Alabama law does not require petitions to contain" the names of experts whom trial counsel should have called at trial. Appellant's Br. at 19, *Burgess v. State*, CR-19-1040 (Ala. Crim. App. Mar. 24, 2021). The CCA disagreed:

> Burgess's pleading [in the proposed amendment] the names of "experts with whom counsel consulted in the preparation of the Second Amended Petition" did not meet the requirement as stated in *Brooks*[*v. State*, 340 So. 3d 410, 437 (Ala. Crim. App. 2020)], 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."

Burgess, 2023 WL 4146021, at *7 (citing *Lockhart v. State*, 354 So. 3d 1039 (Ala. Crim. App. 2021); *Thompson v. State*, 310 So. 3d 850 (Ala. Crim. App. 2018); *Yeomans v. State*, 195 So. 3d 1018 (Ala. Crim. App. 2013)). Accordingly, Burgess's proffered amendment failed to "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 petition was harmless." *Id.*

Independently, the CCA observed that Burgess had merely regurgitated the claims from his Rule 32 petition without assigning error to the circuit court's order of dismissal. Appellate briefing that raises issues without analysis fails to comply with Rule 28(a)(10) of the Alabama Rules of Appellate Procedure, the court held, so Burgess was not entitled to a decision on the merits. *Burgess*, 2023 WL 4146021, at *10. Still, the CCA indicated that even if it were to "address[] the merits of the claims, he would be due no relief." *Id.*

> 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.

Id. The CCA affirmed, and the Alabama Supreme Court denied certiorari. Cert. of Judg., *Burgess v. State*, SC-2024-0158 (Ala. Sept. 27, 2024).

REASONS TO DENY THE WRIT

I. The case is a poor vehicle because Burgess's *Strickland* claim failed for multiple reasons unrelated to its merits. He failed to comply with appellate briefing rules. He neglected to address the trial court's additional reasons for dismissal, resulting in waiver. And for years, Burgess willfully chose not to comply with Alabama's pleading requirement that he name a trial-available expert that counsel allegedly failed to hire; once he finally named someone (who was not necessarily available), it was in a proposed amendment that the state courts did not grant and need not grant on remand, so his odds of success are slim-to-none even if the Court were to reverse.

II. Burgess does not allege a conflict or an important federal question. Many jurisdictions require that postconviction petitioners name trial-available experts to support an uncalled-witness claim, and Burgess does not allege that this reasonable requirement has led to vastly different outcomes in any cases, has caused a profound doctrinal split, or is in any way unconstitutional. Moreover, as was the case here, the full-disclosure rule is rarely the sole basis for a dismissal.

III. The result below was correct. Burgess alleges that the absence of expert testimony affected the outcome of his trial. It is entirely reasonable for the state courts to ask for the identity of an expert who could have offered such testimony at the time of trial. *Strickland* does not conflict with the application of normal pleading standards, nor does it require evidentiary hearings every time an inmate alleges that counsel could have hired an anonymous expert who would have helped his case. Further, although Burgess does not challenge them, the state court's alternative grounds

for rejecting Burgess's claim, resting in large part on the state law of evidence and appellate procedure, also withstand scrutiny. These independent reasons that Burgess's petition failed are also reasons for this Court to deny review.

I. Multiple State-Law Grounds For The Decision Below Cast Doubt On The Court's Jurisdiction And Pose Vehicle Problems.

The certiorari petition presents a simple portrait of an apparently erroneous application of *Strickland*; on Burgess's telling, he plausibly pleaded all the elements of a *Strickland* claim, and that should have entitled him to an evidentiary hearing. But the real story of this case has next-to-nothing to do with federal constitutional law. Burgess's claim was dismissed for three independent and adequate state-law grounds, which deprive this Court of jurisdiction and would make reversal on the narrow ground of the petition entirely futile. *See generally Foster v. Chatman*, 578 U.S. 488, 497 (2016); *see also Lee v. Kemna*, 534 U.S. 362, 375 (2002); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). And on remand, the CCA would have available a fourth state-law ground—affirmance of the denial of Burgess's proposed amendment—which would also likely result in denying his *Strickland* claim.

First, the CCA affirmed denial of Burgess's *Strickland* claim because he failed to comply with Rule 28(a)(10) of the Alabama Rules of Appellate Procedure, which states that a brief "shall contain" an "argument containing the contentions … 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." Failure to comply with the rule constitutes waiver. *See, e.g.*, *Morris v. State*, 261 So. 3d 1181, 1194-95 (Ala.

Crim. App. 2016) (appellate brief lacking analysis had "waived 19 claims of error, [so] we will not address them").

Burgess's appellate briefing "[m]erely list[ed] claims and assert[ed] that the circuit court erred," and the "mere repetition of the claims alleged … does not provide any analysis of the circuit court's judgment of dismissal." 2023 WL 4146021 at *10. A "laundry-list approach" that "tr[ies] to incorporate arguments by reference" does not properly preserve issues on appeal. *Id.* Thus, the court saw no need to reach the merits and did so only as an alternative ground for affirmance. *Id.* ("*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." (emphasis added)).

Burgess's petition does not challenge (or mention) the CCA's application of Rule 28(a)(10) of the Alabama Rules of Appellate Procedure, and even if he had, "this Court does not decide questions not raised or resolved in the lower court[s]. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992). Rule 28(a)(10) is an adequate and independent state-law ground for the decision below, which the Eleventh Circuit has recognized as a procedural default. *See Ferguson v. Comm'r, Ala. Dept. of Corr.*, 69 F.4th 1243, 1259 (11th Cir. 2023) ("[A] conclusory statement without facts or argument [does] not comply with the requirements set forth in Rule 28(a)(10) of the Alabama Rules of Appellate Procedure. Claims presented in a Rule 32 petition but not pursued on appeal are deemed to be abandoned. When a petitioner has failed to present a claim to the state courts and under state procedural rules the claim has become

procedurally defaulted, the claim will be considered procedurally defaulted in federal court." (cleaned up; citations omitted)).

Second, the trial court dismissed Burgess's claims about the failure to present expert testimony for the independent reason that much of the supporting evidence would not have been admissible at trial.[3] Burgess failed to directly address the admissibility issues, which the CCA endorsed on appeal, *Burgess*, 2023 WL 4146021, at *10 ("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."). The inadmissibility of much of the evidence that allegedly would have supported the defense theory bears on both prongs of the *Strickland* analysis.

Counsel was not ineffective for failing to pursue a losing strategy, and Burgess was not prejudiced by the absence of evidence that could not have been admitted. Thus, if the Court were to grant certiorari and reverse for the reason stated by the petition, which does not call into question the lower court's resolution of the evidentiary issues, "the same judgment would be rendered" in the end, and this Court's decision would be merely "advisory." *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945)*; see*

[3] The circuit court found that much of the proffered expert testimony would not have been admissible at trial. PCR-C.1363 (finding that proffered pathologist testimony "about whether the shooting was intentional and the position of the victim at the time of the shooting…would have been inadmissible"); 1365 (finding that proffered plumbing expert testimony opining "about the relative positions of Mrs. Crow and Burgess when the gun fired would not have been admissible"); 1367 (finding that proffered expert testimony of "a crime scene investigator, firearms expert or forensic pathologist … about whether the shooting was intentional would not have been admissible"); 1371 (finding that proffered "lethal force expert … would not have been allowed to give an opinion that embraced the ultimate issue"); 1376 (finding that proffered evidence directed at "alleged inadequacies in the law enforcement investigation are generally improper and inadmissible").

also Coleman, 501 U.S. at 731. At this point, Burgess has waived any argument that the Rule 32 court misapplied the law of evidence in deeming most of the contemplated testimony to be inadmissible.

Third, Alabama courts have long interpreted Rules 32.3 and 32.6(b) of the Alabama Rules of Criminal Procedure to require claimants alleging failure to call an expert witness to do three things before an evidentiary hearing is held. The claim must (1) be "sufficiently pleaded," (2) not be "subject to the grounds of preclusion," and (3) "include[] factual allegations that, if true, entitle the petitioner to relief." *Brooks v. State*, 340 So. 3d 410, 437 (Ala. Crim. App. 2020) (citing *McAnally v. State*, 295 So. 3d 149, 152 (Ala. Crim. App. 2019)). These rules help the courts liquidate the requirement that petitions "contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds." Ala. R. Crim. P. 32.6(b); *see also* Ala. R. Crim. P. 32.3 ("The petitioner shall have the burden of pleading … the facts necessary to entitle the petitioner to relief."). These are normal pleading standards for any claim in Rule 32 proceedings, and they are similar to federal rules governing petitions for habeas corpus.[4] Burgess has not challenged the standards on due process grounds or any other constitutional basis.

Burgess's Rule 32 petition did not pass step one—the pleading stage—because he expressly and repeatedly refused and rejected the requirement to identify a single

[4] *See, e.g.*, *Capote v. State*, No. CR-20-0537, 2023 WL 5316187, at *12 (Ala. Crim. App. Aug. 18, 2023); *Wimbley v. State*, No. CR-20-0201, 2022 WL 17729209, at *16 (Ala. Crim. App. Dec. 16, 2022); *cf.* Rules Governing Section 2254 Cases in the U.S. Dist. Courts 2(c) (2019) ("The petition must: (1) specify all the grounds for relief available; (2) state the facts supporting each ground…."); *McFarland v. Scott*, 512 U.S. 849, 856 (1994) ("Habeas corpus petitions must meet heightened pleading requirements….").

expert who could have testified at trial. *See, e.g.*, PCR-C.1336. Burgess eventually named certain experts "with whom post-conviction counsel consulted in preparation of this petition."[5] PCR-C.1300-05; *Burgess*, 2023 WL 4146021, at *6. But at that point, it was too late to amend, and Burgess still failed to "[1] identify by name the expert witness his [trial] counsel should have hired, [2] set out the testimony that the named expert would have given, and [3] plead that the named expert was both willing and available to testify at [his] trial" in 1994. *Brooks*, 340 So. 3d at 437 (citing *Yeomans v. State*, 195 So. 3d 1018, 1043 (Ala. Crim. App. 2013)). Only after a petitioner "properly *plead[s]* a claim" does he "then" face the burden to "*prove* each of [his] allegations at an evidentiary hearing." *Id.*

It makes perfect sense for the State to adopt pleading standards for postconviction petitions, which often raise dozens of frivolous claims that do not warrant full-blown evidentiary hearings. That's not a matter of "local polic[y]" (Pet.14) but a reality of judicial administration—"summary dismissal may be appropriate in some cases, even capital cases," a fact Burgess does "no[t] dispute." Pet.18. This is one such case; Burgess's claim was dismissed because it was not well pleaded under

[5] Burgess states that the allegations in his petition "demonstrated that firearms experts, such as the one named in [his] petition, were available to testify in Alabama at the time of his trial." Pet.16. This is false. *See* PCR-C.1300-05. Though Burgess stated in his petition that his proffered expert testimony would have been available at the time of trial, this allegation was wholly conclusory, not a well-pleaded fact, under Alabama law. *E.g.*, *Sullivan v. State*, 944 So. 2d 164, 166 (Ala. Crim. App. 2006) ("[I]t is not the pleading of a *conclusion* which, if true, entitles the petitioner to relief. It is the allegation of *facts* in pleading which, if true, entitle the petitioner to relief.") (quoting *Boyd v. State*, 913 So. 2d 1113, 1125 (Ala. Crim. App. 2003)). Burgess was wrong on the law, believing that he had no duty to identify an expert, so he also failed to offer any reason to be excused from the requirement.

established and routinely followed pleading standards for Rule 32 proceedings, not because the courts "failed to correctly apply *Strickland*[]" or anything of the sort. Pet.19-20.[6]

To the extent that Burgess *does* challenge the State's pleading standards, this Court is loath to intrude on state criminal justice systems to such a degree. "A State's procedural rules are of vital importance to the orderly administration of its criminal courts; when a federal court permits them to be readily evaded, it undermines the criminal justice system." *Johnson v. Lee*, 578 U.S. 605, 612 (2016). Thus, "[f]ederal courts may upset a State's postconviction relief procedures *only if they are fundamentally inadequate* to vindicate the substantive rights provided." *Dist. Atty's Off. v. Osborne*, 557 U.S. 52, 69 (2009) (emphasis added). Burgess's petition has not attempted to argue that Rule 32.6(b) "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, or transgresses any recognized principle of fundamental fairness in operation." *Id.* (cleaned up).

At most, Burgess has insinuated that there is something improper about the frequency of dismissals without an evidentiary hearing in Rule 32 proceedings. Pet.18-19. But the insinuation is fatally flawed because Burgess gives the Court no reason to believe that any one of the dismissed claims was facially meritorious or otherwise entitled to an evidentiary hearing. The Court may well draw the opposite

[6] To be sure, as Burgess notes, dismissal under Rule 32.6(b) can operate as a merits ruling for federal habeas purposes, Pet.8 n.2, but the question for this Court on petition for writ of certiorari is whether the state pleading rules are "intertwined" with substantive, federal constitutional law. *See, e.g.*, *Frazier v. Bouchard*, 661 F.3d 519, 525 (11th Cir. 2011). Here, even if Burgess were correct that the Sixth Amendment somehow requires evidentiary hearings for petitioners in state postconviction proceedings with well pleaded Sixth Amendment claims, *he did not have a well pleaded claim* under perfectly adequate and independent state-law pleading rules that he does not challenge.

inference that Rule 32.6(b) has had the salutary effect of drawing judicial resources toward identifying needles in the haystack—the rare meritorious claims for postconviction relief.

Fourth, if this Court were to reverse and remand on the harmless-error issue, the CCA would need to reach whether it was proper to deny Burgess's motion for leave to amend. On remand, CCA would have ample reason to affirm the trial court's exercise of discretion and therefore exclude Burgess's proposed amendment—the entire basis for his cert petition. "The grant or denial of leave to amend is a matter within the sound discretion of the trial judge," so denial would be reviewed only for abuse of discretion. *Ex parte Rhone*, 900 So. 2d 455, 458 (Ala. 2004).

Denial of the motion for leave to amend was reasonable and proper after so many years and prior amendments; there could be no argument that Burgess lacked an opportunity to comply with Rule 32's pleading standards. And on the other side of the ledger, the State would be greatly prejudiced by such late-breaking allegations. The public has a strong interest in finality. It is not in the interests of justice or a well-functioning criminal justice system to permit an indefinite number of amendments in Rule 32 proceedings; at some point, the proceedings must come to an end. The State would argue these points and more. If it is likely that the CCA would agree with the trial court's exercise of discretion and affirm denial of the proposed amendment, then Burgess's claim would almost certainly fail, for he never identified any expert until that amendment. The likelihood that his claim is ultimately denied on the merits is another reason not to grant review.

Burgess offers no reason for this Court to look past his defaults and address a narrow issue, which, even if reversed, would not result in relief.

II. The Petition Does Not Present A Conflict Of Authority Or An Important Federal Question.

The petition does not allege a conflict or an important federal question that would warrant this Court's review. By enforcing a typical pleading standard, Alabama has not created postconviction procedures that are "fundamentally inadequate to vindicate [] substantive rights" in Burgess's case or any other. *Osborne*, 557 U.S. at 69. Alabama is not an outlier in asking petitioners to identify an expert by name; indeed, many jurisdictions around the country have particular rules about how their pleading standards apply to *Strickland* claims about expert testimony.[7] The question presented is not particularly important because a petition that fails to satisfy a State's basic pleading standards would often fail for other reasons as well. In proceedings below, Burgess effectively conceded that the need to name an expert rarely, if ever, constitutes the sole basis for rejecting an ineffectiveness claim.[8] Burgess does not demonstrate that the pleading rules are applied in a manner inconsistent with

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[7] *See Veneros-Figueroa v. State*, 623 S.W.3d 122, 132 (Ark. Ct. App. 2021); *Anderson v. Commonwealth*, 2017-CA-001946-MR, 2019 WL 3851637, at *3 (Ky. Ct. App. Aug. 16, 2019); *People v. Haynes*, 980 N.W.2d 66, 88 (Mich. Ct. App. 2021); *Jones v. State*, 514 S.W.3d 72, 79 (Mo. Ct. App. 2017); *State v. Fox*, 840 N.W.2d 479, 486 (Neb. 2013); *Lacy v. State*, 281 P.3d 119, 2009 WL 4279846, at *2 (Nev. Nov. 13, 2009); *State v. Cooperstein*, 149 N.E.3d 91, 102 (Ohio Ct. App. 2019); *Commonwealth v. Selenski*, 228 A.3d 8, 17-18 (Pa. Super. Ct. 2020); *Dunn v. State*, 14-12-00110-CR, 2013 WL 3770917, at *4 (Tex. Ct. App. July 16, 2013); *State v. Suhail*, 525 P.3d 550, 575 (Utah Ct. App. 2023); *but see State v. Lucas*, 183 So. 3d 1027, 1034 (Fla. 2016) ("[W]e cannot hold that a defendant is always required to name a specific expert witness and show that the specific expert witness would have been available to testify at trial in order to render a rule 3.850 motion legally sufficient.").

[8] In response to the State's motion to dismiss his second amended Rule 32 petition, Burgess noted: "Alabama courts have, at times, found a lack of specificity in post-conviction petitions where petitioner has failed to name an expert witness. Those courts, however, found a lack of specificity not solely based on the omission of an expert's name but also on a petitioner's failure to plead the content of the expert's testimony and how the expert would be used to support petitioner's theory." PCR-C.1175.

established precedent or that their application has resulted in drastically different outcomes in Rule 32 proceedings compared to other jurisdictions.

Instead, Burgess relies on *Hinton v. Alabama*, 571 U.S. 263 (2014), and *Padilla v. Kentucky*, 559 U.S. 356 (2010), cases which have virtually nothing to do with state postconviction pleading requirements. Pet.11,15.

First, Burgess says his case is like *Hinton* because Hinton, like Burgess, pursued a claim in postconviction about his counsel's performance concerning guilt-phase trial experts. Pet.11-14. At Hinton's trial, "[t]he State's case turned on whether its expert witnesses could convince the jury that the six recovered bullets had indeed been fired from the Hinton revolver." *Hinton*, 571 U.S. at 265. Hinton was denied postconviction relief after an evidentiary hearing and, thereafter, the issue centered around whether Hinton's expert from trial "was a qualified firearms and toolmarks expert." *Hinton*, 571 U.S. at 271 (quoting *Ex parte Hinton*, 172 So. 3d 332, 336 (Ala. 2008)). This Court granted review because the Alabama courts misapprehended the focus of *Strickland*'s deficient-performance prong.

In light of the evidence from the evidentiary hearing showing that Hinton's counsel believed that the chosen expert "was not a good expert" and that he mistakenly "believed that he was unable to obtain more than $1,000 to cover expert fees" even though "the trial judge expressly invited Hinton's attorney to file a request for further funds if he felt that more funding was necessary," *id.* at 273, this Court found

that the performance prong had been met.[9] *Id.* at 274 ("The trial attorney's failure to request additional funding in order to replace an expert he knew to be inadequate because he mistakenly believed that he had received all he could get under Alabama law constituted deficient performance.").

Though Burgess asserts that his "counsel hired no expert and presented no evidence in support of their defense theory," Pet.14, the State's "overwhelming" evidence, *Burgess*, 827 So. 2d at 171, did not turn on forensic expert testimony,[10] and there is no evidence (or allegation) that trial counsel made some "inexcusable mistake of law." *Hinton*, 571 U.S. at 275; *see also Kendrick v. Parris*, 989 F.3d 459, 473 (6th Cir. 2021) ("Kendrick has not identified any legal error that his counsel made in failing to obtain an expert."), *cert. denied*, 142 S. Ct. 483 (2021) (mem). Thus, the CCA did not find Burgess's *Hinton* comparison persuasive. *Burgess*, 2023 WL 4146021, at *10 ("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)."). And rightly so: nothing in *Hinton* speaks to pleading standards or a state court's obligation to grant an evidentiary hearing in postconviction proceedings, and the Court expressly avoided adopting a rule that expert assistance is always required in capital cases.

[9] The *Hinton* Court remanded for a prejudice determination. *Hinton*, 571 U.S. at 276. It is worth noting that, in a brief to the circuit court on remand, Hinton asserted that "all three Rule 32 experts were testifying firearms and toolmark examiners at the time of trial." Petitioner's Rep. Br. On Remand 15, *Hinton v. State*, CC-85-3364.83 (Jefferson Cnty. Cir. Ct. Aug. 27, 2014).

[10] The State's pathologist, Dr. Joseph Embry, who performed the autopsy, did not opine about whether the shooting was intentional. Dr. Embry described the victim's injuries, the path of the bullet within her head, and opined that death would have occurred "within a few minutes" of the injury. TR.1386. The State's firearms and toolmarks expert, Brent Wheeler, also did not opine about whether the shooting was intentional. Wheeler opined that the casing and projectile from the scene and the victim were fired from the gun that was submitted in this case. TR.1448, 1451. Wheeler also opined that the shot was fired "between one and two feet" from the victim. TR.1456.

Hinton, 571 U.S. at 274-75 ("We wish to be clear that the inadequate assistance of counsel we find in this case does not consist of the hiring of an expert who, though qualified, was not qualified enough.").

Second, Burgess says that *Padilla* is "instructive" in his case, Pet.15, but it is wholly unclear how. In *Padilla*, this Court reversed the Kentucky Supreme Court's determination that deportation resulting from a conviction is a "collateral" consequence of a conviction such that a lawyer's failure to so advise cannot satisfy *Strickland*'s performance prong. *Padilla*, 559 U.S. at 360. Though *Padilla* focuses on the scope of *Strickland*'s performance prong, it says nothing about procedural fairness in postconviction or pleading standards. In his brief to the CCA, Burgess's sole mention of *Padilla* was contained within a section about jury selection and appears, in total, as follows: "In *Padilla*, petitioner simply pleaded that counsel acted unreasonably, *see* Brief for Petitioner at 17, 559 U.S. 356 (2010) (No. 08-651), 2009 WL 1497552, at *17; nevertheless, the Supreme Court held that petitioner 'sufficiently alleged deficiency.'" Appellant's Br. 55, *Burgess v. State*, CR-19-1040 (Ala. Crim. App. Mar. 24, 2021). Burgess woefully misreads *Padilla*, a "misadvice" case, 559 U.S. at 371 n.12, and to the extent he advances a rule that a mere allegation of unreasonableness is all that is required to for a petitioner to be entitled to a hearing, that rule is untenable and unwarranted.

Lastly, Burgess asserts that, by denying him an evidentiary hearing, "the Alabama courts continued a trend over the past decade in post-conviction capital cases, where even petitioners who plead a facially meritorious federal claim are denied on

the merits with no opportunity to present evidence." Pet.17. Burgess provides no illustrations of this "phenomenon," *id*., because it does not exist. He does provide, for the first time here, a list of CCA decisions in capital postconviction cases from 2015 to present, Pet.App.333a-35a. But the list obviously does not demonstrate any systemic denial of due process; there is no indication that any of the petitioners whose claims were dismissed had meritorious claims. *See also supra* §I.

III. The Decision Below Was Correct, And Burgess's Postconviction *Strickland* Claim Is Meritless.

Certiorari is unwarranted because the courts below reached the correct result. Even setting aside his multilayered default, Burgess has failed to set forth a viable *Strickland* claim.

First, Alabama's pleading rule requiring the allegation that there existed a trial-available expert is no insurmountable barrier to relief but is fully consonant with *Strickland*'s prejudice prong.[11] An allegation that a hypothetical expert would have provided hypothetical testimony is inherently conclusory, speculative, and at odds with *Strickland*'s reasonable probability standard. *See generally Barksdale v. Dunn*, 3:08-cv-327-WKW, 2018 WL 6731175, at *48 (M.D. Ala. Dec. 21, 2018) (collecting cases, and noting that petitioner failed to identify "a firearms expert or any person possessing personal knowledge of the murder weapon who was *available* to testify at the time of Petitioner's capital murder trial, was *willing* and able to do so, and could

[11] Again, Burgess never raised any excuse or contended that some hardship made it impracticable for him to plead trial-available experts.

have furnished any testimony that would have established it was possible the murder weapon accidentally discharged"), *aff'd*, 20-10993, 2024 WL 2698399 (11th Cir. 2024).

The prejudice inquiry does not ask whether it is reasonably probable that trial counsel *could have* presented some expert. It asks whether there is a reasonable probability that some evidence would have changed the outcome; that evidence must have been available to counsel at the time of trial, or it would not have affected the outcome. In Burgess's proposed amendment, not his petition, he pleaded the names of experts with whom his postconviction counsel had consulted in preparing the petition, which did not fulfill his obligation to allege specific facts that available evidence could have been presented by his counsel at trial.[12] *See Waters v. Thomas*, 46 F.3d 1506, 1514 (11th Cir. 1995) ("The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel.") (quoting *Foster v. Dugger*, 823 F.2d 402, 406 (11th Cir. 1987)).

Second, not only is Rule 32 consonant with *Strickland*, but so was the trial court's application of the law to the facts of Burgess's case. In his Rule 32 petition, Burgess alleged that his counsel conducted no investigation and that, if they had, they should have presented evidence that the murder weapon, a Titan .25 caliber, was "manufactured with a defective firing pin," which gave rise to a "potential for accidental discharge." PCR-C.759. According to Burgess, the alleged defect can cause

[12] Additionally, the circuit court found it significant that, aside from failing to name an available expert, Burgess's allegation that his counsel could have hired an expert to examine the gun for defects was missing a critical step—whether counsel exercising reasonable diligence would have had reason to hire such an expert in the first place.

the gun to discharge "if an object strikes the hammer with sufficient force when it is in the uncocked position and the safety is not engaged." PCR-C.760. Burgess alleged that "a qualified firearms expert" could have examined the weapon and detected the defective firing pin. PCR-C.759.

But the circuit court found that Burgess's "conclusion that trial counsel conducted no investigation [was] supported by no disclosure of specific facts." PCR-C.1359. As to deficient performance, the claim failed to plead "specific facts showing that his counsel knew or explaining why they should have known of a possible defect in the gun's firing mechanism." *Id.* at PCR-C.1361 (citing *Alderman*, 647 So. 2d at 33 for the proposition that a petitioner must plead that counsel had knowledge of specific facts giving rise to the claim). Burgess did not "inform[] his counsel that the gun had a trigger or firing pin problem." *Id.* at 1362. Rather, he had "blamed … [the allegedly] accidental and unintentional discharge" on "Mrs. Crow's striking his arm – not a defect in the gun." *Id.* Burgess thus drew his counsel's attention toward a defense theory that had nothing to do with a firearm defect, so they had no reason to believe the case "require[d] expert evaluation." *Id.* Thus, Burgess failed to allege why his case was one of the "[r]are…situations in which the 'wide latitude counsel must have in making tactical decisions' [was] limited to…one technique or approach." *Harrington v. Richter*, 562 U.S. 86, 106 (2011) (quoting *Strickland*, 466 U.S. at 689).

Again, this is not a case like *Hinton*, where the State's case hinged on forensic expert testimony about a ballistics match to the defendant's gun. 571 U.S. at 273 ("[E]ffectively rebutting [the prosecution's case] required a competent expert on the

defense side."). As the circuit court noted, Burgess pointed to no objective fact that should have put his counsel on notice of any need to seek any of the expert assistance alleged in the petition. The "mere fact that a defendant can find, years after the fact," an expert "who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial." *Davis v. Singletary*, 119 F.3d 1471, 1475 (11th Cir. 1997). Burgess's petition also did "not identify by name the firearms expert who would have been willing, available, and qualified in 1994 to testify in Burgess's trial and fail[ed] to specify the contents of the expert's testimony." PCR-C.1362. For these many reasons, the trial court held that Burgess's "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)." *Id.*

Moreover, there was no prejudice to Burgess because the evidence abundantly showed that he intended to kill the victim to the exclusion of his alleged defective firing pin theory. The victim was shot in the middle of the face. TR.1369. Burgess testified that he cocked the hammer back, TR.1148, which does not coincide with his own defective firing pin theory, which would have required some amount of force against an uncocked hammer. Thus, the circuit court correctly concluded that, though Burgess claimed that his counsel should have done more to attempt to "corroborate [his] description of an accidental or unintentional shooting, it was just as probable that such evidence did not exist as it is that trial counsel failed to conduct a reasonable investigation." PCR-C.1360.

Though not the focal point of his certiorari petition, Burgess also alleged in his Rule 32 petition that a pathologist could have testified that the victim "was standing when she was shot" and that the bullet's trajectory was consistent with the victim "striking the pistol or Mr. Burgess's hand or arm, causing his wrist to rotate."[13] PCR-C.763. Notwithstanding Burgess's failure to give a full factual basis for such opinions, the circuit court ruled that testimony from an expert opining about whether the shooting was intentional or about the relative positions of the defendant or the victim are not admissible under Alabama law. PCR-C.1363 (citing *Taylor v. State*, 808 So. 2d 1148, 1161-62 (Ala. Crim. App. 2000)). Next, Burgess alleged that a plumbing engineer could have offered testimony that the toilet would not have broken if the victim had been seated when she was shot and that "to a high degree of scientific certainty … Mrs. Crow was standing at the time she was shot." PCR-C.770. Again, the circuit court found that such testimony would have been inadmissible. *Id.* at 1365 (citing *Crawford v. State*, 78 So. 2d 291, 292 (Ala. 1954)). The circuit court concluded similarly in regard to Burgess's claims about a crime scene investigator or firearms expert and a lethal-force expert. PCR-C.1367, 1371, 1376.

Because of these many failures of Burgess's pleadings, he was due nothing further from the state courts, which correctly dismissed his claim.

[13] According to Burgess's Rule 32 petition, evidence that the victim may have been standing when she was shot would have supported his theory that she went for or hit the gun and that her falling caused the toilet to break. PCR-C.758. His counsel made that argument at trial, and the prosecutor responded that it was more likely that the victim was seated down when she was shot based on Burgess's own statement that he told the victim to sit down. TR.1086, 1153, 1570.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

STEVE MARSHALL
Alabama Attorney General

Edmund G. LaCour Jr.
Solicitor General

Robert M. Overing
Deputy Solicitor General

Cameron G. Ball
Assistant Attorney General
Counsel of Record

OFFICE OF ALA. ATT'Y GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
Cameron.Ball@AlabamaAG.gov