APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

IN THE SUPREME COURT OF ALABAMA

1171004

[Filed November 16, 2018]

Ex parte	)
Mario Dion Woodward.	)
	)

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(In re: Mario Dion Woodward v. State of Alabama)
(Montgomery Circuit Court: CC-07-1388.60; Criminal Appeals: CR-15-0748).

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 November 16, 2018:

Writ Denied. No Opinion. Parker, J. - Stuart, C.J., and Bolin, Shaw, Main, Bryan, Sellers, and Mendheim, JJ., concur. Wise, J., recuses herself.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

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

Witness my hand this 16th day of November, 2018.

Julia Jordan Weller
Clerk, Supreme Court of Alabama

APPENDIX B

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

D. Scott Mitchell
Clerk
Gerri Robinson
Assistant Clerk

P. O. Box 301555
Montgomery, AL
36130-1555
(334) 229-0751
Fax (334) 229-0521

July 27, 2018

CR-15-0748 Death Penalty

Mario Dion Woodward v. State of Alabama (Appeal from Montgomery Circuit Court: CC07-1388.60)

NOTICE

You are hereby notified that on July 27, 2018, the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

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

cc: Hon. Truman Hobbs, Circuit Judge
Hon. Tiffany B. McCord, Circuit Clerk
Modupeolu A. Adegoke, Attorney - Pro Hac

Rhonda Caviedes, Attorney
Jean M. Farrell, Attorney - Pro Hac
Geoffrey G. Young, Attorney - Pro Hac
Richard D Anderson, Asst. Attorney General

APPENDIX C

Notice: This opinion is subject to formal revision before publication in the advance sheets of **Southern Reporter**. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in **Southern Reporter**.

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2017-2018

CR-15-0748

[Filed April 27, 2018]

Mario Dion Woodward	)
	)
v.	)
	)
State of Alabama	)
	)

Appeal from Montgomery Circuit Court
(CC-07-1388.60)

KELLUM, Judge.

Mario Dion Woodward appeals the circuit court's partial summary dismissal and partial denial of his petition for postconviction relief filed pursuant to Rule

32, Ala. R. Crim. P., in which he attacked his capital-murder convictions and sentence of death.

Facts and Procedural History

In 2008, Woodward was convicted of two counts of capital murder in connection with the murder of Montgomery Police Officer Keith Houts. The murder was made capital (1) because Officer Houts was on duty when he was killed, see § 13A-5-40(a)(5), Ala. Code 1975, and (2) because Woodward shot and killed Officer Houts from inside a vehicle, see § 13A-5-40(a)(18), Ala. Code 1975. By a vote of 8-4, the jury recommended that Woodward be sentenced to life imprisonment without the possibility of parole for his capital-murder convictions; the trial court overrode the jury's recommendation and sentenced Woodward to death.[1] This Court affirmed Woodward's convictions and sentence of death. Woodward v. State, 123 So. 3d 989 (Ala. Crim. App. 2011). The Alabama Supreme Court denied certiorari review, and this Court issued a certificate of judgment on April 19, 2013. The United States Supreme Court also denied certiorari review. Woodward v. Alabama, 571 U.S. ___, 134 S.Ct. 405 (2013).

---

[1] Sections 13A-5-45, 13A-5-46, and 13A-5-47, Ala. Code 1975, were amended by Act No. 2017-131, Ala. Acts 2017, to eliminate judicial override and to place the final sentencing decision in the hands of the jury. That Act, however, does not apply retroactively to Woodward. See § 2, Act No. 2017-131, Ala. Acts 2017, § 13A-5-47.1, Ala. Code 1975.

In our opinion affirming Woodward's convictions and sentence, we set out the facts of the crime as follows:

> "Montgomery police officer Keith Houts was on patrol in a neighborhood in north Montgomery on September 28, 2006, and he conducted a traffic stop at approximately 12:30 p.m. Shonda Lattimore testified that she was sitting on her porch when she saw a police officer begin to execute a stop on a gray Impala automobile being driven by a black man wearing a red hat. Lattimore testified that she saw the driver of the Impala reach down for something as the Impala and the police car, with its emergency lights on, passed by the end of her street, before they went out of sight. Soon after the cars passed out of her sight, she heard four or five gunshots fired.
>
> "During the traffic stop Officer Houts entered the license tag of the Impala into the mobile data terminal in his patrol car; the vehicle was registered to Morrie Surles. Officer Houts's patrol car was equipped with a video camera that recorded the events that occurred during the stop. The video recording was played for the jury. The video showed that Houts got out of his patrol car and approached the driver's side door of the Impala. Just as Officer Houts reached the door, the driver of the Impala fired a gun and shot Officer Houts in the jaw. Medical testimony established that the bullet entered Officer Houts's neck and severed his spine, causing him

to collapse instantly. The driver then reached his arm out of the vehicle and shot Officer Houts four more times. The driver fled the scene in the Impala. Although the dashboard camera captured the shooting on videotape, it did not reveal the identity of the assailant because Officer Houts's patrol car was positioned behind the Impala and because the assailant did not get out of the vehicle.

"Although Officer Houts survived the shooting, he never regained consciousness, and he died two days later.

"The police determined that the Impala was registered to Morrie Surles ('Morrie'). Morrie testified that she had purchased the Impala for her daughter, Tiffany Surles ('Surles').

"At around 9:30 on the morning of the shooting, Woodward visited a family friend, Shirley Porterfield. According to Porterfield, Woodward was driving a light-colored Impala, and he was wearing blue jeans, a white t-shirt, and a red fleece jacket. At approximately the same time the shooting occurred, Sharon Shephard, a Montgomery Animal Control officer driving in the area, saw an Impala being driven by a dark-skinned male pass by her at a high rate of speed.

"During the evening on the date the shooting occurred Surles's Impala was found burned in a Montgomery neighborhood. Thalessa Shipman testified that she was a captain of the

'Neighborhood Watch' for her street. She said that she heard a loud car driving around the neighborhood on the night of September 28, 2006. The car stopped at her driveway in the cul-de-sac, then backed up to an empty lot located next to her lot. She identified the car as a dark-colored Dodge Neon. Shipman looked over the fence into the empty lot and saw a light-colored car there, and someone standing beside that car. Seconds later, the light-colored car went up in flames, and the person who had been standing next to the burning car jumped into the Neon, and the Neon sped away. Shipman contacted law-enforcement authorities, and they later identified the Impala as being registered to Morrie Surles based on the vehicle-identification number. Additional evidence established that a friend of Woodward's, Joseph Pringle, owned a black Dodge Neon that had a loose muffler and was loud. The State played a video recording of Pringle's Neon for Shipman, and she identified the sound of the car as the one she had heard on the night the car was burned in her neighborhood. A detective involved in the murder investigation received information about a black Dodge Neon, and on the day of the murder he and his partner located the car. Joseph Pringle was in the driver's seat, and another man was in the passenger seat; the trunk of the vehicle was open. A third man was standing next to the car, speaking to Pringle; that man was holding a gas can.

"Tiffany Surles, Woodward's girlfriend at the time of the shooting, testified that in September 2006 she was living with Woodward in an apartment they had rented together. During the evening of September 27, 2006, Surles and Woodward argued, and Woodward left the apartment in her Impala, and he returned later that night. Surles testified that the following morning, on the day Officer Houts was shot, she was taking a shower when Woodward left the apartment again. Woodward had the keys to her Impala the night before, and the Impala was gone. Surles had decided the night before that she was going to move out of the apartment. After Woodward left the apartment on the morning of the shooting Surles telephoned a friend, Wendy Walker, and asked her to help Surles move out of the apartment. Walker and Surles moved Surles's personal belongings to Walker's apartment, and the two women decided to drive to Birmingham to go shopping. Woodward telephoned Surles before she and Walker left for Birmingham, and he wanted Surles to meet him. Surles testified that Woodward met them at Walker's apartment complex and that he got out of a small, dark car. Walker testified that the car Woodward got out of was a black Neon. Neither woman saw Surles's Impala.

"Woodward joined Surles and Walker in Walker's vehicle, and they drove to Birmingham. Surles and Walker testified that during the trip to Birmingham Woodward said that he had

'messed up' and that he had shot a police officer who pulled him over. Walker testified that Woodward spoke on his cellular telephone during the trip and that she had heard him tell someone to 'get rid his girl['s] car.' (R. 963.) Surles stated that Woodward told her that he had taken care of her car. Surles said she did not get her car back. Walker and Surles testified that Woodward threw something out of Walker's vehicle while they were en route to Birmingham. Walker testified that the object Woodward threw was a gun.

"Walker and Surles testified that in Birmingham they went to the Century Plaza shopping mall. Woodward bought a change of clothing and then asked the women to drop him off at a building near the Valleydale exit of the interstate. Vernon Cunningham testified that he is acquainted with Woodward, and that Woodward telephoned him on September 28, 2006, and wanted to meet with him. Cunningham arranged to meet with Woodward and said two girls dropped Woodward off at the arranged meeting place on Valleydale Road in Birmingham later that day. Cunningham drove Woodward to Cunningham's house. On the way to Cunningham's house, they stopped at a grocery store; a videotape from the store's security camera showed that Woodward was wearing blue-jean shorts, a red sweatshirt, and a red baseball cap with a white emblem on the front. After they arrived at Cunningham's house, Woodward gave Cunningham the sweatshirt and

red baseball cap he had been wearing, and he told Cunningham to burn them. Cunningham testified that he burned the items in his outdoor grill, and the police found remnants of clothing in that grill. Cunningham also testified that Woodward told him that he had shot a police officer during a traffic stop.

"Cunningham testified that Woodward asked for a ride and Cunningham agreed to take him to a local restaurant. Roderick Jeter picked Woodward up at the restaurant and drove Woodward to Atlanta, where he dropped Woodward off at a gas station.

"Montgomery police detectives interviewed numerous witnesses, and, from the information they received, they determined that Woodward had confessed to shooting Officer Houts and that he was then in Atlanta.

"Deputy United States Marshal Joe Parker testified that a be-on-the-lookout, or 'BOLO,' had been issued for Woodward in the Atlanta area and that on the day after the shooting he recognized Woodward while he was at a gas station in Atlanta. Parker arrested Woodward. He further testified that, at the time of the arrest, Woodward spontaneously exclaimed, 'What's going on? I didn't shoot anybody.' (R. 1114.)

"Records custodians for two cellular telephone companies testified about calls placed from Woodward's cellular telephones and as to

> which towers in Montgomery and Birmingham that the calls were routed through. That testimony established that Woodward was in the area where Officer Houts was shot at the same time the shooting took place.
>
> "Finally, Agent Al Mattox from the Alabama Bureau of Investigation testified that he had reviewed and attempted to enhance the videotape from Officer Houts's dashboard camera. He testified that it appeared from the videotape that the person who killed Officer Houts was a black male."

Woodward, 123 So. 3d at 999-1001.[2]

On April 15, 2014, Woodward timely filed the instant Rule 32 petition, raising numerous claims of ineffective assistance of trial counsel.[3] On June 4, 2014, the State filed an answer and a motion to dismiss Woodward's petition. On December 22, 2014, Woodward filed an amended petition in which he reasserted the claims raised in his original petition and raised additional claims for relief, including a claim that newly discovered material facts establish that he

---

[2] This Court may take judicial notice of its own records, and we do so in this case. See Nettles v. State, 731 So. 2d 626, 629 (Ala. Crim. App. 1998), and Hull v. State, 607 So. 2d 369, 371 n.1 (Ala. Crim. App. 1992).

[3] The time for filing a Rule 32 petition in a case in which the death penalty has been imposed was amended by Act No. 2017-417, Ala. Acts 2017, codified at § 13A-5-53.1, Ala. Code 1975. However, that Act does not apply retroactively to Woodward. See § 3, Act No. 2017-417, Ala. Acts 2017, § 13A-5-53.1(j), Ala. Code 1975.

is actually innocent of the murder of Officer Houts.[4] On February 11, 2015, the State filed an answer and a motion to dismiss Woodward's amended petition. On April 2, 2015, Woodward filed a motion for discovery of records from the Alabama Department of Human Resources, the Montgomery County jail, and various media outlets; the trial court did not specifically rule on the motion. On September 14, 2015, Woodward filed a motion requesting that the circuit judge recuse himself; the judge denied that motion on September 22, 2015. On September 23, 2015, Woodward filed an amendment to his amended petition, raising one additional claim.

On September 24, 2015, the circuit court conducted a hearing on the State's motion to dismiss, after which the court issued an order, on October 9, 2015, summarily dismissing all the claims asserted in Woodward's petition save one: The court determined that an evidentiary hearing was warranted on Woodward's claim that his trial counsel had been ineffective for not making a Batson v. Kentucky, 476 U.S. 79 (1986), objection to the State's use of its peremptory strikes. After denying both Woodward's and the State's discovery requests relating to the ineffective-assistance/Batson claim, the circuit court conducted an evidentiary hearing on that claim on February 18, 2016, and, on February 23, 2016, the

---

[4] The amended petition superseded the original petition. See, e.g., Reeves v. State, 226 So. 3d 711, 722 (Ala. Crim. App. 2016); and Smith v. State, 160 So. 3d 40, 47-49 (Ala. Crim. App. 2010). Unless otherwise stated, all references in this opinion to Woodward's petition are references to the amended petition.

circuit court issued an order denying that claim. On March 18, 2016, Woodward filed a postjudgment motion to reconsider the circuit court's judgment; the court denied the motion by written order on March 21, 2016.

Standard of Review

Rule 32.7(d), Ala. R. Crim. P., authorizes a circuit court to summarily dispose of a petitioner's Rule 32 petition without accepting evidence,

> "[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 the petitioner to relief under this rule and that no purpose would be served by any further proceedings ...."

See also Hannon v. State, 861 So. 2d 426, 427 (Ala. Crim. App. 2003); Cogman v. State, 852 So. 2d 191, 193 (Ala. Crim. App. 2002); Tatum v. State, 607 So. 2d 383, 384 (Ala. Crim. App. 1992). Summary disposition is appropriate if the record directly refutes a petitioner's claim or if the claim is obviously without merit. See, e.g., Shaw v. State, 148 So. 3d 745, 764-65 (Ala. Crim. App. 2013). Moreover, "a judge who presided over the trial or other proceeding and observed the conduct of the attorneys at the trial or other proceeding need not hold a hearing on the effectiveness of those attorneys based upon conduct that he observed." Ex parte Hill, 591 So. 2d 462, 463 (Ala. 1991).

"Once a petitioner has met his burden ... to avoid summary disposition pursuant to Rule 32.7(d), Ala. R. Crim. P., he is then entitled to an opportunity to

present evidence in order to satisfy his burden of proof." Ford v. State, 831 So. 2d 641, 644 (Ala. Crim. App. 2001). Rule 32.9(a), Ala. R. Crim. P., provides:

> "Unless the court dismisses the petition, the petitioner shall be entitled to an evidentiary hearing to determine disputed issues of material fact, with the right to subpoena material witnesses on his behalf. The court in its discretion may take evidence by affidavits, written interrogatories, or depositions, in lieu of an evidentiary hearing, in which event the presence of the petitioner is not required, or the court may take some evidence by such means and other evidence in an evidentiary hearing."

In Wilkerson v. State, 70 So. 3d 442 (Ala. Crim. App. 2011), this Court explained:

> "'The burden of proof in a Rule 32 proceeding rests solely with the petitioner, not the State.' Davis v. State, 9 So. 3d 514, 519 (Ala. Crim. App. 2006), rev'd on other grounds, 9 So. 3d 537 (Ala. 2007). '[I]n a Rule 32, Ala. R. Crim. P., proceeding, the burden of proof is upon the petitioner seeking post-conviction relief to establish his grounds for relief by a preponderance of the evidence.' Wilson v. State, 644 So. 2d 1326, 1328 (Ala. Crim. App. 1994). Rule 32.3, Ala. R. Crim. P., specifically provides that '[t]he petitioner shall have the burden of ... proving by a preponderance of the evidence the

> facts necessary to entitle the petitioner to relief.'"

70 So. 3d at 451.

"[W]here there are disputed facts in a postconviction proceeding and the circuit court resolves those disputed facts, '[t]he standard of review on appeal ... is whether the trial judge abused his discretion when he denied the petition.'" Boyd v. State, 913 So. 2d 1113, 1122 (Ala. Crim. App. 2003) (quoting Elliott v. State, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992)). However, "when the facts are undisputed and an appellate court is presented with pure questions of law, that court's review in a Rule 32 proceeding is de novo." Ex parte White, 792 So. 2d 1097, 1098 (Ala. 2001). "The sufficiency of pleadings in a Rule 32 petition is a question of law." Ex parte Beckworth, 190 So. 3d 571, 573 (Ala. 2013).

With limited exceptions not applicable here, the general rule is that this Court may affirm a circuit court's judgment if it is correct for any reason. See Bryant v. State, 181 So. 3d 1087, 1100 (Ala. Crim. App. 2011); Moody v. State, 95 So. 3d 827, 833 (Ala. Crim. App. 2011), and McNabb v. State, 991 So. 2d 313, 333 (Ala. Crim. App. 2007), and the cases cited therein. Moreover, "[o]n direct appeal we reviewed the record for plain error; however, the plain-error standard of review does not apply to a Rule 32 proceeding attacking a death sentence." Ferguson v. State, 13 So. 3d 418, 424 (Ala. Crim. App. 2008). See also Mashburn v. State, 148 So. 3d 1094, 1104 (Ala. Crim. App. 2013).

Analysis

I.

Woodward first contends that he was denied due process when Judge Truman Hobbs refused to recuse himself from the Rule 32 proceedings upon Woodward's motion. (Issue I in Woodward's brief.)

"All judges are presumed to be impartial and unbiased" and "[t]he burden is on the party seeking recusal to prove otherwise." Luong v. State, 199 So. 3d 173, 205 (Ala. Crim. App. 2015). "'A trial judge's ruling on a motion to recuse is reviewed to determine whether the judge exceeded his or her discretion.'" Ex parte Jones, 86 So. 3d 350, 352 (Ala. 2011) (quoting Ex parte George, 962 So. 2d 789, 791 (Ala. 2006)). "'The necessity for recusal is evaluated by the "totality of the facts" and circumstances in each case.'" Ex parte Bank of America, N.A., 39 So. 3d 113, 119 (Ala. 2009) (quoting Ex parte City of Dothan Pers. Bd., 831 So. 2d 1, 2 (Ala. 2002)).

Canon 3.C(1), Alabama Canons of Judicial Ethics, provides, in pertinent part:

> "C. Disqualification.
>
> "(1) A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned, including but not limited to instances where:
>
> "(a) He has a personal bias or prejudice concerning a party, or personal

> knowledge of disputed evidentiary facts concerning the proceeding ...."

In Carruth v. State, 927 So. 2d 866 (Ala. Crim. App. 2005), this Court explained the standard for determining when recusal is required:

> "In Ex parte Duncan, 638 So. 2d 1332 (Ala. 1994), the Alabama Supreme Court explained:
>
> > "'Under Canon 3(C)(1), Alabama Canons of Judicial Ethics, recusal is required when "facts are shown which make it reasonable for members of the public or a party, or counsel opposed to question the impartiality of the judge." Acromag-Viking v. Blalock, 420 So. 2d 60, 61 (Ala. 1982). Specifically, the Canon 3(C) test is: "Would a person of ordinary prudence in the judge's position knowing all of the facts known to the judge find that there is a reasonable basis for questioning the judge's impartiality?" Matter of Sheffield, 465 So. 2d 350, 356 (Ala. 1984). The question is not whether the judge was impartial in fact, but whether another person, knowing all of the circumstances, might reasonably question the judge's impartiality -- whether there is an appearance of impropriety. Id.; see Ex parte Balogun, 516 So. 2d 606 (Ala. 1987); see, also, Hall

> v. Small Business Administration, 695 F.2d 175 (5th Cir. 1983).'

"638 So. 2d at 1334.

> "'The standard for recusal is an objective one: whether a reasonable person knowing everything that the judge knows would have a "reasonable basis for questioning the judge's impartiality." [Ex parte] Cotton, 638 So. 2d [870] at 872 [(Ala. 1994)]. The focus of our inquiry, therefore, is not whether a particular judge is or is not biased toward the petitioner; the focus is instead on whether a reasonable person would perceive potential bias or a lack of impartiality on the part of the judge in question. In In re Sheffield, 465 So. 2d 350, 357 (Ala. 1984), this Court wrote:
>
> > "'"'[T]he reasonable person/ appearance of impropriety test, as now articulated in Canon 3(C)(1), in the words of the Supreme Court of the United States, may 'sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.' In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). As stated in Canon 1 of the Code of Judicial Ethics, 'An independent

> and honorable judiciary is indispensable to justice in our society,' and this requires avoiding all appearance of impropriety, even to the point of resolving all reasonable doubt in favor of recusal."
>
> "'....'

"Ex parte Bryant, 682 So. 2d 39, 41 (Ala. 1996).

"'[Under Canon 3(C)(1)(a), a]ny disqualifying prejudice or bias as to a party must be of a personal nature and must stem from an extrajudicial source.' Ex parte Melof, 553 So. 2d 554, 557 (Ala. 1989), abrogated on other grounds, Ex parte Crawford, 686 So. 2d 196 (Ala. 1996).

> """The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.""

"Ex parte Duncan, 638 So. 2d at 1334, quoting Ex parte Large, 501 So. 2d 1208, 1210 (Ala. 1986), quoting in turn United States v. Grinnell Corp., 384 U.S. 563, 583, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). As this Court explained in Woodall [v. State, 730 So. 2d 627 (Ala. Crim. App. 1997)], in upholding the trial court's denial of a motion to recuse on the ground that the trial

court had previously entered a civil judgment against the defendant:

> "'To disqualify a judge because of bias, the bias must be personal bias. Ex parte Large, 501 So. 2d 1208, 1210-11 (Ala. 1986).
>
> > """The bias or prejudice which has to be shown before a judge is disqualified must be 'personal' bias, and not 'judicial' bias. Personal bias, as contrasted with judicial, is an attitude of extra-judicial origin, or one derived non coram judice. In re White, 53 Ala. App. 377, 300 So. 2d 420 (1974). The fact that one of the parties before the court is known to and thought well of by the judge is not sufficient to show bias. Duncan v. Sherrill, 341 So. 2d 946 (Ala. 1977). Neither is the fact that the judge had previously sentenced the defendant's partner in crime to the maximum sentence and bemoaned the fact that he could not impose a longer sentence sufficient to constitute proof of bias. Coleman v. State, 57 Ala. App. 75, 326 So. 2d 140 (1976). Nor is bias proved simply because the trial judge who presided at the second trial of defendant had also presided at his

> first trial and heard evidence later found to be inadmissible by an appellate court. Walker v. State, 38 Ala. App. 204, 84 So. 2d 383 (1955)."
>
> "'McMurphy v. State, 455 So. 2d 924, 929 (Ala. Cr. App. [1984])."

Carruth, 927 So. 2d at 874 (emphasis omitted).

Woodward first argues, as he did in his motion for recusal, that Judge Hobbs was biased against him and that Judge Hobbs's impartiality in the Rule 32 proceedings could reasonably be questioned because Judge Hobbs was the same judge who had overridden the jury's recommendation of life imprisonment without the possibility of parole and sentenced Woodward to death. Woodward argues that "an appearance of bias is inherent" in Alabama's former judicial override procedure[5] because, he says, "of the eleven people sentenced to death by judicial override between 1990 and 2005 who sought post-conviction relief before the same judge who sentenced them to death, none received relief in post-conviction review" and "one petitioner was granted relief by a different court on the same claims that the override judge had denied." (Woodward's brief, p. 23.) According to Woodward, these circumstances "cast[] doubt on the impartiality of override judges presiding over post-conviction proceedings." (Woodward's brief, p. 23.) We disagree.

---

[5] See note 1, supra.

We cannot say that a reasonable person knowing all the facts and circumstances would question Judge Hobbs's impartiality simply because he was the same judge who had presided over Woodward's trial and had sentenced Woodward to death. Cf. Whisenhant v. State, 482 So. 2d 1225, 1237 (Ala. Crim. App. 1982) ("There was no error, as contended by appellant, in the trial judge's refusal to recuse himself from this case ... based solely upon the fact that this same judge heard this case and imposed the death penalty in the appellant's prior trial."), aff'd in pertinent part, 482 So. 2d 1241 (Ala. 1983). See also Bush v. State, 695 So. 2d 70, 94-95 (Ala. Crim. App. 1995) (holding that there was no error on the part of the trial judge in refusing to recuse himself even though he had sentenced the defendant to death in two prior trials), aff'd, 695 So. 2d 138 (Ala. 1997). Moreover, in Brown v. State, 663 So. 2d 1028, 1031 (Ala. Crim. App. 1995), this Court held that "bias by the trial court against a defendant in a post-conviction proceeding cannot be proved simply because the same trial judge presided over the defendant's trial."

Woodward also argues, as he did in his motion for recusal, that Judge Hobbs made comments to the media that warranted his recusal. Woodward cites an article on the USA Today Web site, a copy of which is contained in the record, that was written on November 19, 2013, shortly after the United States Supreme Court had denied certiorari review of Woodward's conviction and sentence. Justice Sotomayor, in dissenting from the denial of certiorari review in Woodward's case, had questioned the constitutionality of Alabama's former judicial-override procedure as well

as what she termed "Alabama judges' distinctive proclivity for imposing death sentences in cases where a jury has already rejected that penalty," and had opined that "Alabama judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures." Woodward v. Alabama, 571 U.S. ___, ___, 134 S.Ct. 405, 408 (2013) (Sotomayor, J., dissenting). Woodward argues that Judge Hobbs made statements to the media about Justice Sotomayor's dissenting opinion that would lead a reasonable person to question his impartiality and that establish that he was biased against Woodward. We disagree.

Canon 3.A(6), Alabama Canons of Judicial Ethics, provides that a judge should not comment publicly on any "pending or impending proceeding." However, "not all public discussion by the judiciary of a pending case" violates Canon 3.A(6). In re Sheffield, 465 So. 2d 350, 355 (Ala. 1984). "[M]ost appellate courts have not automatically disqualified judges on Canon 3C(1) appearance of partiality when they have been quoted in newspaper interviews." Roatch v. Puera, 534 N.W.2d 560, 563 (Minn. App. 1995). Cf. Ex parte Monsanto Co., 862 So. 2d 595, 628 (Ala. 2003) (holding that a trial judge's "answering a few questions posed by local reporters in a high-profile case, do[es] not create the appearance of a judge coveting publicity or seeking a place in history" that would warrant recusal). "We must consider the entirety of the court's statements, not just the lone sentence upon which appellant focuses, in order to decide whether recusal was appropriate." Commonwealth v. Druce, 796 A.2d 321, 331 (Pa. Super. Ct. 2002), aff'd, 848 A.2d 104, 577 Pa. 581 (2004).

As the State points out in its brief to this Court, Woodward has taken Judge Hobbs's statements to the media out of context and has ignored additional comments Judge Hobbs made. In context, the article sets out Judge Hobbs's comments as follows:

> "In 2008, Montgomery Circuit Judge Truman Hobbs gave Woodward the death penalty, overriding a jury recommendation that Woodward be given life in prison without parole. In a 17-page dissent, Sotomayor said judicial review of capital murder cases, combined with judges being required to seek re-election, meant Alabama judges could impose the death penalty because of political pressure.
>
> "....
>
> "In an interview Monday, Hobbs said that he did 'what the law compelled me to do' in the Woodward case, and denied that politics played a role in his decision to impose the death penalty.[6] However, he did not disagree with Sotomayor's broader point.
>
> "'To the extent that she argues that judges shouldn't be forced to run in partisan elections, I couldn't agree with her more,' said Hobbs, a Democrat. 'To the extent that she says it exposes judges to additional political pressure, I couldn't agree with her more on that.'

---

[6] Woodward fails to mention this statement when arguing this issue.

"....

"The jury in the trial voted 8 to 4 to recommend life without parole for Woodward due to mitigating factors including testimony from family and friends about physical and emotional abuse Woodward suffered as a child. The jury also heard family and friends praise his role as a father to five children.

"At a subsequent hearing, however, Montgomery County (Ala.) District Attorney Ellen Brooks noted that Woodward had previously pleaded guilty to manslaughter in the shooting death of a woman in 1990. Brooks also questioned Woodward's role as a father, saying he had never paid child support or state or federal income taxes.

"Hobbs imposed the death penalty, noting Woodward's previous manslaughter conviction in his sentencing order and concluding that Woodward did 'the bare minimum for his brood.'

"The judge said Monday the case was the only time he departed from a jury's recommendation.

"'I hope it's the only one I ever have to,' he said. 'It's traumatic for the juries and the judges.'

"....

"The Supreme Court upheld Alabama's judicial review statute in 1995, but Sotomayor

> wrote that 'the time has come for us to reconsider that decision,' noting that judicial overrides have become rare in the nation. ...
>
> "....
>
> "Hobbs also said he would not complain if judicial review was taken away.
>
> "'Personally, I'd love for them to do away with it,' he said. 'It would take a lot of the pressure off me.'"

(C. 1524-25.)

When read in context, Judge Hobbs's comments raise no question as to his impartiality in Woodward's case, they do not indicate that he was biased against Woodward in any way, and they certainly do not, as Woodward contends, reflect that Judge Hobbs was under any type of political pressure to sentence Woodward to death or would be under any type of political pressure to uphold that sentence in subsequent postconviction proceedings. Judge Hobbs did nothing more than express his dislike of Alabama's method of selecting judges and what was then Alabama's capital-sentencing scheme. Cf. Judicial Inquiry Comm'n of West Virginia v. McGraw, 171 W. Va. 441, 444, 299 S.E.2d 872, 875 (1983) ("[T]he public expression of a judge as to a legal issue does not automatically require his later disqualification when the issue is presented to him in a specific case."). Judge Hobbs made clear in his comments that he had imposed the death sentence on Woodward because the law required him to do so and not because of any political pressure. Moreover, in his order denying the

motion to recuse Judge Hobbs specifically denied being under any political pressure when he sentenced Woodward to death, stating, in relevant part:

> "[T]his judge's reference to 'pressure' [in the article] had nothing to do with politics. It was a reference to the enormous internal pressure faced by anyone with the hint of a soul who must make a life and death decision. It is an unwelcome, daunting decision but, like many others, it is compelled by the dictates of the office."

(C. 1345.) Clearly then, Judge Hobbs's comments to the media about the pressure he faced as a trial judge were not references to political pressure, as Woodward contends, but to the pressure any judge feels when faced with the daunting task of determining a person's fate, and those comments did not warrant recusal. See, e.g., Commonwealth v. Travaglia, 541 Pa. 108, 142-45, 661 A.2d 352, 369-70 (1995) (relying heavily on the trial judge's findings in his order denying a motion to recuse that, despite his statements to the media that the petitioner deserved the death penalty, he would be fair and impartial in considering the petitioner's postconviction claims, to uphold the denial of the motion to recuse).

After carefully examining the record, we conclude that the totality of the facts and circumstances in this case raise no question at all, much less a reasonable question, as to Judge Hobbs's impartiality and that there is no evidence whatsoever that Judge Hobbs was biased against Woodward. Woodward's arguments, neither individually nor cumulatively, warranted

Judge Hobbs's recusal. Therefore, we find no error on the part of the circuit court in denying Woodward's motion for Judge Hobbs's recusal.

II.

Woodward also contends that the circuit court erred in denying his requests for discovery. (Issue VII in Woodward's brief.)

The standard for determining whether a Rule 32 petitioner is entitled to discovery is good cause. See Ex parte Land, 775 So. 2d 847, 852 (Ala. 2000) ("'[G]ood cause' is the appropriate standard by which to judge postconviction discovery motions."), overruled on other grounds by State v. Martin, 69 So. 3d 94 (Ala. 2011). "[P]ostconviction discovery does not provide a petitioner with a right to 'fish' through official files and ... it 'is not a device for investigating possible claims, but a means of vindicating actual claims.'" Id. Thus, "[t]he threshold issue in a good-cause inquiry is whether the Rule 32 petitioner has presented claims that are facially meritorious." Ex parte Turner, 2 So. 3d 806, 812 (Ala. 2008), overruled on other grounds by State v. Martin, 69 So. 3d 94 (Ala. 2011). A claim is facially meritorious "only if the claim (1) is sufficiently pleaded in accordance with Rule 32.3 and Rule 32.6(b); (2) is not precluded by one of the provisions in Rule 32.2; and (3) contains factual allegations that, if true, would entitle the petitioner to relief." Kuenzel v. State, 204 So. 3d 910, 914 (Ala. Crim. App. 2015). A Rule 32 petitioner is not entitled to discovery on claims that are not facially meritorious, i.e., on claims that are subject to summary dismissal. See, e.g., Morris v. State, [Ms. CR-11-1925, April 29, 2016] ___ So. 3d ___, ___ (Ala.

Crim. App. 2016) ("Morris was not entitled to discovery, because the claims for which he sought discovery were either insufficiently pleaded, procedurally barred, or meritless, and they were dismissed."); Van Pelt v. State, 202 So. 3d 707, 720 (Ala. Crim. App. 2015) ("Because we conclude ... that Van Pelt's claims were insufficiently pleaded and that summary dismissal was appropriate, Van Pelt did not show 'good cause' to be entitled to discovery on those claims."); and Yeomans v. State, 195 So. 3d 1018, 1051 (Ala. Crim. App. 2013) ("Our opinion today affirms the summary dismissal of all claims on which Yeomans sought discovery; therefore, Yeomans did not show 'good cause' to be entitled to discovery on those claims.").

Once a Rule 32 petitioner satisfies the threshold of raising a facially meritorious claim, the court must then determine whether there is good cause for the discovery. In determining whether there is good cause, a court should consider "'the scope of the requested discovery, the length of time between the conviction and the post-conviction proceeding, the burden of discovery on the State and on any witnesses, and the availability of the evidence through other sources.'" Ex parte Mack, 894 So. 2d 764, 768 (Ala. 2003), overruled on other grounds by Ex parte Jenkins, 972 So. 2d 159 (Ala. 2005) (quoting People v. Johnson, 205 Ill.2d 381, 408, 250 Ill.Dec. 820, 836-37, 793 N.E.2d 591, 607-08 (2002) (emphasis omitted)).

Woodward argues that the circuit court erred in denying his first motion for discovery, in which he requested, among other things: (1) all records from the

Alabama Department of Human Resources relating to himself, his mother, his father, and his two sisters; and (2) all records and all audio recordings from the Montgomery County jail relating to himself, his mother, his father, and his two sisters.[7] Although the circuit court did not specifically rule on this motion, its summary dismissal of all but one of the claims in Woodward's petition constituted an implicit denial of the motion. Woodward argues on appeal, as he did in his motion, that he established good cause for the requested discovery because, he says, he raised facially meritorious claims that his trial counsel were ineffective for not adequately investigating and presenting mitigating evidence. However, as explained in Part IV of this opinion, infra, Woodward's claims relating to counsel's investigation and presentation of mitigating evidence were not facially meritorious and were properly summarily dismissed by the circuit court. Therefore, Woodward was not entitled to discovery relating to those claims and the circuit court properly denied his requests in this regard.

---

[7] Woodward also requested in that motion all records from "NBC News 12 WSFA, CBS 8 WAKA, ABC 32 WNCE and the Montgomery Advertiser" relating to media coverage of the crime, subscriber information, and page hits for any stories published on the Internet. (C. 412.) However, he does not mention this request when arguing this issue in his brief. It is well settled that this Court "will not review issues not listed and argued in brief." Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995). "'[A]llegations ... not expressly argued on ... appeal ... are deemed by us to be abandoned.'" Burks v. State, 600 So. 2d 374, 380 (Ala. Crim. App. 1991) (quoting United States v. Burroughs, 650 F.2d 595, 598 (5th Cir. 1981)).

Woodward also argues that the circuit court erred in denying his second and third motions for discovery, both of which related to the claim on which he was granted an evidentiary hearing -- that his counsel were ineffective for not making a Batson v. Kentucky, 476 U.S. 79 (1986), objection to the State's use of its peremptory strikes. Woodward argues on appeal, as he did in the motions, that because the circuit court found that he was entitled to an evidentiary hearing on his ineffective-assistance/Batson claim, he was therefore entitled to the requested discovery in order to prove at the hearing that the State had violated Batson in its use of peremptory strikes. We disagree.

Woodward requested "all records, including handwritten notations, marks, statements, writings, memoranda, photographs, recordings, evidence, reports, or any other materials" in the possession of the district attorney's office "concerning voir dire or jury selection during the criminal prosecution of Mr. Woodward," "concerning the rationale, explanation and/or justification for the District Attorney's use of peremptory strikes to remove eleven African American venire persons as potential jurors in Mr. Woodward's criminal trial," and "concerning the District Attorney's use of peremptory strikes to remove African American venire persons as potential jurors in any criminal prosecution since the Alabama Court of Criminal Appeals' decision in Freeman v. State, 651 So. 2d 576 (Ala. Crim. App. 1994) ... until the start of Mr. Woodward's trial (1994-2008)." (C. 1362-63.) The circuit court denied the request on the ground that it was overbroad and contrary to Alabama law. We agree. This Court has held that "a prosecutor's notes compiled

during jury selection are privileged and are not subject to discovery." Ex parte Perkins, 920 So. 2d 599, 607 (Ala. Crim. App. 2005).

Woodward also requested that he be permitted to make photographic copies of the juror questionnaires in his case. Although the circuit court denied Woodward's request to make copies of the juror questionnaires, the record reflects that Woodward was permitted to review those questionnaires while they were in the court administrator's possession. Woodward argues on appeal, as he did in his motion, that there was good cause for him to have copies of the juror questionnaires because, he says, they "would have allowed [him] to contest the State's position that the peremptory strikes were used for race neutral reasons had the trial court found a Batson violation." (Woodward's brief, p. 93.) We point out, however, that the State did not argue that the reasons for its strikes were race-neutral; rather, the State argued that Woodward's ineffective-assistance/Batson claim was insufficiently pleaded and was meritless because there was no prima facie case of discrimination. Although the State did refer to the juror questionnaires in its response to Woodward's petition, it did so only in relation to whether Woodward's pleadings established a prima facie case of discrimination.

In any event, that the juror questionnaires would have aided Woodward in proving his ineffective-assistance/Batson claim does not establish good cause for Woodward to make, and presumably retain in his possession, copies of those questionnaires, especially in light of the fact Woodward had access to the

questionnaires and was able to review those questionnaires in preparation for the evidentiary hearing. In this regard, we point out that Rule 18.2(b), Ala. R. Crim. P., provides that juror questionnaires "shall not be included in the clerk's portion of the record on appeal" and that, "[i]f any party raises an issue on appeal that relates to information contained in a questionnaire, the appellate court may order the record on appeal to be supplemented to include any or all questionnaires at issue." The Committee Comment to this rule states:

> "The provision that juror questionnaires shall not be included in the record on appeal except by reference unless the appellate court orders the record supplemented to include some or all of the questionnaires is intended to help maintain the confidentiality of the information provided in the questionnaires by the prospective jurors. If juror questionnaires are routinely copied into the record on appeal, the confidentiality of the information contained in the questionnaires cannot be assured because copies of the record on appeal are served on the parties and remain with those parties after the appeal is concluded."

The difficulty in ensuring the confidentiality of the juror questionnaires would be the same if Woodward had been permitted to make copies of the questionnaires in the Rule 32 proceedings.

We recognize that the State indicated that it had no objection to Woodward making copies of the questionnaires as long as Woodward returned those copies to the court at the conclusion of the Rule 32

proceedings. However, given the importance of maintaining the confidentiality of juror information and the fact that Woodward was given access to the juror questionnaires, we cannot say that the circuit court abused its discretion in allowing Woodward to review the questionnaires but refusing to allow Woodward to make copies of the questionnaires.

For these reasons, the circuit court properly denied Woodward's discovery motions.

III.

Woodward contends that the circuit court "consistently misapplied the law" when summarily dismissing all but one of the claims in his petition. (Issue II in Woodward's brief, p. 26.) Woodward makes several arguments in this regard, all of which were raised in his postjudgment motion to reconsider. We address each argument in turn.

A.

First, Woodward contends that the circuit court erred in not making specific findings of fact regarding each of the claims in his petition that the court summarily dismissed.

The general rule is that a circuit court is not required to make specific findings of fact when summarily dismissing a Rule 32 petition. See Fincher v. State, 724 So. 2d 87, 89 (Ala. Crim. App. 1998) ("Rule 32.7 does not require the trial court to make specific findings of fact upon a summary dismissal."). Contrary to Woodward's argument, "'Rule 32.9(d), Ala. R. Crim. P., requires the circuit court to make specific findings

of fact only after an evidentiary hearing or the receipt of affidavits in lieu of a hearing.'" Daniel v. State, 86 So. 3d 405, 412 (Ala. Crim. App. 2011) (quoting Chambers v. State, 884 So. 2d 15, 19 (Ala. Crim. App. 2003)). The exception to this general rule is when the circuit judge presided over the petitioner's trial and summarily dismisses a claim on its merits based on the judge's own personal knowledge. See, e.g., Ex parte Walker, 800 So. 3d 135, 138 (Ala. 2000) ("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.' Sheats v. State, 556 So. 2d 1094, 1095 (Ala. Crim. App. 1989)."); and Fincher, 724 So. 2d at 89 ("Rule 32.7 does not require the trial court to make specific findings of fact upon a summary dismissal. It would be absurd to require the trial court to resolve a factual dispute where none exists. ... [However,] any time a circuit court states that a Rule 32 petition is being disposed of on the merits, the circuit court must provide specific findings of fact supporting its decision -- even if there has been no evidentiary hearing and no affidavits, written interrogatories, or depositions have been submitted in lieu of an evidentiary hearing.").

In this case, the circuit court made specific findings of fact regarding its reasons for summarily dismissing the vast majority of the claims in Woodward's petition. The circuit court dismissed some claims on the merits and others on the ground that Woodward had failed to satisfy his burden of pleading under Rule 32.3 and Rule 32.6(b), Ala. R. Crim. P. As for those few claims about

which the circuit court did not make specific findings of fact, the circuit court did not mention those claims in its order, and nothing in the record indicates that the circuit court dismissed those claims on their merits so as to necessitate findings of fact. Moreover, we conclude, for the reasons explained in Part IV of this opinion, infra, that those claims the circuit court did not mention in its order were properly dismissed.

Therefore, we find no error on the part of the circuit court in not making specific findings of fact regarding each of the claims in Woodward's petition that it summarily dismissed.

B.

Second, Woodward contends that the circuit court "erroneously found that, because the jury voted 8-4 for life, trial counsel were immune to claims of ineffectiveness in the penalty phase" and that, therefore, the court's "finding that the petition is meritless in the face of the jury's 8-4 life recommendation is legally incorrect." (Woodward's brief, p. 28.) In support of this argument, Woodward cites the hearing on the State's motion to dismiss, during which the court noted that Woodward's attorneys "were able to persuade eight jurors out of 12 that a man that's killed two people shouldn't be put to death" and that the court believed that counsel "did an outstanding job" and "achieved a better result than [the court] ever thought they would achieve in the penalty phase." (R. 76.)

The circuit court's statements in no way indicate that the court believed that trial counsel were immune

from claims of ineffective assistance of counsel simply because the jury recommended a sentence of life imprisonment without the possibility of parole. Moreover, the circuit court's summary-dismissal order, which Woodward curiously fails to mention when arguing this issue, clearly reflects that the circuit court did not, as Woodward contends, find that his trial counsel were immune from claims of ineffective assistance of counsel. In its order, the circuit court found that the additional mitigating evidence Woodward alleged his counsel should have presented during the penalty phase of the trial would not have altered the balance of aggravating and mitigating circumstances, i.e., that Woodward was not prejudiced by counsel's failure to present that evidence. The court noted that "the attorneys were able to persuade the majority of the jury to recommend life without parole," which the court described as "an unexpectedly (to this observer) favorable result during the penalty phase, proving the effectiveness of their strategy and their execution of that strategy." (C. 1361.) The court then correctly recognized that "[a]t the end of the day, under Alabama law, the decision of life versus death comes down to the trial judge" and, after considering the additional mitigating evidence that Woodward argued should have been presented by his trial counsel, found that the additional mitigating evidence would "not change the balance of the equation" and that "[n]othing Woodward has contended would change the final result." (C. 1361.)

"When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent

the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland v. Washington, 466 U.S. 668, 695 (1984). "To assess that probability, [a court must] consider 'the totality of the available mitigation evidence -- both that adduced at trial, and the evidence adduced in the habeas proceeding' -- and 'reweig[h] it against the evidence in aggravation.'" Porter v. McCollum, 558 U.S. 30, 41 (2009) (quoting Williams v. Taylor, 529 U.S. 362, 397-98 (2000)). "[T]he assessment should be based on an objective standard that presumes a reasonable decisionmaker," Williams v. Allen, 542 F.3d 1326, 1345 (11th Cir. 2008), and, in an override case, necessarily includes considering whether the totality of the available mitigating evidence would have persuaded additional jurors to recommend a sentence of life imprisonment without the possibility of parole. See Ex parte Carroll, 852 So. 2d 833, 836 (Ala. 2002) ("[A] jury's recommendation of life imprisonment without the possibility of parole ... is to be treated as a mitigating circumstance. The weight to be given that mitigating circumstance should depend upon the number of jurors recommending a sentence of life imprisonment without parole, and also upon the strength of the factual basis for such a recommendation in the form of information known to the jury."). Although a jury's recommendation of life imprisonment without the possibility of parole does not preclude a finding of prejudice under Strickland, it does weigh against such a finding. See, e.g., McMillan v. State, [Ms. CR-14-0935, August 11, 2017] ___ So. 3d ___, ___ (Ala. Crim. App. 2017); Spencer v. State, 201 So. 3d

573, 613 (Ala. Crim. App. 2015); Jackson v. State, 133 So. 3d 420, 449 (Ala. Crim. App. 2009); Hooks v. State, 21 So. 3d 772, 791 (Ala. Crim. App. 2008); and Boyd v. State, 746 So. 2d 364, 389 (Ala. Crim. App. 1999).

In this case, there is no indication that the circuit court did not properly follow the law. If the court had found that Woodward's trial counsel were immune from Woodward's ineffective claims, as Woodward argues, it would not have bothered to weigh the totality of the mitigating evidence, both that presented at trial and that pleaded in Woodward's petition, against the aggravating circumstances and make a finding that the balance of the aggravating and mitigating circumstances was not altered. Simply put, it is clear that the circuit court considered the jury's recommendation, as it is permitted to do, but that the court did not conclude that trial counsel were immune from an ineffectiveness claim. Therefore, this claim is meritless.

C.

Third, Woodward contends that the circuit judge erred in relying on his personal knowledge of Woodward's trial to summarily dismiss several of Woodward's claims of ineffective assistance of counsel.

As noted previously in this opinion, "a judge who presided over the trial or other proceeding and observed the conduct of the attorneys at the trial or other proceeding need not hold a hearing on the effectiveness of those attorneys based upon conduct that he observed." Ex parte Hill, 591 So. 2d 462, 463 (Ala. 1991). The general rule is that "[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.'" Ex parte Walker, 800 So. 3d 135, 138 (Ala. 2000) (quoting Sheats v. State, 556 So. 2d 1094, 1095 (Ala. Crim. App. 1989)).

Woodward argues that the majority of his claims were based on counsel's alleged failure to investigate and to discover evidence, conduct that occurred outside the record and to which the circuit court was not privy. Because the circuit court "would have no reason to have personal knowledge of the actual facts underlying those specific claims," Woodward argues, the circuit court could not summarily dismiss those claims without an evidentiary hearing. (Woodward's brief, p. 29.) Woodward relies on Hodges v. State, 147 So. 3d 916 (Ala. Crim. App. 2007), rev'd on other grounds, 147 So. 3d 973 (Ala. 2011), in support of this argument. That reliance is misplaced.

In Hodges, the circuit judge who had presided over the petitioner's trial summarily dismissed claims that trial counsel were ineffective for not adequately investigating and presenting mitigating evidence during the penalty phase of the petitioner's capital trial, stating only generally that the "'[t]he Court has an independent recollection of the trial of this case. The representation provided by trial counsel was adequate in every respect and met the full requirements of the law with respect to adequate representation.'" Hodges, 147 So. 3d at 962. In other words, the circuit court found that counsel's performance was not deficient

even though the judge did not actually observe the conduct that formed the basis of the claims. This Court held "that it is not plausible that the circuit court could have had personal knowledge of the facts underlying any of these claims of ineffective assistance based on the court's recollection of the trial proceedings," and we remanded the cause for the circuit court to allow the petitioner an opportunity to prove his claims. Hodges, 147 So. 3d at 963. Hodges and this Court's subsequent opinion in Partain v. State, 47 So. 3d 282, 286 (Ala. Crim. App. 2008), stand for the proposition that a circuit judge who presided over the petitioner's trial may summarily dismiss a claim of ineffective assistance of counsel on the ground that counsel's performance was not deficient if the court actually observed the performance challenged by the petitioner but may not summarily dismiss a claim of ineffective assistance of counsel on the ground that counsel's performance was not deficient if the claim is based on conduct that the court did not observe, such as counsel's out-of-court investigation. In this case, however, the circuit court did not find that counsel's performance was not deficient; rather, the court found that counsel's performance did not prejudice Woodward. Therefore, Hodges is inapposite here.

Instead, Lee v. State, 44 So. 3d 1145 (Ala. Crim. App. 2009), is applicable. In Lee, the circuit judge who presided over the petitioner's trial summarily dismissed a claim that trial counsel were ineffective for not hiring a mitigation expert to conduct a mitigation investigation, which investigation, the petitioner claimed, would have led to mitigating evidence that his childhood was plagued by poverty, drug abuse, and

domestic violence. The circuit court found, among other things, that the petitioner was not prejudiced by counsel's performance, explaining that "'[e]ven if the information ... had been presented during the penalty phase and weighed with the other evidence offered in mitigation by ... trial counsel it would not have persuaded this Court that the aggravating circumstance did not outweigh the mitigating circumstance.'" Lee, 44 So. 3d at 1156. This Court upheld the circuit court's summary dismissal of the claim as "consistent with Alabama law," specifically noting that "[a] court is not required to hold an evidentiary hearing but may consider all factual assertions raised in the petition to be true." Id.

That is exactly what the circuit court did here. The court accepted as true the allegations raised in Woodward's petition regarding counsel's failure to investigate and discover evidence for both the guilt phase and penalty phase of the trial, and then concluded that Woodward was not prejudiced by counsel's performance because even if the evidence Woodward alleged should have been discovered had been presented at trial, there was no reasonable probability that the outcome of the trial would have been different. There was no error in the circuit court's accepting Woodward's allegations as true and concluding, based on the circuit judge's personal knowledge of the trial, that Woodward was not prejudiced by counsel's performance.

Woodward also argues that, by relying on his own personal knowledge of the trial, the circuit judge erroneously considered Woodward's claims of

ineffective assistance of counsel subjectively rather than objectively. Specifically, Woodward argues that the circuit judge's "dismissal based on his determination that evidence would not have changed his mind was improper." (Woodward's brief, p. 31; emphasis added.) However, the circuit court never made such a determination. With respect to Woodward's claims of ineffective assistance of counsel relating to counsel's investigation and presentation of evidence during the guilt phase of the trial, the circuit court found that, even had the evidence Woodward pleaded in his petition been presented, it "would not have changed the outcome." (C. 1359.) The circuit judge never stated, suggested, or implied that the additional evidence would not have changed "his mind."

With respect to Woodward's claims of ineffective assistance of counsel relating to counsel's investigation and presentation of evidence during the penalty phase of the trial, as noted in Part III.B. of this opinion, supra, the circuit court correctly recognized that, when Woodward was tried, "[a]t the end of the day, under Alabama law, the decision of life versus death comes down to the trial judge" and, after considering the additional mitigating evidence that Woodward argued should have been presented by his trial counsel, the court found that the additional evidence would not have changed "the balance of the equation" and that "[n]othing Woodward has contended would change the final result." (C. 1361.) In other words, the court concluded that there was no "reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."

Strickland v. Washington, 466 U.S. 668, 695 (1984). Contrary to Woodward's belief, nothing in the circuit court's order indicates that the court did not properly make this determination with the presumption of a reasonable decision-maker. See Williams v. Allen, 542 F.3d 1326, 1345 (11th Cir. 2008).

For the reasons stated above, there was no error on the part of the circuit court in relying on its personal knowledge of Woodward's trial to summarily dismiss several of Woodward's claims of ineffective assistance of counsel.

D.

Fourth, Woodward contends that the circuit court erred in "assess[ing] prejudice independently for each alleged error [his] counsel made." (Woodward's brief, p. 33.) According to Woodward, the circuit court was required to analyze all of his claims of ineffective assistance of counsel "as a whole" and to determine whether the cumulative effect of counsel's alleged errors prejudiced him. (Woodward's brief, p. 33.)

In Bryant v. State, 181 So. 3d 1087 (Ala. Crim. App. 2011), this Court rejected a similar argument:

> "[I]t is well settled in Alabama that an ineffective-assistance-of-counsel claim is a general claim that consists of several different allegations or subcategories, and, for purposes of the pleading requirements in Rule 32.3 and Rule 32.6(b), '[e]ach subcategory is [considered] a[n] independent claim that must be sufficiently pleaded.' Coral v. State, 900 So. 2d 1274, 1284 (Ala. Crim. App. 2004), overruled on other

grounds, Ex parte Jenkins, 972 So. 2d 159 (Ala. 2005). As this Court explained in Taylor v. State, 157 So. 3d 131 (Ala. Crim. App. 2010):

> "'Taylor also contends that the allegations offered in support of a claim of ineffective assistance of counsel must be considered cumulatively, and he cites Williams v. Taylor, 529 U.S. 362 (2000). However, this Court has noted: "Other states and federal courts are not in agreement as to whether the 'cumulative effect' analysis applies to Strickland claims"; this Court has also stated: "We can find no case where Alabama appellate courts have applied the cumulative-effect analysis to claims of ineffective assistance of counsel." Brooks v. State, 929 So. 2d 491, 514 (Ala. Crim. App. 2005), quoted in Scott v. State, [Ms. CR–06–2233, March 26, 2010] ___ So. 3d ___, ___ (Ala. Crim. App. 2010); see also McNabb v. State, 991 So. 2d 313, 332 (Ala. Crim. App. 2007); and Hunt v. State, 940 So. 2d 1041, 1071 (Ala. Crim. App. 2005). More to the point, however, is the fact that even when a cumulative-effect analysis is considered, only claims that are properly pleaded and not otherwise due to be summarily dismissed are considered in that analysis. A cumulative-effect analysis does not eliminate the pleading requirements established in Rule 32, Ala. R. Crim. P. An analysis of claims of ineffective

> assistance of counsel, including a cumulative-effect analysis, is performed only on properly pleaded claims that are not summarily dismissed for pleading deficiencies or on procedural grounds. Therefore, even if a cumulative-effect analysis were required by Alabama law, that factor would not eliminate Taylor's obligation to plead each claim of ineffective assistance of counsel in compliance with the directives of Rule 32.'
>
> "157 So. 3d at 140 (emphasis added). Because, as explained below, the majority of Bryant's ineffective-assistance-of-counsel claims were properly summarily dismissed because they were insufficiently pleaded, a cumulative-error analysis here would not encompass all of Bryant's claims of ineffective assistance of counsel. Therefore, the circuit court did not err in not considering all of Bryant's claims of ineffective assistance of counsel cumulatively."

181 So. 3d at 1104.

Similarly, here, as explained in Part IV of this opinion, infra, the majority of Woodward's ineffective-assistance-of-counsel claims were properly summarily dismissed because they were insufficiently pleaded. Therefore, a cumulative-error analysis here would not encompass all of Woodward's claims of ineffective assistance of counsel and the circuit court did not err in not considering all of Woodward's claims of ineffective assistance of counsel cumulatively.

E.

Finally, Woodward contends that the circuit court "erred in finding much of the evidence trial counsel failed to present at trial, as compiled in Woodward's petition, 'cumulative' of evidence that trial counsel did present." (Woodward's brief, p. 35.) This argument is specific to two of Woodward's claims of ineffective assistance of counsel and is more appropriately addressed when analyzing those two claims in Part IV of this opinion, infra.

IV.

Woodward also reasserts on appeal most of the claims raised in his petition, all but one of which are claims of ineffective assistance of counsel.[8] (Issues III-VI in Woodward's brief.)

> "'In order to prevail on a claim of ineffective assistance of counsel, a defendant must meet the two-pronged test articulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984):
>
> > "'"First, the defendant must show that counsel's performance was deficient. This requires

[8] Those claims Woodward raised in his petition but does not pursue in his brief on appeal are deemed abandoned and will not be considered by this Court. See Ferguson v. State, 13 So. 3d 418, 436 (Ala. Crim. App. 2008) ("[C]laims presented in a Rule 32 petition but not argued in brief are deemed abandoned.").

> showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."

"'466 U.S. at 687, 104 S.Ct. at 2064.

"'"'The performance component outlined in Strickland is an objective one: that is, whether counsel's assistance, judged under 'prevailing professional norms,' was 'reasonable considering all the circumstances.'" Daniels v. State, 650 So. 2d 544, 552 (Ala. Cr. App. 1994), cert. denied, [514 U.S. 1024, 115 S.Ct. 1375, 131 L.Ed.2d 230 (1995)], quoting Strickland, 466 U.S. at 688, 104 S.Ct. at 2065. "A court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged

conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

"'The claimant alleging ineffective assistance of counsel has the burden of showing that counsel's assistance was ineffective. Ex parte Baldwin, 456 So. 2d 129 (Ala. 1984), aff'd, 472 U.S. 372, 105 S.Ct. 2727, 86 L.Ed.2d 300 (1985). "Once a petitioner has identified the specific acts or omissions that he alleges were not the result of reasonable professional judgment on counsel's part, the court must determine whether those acts or omissions fall 'outside the wide range of professionally competent assistance.' [Strickland,] 466 U.S. at 690, 104 S.Ct. at 2066." Daniels, 650 So. 2d at 552. When reviewing a claim of ineffective assistance of counsel, this court indulges a strong presumption that counsel's conduct was appropriate and reasonable. Hallford v. State, 629 So. 2d 6 (Ala. Cr. App. 1992), cert. denied, 511 U.S. 1100, 114 S.Ct. 1870, 128 L.Ed.2d 491 (1994); Luke v. State, 484 So. 2d 531 (Ala. Cr. App. 1985). "This court must avoid using 'hindsight' to evaluate the performance of counsel. We must evaluate all the circumstances surrounding the case at the time of counsel's actions before determining whether counsel rendered ineffective

assistance." Hallford, 629 So. 2d at 9. See also, e.g., Cartwright v. State, 645 So. 2d 326 (Ala. Cr. App. 1994).

> """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, 104 S.Ct. at 2065 (citations omitted). See Ex parte Lawley, 512 So. 2d 1370, 1372 (Ala. 1987).

> """Even if an attorney's performance is determined to be deficient, the petitioner is not entitled to relief unless he establishes that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Strickland,] 466 U.S. at 694, 104 S.Ct. at 2068."

"'Daniels, 650 So.2d at 552.

> """When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded

> that the balance of aggravating and mitigating circumstances did not warrant death."
>
> "'Strickland, 466 U.S. at 697, 104 S.Ct. at 2069, quoted in Thompson v. State, 615 So. 2d 129, 132 (Ala. Cr. App. 1992), cert. denied, 510 U.S. 976, 114 S.Ct. 467, 126 L.Ed.2d 418 (1993).
>
> "'....'
>
> "Bui v. State, 717 So. 2d 6, 12-13 (Ala. Cr. App. 1997), cert. denied, 717 So. 2d 6 (Ala. 1998)."

Dobyne v. State, 805 So. 2d 733, 742-44 (Ala. Crim. App. 2000), aff'd, 805 So. 2d 763 (Ala. 2001). "[I]n reviewing claims of ineffective assistance of counsel, this Court need not consider both prongs of the Strickland test." Clark v. State, 196 So. 3d 285, 303 (Ala. Crim. App. 2015). "Because both prongs of the Strickland test must be satisfied to establish ineffective assistance of counsel, the failure to establish one of the prongs is a valid basis, in and of itself, to deny the claim." Id.

Rule 32.3, Ala. R. Crim. P., states that "[t]he petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief." Rule 32.6(b), Ala. R. Crim. P., states that "[t]he 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." As this Court noted in Boyd v. State, 913 So. 2d 1113 (Ala. Crim. App. 2003):

> "'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). It is the allegation of facts in pleading which, if true, entitle[s] 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."

913 So. 2d at 1125.

> "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). To sufficiently plead an allegation of ineffective assistance of counsel, a Rule 32 petitioner not only 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), but also 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 proceeding would have been different.' 466 U.S. at 694, 104 S.Ct. 2052. A bare allegation that prejudice occurred without specific facts indicating how the petitioner was prejudiced is not sufficient."

Hyde v. State, 950 So. 2d 344, 356 (Ala. Crim. App. 2006). Moreover, although "[t]his Court may take judicial notice of its own records ..., we are not required, in the context of a Rule 32 proceeding, to search the record from a petitioner's direct appeal to ascertain the factual basis for a postconviction claim." Mashburn v. State, 148 So. 3d 1094, 1124 (Ala. Crim. App. 2013).

With these principles in mind, we address each of Woodward's claims in turn.

A.

Woodward contends that his trial counsel were ineffective for not conducting an adequate pretrial investigation for the guilt-phase of the trial.

In his petition, Woodward alleged that, although counsel were granted funds to hire a guilt-phase investigator in January 2008, seven months before

trial, counsel did not hire the investigator until May 2008, only three months before trial. Woodward argued that three months was not sufficient time for the investigator to adequately investigate the case, especially in light of the fact that the investigator had no experience investigating capital cases and spent the majority of his time assisting with the mitigation investigation for the penalty phase of the trial instead of investigating for the guilt phase. According to Woodward, the investigator "failed to follow up on information regarding certain key witnesses and certain discrepancies in the State's case" (C. 257), failed to interview the prosecution's witnesses, and failed to "follow up on information and potential defenses raised by Mr. Woodward." (C. 260.) Woodward also alleged that there was evidence "in the record which should have sparked a vigorous investigation of Mr. Woodward's account of what took place that day," and he listed six pieces of evidence that he believed warranted further investigation.[9] (C. 260.)

---

[9] Those six pieces of evidence are: (1) Evidence that the 2006 Impala automobile used in the shooting had damage to the ignition, thus indicating that it was stolen by someone other than Woodward, who had access to the keys; (2) police reports indicating that someone other than Joseph Pringle had burned the Impala; (3) telephone records indicating that Pringle had asked for the day off work before the shooting, which indicated that Pringle had not taken off work solely to assist Woodward as the State had alleged; (4) forensic reports indicating that Woodward's fingerprints were not found on the Impala; (5) evidence that Tiffany Surles and Wendy Walker had been coerced into "chang[ing] prior statements [they had made] denying that Mr. Woodward confessed to the shooting" (C. 261); and (6) "[e]vidence that a number of police officers investigating the shooting were subsequently discharged or forced into retirement for corruption." (C. 261.)

In its order, the circuit court found that this claim was not sufficiently pleaded because Woodward had failed to allege what the fruit of a more thorough investigation would have been. The court also noted that Woodward's allegations of coerced witness statements and police corruption were "unsupported innuendo and rank hearsay." (C. 1360.) In his brief on appeal, Woodward reasserts this claim from his petition, but he makes no argument regarding why he believes the circuit court's findings were incorrect. This Court has held that similar failures of argument do not comply with Rule 28(a)(10), Ala. R. App. P., and constitute a waiver of the underlying postconviction claim. See, e.g., Morris v. State, [Ms. CR-11-1925, April 29, 2016] ___ So. 3d ___, ___ (Ala. Crim. App. 2016); Bryant v. State, 181 So. 3d 1087, 1118-19 (Ala. Crim. App. 2011); and Taylor v. State, 157 So. 3d 131, 142-45 (Ala. Crim. App. 2010).

In any event, we agree with the circuit court that Woodward failed to satisfy the pleading requirements in Rule 32.3 and Rule 32.6(b) with respect to this claim. Although Woodward alleged what was not done during the investigation, he failed to allege what information or evidence would have been discovered had additional investigation been done, or how any additional information or evidence would have been favorable to his defense. For example, Woodward alleged that the investigator failed to interview State witnesses, but he failed to specifically identify a single witness that he believed should have been interviewed, what information would have been obtained from such an interview, or how any such information would have been favorable to his defense. Woodward also alleged

that the investigator did not investigate "information and potential defenses" that he had provided to the investigator, but he failed to state what information he gave to the investigator or what potential defenses he raised.

"'[C]laims of failure to investigate must show with specificity what information would have been obtained with investigation, and whether, assuming the evidence is admissible, its admission would have produced a different result.'" Van Pelt v. State, 202 So. 3d 707, 730 (Ala. Crim. App. 2015) (quoting Thomas v. State, 766 So. 2d 860, 892 (Ala. Crim. App. 1998), aff'd, 766 So. 2d 975 (Ala. 2000), overruled on other grounds by Ex parte Taylor, 10 So. 3d 1075 (Ala. 2005)). Woodward clearly failed to satisfy his burden of pleading. Therefore, summary dismissal of this claim of ineffective assistance of counsel was proper.

B.

Woodward contends that his trial counsel were ineffective for not adequately supporting the motion for a change of venue with evidence establishing that the community in which the case was to be tried was saturated with prejudicial pretrial publicity. In its order, the circuit court found that Woodward had failed to sufficiently plead this claim in accordance with Rule 32.3 and Rule 32.6(b), Ala. R. Crim. P. In his brief on appeal, Woodward makes a bare assertion that this claim is "meritorious on its face" and then reargues the claim, but he does not address the circuit court's findings or make any argument regarding why he believes the circuit court erred in finding that this

claim was not sufficiently pleaded.[10] (Woodward's brief, p. 86.) Therefore, Woodward has failed to satisfy the requirements in Rule 28(a)(10) and is deemed to have waived this claim. See also Morris v. State, [Ms. CR-11-1925, April 29, 2016] ___ So. 3d ___, ___ (Ala. Crim. App. 2016); Bryant v. State, 181 So. 3d 1087, 1118-19 (Ala. Crim. App. 2011); and Taylor v. State, 157 So. 3d 131, 142-45 (Ala. Crim. App. 2010).

In any event, we agree with the circuit court that Woodward failed to sufficiently plead this claim of ineffective assistance of counsel. "Before a change of venue is warranted, the community must be saturated with prejudicial publicity or there must be actual prejudice against the defendant." Moody v. State, 95 So. 3d 827, 845 (Ala. Crim. App. 2011). With respect to community saturation, this Court has stated:

> "Prejudice is presumed '"when pretrial publicity is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the community where the trials were held."' Hunt[v. State], 642 So. 2d [999,] 1043 [(Ala. Crim. App. 1993), aff'd, 642 So. 2d 1060 (Ala. 1994)] (emphasis omitted) (quoting Coleman v. Kemp, 778 F.2d 1487, 1490 (11th Cir. 1985)). '"To justify a presumption of

[10] In a footnote in his brief, Woodward argues that it was "unfair" for the circuit court to summarily dismiss this claim because the circuit court had denied his request for discovery relating to this claim. (Woodward's brief, p. 86.) However, Woodward cites no authority in support of that argument and, as explained in Part II of this opinion, a postconviction petitioner is not entitled to discovery on claims that are not sufficiently pleaded.

prejudice under this standard, the publicity must be both extensive and sensational in nature. If the media coverage is factual as opposed to inflammatory or sensational, this undermines any claim for a presumption of prejudice.'" Jones v. State, 43 So. 3d 1258, 1267 (Ala. Crim. App. 2007) (quoting United States v. Angiulo, 897 F.2d 1169, 1181 (1st Cir. 1990)). 'In order to show community saturation, the appellant must show more than the fact "that a case generates even widespread publicity."' Oryang v. State, 642 So. 2d 979, 983 (Ala. Crim. App. 1993) (quoting Thompson v. State, 581 So. 2d 1216, 1233 (Ala. Crim. App. 1991)). Only when 'the pretrial publicity has so "pervasively saturated" the community as to make the "court proceedings nothing more than a 'hollow formality"" will presumed prejudice be found to exist. Oryang, 642 So.2d at 983 (quoting Hart v. State, 612 So. 2d 520, 526–27 (Ala. Crim. App.), aff'd, 612 So. 2d 536 (Ala. 1992), quoting in turn, Rideau v. Louisiana, 373 U.S. 723, 726, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963)). 'This require[s] a showing that a feeling of deep and bitter prejudice exists in [the county] as a result of the publicity.' Ex parte Fowler, 574 So. 2d 745, 747 (Ala. 1990).

"In determining whether presumed prejudice exists, we look at the totality of the circumstances, including the size and characteristics of the community where the offense occurred; the content of the media coverage; the timing of the media coverage in

> relation to the trial; the extent of the media coverage; and the media interference with the trial or its influence on the verdict. See, e.g., Skilling v. United States, 561 U.S. 358, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010), and Luong v. State, 199 So. 3d 139, 146 (Ala. 2014). '[T]he "presumptive prejudice" standard is "'rarely' applicable, and is reserved for only 'extreme situations.'" Whitehead v. State, 777 So. 2d 781, 801 (Ala. Crim. App. 1999), aff'd, 777 So. 2d 854 (Ala. 2000) (quoting Hunt, 642 So. 2d at 1043, quoting in turn, Coleman, 778 F.2d at 1537))."

Floyd v. State, [Ms. CR-13-0623, July 7, 2017] ___ So. 3d ___, ___ (Ala. Crim. App. 2017).

In his petition, Woodward alleged that counsel failed to support the motion for a change of venue with "the page hits (and geographical location of such hits) on the websites covering the crime and the number of newspaper subscribers in Montgomery County that received newspapers covering the crime, as well as evidence of demonstrations and vigils related to the crime held in the area." (C. 229.) Woodward alleged that "many of th[e] exhibits [counsel offered in support of the motion for a change of venue] related to media coverage and comments from outside Montgomery County" and that counsel "failed to convey the full extent to which [the] area from which the jury pool would be selected was saturated with media coverage that essentially tried and convicted [him] of capital murder without giving him an opportunity to present a defense." (C. 228.) According to Woodward, "counsel's error in failing to provide the most relevant evidence

demonstrating the impact of coverage on the juror pool" (C. 228-29) resulted in the trial court's denying the motion for a change of venue and that, had counsel presented "relevant localized evidence," his motion for a change of venue would have been granted. (C. 230.)

Woodward's claim consists of nothing more than bare allegations unsupported by any specific facts. Woodward failed to allege in his petition any specific facts indicating the size and characteristics of the community where the offense occurred; the content of the media coverage; the timing of the media coverage in relation to the trial; the extent of the media coverage; and the media interference with the trial or its influence on the verdict. In other words, Woodward failed to allege any facts in his petition indicating that the community was, in fact, saturated with inflammatory and prejudicial pretrial publicity and, thus, he failed to plead sufficient facts indicating that counsel's performance in presenting the motion for a change of venue was deficient or that the alleged deficient performance prejudiced him.

Therefore, summary dismissal of this claim of ineffective assistance of counsel was proper.

C.

Woodward contends that his trial counsel were ineffective for not making a Batson v. Kentucky, 476 U.S. 79 (1986), objection to the State's use of its peremptory strikes. The circuit court conducted an evidentiary hearing on this claim, at which Woodward's trial counsel, Richard Kelly Keith and Joseph Peter Van Heest, both testified. In its order, the circuit court

found this claim to be meritless. Specifically, the court found that counsel had made a strategic decision not to make a Batson objection because they believed "that the jury selected was more inclined to vote for life." (C. 1438.)

At the evidentiary hearing, Keith testified that, after the jury was struck, the trial court asked if the defense had any motions, at which point, he and Van Heest discussed whether to make a Batson objection. Although Keith could not remember specifically what was said during the conversation, Keith stated that he and Van Heest decided not to make a Batson objection and that he then told the trial court that they had no motions. Keith explained:

> "I kept a record during the strikes for the State and myself, the racial makeup of the strikes and was very much aware of the number of blacks that were struck by the State. And [Van Heest] and I had some kind of short discussion. I don't recall exactly what we may have said. But, again, after looking at the jurors that we had, I was very, extremely satisfied with what we had and found no reason to make a Batson motion."

(R. 90.) According to Keith, although the State used 11 of its 12 peremptory strikes to remove blacks from the venire[11] and there were arguably grounds to lodge a

---

[11] Keith initially stated that the State had used 10 of its 12 peremptory strikes against blacks; this number was based on his notes from voir dire. However, after looking at the jury list, Keith stated that his notes incorrectly stated that one of the prospective

Batson objection, he "was satisfied that it would be in Woodward's best interest that we not make a Batson motion and possibly disrupt the makeup of the jury." (R. 88.) Specifically, Keith said that "we had a good jury that in my opinion was inclined to not give [Woodward] the death penalty if convicted." (R. 96-97.) Keith further testified that based on the amount of evidence against Woodward, he and Van Heest believed that a conviction was likely. Van Heest testified that he had no specific recollection of why he and Keith did not make a Batson objection.

On appeal, Woodward argues that the circuit court erred in finding that counsel had made a strategic decision not to make a Batson objection. First, Woodward argues that "neither [Keith nor Van Heest] could specifically recall why they failed to make a Batson objection at trial" and that, therefore, the circuit court's findings are not supported by the evidence. (Woodward's brief, p. 80.) Although Woodward is correct that Van Heest testified that he could not recall why he and Keith did not make a Batson objection, Woodward's characterization of Keith's testimony is incorrect. Woodward cites to page 90 of the hearing transcript to support his assertion that Keith could not recall the reason he and Van Heest did not make a Batson objection. However, as the above-quoted excerpt from page 90 reflects, Keith testified that he could not recall exactly what was said when he and Van Heest discussed making a Batson objection, not that he could not recall why they

---

jurors struck by the State was white when, in fact, the juror was black.

ultimately chose not to make a Batson objection. Contrary to Woodward's argument, Keith clearly and unequivocally testified at the evidentiary hearing that his and Van Heest's not making a Batson objection was a strategic decision based on the belief -- a belief that ultimately proved correct -- that the jury selected would not recommend a death sentence.

Relying on statements made by the circuit court during the hearing on the State's motion to dismiss, Woodward also argues that the circuit court "pre-judged the issue, adopting the State's position that trial counsel had made a strategic decision not to make the Batson objection, based on a silent [trial] record, before hearing any testimony at the evidentiary hearing."[12] (Woodward's brief, p. 81.) However, in its order denying

---

[12] At the hearing on the State's motion to dismiss, the State, in arguing for summary dismissal of this claim, pointed out that the transcript of Woodward's trial indicated that, just after the jury was selected, the trial court asked if defense counsel had any motions and then gave defense counsel time to confer, after which defense counsel indicated that they had no motions. The State argued that this exchange indicated that counsel had discussed making a Batson objection and had made a strategic decision not to. Woodward argued, on the other hand, that Batson was never mentioned on the record by the trial court or by defense counsel and that it could not be assumed from the mere reference to motions that the trial court was referring to Batson when it asked defense counsel if they had any motions or that defense counsel had ever discussed Batson. Thus, Woodward argued, he was entitled to an evidentiary hearing on this claim. In response to these arguments, the circuit court commented that it "was abundantly clear to everybody here that the Court was waiting to entertain a Batson objection, if that's what they wanted to do. And I gave them some time ... [a]nd they came back and didn't make an objection." (R. 42-43.)

this claim, the circuit court clearly indicated that its denial of the claim was based on the testimony presented at the evidentiary hearing, specifically on Keith's testimony, and not on its own recollection of the trial or on the record from Woodward's direct appeal. That the circuit court engaged in discussion with the parties at the hearing on the State's motion to dismiss and, in doing so, expressed its own recollection of events, in no way indicates, or even suggests, that the court "prejudged" Woodward's ineffective-assistance/ Batson issue. Indeed, the fact that the circuit court, after hearing extensive arguments at the hearing on the State's motion to dismiss, found that Woodward was entitled to an evidentiary hearing on that claim clearly establishes that the court did not prejudge the issue.

Woodward further argues that the circuit court "simply ignored Van Heest's testimony" and "relied solely on Keith's testimony" to deny his claim. (Woodward's brief, p. 82.) However, the circuit court did not "ignore" Van Heest's testimony. In its order, the circuit court noted that both Keith and Van Heest had testified at the evidentiary hearing. Although the circuit court did rely on Keith's testimony in denying this claim, as the State points out in its brief on appeal, there was no real testimony from Van Heest on which the circuit court could have relied because Van Heest testified only that he could not recall the reason for not making a Batson objection. Moreover, "[t]he credibility of witnesses is for the trier of fact, whose finding is conclusive on appeal. This Court cannot pass judgment on the truthfulness or falsity of testimony or on the credibility of witnesses." Hope v. State, 521 So. 2d

1383, 1387 (Ala. Crim. App. 1988). The circuit court obviously credited Keith's testimony that he and Van Heest had a strategic reason for not making a Batson objection. We will not disturb that finding on appeal.

Finally, Woodward argues that there is a prima facie case of discrimination in his case and that "[t]here can be no strategic basis for allowing discrimination against a potential juror." (Woodward's brief, p. 84.) Assuming, without deciding, that there is a prima facie case of discrimination in this case, Woodward cites no authority for the proposition that counsel is per se deficient for not making a Batson objection when there is a prima facie case of discrimination,[13] and we have found none.

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 test -- a showing of deficient performance by counsel," Ex parte Frazier, 758 So. 2d 611, 615 (Ala. 1999), and

---

[13] Woodward cites only Batson and its progeny.

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.

In this case, the circuit court's finding that counsel strategically chose to forgo a Batson objection because

they believed they had seated a jury favorable to Woodward is supported by the record, and we cannot say that counsel's strategic decision was unreasonable. Therefore, the circuit court properly denied this claim of ineffective assistance of counsel.

D.

Woodward contends that his trial counsel were ineffective for not filing a pretrial motion in limine to prohibit the State from presenting testimony from Deputy United States Marshal Joe Parker that when Woodward was arrested, he spontaneously stated, "'What's going on? I didn't shoot anybody.'" Woodward, 123 So. 3d at 1001. Woodward also contends that his trial counsel were ineffective for "fail[ing] to take steps to minimize the negative impact of Agent Parker's testimony." (Woodward's brief, p. 56.)

For a better understanding of these claims, we quote extensively from our opinion on direct appeal, in which we addressed whether the trial court denied Woodward his constitutional right to present a defense when it prohibited Woodward from presenting testimony he claimed rebutted Agent Parker's testimony:

> "During the State's case-in-chief Agent Joe Parker of the United States Marshal's Service testified that he saw Woodward at a gas station in Atlanta, Georgia, and arrested him there. Parker testified that, immediately upon being taken into custody, Woodward spontaneously said, 'What's going on? I didn't shoot anybody.' (R. 1114.) On cross-examination the defense

asked Parker whether Woodward also said that he had been in contact with his attorney and 'was looking to turn himself in.' (R. 1115.) Parker testified that Woodward did not make that statement in front of him, nor did he hear of such a statement after Woodward was taken into custody.

"After the State presented its case-in-chief, Woodward notified the trial court that he intended to call Tiffany McCord -- an attorney who was representing Woodward on another matter at the time of the shooting -- to testify that Woodward had contacted her before his arrest, and that 'as a result of that, she contacted the Montgomery Police Department to try to make arrangements to turn him in.' (R. 1233.) The trial court told him that if he called McCord to testify, he would waive his attorney-client privilege, and McCord would be subject to cross-examination on all conversations she had had with Woodward. The defense indicated that it wanted to limit the questioning of McCord for the purpose of showing that she had had contact with Woodward and that she had then contacted the Montgomery Police Department to facilitate Woodward's turning himself in. The defense further stated that Parker's testimony that Woodward had said 'I didn't shoot anybody' was 'totally incriminating' and that McCord's testimony would show that Woodward 'was already aware that he was, basically, sought after.' (R. 1238.) The trial court stated that Parker's testimony about Woodward's statement

was not prejudicial because the police had contacted McCord, Surles, and Wendy Walker, 'so the fact that the police were looking for him should have come as no surprise.' (R. 1238.)[2] The trial court stated that the defense had two problems if McCord testified: first, McCord had not been listed as a witness and, when the defense stated its intention to call her, McCord informed the court that she knew members of the jury; second, the court again stated that it did not believe the defense could reveal only part of her conversations with her client, 'And for all I know, he confessed to [McCord] too.' (R. 1241–42.) The trial court then denied Woodward's request to allow him to call McCord as a witness. Woodward did not make an offer of proof to establish what McCord would have testified to if the trial court had permitted the testimony.

"Woodward now argues that McCord's testimony would have rebutted Parker's testimony about the statement Woodward made when he was taken into custody. Specifically, Woodward argues:

> "'Agent Parker's testimony that Mr. Woodward said "I didn't shoot anybody" upon his arrest could only mean that Mr. Woodward knew that he was being arrested for shooting someone. The only inference the jury could have drawn was that the reason Mr. Woodward knew that he was being arrested for shooting

> someone was that he had, in fact, shot someone. Ms. McCord's testimony was necessary to refute that damaging inference by providing another explanation for how Mr. Woodward knew that he was being arrested for shooting someone: that Ms. McCord had told him that he was sought by law enforcement in connection with a shooting.'

"(Woodward's brief, at p. 21.) (Emphasis added [in Woodward].)

"Because Woodward failed to make an offer of proof as to the testimony he now claims he would have elicited from McCord, the issue was not preserved.

"....

"... Because Woodward was sentenced to death, however, we must review Woodward's claim for plain error. Rule 45A, Ala. R. App. P.

"....

"... The record is silent as to Woodward's present claim that McCord had informed him that he was wanted by the authorities in connection with Officer Houts's shooting and that this testimony would provide a noninculpatory explanation for his spontaneous statement to Parker. The transcript discloses only repeated statements from defense counsel that McCord would testify that Woodward had contacted her. Moreover, McCord would have

been unable to testify whether Woodward had been unaware -- prior to their conversation -- that Montgomery authorities wanted to question him. That would have been information known only to Woodward, himself, and he did not testify at trial. Any testimony from McCord about what Woodward did or did not know before he telephoned her would have been pure speculation on her part. Woodward's assertion of error is based on his current speculation about McCord's testimony -- that she would have testified that she informed him that the police suspected him in the shooting of Officer Houts -- and speculation based on a silent record does not support a finding of plain error.

"A finding of plain error is unwarranted for the additional reason that the record does not establish that the trial court's alleged error adversely affected Woodward's substantial rights.

"....

"Woodward asserted at trial only that McCord would testify that she spoke to Woodward when he telephoned her. That testimony would have had no probative value on the jury's determination of the issue whether Woodward had shot Officer Houts. McCord's testimony that Woodward contacted her while he was en route to Atlanta would not have provided evidence, or even an inference, that Woodward became aware that he was wanted by the police only because McCord had told him so.

To the contrary, a reasonable implication from McCord's testimony would have been that Woodward contacted his defense attorney during his flight to Atlanta because he had shot Officer Houts. Because McCord's testimony would not have made the existence of any fact of consequence more probable or less probable than it would be without the testimony, the testimony would have been irrelevant. Rule 402, Ala. R. Evid. ...

"... Testimony from McCord that she told Woodward that the police were looking for him would not have put the case in a different light. Woodward told three people that he had shot a police officer during a traffic stop. Further, Woodward's solicitation of the assistance of several people in his travels out of the city and then out of the state, his instruction to Cunningham to burn some of the clothing he had been wearing, and his instruction to another friend to dispose of Surles's vehicle all indicated that he knew the police would be looking for him. His inability to present McCord's testimony that she told him the Montgomery police were looking for him did not preclude him from putting on a defense or undermine confidence in the verdicts.

"Even assuming that the record contained a proffer showing that McCord would have testified as Woodward alleges she would have, that is, even assuming Woodward established through an offer of proof that McCord would

> have testified that she told Woodward that he was being sought by the police, that testimony would not have rebutted the inference that Woodward's statement to the arresting officer was based on guilty knowledge. That Woodward heard from McCord that he was wanted by the police does not eliminate or even diminish the inference that Woodward shot Officer Houts. As the trial court noted, testimony already received at trial from three State's witnesses established that Woodward had told them earlier in the day that he had shot someone. Thus, even if the record supported Woodward's current claim, we would find no error, and certainly no plain error, in the trial court's denial of his request to allow McCord to testify, because her testimony would have been irrelevant and immaterial and therefore not probative.
>
> "
>
> ---
>
> "[2]Additional discussion revealed that the district attorney had not intended for Parker to testify about the statement, and she agreed not to mention the statement in her closing argument to the jury. (R. 1241.)"

Woodward, 123 So. 3d at 1003-10 (some footnotes omitted).

1.

In his petition, Woodward alleged that counsel were ineffective for not filing a pretrial motion in limine to preclude Agent Parker from testifying about Woodward's statement on the ground that the

statement, "unless it was given its proper context," was irrelevant or, even if marginally relevant, that its prejudicial effect outweighed its probative value. (C. 232.) Woodward alleged that had counsel filed a pretrial motion in limine, it "would almost certainly have succeeded" or, in the alternative, the State would have agreed not to present the testimony because the district attorney had indicated during trial that she had not intended to elicit testimony from Agent Parker about the statement,[14] and she agreed not to mention the statement in closing argument to the jury. (C. 232.) In its order, the circuit court found that this claim was meritless. Specifically, the court found that trial counsel's performance was not deficient because Woodward's statement was relevant and admissible and any motion in limine would have been denied, and that, even if counsel's performance was deficient, Woodward was not prejudiced because, even "if the statement had never come into evidence, the result does not change in light of the massive evidence amassed against Woodward, not the least of which was the confession he made to three witnesses, all of them his friends." (C. 1359.) We agree.

There was no basis for excluding from evidence Woodward's statement to Agent Parker. "'Any indications of consciousness of guilt arising from the conduct, demeanor, or expressions of an accused are legal evidence against him.'" Scott v. State, 163 So. 3d 389, 437 (Ala. Crim. App. 2012) (quoting Conley v. State, 354 So. 2d 1172, 1179 (Ala. Crim. App. 1977)).

---

[14] The record from Woodward's direct appeal indicates that the testimony was elicited by an assistant district attorney.

See also Whitehead v. State, 777 So. 2d 781, 831 (Ala. Crim. App. 1999) ("[T]he circumstances surrounding [the defendant's] arrest were relevant and admissible as evidence that tended to show [the defendant's] consciousness of guilt."), aff'd, 777 So. 2d 854 (Ala. 2000). Woodward's statement was relevant and admissible because it indicated consciousness of guilt, and, although the statement was prejudicial to Woodward, as all the evidence presented against Woodward was, it was not so unduly and unfairly prejudicial as to warrant exclusion. See Rule 403, Ala. R. Evid. ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). See also Grayson v. State, 824 So. 2d 804, 821 (Ala. Crim. App. 1999) ("Prejudicial is used [in Rule 403, Ala. R. Evid.,] to limit the introduction of probative evidence ... only when it is unduly and unfairly prejudicial. ... What is meant here is an undue tendency to move the tribunal to decide [the cause] on an improper basis, commonly, but not always, an emotional one.") (citations and internal quotation marks omitted), aff'd 824 So. 2d 844 (Ala. 2002). "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).

Moreover, Woodward's assertion in his petition that, had counsel filed a motion in limine, the State would have agreed not to present the testimony about his statement, does not alter our analysis. Woodward argues on appeal, as he did in his petition, that the

district attorney's statement during trial that she had not intended to elicit testimony from Agent Parker about Woodward's statement and her agreement not to mention Woodward's statement during closing argument indicates that, had counsel filed a pretrial motion in limine, the State would have agreed not to present evidence of his statement. However, even assuming that assertion is correct, Woodward fails to recognize that the district attorney's statement also clearly establishes that the admission of Woodward's statement was a mistake on the part of the prosecution team. We fail to see how a pretrial motion in limine, or even an agreement by the State, could have prevented a mistake.

Counsel were not deficient for not filing a motion in limine to exclude testimony about the statement Woodward made upon his arrest. Therefore, summary dismissal of this claim of ineffective assistance of counsel was proper.

2.

Woodward also alleged in his petition that his trial counsel were ineffective for not "minimiz[ing] the negative impact" of Agent Parker's testimony by presenting evidence that, he said, established a noninculpatory explanation for the statement he made upon his arrest. (C. 248.) In its order, the circuit court found that this claim was meritless because, as with the previous claim, even "[i]f the statement could be explained ... the result does not change in light of the massive evidence amassed against Woodward, not the least of which was the confession he made to three

witnesses, all of them his friends." (C. 1359.) Again, we agree.

Woodward first alleged that his counsel were ineffective in their attempt to have Tiffany McCord testify on his behalf and that had counsel presented the proper arguments to the trial court, McCord would have been allowed to testify.[15] He further alleged:

> "If Ms. McCord had been permitted to testify, she would have testified that Mario Woodward's family had contacted her and told her that Mr. Woodward was aware that he was wanted in connection with the shooting of Officer Houts, and wanted to speak with Ms. McCord about the situation. She would have further testified that Mr. Woodward then called her and told her he wanted to turn himself in. Ms. McCord would have further testified that she contacted the Montgomery Police Department to try and make arrangements for Mr. Woodward to turn himself in. She spoke with a police officer there, who said he would call her back."

(C. 249.)

---

[15] Woodward alleged in his petition that his counsel should have (1) "listed Ms. McCord as a potential witness, so that potential jurors could have been questioned during voir dire as to whether they knew her," thereby eliminating one of the reasons for the trial court's refusal to allow her to testify; and (2) argued that, "[b]ecause Ms. McCord would have been testifying as a rebuttal witness, it was not necessary for defense counsel to include her on the initial witness list." (C. 249.)

This portion of Woodward's claim fails for the same reason Woodward's argument on direct appeal regarding McCord's testimony failed. Testimony from McCord that Woodward's family told her that Woodward knew that he was wanted in connection with the shooting of Officer Houts and that Woodward told her that he wanted to turn himself into police "would not have rebutted the inference that Woodward's statement to the arresting officer was based on guilty knowledge."[16] Woodward, 123 So. 3d at 1008. "To the contrary, a reasonable implication from McCord's testimony would have been that Woodward contacted [his family and then his] defense attorney during his flight to Atlanta because he had shot Officer Houts." Id. We point out that Woodward did not allege in his petition that he was unaware that he was wanted in connection with the shooting until McCord or a member of his family had told him so, and as this Court noted on direct appeal: "McCord would have been unable to testify whether Woodward had been unaware -- prior to their conversation -- that Montgomery authorities wanted to question him. That would have been information known only to Woodward, himself, and he did not testify at trial." Id. at 1007. Simply put, even had trial counsel been successful in convincing the trial court to allow McCord to testify and McCord had testified at trial, her testimony, as pleaded by Woodward in his petition, would not have provided a noninculpatory explanation for Woodward's statement

---

[16] We note that testimony from McCord regarding what Woodward's family members told her would be hearsay and Woodward alleged no facts in his petition indicating that such testimony would fall within any exception to the hearsay rule.

to Agent Parker or otherwise minimized "the negative impact" of that statement.

Woodward also alleged that his counsel should have called other witnesses to testify on his behalf to explain the statement he made to Agent Parker. Specifically, Woodward alleged:

> "Mr. Woodward's family had called Ms. McCord to inform her that he was aware he was wanted in connection with the Houts shooting. A family member would have been able to testify that they had been in contact with him regarding the fact that he was wanted by the police in connection with the shooting prior to his arrest.
>
> "They could also have put on evidence that Roderick Davenport, who was with Mr. Woodward shortly before he was arrested, gave a statement that, prior to his arrest, Mr. Woodward had 'called a female attorney and told her he was going to return to Montgomery to turn himself in.' See Montgomery Police Department Supplementary Offense Report, dated 8/9/07, at 5."

(C. 250.)

That portion of Woodward's claim that his counsel should have called "[a] family member" to testify is not sufficiently pleaded because Woodward failed to identify by name any family member he believed counsel should have called to testify. See, e.g., 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."); and Stallworth v. State, 171 So. 3d 53, 68 (Ala. Crim. App. 2013) (noting that, to sufficiently plead a claim that counsel was ineffective for not calling a witness to testify, a Rule 32 petitioner "must plead, among other things, facts establishing the following: (1) the identity of the witness; (2) the content of the witness's expected testimony; (3) that the testimony was favorable to the defendant; (4) that the witness was available to testify at [the petitioner's] trial and would have testified; and (5) that a reasonable investigation would have led counsel to the witness").

Moreover, neither testimony from a family member that the family member "had been in contact with [Woodward] regarding the fact that [Woodward] was wanted by the police in connection with the shooting prior to his arrest" (C. 250) nor testimony from Roderick Davenport that he had heard Woodward tell a female attorney, presumably McCord, that Woodward was going to turn himself in would have "rebutted the inference that Woodward's statement to the arresting officer was based on guilty knowledge." Woodward, 123 So. 3d at 1008. We again point out that Woodward did not allege in his petition that he was unaware that he was wanted in connection with the shooting until McCord or a member of his family had told him so. In addition, as with McCord, Woodward's family members could not have testified that Woodward had been

unaware -- before their conversation with him -- that he was wanted in connection with the shooting of Officer Houts; such testimony "would have been pure speculation." Woodward, 123 So. 3d at 1007. Simply put, even had trial counsel called to testify Roderick Davenport and/or one of Woodward's family members and even had those witnesses testified as Woodward alleges they would have, their testimony would not have provided a noninculpatory explanation for Woodward's statement to Agent Parker or otherwise minimized "the negative impact" of that statement.

Because the testimony of McCord, Davenport, and "[a] family member," as pleaded in Woodward's petition, would not have rebutted the inference that Woodward's statement was based on guilty knowledge and in light of the strength of the State's case against Woodward, there is no reasonable probability that, absent counsel's failure to call these witnesses, the outcome of Woodward's trial would have been different. Therefore, summary dismissal of this claim of ineffective assistance of counsel was proper.

E.

Woodward contends that newly discovered material facts establish that he is innocent of the crime and entitle him to a new trial. Woodward also contends that his trial counsel were ineffective for not discovering the newly discovered material facts and presenting those facts at trial.

In his petition, Woodward alleged that "biometric evidence" establishes that he could not have been the

shooter.[17] (C. 218.) Specifically, Woodward alleged that Manfred Schenk, a senior technology officer at Cherry Biometrics, Inc., was a biometrics expert with "more than twenty years of experience at the time of Mr. Woodward's trial, in establishing standards for effective biometric systems for various local and federal law enforcement agencies." (C. 220.) Woodward alleged that he retained Schenk in the Rule 32 proceedings "to provide his expert opinion on the biological characteristics of the shooter, based on the dashboard camera video, compared to Mr. Woodward's biological characteristics based on actual measurements of Mr. Woodward's forearm and wrist, using standards generally accepted in the field of biometrics." (C. 220.) According to Woodward, Schenk used "common enabling technology" and "proportionality equations of the known dimensions available from the vehicle manufacturer of the 2006 Impala," which is the "generally accepted methodology in the field of biometrics," to form an opinion as to the circumference of the shooter's wrist and the circumference of the shooter's forearm. (C. 219-20.) Woodward alleged that it was Schenk's opinion that the circumference of the widest portion of the shooter's forearm was 11.49 inches and that the circumference of the shooter's wrist was 7.96 inches. (C. 220.) Woodward further alleged that his "wrist is currently 6.5 inches and the circumference of the widest portion of his forearm is 10.5 inches," and that, since his arrest, he had gained

---

[17] "Biometrics" is defined as "the measurement and analysis of unique physical or behavioral characteristics (as fingerprint or voice patterns) esp., as a means of verifying personal identity." Merriam-Webster's Collegiate Dictionary 124 (11th ed. 2003).

35 pounds. (C. 221.) According to Woodward, it was Schenk's opinion, "after conducting this comparative analysis, even with an error rate of 5% and despite Woodward's weight gain of approximately 35 pounds since his arrest, [that] the shooter could not have been Mr. Woodward or someone with his biological characteristics." (C. 221.)

1.

Woodward first alleged in his petition that Schenk's opinion constitutes newly discovered material facts under Rule 32.1(e), Ala. R. Crim. P., which provides:

> "Subject to the limitations of Rule 32.2, any defendant who has been convicted of a criminal offense may institute a proceeding in the court of original conviction to secure appropriate relief on the ground that:
>
> "....
>
> "(e) Newly discovered material facts exist which require that the conviction or sentence be vacated by the court, because:
>
> "(1) The facts relied upon were not known by the petitioner or the petitioner's counsel at the time of trial or sentencing or in time to file a posttrial motion pursuant to Rule 24, or in time to be included in any previous collateral proceeding and could not have been discovered by any of those times through the exercise of reasonable diligence;

> "(2) The facts are not merely cumulative to other facts that were known;
>
> "(3) The facts do not merely amount to impeachment evidence;
>
> "(4) If the facts had been known at the time of trial or of sentencing, the result probably would have been different; and
>
> "(5) The facts establish that the petitioner is innocent of the crime for which the petitioner was convicted or should not have received the sentence that the petitioner received."

Although couched in terms of newly discovered material facts, Woodward's claim is actually one of newly discovered expert opinion. In its order, the circuit court found that Woodward's claim failed to satisfy the requirement in Rule 32.1(e)(1) because the facts and evidence underlying Schenk's opinion, "[t]he video, the vehicle's dimensions, and certainly Woodward's physical characteristics," as opposed to the opinion itself, "were readily available to Woodward from the outset of the prosecution." (C. 1358.) On appeal, Woodward argues that the circuit court's finding in this regard is erroneous because, he says, even if the facts underlying Schenk's opinion were known before trial, the opinion itself was not known and could not have been ascertained through the exercise of reasonable diligence. Specifically, Woodward argues, as he did in his petition, that, although an expert biometrics opinion was "'theoretically available'" at trial, it would have been unreasonable for him to seek such an opinion, in part, because the State did not

present any evidence at trial regarding the shooter's biometric characteristics. (Woodward's brief, p. 86; C. 223, quoting Ex parte Ward, 89 So. 3d 720, 726 (Ala. 2011).) However, Woodward's focus on Schenk's opinion, instead of the facts and evidence underlying that opinion, is misplaced.

There have been only a few occasions in Alabama where an expert opinion sought for the first time after trial formed the basis of a newly-discovered-evidence claim. In Musgrove v. State, 144 So. 3d 410, 439 (Ala. Crim. App. 2012), this Court held that an expert opinion on eyewitness identification, sought for the first time after trial, amounted to nothing more than impeachment of the eyewitness. Although this Court did not specifically address whether an expert opinion sought after trial could satisfy the requirement in Rule 32.1(e)(1), we noted that "newly available evidence" is not the equivalent of newly discovered evidence.

In Minor v. State, 914 So. 2d 372 (Ala. Crim. App. 2004) (opinion on return to remand), this Court held that an expert medical opinion, sought for the first time after trial, that contradicted the testimony of the State's medical expert regarding the child-victim's hematocrit level, amounted to nothing more than impeachment evidence. Again, this Court did not specifically address whether an expert opinion sought after trial could satisfy the requirement in Rule 32.1(e)(1). However, we accepted as true the appellant's argument that the testimony of the State's expert regarding the child-victim's hematocrit level was a "surprise" to the appellant that he "could not have anticipated" and that "could not have been discovered

before trial with due diligence." 914 So. 2d at 401-02. In other words, we addressed the claim of newly discovered expert opinion only after first accepting as true the appellant's argument that the facts and evidence underlying the expert's opinion met the requirement in Rule 32.1(e)(1).

The Alabama Supreme Court did the same in Ex parte Layton, 911 So. 2d 1052 (Ala. 2005). In that case, the Court rejected a claim that expert opinions from two doctors regarding a child-sex-abuse victim's medical records constituted newly discovered evidence because the appellant had failed to establish that the expert opinions would have been admissible at trial or, if they had been admissible, that they probably would have changed the result of the trial. Although the Court did not specifically address whether an expert opinion, sought for the first time after trial, could satisfy the requirement in Rule 32.1(e)(1), the Court pointed out that the victim's medical records, upon which the expert opinions were based, were not discovered until after the trial had ended, and the Court presumed that those records could not have been discovered earlier through the exercise of reasonable diligence. Ex parte Layton, 911 So. 2d at 1055 n.3. In other words, the Court addressed the claim of newly discovered expert opinion only after first finding that the facts and evidence underlying those opinions were, in fact, newly discovered under Rule 32.1(e)(1).

Other states that have addressed the issue have generally found that an expert opinion, sought for the first time after trial, cannot meet the requirements of newly discovered evidence unless the facts or evidence

underlying the expert opinion, as opposed to the opinion itself, were not known at trial and could not have been ascertained through the exercise of reasonable diligence. The Idaho Supreme Court has held that "[i]n order to be newly discovered evidence, the evidence itself, not just [the] importance or materiality of that evidence, must be unknown and unavailable prior to trial." State v. Stevens, 146 Idaho 139, 146, 191 P.3d 217, 224 (2008). In concluding in that case that the appellant was not entitled to a new trial based on newly discovered expert opinion, the Court pointed out that the fact that the appellant "failed to present his own experts' opinions at trial does not make the evidence on which they rely newly discovered." Id.

In State v. Carter, 84 So. 3d 499, 522 (La. 2012), the Louisiana Supreme Court held that "seeking out new expert witnesses after the conclusion of trial to counter evidence and testimony properly presented at trial does not qualify as 'new and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during trial.'" And the Washington Court of Appeals has held that "[a] new expert opinion, based on facts available to the trial experts, does not constitute newly discovered evidence that could not, with due diligence, have been discovered before trial." In re Copeland, 176 Wash. App. 432, 451, 309 P.3d 626, 636 (2013). See also State v. Blasus, 445 N.W.2d 535, 543 (Minn. 1989) ("Generally, expert testimony does not constitute newly discovered evidence justifying a new trial."); Roberts v. State, 173 Ga. App. 701, 705, 327 S.E.2d 819, 823 (1985) (holding that the appellant failed to establish

entitlement to new trial based on newly discovered expert opinion where "the expert's opinions were not known until they were sought," but the appellant "concede[d] that this opinion was not sought until after the trial was over" and there was "no showing that the expert could not have formed and rendered his opinion based upon evidence that was known and available ... before trial"); People v. Harper, (No. 1-15-2867, May 12, 2017) (Ill. Ct. App. 2017) (unpublished opinion) ("[S]ince [the expert's] opinions do not rest on any evidence that was not available to the defendant prior to the second trial, his expert opinion does not qualify as newly discovered evidence."); Commonwealth v. Jordan, (No. 1981 WDA 2014, January 6, 2016) (Pa. Super. Ct. 2016) (unpublished opinion) ("[A] new opinion offered after trial may be considered an unknown fact only where a new scientific technique becomes available after trial and an expert bases his opinion on that new scientific technique [or] if an expert's opinion is based upon a fact which was unknown at the time of trial."); and State v. O'Haver, 349 Wis.2d 525, 835 N.W.2d 290 (Wis. Ct. App. 2013) (unpublished opinion) ("A new expert opinion based on facts available prior to trial is generally not newly discovered evidence.").

We believe the Kentucky Supreme Court stated it best:

> "Certainly, testimony in the form of an expert's opinion is 'evidence' in the literal sense. KRE 702. But an expert's opinion cannot fit the definition of 'newly discovered evidence' unless it is based upon underlying facts that were not

> previously known and could not with reasonable diligence have been discovered. An opinion consisting simply of a reexamination and reinterpretation of previously known facts cannot be regarded as 'newly discovered evidence.' There would be no finality to a verdict if the facts upon which it was based were perpetually subject to whatever reanalysis might be conceived in the mind of a qualified expert witness."

Foley v. Commonwealth, 425 S.W.3d 880, 887 (Ky. 2014). We agree. The purpose of Rule 32.1(e) is to provide relief from what may be an injustice based on facts or evidence that were unavailable at the time of trial, not to reward a petitioner for finding experts posttrial.

In this case, the circuit court was correct that the facts and evidence underlying Schenk's opinion were known at the time of trial or could have been discovered by the time of trial through the exercise of reasonable diligence and that, therefore, Schenk's opinion does not meet the requirements of newly discovered evidence in Rule 32.1(e). Accordingly, the circuit court's summary dismissal of this claim was proper.

2.

Woodward also alleged in his petition that his trial counsel were ineffective for not retaining Schenk, or another biometrics expert, to "examine and analyze the biological characteristics of the shooter in the video." (C. 242.) Woodward alleged that counsel knew that the

State was going to introduce into evidence the video of the shooting at trial and that it was going to present testimony from Al Mattox, an agent with the Alabama Bureau of Investigation at the time, who had attempted to enhance the video to ascertain as much information about the shooting as possible, including the identity of the shooter. The record from Woodward's direct appeal reflects that Mattox was not able to identify the shooter, but did opine that, based on his review of the video, he believed the shooter was a black male.[18] Woodward argued in his petition that, knowing that the State intended to introduce into evidence the video of the shooting and present expert testimony about that video, it was unreasonable for counsel not to retain their own expert to analyze the video "to determine if it was possible to determine that the shooter was not Mr. Woodward, to rebut the State's 'video enhancement' expert, or to assist defense counsel in preparing an effective cross-examination of Mr. Mattox." (C. 245.) According to Woodward, a biometrics expert "would have raised a question for the jury as to the conclusions reached by Mr. Mattox, thereby raising reasonable doubt" as to his guilt. (C. 248.) By failing to retain a biometrics expert, Woodward alleged, counsel "effectively conceded that the shooter was a black male, with the implication that the black male was, in fact,

---

[18] Mattox was also able to determine the following from the video: the tag number of the vehicle and that the vehicle was a Chevrolet; that the shooter was the driver of the vehicle and had used his right hand to fire the weapon; that the murder weapon was a large-frame automatic pistol; and that there were no other occupants in the shooter's vehicle. See Woodward v. State, 123 So. 3d 989, 1010 (Ala. Crim. App. 2011).

Mario Woodward." (C. 245.) Woodward also alleged that the State's case against him was circumstantial, with "no direct physical evidence of [his] guilt" (C. 242-43), and that "the State's case relied in large part upon the 31-second dashboard video which does not allow identification of the shooter" and on the testimony of Woodward's girlfriend at the time that he had access to her gray Chevrolet Impala automobile. (C. 243.) Thus, Woodward concluded, he was prejudiced by counsel's failure to retain a biometrics expert.

In its order, the circuit court found that counsel's failure to retain a biometrics expert was not deficient performance. Specifically, the court stated that it "cannot agree that all reasonable attorneys would have employed such an expert; the existence of biometrics was unknown to this Court prior to this petition being filed." (C. 1358.) The court also found that Woodward was not prejudiced, noting that "even if Mr. Schenk were a Nobel laureate, the evidence of Woodward's guilt was so overwhelming that Mr. Schenk's conclusions, even had they been made contemporaneously with the shooting, would not have changed the outcome." (C. 1359.) On appeal, Woodward argues that the circuit court erred in relying "on its own unawareness of biometrics" to find that counsel's performance was not deficient. (Woodward's brief, p. 42.) Woodward also argues that the circuit court's finding that he was not prejudiced was erroneous. Specifically, he argues that Schenk's opinion "is dispositive of Woodward's innocence" even when viewed in light of the other evidence at trial because, according to Woodward, it is "objective and scientific" evidence that he was not the shooter, and is, in fact,

"the only evidence presented in this case with respect to the identification of the shooter as seen in the dashboard video." (Woodward's brief, p. 49.)[19]

Although we agree with Woodward that the circuit court's lack of familiarity with biometrics is not the proper standard for evaluating whether counsel's performance was deficient, we conclude that Woodward failed to satisfy his burden of pleading this claim. With respect to deficient performance, "[t]he question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 105 (2011) (quoting Strickland v. Washington, 466 U.S. 668, 690 (1984)). We must be cautious not to rely on the "'harsh light of hindsight,'" Harrington, 562 U.S. at 107 (quoting Bell v. Cone, 535 U.S. 685, 702 (2002)), and we must evaluate counsel's performance based on counsel's perspective at the time. As this Court noted in Benjamin v. State, 156 So. 3d 424 (Ala. Crim. App. 2013):

---

[19] Woodward also argues that the circuit court's prejudice finding indicates that it considered his claim subjectively rather than objectively. We rejected this argument in Part III.C. of this opinion. Woodward further argues that the circuit court erroneously found that "'[[t]he biometrics expert's] proposed testimony was cumulative to the actual testimony.'" (Woodward's brief, p. 35, quoting the circuit court's order.) However, the circuit court did not find that Schenk's testimony, as a biometrics expert, was cumulative to evidence presented at trial. Rather, the circuit court found that Schenk's testimony, as a cellular-networks expert, see Part IV.F. of this opinion, infra, was cumulative to evidence presented at trial. Therefore, this argument is meritless.

> "'We are mindful that in an ineffective assistance of counsel claim, counsel is 'strongly presumed to have rendered' adequate assistance within the bounds of reasonable professional judgment and that we must be vigilant against the skewed perspective that may result from hindsight.' State v. Harris, 343 Wis.2d 479, 495, 819 N.W.2d 350, 358 (2012). 'Courts should at the start presume effectiveness and should always avoid second-guessing with the benefit of hindsight.' Atkins v. Singletary, 965 F.2d 952, 958 (11th Cir.1992). 'To avoid the "distorting effects of hindsight," we evaluate counsel's performance based on his "perspective at the time"....' Harned v. United States, 511 Fed.Appx. 829, 830-31 (11th Cir. 2013) (not selected for publication in the Federal Reporter)."

156 So. 3d at 443. "'There is no per se rule that requires trial attorneys to seek out an expert.'" State v. Gissendanner, [Ms. CR-09-0998, October 23, 2015] ___ So. 3d ___, ___ (Ala. Crim. App. 2015) (quoting Gersten v. Senkowski, 299 F.Supp.2d 84, 100 (E.D.N.Y. 2004), aff'd, 426 F. 3d 588 (2nd Cir. 2005)). "'[T]he mere fact a defendant can find, years after the fact, a[n] ... expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial.'" Daniel v. State, 86 So. 3d 405, 423 (Ala. Crim. App. 2011) (quoting Davis v. Singletary, 119 F.3d 1471, 1475 (11th Cir. 1997)).

Woodward alleged in his petition that the fact that the State was planning to present testimony from Mattox regarding his enhancement of the video should

have led counsel to seek their own analysis of the video to rebut that testimony. However, as noted above, with respect to the identity of the shooter, Mattox testified only that it was his opinion that the shooter was a black male. Setting aside the fact that Schenk's testimony, as pleaded in Woodward's petition, would not have rebutted Mattox's testimony regarding the race and gender of the shooter, we cannot say that Mattox's opinion that the shooter was a black male would have led a reasonable attorney to seek a biometrics expert in rebuttal. As Woodward admitted in his petition, the video did not show the identity of the shooter. Neither Mattox's testimony nor the video directly implicated Woodward in the shooting and, in fact, were arguably the least incriminating evidence presented by the State at trial.

Woodward has pleaded no other facts in his petition indicating what information counsel knew at the time that would have given them reason to believe that a biometrics expert could have analyzed the video and provided an opinion beneficial to the defense. Nor has he pleaded any facts in his petition indicating that the failure to seek the assistance of a biometrics expert to analyze the video, a video that showed only the shooter's arm, fell below professional norms, and that no competent attorney would have failed to seek such an expert. "[W]hen the prosecution's theory of the case hinges on expert forensic science testimony, the acquisition of an expert witness for the defense may be exactly what professional norms under Strickland v. Washington require." Kendrick v. State, 454 S.W.3d 450, 475 (Tenn. 2015). However, in most cases, "'[a]n attorney's decision whether to retain witnesses,

including expert witnesses, is a matter of trial strategy,'" Walker v. State, 194 So. 3d 253, 296 (Ala. Crim. App. 2015) (quoting People v. Payne, 285 Mich. App. 181, 190, 774 N.W.2d 714, 722 (2009)), and "'a tactical decision will not form the basis for an ineffective assistance of counsel claim unless it was "so patently unreasonable that no competent attorney would have chosen it."'" Gissendanner, ___ So. 3d at ___ (quoting Brown v. State, 288 Ga. 902, 909, 708 S.E.2d 294, 301 (2011)).

Here, the State's case did not, as Woodward apparently believes, hinge on Mattox's testimony, or even on the video of the shooting; as already noted, neither the video nor Mattox's testimony incriminated Woodward in the murder. The crux of the State's case was the overwhelming circumstantial evidence tying Woodward to the murder, Woodward's actions after the crime, such as his flight to Georgia and the statement he made when he was arrested, and Woodward's confessions to three witnesses that he had shot a police officer. At trial, counsel vigorously attacked all of this evidence. Based on Woodward's pleadings, we cannot say that no reasonable attorney would have chosen to focus on the evidence that directly linked Woodward to the murder instead of retaining a biometrics expert to analyze the video.

Moreover, we point out that, in pleading his claim of newly discovered evidence, Woodward specifically argued that it was not reasonable to expect him or his counsel to seek evidence "'where [they] had no reason to apprehend any existed'" and "'where there is no indication of helpful evidence.'" (C. 222-23, quoting Ex

parte Ward, 89 So. 3d 720, 725-26 (Ala. 2011).) By making this argument, Woodward effectively conceded that counsel had no reason to believe that a biometrics analysis of the video would have provided any helpful evidence, and that, therefore, his counsel's not retaining a biometrics expert did not constitute deficient performance.

Because Woodward failed to plead sufficient facts indicating that his counsel's performance in this regard was deficient, summary dismissal of this claim of ineffective assistance of counsel was proper.

F.

Woodward contends that his trial counsel were ineffective for not objecting to the testimony of State's witnesses Pete DeLeon and Jennifer Scheid regarding cellular-telephone calls he made the day of the shooting on the ground that they were not qualified to testify as expert witnesses. Woodward also contends that his trial counsel were ineffective for not retaining an expert on cellular networks and towers to rebut the testimony of DeLeon and Scheid.

On direct appeal, this Court addressed Woodward's challenge to DeLeon's and Scheid's testimony and his argument that the trial court had erred in denying his motion for a continuance to secure his own expert:

> "Pete DeLeon, a custodian of records at Alltel Wireless, testified about call records, including cell-tower information, for three different accounts. Woodward had two accounts, but the records indicated that Tiffany Surles was the user of the cell phone associated with one of

Woodward's accounts. The third record DeLeon testified about was Wendy Walker's. DeLeon identified two maps: one map contained only the location for Alltel's cell towers and that map was created by engineers; DeLeon testified that he created a second map that showed the location of the cell towers that were 'hit' from Woodward's cell phone on the day of the shooting. The locations of the cell towers were consistent with Woodward's being in the area where witness Shirley Porterfield had testified she had seen him on the morning of the shooting, driving a light-colored Impala. DeLeon testified that Alltel records did not permit even a radio-frequency ('RF') engineer to pinpoint the exact location of the person using the cell phone; the records only provided information about the cell towers that were used during a call.

"Jennifer Scheid, a custodian of records for Sprint Nextel, testified about call records, including cell-tower information, for three accounts: one account was a prepaid phone; one subscriber was Paul Lewis but the registered user's name on that account was Joe and was consistent with being used by Joseph Pringle; and the final account was Brittne Deramus's. She said the records were the type kept in the ordinary course of business for Sprint Nextel. Scheid testified without objection that State's Exhibit 63 consisted of maps displaying the locations of Sprint Nextel's cell-phone towers, based on the latitude and longitude readings in the company's database. She stated that the

maps fairly and accurately represented the cell-site locations of Sprint Nextel, and that they would aid in her explanation to the jury about the calls made on the day of the murder. The maps were admitted without objection.

"Scheid testified without objection that one of the records displayed outgoing phone calls from the prepaid phone at 12:36 p.m. and again at 12:38 p.m. to a number that other evidence established was Tiffany Surles's cell-phone number. Those calls were placed using the tower located in downtown Montgomery, Scheid testified -- again without objection from Woodward. Scheid testified about phone calls made from the prepaid phone that afternoon, one of which went through a tower located on I–65 north of Montgomery and another used a tower located in Atlanta, Georgia. Additional testimony was received about other calls made that day; some of the calls went through a tower that was close to Century Plaza mall in Birmingham.

"After Scheid testified that one of the calls went through a tower located on Interstate 65 the prosecutor asked her whether the cell phone customer had been traveling north on the interstate at the time. Defense counsel objected that the question was beyond Scheid's expertise, and he said, 'They can talk about towers where the cell phone went through but not the physical location of any person making the call, improper foundation predicate.' (R. 1159.) The State

withdrew the question. The State later pointed at a cell-phone tower on one of the maps and asked Scheid, 'If there had been testimony saying that this phone had been used going up I–65, would that be consistent with an individual being close to this cell-phone tower?' (R. 1160–61.) Defense counsel objected on the ground that the witness was limited to testifying about which towers were used during certain calls, and the trial court overruled that objection. [Scheid then answered in the affirmative.]

"On cross-examination defense counsel stated to Scheid that she had 'some level of expertise, obviously, to cell phones and towers and that kind of thing,' and Scheid agreed. (R. 1165.) Defense counsel then stated to Scheid that she was not an 'RF engineer,' and Scheid agreed, then testified that an RF engineer is someone who works with the actual towers. Scheid further agreed when defense counsel said that an RF engineer typically comes in to determine the actual location of a person making a phone call, and when he further stated to the witness, 'And that's why you were only able to tell the jury about what towers were used but not, basically, where the person was, the approximate area where the calls originated from?' (R. 1166.) Defense counsel then asked Scheid a series of questions about the configurations of cell-phone towers and she answered those questions, but when defense counsel asked about the configurations of the

antennas on the cell-phone towers, Scheid testified that an engineer would know that information. Scheid testified that her company's cell-phone towers have two or three 'sectors,' which she said 'refers to which side of the tower the call was hitting off of.' (R. 1169.) Scheid was able to identify from the records admitted into evidence which sector a call had been routed through; however, she also testified that an RF engineer might be able to better determine the location of a caller by knowing which sector a call used. Woodward provided Scheid with a map he had created, and it purported to represent calls made from Woodward's phone on the day of the murder. When the State objected to Woodward's use of the map because he had not laid a proper foundation for it, Woodward argued that Scheid was well qualified to answer some questions from the map, 'considering all the maps she's been looking at that [were] just like this.' (R. 1172.) Woodward also stated, 'And, Judge, the sector layout isn't crucial to the testimony. It just helps -- enables -- her to explain --' (R. 1173.) After reviewing the records from Sprint Nextel that had been admitted into evidence Scheid then stated that the 12:36 p.m. phone call from Woodward's phone came from a different sector than did the 12:38 p.m. call he made.

"Scheid testified on cross-examination that a cell-phone call usually is routed through the closest tower with the strongest signal, but that if there was a problem with the closest tower or

if a tower was at maximum capacity, the cell-phone handset would then use another nearby tower or the tower providing the next strongest signal.

"....

"B. ... Woodward argues that the trial court erred when it permitted DeLeon and Scheid -- both lay witnesses -- to offer their opinions as to the meaning of the cell-phone records and maps, rather than testifying about matters within their personal knowledge. Specifically, he argues that DeLeon and Scheid were erroneously permitted to testify that the cell-phone records indicated the locations of the callers at certain times. Woodward cites only two pages of the transcript in this portion of his argument. The State correctly notes that Woodward did not raise this objection during any of DeLeon's testimony; thus, as to his testimony, we review this claim for plain error. Woodward did object during Scheid's testimony.... We review the trial court's adverse ruling on Woodward's objection to Scheid's testimony for an abuse of discretion. See Ex parte Loggins, 771 So. 2d 1093, 1103 (Ala. 2000). We find no plain error in any of DeLeon's testimony or Scheid's testimony, and we find no abuse of the trial court's discretion in its ruling on Woodward's objection to Scheid's testimony.

"Rule 701, Ala. R. Evid., provides:

> "'If a witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.'

"Rule 702, Ala. R. Evid., provides:

> "'If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.'

"Although our research has disclosed no Alabama case that addresses this issue, the Tennessee Court of Criminal Appeals addressed a similar issue in dicta when a defendant argued that the trial court had erred in permitting a detective to testify as an expert regarding cell-phone towers. State v. Hayes, (No. M2008–02689–CCA–R3–CD, Dec. 23, 2010) (Tenn. Crim. App. 2010) (not published in S.W.3d). The Tennessee Court of Criminal Appeals rejected the argument, stating:

> "'The detective merely testified that he saw the locations of the cell phone towers

> listed on the cell phone records and plotted those locations on a map. He inferred that the defendant traveled near those towers. Detective Fitzgerald explicitly stated that he was not an expert in how the cell phone towers worked. We conclude that a layperson could plot the locations of the towers on a map and draw the same inference; therefore, his testimony did not require specialized knowledge as contemplated by Tennessee Rule of Evidence 702, which governs expert testimony, and the trial court did not err by allowing the testimony.'

"We agree with the Tennessee court's analysis, and we adopt it here. DeLeon and Scheid testified based on their review of the records of the cell-phone company each worked for as a records custodian and based on their personal knowledge of the manner in which those records are generated and recorded. Neither DeLeon's nor Scheid's testimony required specialized knowledge. The testimony was offered to assist the jury to reach a clear understanding of the witness's testimony or to determine a fact in issue, and was thus properly offered as lay-witness testimony. Furthermore, the State did not offer the witnesses as experts, and the trial court, therefore, did not accept them as experts. Moreover, Woodward cross-examined each witness, and established through his cross-examination that each witness was able to explain to the jury which cell-phone

tower a call went through when the call was made but was not able to give the exact location of the caller when the call was made. (R. 1131–33, 1166.)

"The witnesses did not testify about the exact location of the caller at any time during their testimony, contrary to Woodward's assertion on appeal. In fact, DeLeon testified that Alltel was not able to pinpoint the location of a user based on cell-tower information. We hold that the trial court did not abuse its discretion or commit plain error when it permitted the witnesses to testify about the cell phone records and cell towers used during certain phone calls. Woodward is not entitled to any relief on this claim of error.

"C. Woodward next argues that the trial court abused its discretion when it denied his motion for a continuance to procure the services of an RF expert. Woodward argues that the testimony of an RF engineer would have rebutted the State's argument and would have demonstrated that he was not at the crime scene when Officer Houts was shot.

"....

"... [W]e hold that the trial court did not abuse its discretion when it denied Woodward's mid-trial motion for a continuance. Woodward

did not satisfy any of the three requirements for a continuance.[20]

"1. First, Woodward failed to establish that the testimony would have been material. Woodward argued that he needed the services of an RF expert who would testify that the 12:36 p.m. phone call he placed to Surles approximately two minutes after the murder 'hit' sector three of the cell tower, while sector one was the sector of the tower closest to where the shooting occurred. This testimony would not have been material because the State did not present testimony about which sector of the cell tower the phone call hit. The State's witness testified only that the call went through the tower near the crime scene. Testimony by a defense expert about which sector of the cell tower the call hit two minutes after the murder occurred would not have rebutted any evidence the State admitted about the phone call. Rather, because the phone call was placed approximately two minutes after the murder, the testimony Woodward argued he needed to present would have, in fact, provided additional evidence that he was in the area where the shooting occurred within minutes after the shooting. Importantly,

---

[20] See Ex parte Saranthus, 501 So. 2d 1256, 1257 (Ala. 1985) ("If the following principles are satisfied, a trial court should grant a motion for continuance on the ground that a witness or evidence is absent: (1) the expected evidence must be material and competent; (2) there must be a probability that the evidence will be forthcoming if the case is continued; and (3) the moving party must have exercised due diligence to secure the evidence.").

> the State did not present evidence about Woodward's precise path in the moments after he left the scene of the shooting. As the State correctly argues, the testimony Woodward argues he should have been allowed to present would not have contradicted the State's testimony about the phone call or his general location immediately after the shooting. The trial court recognized that the evidence would not have been material. In response to Woodward's argument in support of the motion to continue the trial court stated that Woodward had 'more than established' that the testimony about a cell tower being hit did not pinpoint the caller's exact location; the court said: 'I think everybody understands all it does is put you in an area. You're not going to hit a cell tower in downtown Montgomery [if] you're calling from Birmingham or you're calling from East Montgomery .... I think we all got that.' (R. 1229–30.)"

Woodward, 123 So. 3d at 1012-19 (footnotes omitted).

1.

In his petition, Woodward alleged that DeLeon's and Scheid's testimony was "expert testimony disguised as fact testimony of purported record custodians" (C. 266), that "neither Mr. DeLeon nor Ms. Scheid were qualified to offer their opinions as to the conclusions about a caller's location based upon the cell phone records and maps because they were not radio frequency experts" (C. 269), and that, therefore, counsel were ineffective for not objecting to their

testimony on these grounds. In its order, the circuit court found that Woodward's claim was meritless because this Court had decided the underlying substantive issue adversely to Woodward on direct appeal. We agree with the circuit court.

First, contrary to Woodward's apparent belief, counsel did object to Scheid's testimony at trial, and on direct appeal this Court found that objection to be sufficient to preserve for review Woodward's challenge to Scheid's testimony. Counsel cannot be ineffective for not raising an objection that counsel did, in fact, raise. Second, as this Court explained in direct appeal, DeLeon and Scheid did not, as Woodward contends, provide expert testimony. Rather, they were lay witnesses who testified to facts within their own personal knowledge. "DeLeon and Scheid testified based on their review of the records of the cell-phone company each worked for as a records custodian and based on their personal knowledge of the manner in which those records are generated and recorded." Woodward, 123 So. 3d at 1017. Their testimony did not require specialized knowledge and "was offered to assist the jury to reach a clear understanding of their testimony or to determine a fact in issue, and was thus properly offered as lay-witness testimony." Id. Therefore, there was no basis for counsel to object to the testimony on the ground that DeLeon and Scheid were not qualified to offer expert testimony. Because there was no legal basis for an objection to DeLeon's and Scheid's testimony on this ground, counsel's performance could not be deficient in this regard. Counsel "will not be found to have rendered deficient performance for failing to make a baseless objection."

Hodges v. State, 147 So. 3d 916, 949 (Ala. Crim. App. 2007), rev'd on other grounds, 147 So. 3d 973 (Ala. 2011).

Citing Ex parte Taylor, 10 So. 3d 1075 (Ala. 2005), Woodward argues on appeal that the circuit court's finding that this claim was meritless because it was rejected by this Court on direct appeal "is erroneous under controlling Alabama law." (Woodward's brief, p. 55.) We disagree. In 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 to sustain a claim of ineffective assistance of counsel." 10 So. 3d at 1078. However, Ex parte Taylor applies only to the prejudice prong of Strickland, not to the deficient-performance prong. See Clark v. State, 196 So. 3d 285, 311 n.4 (Ala. Crim. App. 2015). Because this Court's holding on direct appeal establishes that counsel's performance was not deficient, Ex parte Taylor is inapplicable.

Counsel were not ineffective in their handling of DeLeon's and Scheid's testimony. Therefore, summary dismissal of this claim of ineffective assistance of counsel was proper.

2.

Woodward also alleged in his petition that counsel should have retained a "wireless network expert," such as Manfred Schenk, to assist them in cross-examination of DeLeon and Scheid and to counter those witnesses' testimony. (C. 262.) Woodward alleged

that DeLeon and Scheid "both testified that because certain calls connected through certain cell towers, the persons who made those calls must have been in the areas of those towers when the calls were made." (C. 269.) Woodward also alleged that both DeLeon and Scheid "interpreted historical cell site data to arrive at conclusions about the location of the cell phone caller." (C. 271-72.) According to Woodward, Schenk or another similar expert would have testified "that such cell phone evidence cannot be used to pinpoint the caller's location, and in fact can tell you no more ... than ... the caller is within a 21.6-mile radius of a particular cell tower." (C. 262.) Woodward also alleged that Schenk or another similar expert "would have testified that cell towers are inaccurate and unreliable as tracking methods" (C. 270); that "the particular cell tower that a cell phone connects to is based upon a number of factors that cell phone companies use to maintain the user's quality of service (e.g., the loading on the tower, interference, etc.), the least of which is the user's proximity to the tower" (C. 271); that "adjacent cell towers are intended to provide an overlap in coverage to ensure a user can be moved to any number of towers -- up to 20 miles away -- to avoid the user's disconnection" (C. 271); and that it "was impossible to pinpoint Mr. Woodward's location using cell tower data." (C. 277.) Woodward maintained that had counsel secured testimony from an expert like Schenk, there is a reasonable probability that the outcome of the trial would have been different.

In its order, the circuit court found that this claim was meritless because Schenk's proposed testimony was consistent with the testimony at trial and, in fact,

would have been largely cumulative to that testimony. Woodward argues on appeal that the circuit court's finding "improperly ignores the State's repeated mischaracterizations of the cell tower evidence to 'pinpoint' Woodward's location," and he cites portions of the prosecutor's closing argument where, he claims, the prosecutor argued that the cell-tower evidence established Woodward's exact locations throughout the day, including at the time of the shooting. (Woodward's brief, p. 53.) Although Woodward is correct that during closing argument the prosecutor stated that Woodward's "phone calls placed him there at the crime scene" (Record on Direct Appeal ("RDA"), R. 1298), Woodward fails to acknowledge that the prosecutor prefaced that statement with the following:

> "And I'm going to tell you up front, we didn't introduce those phone calls to show you that the defendant was in an exact location at an exact time. That wasn't the purpose of introducing those phone calls. The purpose of introducing the phone calls was to corroborate what the witnesses had told you. And, in fact, they did."

(RDA. R. 1297.) The State did not, as Woodward argues, mischaracterize the evidence, and we agree with the circuit court that Schenk's proposed testimony would have been consistent with, and largely cumulative to, the testimony presented at trial.

As we noted in our opinion on direct appeal, DeLeon and Scheid "did not testify about the exact location of the caller at any time during their testimony" and Woodward "established through his cross-examination that each witness was able to explain to the jury which

cell-phone tower a call went through when the call was made but was not able to give the exact location of the caller when the call was made." Woodward, 123 So. 3d at 1017. As the trial court noted at trial, the celltower evidence did nothing more than "'put [Woodward] in an area'" and did not establish Woodward's exact location at the time of the crime. Woodward, 123 So. 3d at 1019. Therefore, Schenk's testimony that the cell tower evidence could only establish that Woodward was within an approximately 21-mile radius of the cell tower not only would have been consistent with the testimony at trial but "would have, in fact, provided additional evidence that [Woodward] was in the area where the shooting occurred within minutes after the shooting." Woodward, 123 So. 3d at 1018-19. Moreover, Scheid testified at trial that which cell tower a call goes through is dependent on several factors, including whether the tower is at maximum capacity and whether there are buildings or hills obstructing the signal, testimony substantially similar to the testimony Woodward alleged in his petition Schenk could have provided. (RDA, R. 1180.)

"'This Court has previously refused to allow the omission of cumulative testimony to amount to ineffective assistance of counsel.'" State v. Gissendanner, [Ms. CR-09-0998, October 23, 2015] ___ So. 3d ___, ___ (Ala. Crim. App. 2015) (quoting United States v. Harris, 408 F.3d 186, 191 (5th Cir. 2005)). "[A] petitioner cannot satisfy the prejudice prong of the Strickland test with evidence that is merely cumulative of evidence already presented at trial.'" Benjamin v. State, 156 So. 3d 424, 453 (Ala. Crim. App. 2013) (quoting Devier v. Zant, 3 F.3d 1445, 1452 (11th Cir.

1993)). Evidence is cumulative "'even where the ... evidence is more elaborate than the trial testimony.'" Saunders v. State, [Ms. CR-13-1064, December 16, 2016] ___ So. 3d ___, ___ (Ala. Crim. App. 2016) (quoting State v. Bright, 200 So. 3d 710, 737 (Fla. 2016)).

We note that Woodward argues on appeal that Schenk's testimony would not have been cumulative to the testimony at trial because, he says, Schenk would also have testified that the crime scene was outside the radius of the sectors of the cell tower that Woodward's calls made at 12:36 p.m. and 12:38 p.m. the day of the shooting went through. According to Woodward, cell towers have three "sectors" that indicate the direction from which a call is made, and each sector of a cell tower has its own 20-mile radius from which a call going through that sector could have been made. Woodward maintains that Schenk's testimony about the cell tower's sectors would have established that it was unlikely that he was at the crime scene at the time of the shooting, and he has attached to his brief on appeal a map purportedly created by Schenk showing the radius of the three sectors of the cell tower his phone calls went through.

Woodward's argument is unavailing because the factual allegations in support of the argument were not included in his petition. Woodward alleged in his petition that Schenk would have testified that the cell-tower evidence could establish only that Woodward was within a 21.6-mile radius of the cell tower at the time he made the calls and could not pinpoint his exact location. Woodward, however, never alleged in his

petition that Schenk would have also testified about which sectors Woodward's calls went through. A Rule 32 petitioner cannot raise on appeal different or more specific factual allegations in support of a postconviction claim that were not included in his or her petition. See, e.g., Bearden v. State, 825 So. 2d 868, 872 (Ala. Crim. App. 2001) ("Although Bearden attempts to include more specific facts regarding his claims of ineffective assistance of counsel in his brief to this Court, those allegations are not properly before this Court for review because Bearden did not include them in his original petition before the circuit court."). Because Woodward's factual allegations regarding Schenk's testimony about cell-tower sectors were not included in his petition, they are not properly before this Court for review and will not be considered. Moreover, it is well settled that "attachments to briefs are not considered part of the record and therefore cannot be considered on appeal." Huff v. State, 596 So. 2d 16, 19 (Ala. Crim. App. 1991).

For the reasons stated above, summary dismissal of this claim of ineffective assistance of counsel was proper.

G.

Woodward contends that his trial counsel were ineffective for not objecting to the presence of uniformed police officers in the courtroom during his trial.

In his petition, Woodward alleged that "[u]niformed police officers took up many rows in the courtroom during trial, their number increasing as the trial went

on, becoming overwhelming by the time [the trial court] was prepared to sentence" him. (C. 252.) Woodward alleged that "during the sentencing, the proceeding was moved to a larger courtroom to accommodate the expected large crowd." (C. 252.) In addition, Woodward alleged that the uniformed officers "were brought into the courtroom before Mr. Woodward's family every day" forcing Woodward's family to "scramble" to find seats and preventing them from sitting near him during trial so the jury could see their support (C. 252); that "Officer Houts's wife sat at the counsel table with the prosecutor, very near to the jury throughout the trial" and "[o]ther members of Officer Houts's family sat in the front row" (C. 252); that "there was a great spectacle of security surrounding Mr. Woodward" with "at least five uniformed deputy sheriffs in the courtroom" at all times with "one standing directly behind Mr. Woodward," and "protective sweep[s]" of the courtroom repeatedly throughout the trial (C. 252); and that there was "extensive and negative pretrial publicity surrounding the case." (C. 253.) According to Woodward, the presence of uniformed officers in the courtroom, coupled with the additional circumstances listed above created an atmosphere during trial so prejudicial that it violated his right to a fair trial and, therefore, his counsel were ineffective for not raising this issue at trial.

In its order, the circuit court found that this claim was not sufficiently pleaded because Woodward had failed to allege the number of police officers present during the trial and how many of those officers were in uniform. In addition, the circuit court noted that it had been keenly aware at trial of the "potential problem

that a massive police presence could have" but that "[n]o overwhelming police presence was noted at any time and certainly did not impact any decision by the Court." (C. 1359.)

On appeal, Woodward argues that the circuit court erred in finding that this claim was insufficiently pleaded because, he says, his allegation that uniformed officers took up "many rows" in the gallery coupled with his allegations regarding other circumstances of his trial -- i.e., that his family was unable to sit near him, that Officer Houts's wife sat at the prosecutor's table and his family members sat in the first row of the gallery, that there were security measures taken during trial, and that there had been pretrial publicity about the case -- were sufficient to satisfy his burden of pleading. We disagree.

In Spencer v. State, 201 So. 3d 573 (Ala. Crim. App. 2015), this Court held that a Rule 32 petitioner had failed to sufficiently plead a claim that trial counsel were ineffective for not objecting to the presence of uniformed police officers in the courtroom where the petitioner failed to allege, among other things, "how many and when uniformed officers were present in the courtroom." 201 So. 3d at 589. Woodward also did not plead "how many and when uniformed officers were present in the courtroom." Woodward alleged only that uniformed officers were seated in "many rows" in the gallery and that the number of uniformed officers increased during the course of the trial. Those bare allegations, however, do not provide sufficient context from which to determine whether the police presence, even coupled with the other circumstances pleaded in

Woodward's petition, was so overwhelming that it denied Woodward a fair trial and that, therefore, his counsel were ineffective for not raising the issue at trial.

Moreover, Woods v. Dugger, 923 F.2d 1454 (11th Cir. 1991), cited by Woodward in his petition and in his brief on appeal, does not require a different conclusion. In Woods, the United States Court of Appeals for the Eleventh Circuit held that a federal habeas corpus petitioner had been denied his right to a fair trial as a result of an overwhelming presence of uniformed prison guards in the courtroom during his trial for the murder of a prison guard as well as other circumstances. The Court in Woods reached the merits of the claim by looking at the record and concluding that the atmosphere of the trial was such that it denied the petitioner a fair trial. However, the Court in Woods did not speak to the issue of a postconviction petitioner's burden of pleading. As already explained previously in this opinion, a Rule 32 petitioner in Alabama has a heavy burden of pleading sufficient facts to show that he or she is entitled to relief, and only after a petitioner satisfies that burden of pleading will a court look to the merits of a postconviction claim. More importantly, this Court is not required to search the trial record to determine the factual basis for a postconviction claim; the facts supporting a claim must be included in the petition itself. Here, Woodward failed to plead sufficient facts in his petition to indicate that the police presence at his trial was so great that, coupled with other circumstances, it denied him a fair trial.

We note that Woodward also argues on appeal that the circuit court's finding that any police presence "did not impact any decision by the Court" (C. 1359), "misses the point of the claim, which was the impact of the overwhelming police presence on the jury." (Woodward's brief, p. 63.) However, as noted above, one of Woodward's allegations in his petition was that his sentencing by the trial court had to be moved to a bigger courtroom because of the allegedly large crowd of police officers in attendance. By making this allegation about the allegedly large police presence during the sentencing hearing before the trial court, which occurred after the jury trial had concluded, Woodward made his claim not just about the impact the alleged police presence had on the jury during the guilt and penalty phases of the trial but also about the impact the alleged police presence had on the trial court at the sentencing hearing. The circuit court's finding that the alleged police presence had no impact on its decision-making was clearly meant to address Woodward's allegation regarding the sentencing hearing and, thus, did not "miss the point" of his claim. Indeed, had the circuit court not made this finding, we have no doubt that Woodward would now be arguing that the circuit court erred in not addressing his allegation about the sentencing hearing.

Because Woodward failed to plead sufficient facts indicating that his trial counsel were ineffective for not objecting to the presence of uniformed police officers in the courtroom, summary dismissal of this claim of ineffective assistance of counsel was proper.

H.

Woodward contends that his trial counsel were ineffective for not adequately investigating and presenting mitigating evidence at the penalty phase of his trial and at the sentencing hearing before the trial court.

Whether trial counsel were ineffective for not adequately investigating and presenting mitigating evidence "'turns upon various factors, including the reasonableness of counsel's investigation, the mitigation evidence that was actually presented, and the mitigation evidence that could have been presented.'" McMillan v. State, [Ms. CR-14-0935, August 11, 2017] ___ So. 3d ___, ___ (Ala. Crim. App. 2017) (quoting Commonwealth v. Simpson, 620 Pa. 60, 100, 66 A.3d 253, 277 (2013)).

> "'[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.' State v. Combs, 100 Ohio App. 3d 90, 105, 652 N.E.2d 205, 214 (1994). 'Most capital appeals include an allegation that additional witnesses could have been called. However, the standard of review on appeal is deficient performance plus prejudice.' Malone v. State, 168 P.3d 185, 234–35 (Okla. Crim. App. 2007)."

State v. Gissendanner, [Ms. CR–09–0998, October 23, 2015] ___ So. 3d ___, ___ (Ala. Crim. App. 2015). "[C]ounsel does not necessarily render ineffective assistance simply because he does not present all

possible mitigating evidence." Williams v. State, 783 So. 2d 108, 117 (Ala. Crim. App. 2000), overruled on other grounds by Ex parte Taylor, 10 So. 3d 1075 (Ala. 2005).

As noted previously in this opinion, "[w]hen a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland v. Washington, 466 U.S. 668, 695 (1984). "To assess that probability, we consider 'the totality of the available mitigation evidence -- both that adduced at trial, and the evidence adduced in the habeas proceeding' -- and 'reweig[h] it against the evidence in aggravation.'" Porter v. McCollum, 558 U.S. 30, 41 (2009) (quoting Williams v. Taylor, 529 U.S. 362, 397–98 (2000)). We "'must consider the strength of the evidence in deciding whether the Strickland prejudice prong has been satisfied.'" McWhorter v. State, 142 So. 3d 1195, 1231 (Ala. Crim. App. 2011) (quoting Buehl v. Vaughn, 166 F.3d 163, 172 (3d Cir. 1999)).

At trial, counsel presented a plethora of mitigating evidence, calling 11 witnesses to testify during the penalty phase. Woodward's mother, Wanda, and his sister, Juanelle Moss, testified about Woodward's childhood. Wanda testified that Woodward's father, Mark, was a drug dealer who drank alcohol and used marijuana and cocaine regularly; he was even discharged from the United States Air Force for selling

drugs. Wanda said that Mark was paranoid and was verbally and physically abusive toward her and Woodward. Wanda said that Mark repeatedly accused her of doing things she had not done, called her obscene names, and beat her in front of her three children. Wanda recalled one incident when Mark accused her of saying something to one of his friends and beat her with a telephone. Wanda testified that Woodward tried to intervene and that she contacted the police, but the police did not arrest Mark; instead, they told her to leave the house, so she took the children and stayed at a friend's house for the night. Teresa Woods, a friend of Wanda and Mark Woodward, confirmed that Wanda and her children stayed with her one night in the 1980s. Woods testified that she recalled receiving a frantic telephone call from Wanda asking her to come get Wanda and the children because Mark had beaten Wanda. When she did, Woods said, she saw bruising on Wanda's back from Mark hitting Wanda with a telephone and bruising on Wanda's neck from Mark choking Wanda. Woods testified that Mark was "controlling" and that Wanda and the children "had to do what he said." (RDA, R. 1500.)

Wanda also testified that Mark beat Woodward, would talk to Woodward "like he wasn't a child of his," and would call Woodward obscene names. (RDA, R. 1408.) She said that Mark's abusive behavior toward both her and Woodward "devastated" all her children. (RDA, R. 1402.) Wanda said that she twice left Mark and moved to Detroit with her children -- once in 1981, when Woodward was about 7 years old, and once in 1984, when Woodward was about 10 years old. Each time, however, Wanda and Mark reconciled after about

a year apart, and, according to Wanda, Mark's verbal and physical abuse toward her and Woodward continued. In addition, by that time, Wanda said, Woodward was old enough to notice that his father did not go to work every day and Woodward knew that Mark "had to be doing something other than working a normal job." (RDA, R. 1407.) Wanda testified that Woodward started to change as Mark's abusive behavior continued -- his grades in school dropped and his attitude toward his father changed.

Moss confirmed that Mark verbally and physically abused both Wanda and Woodward. According Moss, Mark was "a good man" but "wants things his way at times" and would get angry if things were not to his liking. (RDA, R. 1510.) Moss testified that Mark would sometimes force Woodward to stay up all night completing chores until "everything [was] right" (RDA, R. 1513), would call Woodward obscene names on a daily basis, and would hit and punch Woodward if Mark thought Woodward was "talk[ing] back." (RDA, R. 1514.) Moss said that Woodward was very small as a child and could not fight back when Mark abused him and that Mark's abuse "[d]evastated" Woodward. (RDA, R. 1515.) Moss also stated that Mark did not permit her or Woodward to invite friends to their house very often because "he didn't want people to know what he was doing" and "what was, actually, going on in the household." (RDA, R. 1516.)

Wanda testified that in 1988, when Woodward was just 14 years old, Mark kicked Woodward out of the house. Wanda said that Mark, Woodward, and some of Woodward's friends were in the backyard working

when one of Woodward's friends ran into the house and told her to come outside and "calm Mark down." (RDA, R. 1415.) Wanda said that when she went outside, she saw Mark standing on one side of the yard and Woodward standing on the other side of the yard and "[o]ne had a shovel, and one had a rake." (RDA. R. 1415.) When she asked what was going on, Wanda said, Mark told her to go inside the house and bring him the gun. Wanda said that Mark "wanted the gun to shoot" Woodward. (RDA, R. 1415.) Wanda refused to get the gun and told Woodward to run away because she was afraid of what might happen if he stayed. Wanda testified that when Woodward returned home the next morning, Mark kicked him out of the house permanently. After that, Woodward lived on the streets or with friends.

Wanda testified that shortly after he kicked Woodward out of the house, Mark was arrested for conspiracy to distribute illegal narcotics and was sentenced to five years' imprisonment. Wanda testified that, despite having been kicked out of the house, Woodward attended "the hearing" for his father in order to support him. (RDA, R. 1430.) When Mark went to prison, Wanda said, she was unemployed and was forced to rely on Mark's mother for financial support, who reported to Mark on a regular basis. In addition, Wanda said, Mark had "people watching" her while he was in prison and reporting to him what she was doing. (RDA, R. 1418.) Even though he was in prison, Wanda said, "Mark was still in control" and she was too afraid of him to allow Woodward to come home against Mark's wishes. (RDA, R. 1418.) Wanda eventually found a job and she and Mark divorced in 1993, after he was

released from prison. Moss testified that after Mark completed his prison sentence and he and Wanda divorced, he turned his life around. According to Moss, Mark remarried and had two more children, and he was not abusive to his current wife and children.

Wanda testified that in August 1990,[21] when Woodward was about 16 years old, Montell Burton, one of Woodward's closest friends since he was 5 years old, was shot and killed in his front yard. Woodward was "distraught" over Burton's death, but nonetheless provided support for Burton's mother, who Woodward was also close to. (RDA, R. 1420.) In October 1990, Wanda said, Woodward went to a nightclub in Prattville with some of his friends. Wanda testified that one of Woodward's friends, Willie Mills, got into an argument with another patron of the club and when Woodward tried to defend Mills, Woodward accidentally shot and killed a young woman. According to Wanda, Woodward accepted responsibility for his actions, pleaded guilty to manslaughter, and served his prison sentence.[22] On cross-examination, Wanda admitted that Woodward had fled the state immediately after the shooting.

While both Woodward and his father were in prison, Wanda said, they began writing each other letters.

---

[21] The trial transcript lists the year as 1980, but that appears to be a typographical error. Wanda testified that Mark was in prison at this time, and Wanda's previous testimony established that Mark was not arrested until 1988.

[22] The State introduced into evidence a certified copy of Woodward's manslaughter conviction.

Wanda also said that when Mark was released from prison, he visited Woodward in prison. Wanda testified that Woodward forgave his father for his abusive behavior throughout Woodward's life, and that all Woodward wanted "was [to] have his approval." (RDA, R. 1423.) When Woodward was released from prison in 1997, he went to work for his father, who by that time, had an automobile tire business. However, Wanda said that they "started clashing, and they couldn't get along" because Mark always believed that "everything he do[es] is right." (RDA, R. 1425.) Wanda also testified that although Mark had been in court "a few times" during Woodward's capital trial, he would not testify on Woodward's behalf because he did not "want nobody to know what it really is with him" or "to think bad of him." (RDA, R. 1430.) Moss also testified that Mark was unwilling to testify on Woodward's behalf because he was "worried about his other family and how people are going to react to the situation." (RDA, R. 1523.)

Wanda testified that between 1998 and 2004, Woodward fathered five children with four women. Despite the circumstances, Wanda said, Woodward had a good relationship with all his children and their mothers, and she often spent time with Woodward and her grandchildren. Wanda stated that Woodward was a good father, that he never abused his children, that he provided for his children by buying them clothing and food and paying household bills for their mothers whenever they needed help, and that he encouraged his children to stay in school and get an education. Moss also testified that she spent a lot of time with Woodward and his children, that Woodward was very

good with his children, and that the children loved Woodward.

Andrea Bell, Montell Burton's sister, testified that she grew up in the same neighborhood as Woodward and that she had known Woodward since they were children. Bell said that Woodward was quiet as a child, was always smiling, and was never mean to anyone. Daryl Burton ("Daryl"), Montell Burton's brother, testified that he had also known Woodward since childhood. Daryl said that when they were kids, Mark would sometimes pay him and Montell to "rough [Woodward] up" in an attempt to make Woodward tough. (RDA, R. 1542.) Daryl also said that, although he never witnessed Mark abusing Woodward, there were several times that he and Montell would hide Woodward in closet when Mark came looking for him. Daryl testified that after Mark kicked Woodward out of the house, Woodward would sometimes stay at his house, and he would notify Wanda that Woodward was safe. When Montell was shot and killed, Daryl said, Woodward was there to comfort the family. Finally, Daryl testified that he had spent time with Woodward and Woodward's children and that Woodward was a loving father.

Michael Murray testified that he first met Woodward in elementary school and had known Woodward for over 25 years. Murray testified that Woodward was introverted and shy as a child, but was also a loving and compassionate person who had been there to support him throughout his life. Murray said that after his mother passed away in 1986, he and his siblings were living in a housing project, destitute, and

often unable to afford food. One day when he was hungry and unable to afford food, Murray said, Woodward visited him and gave him money for food. Murray also said that Montell Burton's death took a psychological toll on Woodward and following it Woodward became withdrawn. Nonetheless, Woodward checked on Montell's mother regularly after his death. Murray said that he did not see Mark Woodward much when he and Woodward were growing up, and that he never knew Mark to be involved in Woodward's life. Murray also said that Woodward was a small child and was sometimes picked on by larger boys. Murray testified that Woodward is a loving father to his children and encourages his children to strive for success.

Vada Marshall testified that he and Woodward grew up in the same neighborhood and that he had known Woodward since they were five years old. Marshall said that Woodward was a mild-mannered child. Marshall also said that Wanda was the "[s]weetest person you ever want to meet," but that Mark was strict, and hard on Woodward, and appeared to want Woodward to grow up too quickly. (RDA, R. 1590.) Marshall said that Woodward stayed with his family for a time when they were teenagers, when Woodward was no longer living at home. Marshall also said that Montell Burton and Woodward were very close and that Montell's death affected Woodward deeply. Marshall testified that he often took his son to Wanda's house to play with Woodward's five children and that it was obvious how much Woodward's children loved Woodward. Finally, Marshall said that he had worked for Mark Woodward at his automobile tire

business for nine years and that Mark always believed he was right about everything; however, Mark had more recently turned his life around.

Three of Woodward's children, nine-year-old M.D.W., nine-year-old M.W., and eight-year-old T.W. also testified at the penalty phase of Woodward's trial. M.D.W. testified that he saw his father and his siblings almost every weekend and that Woodward would take him and his siblings out to eat and would buy him clothing and presents. M.D.W. stated that Woodward told him to behave and to get good grades in school, and that Woodward would give him money when he got good grades. M.D.W. also said that he had visited Woodward in jail, and that he loved his father. M.W. testified that he spent a lot of time with Woodward before Woodward's arrest, that he loved Woodward, and that Woodward was a good father. T.W. testified that she saw her father and siblings on weekends, that her father bought her clothes and presents and told her to get good grades in school. T.W. said that her father was nice and that she loved him.

Latonya Towns Jackson, M.W.'s mother, testified that Woodward was a wonderful father, that he was very involved in M.W.'s life, and that he never abused M.W. Before his arrest, Jackson said, Woodward spoke to M.W. every day and spent a lot of time with all of his children and, after his arrest, Jackson said, Woodward wrote letters to M.W. regularly and spoke to M.W. on the telephone often. Counsel introduced into evidence some of the letters Woodward had written M.W. Jackson also testified that Woodward helped support her financially by helping pay for her rent and other

expenses and that he had even loaned money to her grandmother one time when her grandmother was having financial difficulties. On cross-examination, Jackson admitted that Woodward had never been ordered to pay child support and she testified that she did not know where Woodward got the money he gave her, although she believed that Woodward did "construction work." (RDA, R. 1483.)

At the conclusion of the penalty phase of the trial, the jury unanimously found the existence of two aggravating circumstances: that Woodward had previously been convicted of another capital offense or a felony involving the use or threat of violence, see § 13A-5-49(2), Ala. Code 1975, and that the capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws, see § 13A-5-49(7), Ala. Code 1975. Nonetheless, the jury found the mitigating evidence presented by counsel so strong and cogent that it recommended, by a vote of 8 to 4, that Woodward be sentenced to life imprisonment without the possibility of parole. This weighs against a finding that Woodward was prejudiced by counsel's performance. See, e.g., McMillan v. State, [Ms. CR-14-0935, August 11, 2017] ___ So. 3d ___, ___ (Ala. Crim. App. 2017); Spencer v. State, 201 So. 3d 573, 613 (Ala. Crim. App. 2015); Jackson v. State, 133 So. 3d 420, 449 (Ala. Crim. App. 2009); Hooks v. State, 21 So. 3d 772, 791 (Ala. Crim. App. 2008); and Boyd v. State, 746 So. 2d 364, 389 (Ala. Crim. App. 1999).

At the sentencing hearing, the trial court received and considered a presentence report and the State

presented additional evidence not heard by the jury to refute Woodward's mitigating evidence. The additional information and evidence at the sentencing hearing indicated that Woodward had an extensive criminal history, both as a juvenile and as an adult, involving guns and drugs; that he had had numerous disciplinary citations when he was previously incarcerated; that Woodward did not file an income-tax return in Alabama between 1996 and 2006 and there were no records indicating that he had any taxable income during that time; that Woodward had never been ordered to pay child support for his children; that Woodward was not listed as the father on the birth certificates of two of his children; and that in April 1990, two years after Woodward's mother said that Woodward had been kicked out of the house and was living on the streets, Wanda reported that Woodward had run away from home.

In its sentencing order, the trial court found the same two aggravating circumstances as the jury -- that Woodward had previously been convicted of another capital offense or a felony involving the use or threat of violence and that the capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. The court found no statutory mitigating circumstances, but found three nonstatutory mitigating circumstances based on the testimony presented by trial counsel: that Woodward was a good father to his children, that Woodward had a childhood replete with verbal and physical abuse, and that the jury had recommended a sentence of life imprisonment without the possibility of parole. The trial court assigned little weight to the

mitigating circumstances that Woodward was a good father and had a difficult childhood, finding that evidence that was not heard by the jury seriously undermined those circumstances. The court found that the jury's recommendation was the strongest mitigating circumstance, and it afforded that recommendation great weight, but concluded that the aggravating circumstances outweighed the mitigating circumstances, and sentenced Woodward to death.

1.

Woodward first alleged in his petition that his trial counsel delayed in hiring a mitigation expert until seven months before his trial and failed to move for a continuance of the trial when the mitigation expert indicated that she would be unable to complete the mitigation investigation in time for trial. As a result, Woodward alleged, "critical witnesses" were not interviewed and called to testify and "many records" were not reviewed and presented at trial. (C. 289.) In its order, the circuit court found that, even had counsel moved for a continuance of the trial, that motion would have been denied and that, therefore, this claim was meritless. However, we need not address the propriety of the circuit court's finding in this regard because we conclude that Woodward failed to plead this claim with sufficient specificity to satisfy the requirements in Rule 32.3 and Rule 32.6(b).

"'[C]laims of failure to investigate must show with specificity what information would have been obtained with investigation, and whether, assuming the evidence is admissible, its admission would have produced a different result.'" Van Pelt v. State, 202 So.

3d 707, 730 (Ala. Crim. App. 2015) (quoting Thomas v. State, 766 So. 2d 860, 892 (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." Mashburn v. State, 148 So. 3d 1094, 1151 (Ala. Crim. App. 2013). "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, 766 So. 2d at 893.

In his petition, Woodward alleged that his counsel's delay in hiring a mitigation expert and their failure to move for a continuance resulted in the following witnesses not being interviewed or called to testify: Adrienne Davis, identified as Woodward's girlfriend when he was a teenager, with whose family he often lived after his father kicked him out of the house; Harvetta Hill, identified as Davis's mother; "Mr. Jeter,"[23] identified as Woodward's probation officer (C. 289); Willie Mills, identified as Woodward's friend who was with him when he shot and killed a young woman in 1990; "Nathaniel Woodward, 'Mood' Woodward, Helen Woodward, Jr., Annette Woodward, and Helen

[23] Woodward did not provide Mr. Jeter's first name in his petition.

Woodward, Sr.," identified as "living members of Mark Woodward's family" (C. 293); and "Aubrey Woodward, Bianca Woodward, Shantori [last name unknown], and Marco Woodward," identified as Mark Woodward's "other children." (C. 294.) However, Woodward failed to allege sufficiently specific facts indicating what those witnesses would have testified to or how their testimony would have been mitigating.

Woodward made no allegation in his petition regarding what Adrienne Davis, Mr. Jeter, or Willie Mills would have testified to. With respect to Harvetta Hill, Woodward alleged only that "she would have provided compelling testimony regarding Mark Woodward's physical abuse of Wanda Woodward and about the time that Mario Woodward stayed on her couch when he was put out of his house." (C. 290.) However, a bare and conclusory allegation that a witness would have provided "compelling testimony," without specific facts regarding what that testimony would have been, is not sufficient to satisfy the burden of pleading. With respect to his father's family members and "other" children, Woodward alleged that they could have provided testimony regarding Mark Woodward's "mental health issues." (C. 293.) However, other than Mark's alleged paranoia, about which Wanda Woodward testified at trial, Woodward failed to identify in his petition any mental-health issues he believed his father suffered from, nor did he allege with specificity what testimony his father's family members could have provided. Additionally, with respect to all the witnesses listed within this claim in his petition, Woodward failed to allege any facts indicating that the

witnesses would have been available and willing to testify on Woodward's behalf at trial.

Woodward also alleged in his petition that counsel's delay in hiring a mitigation expert and their failure to move for a continuance resulted in the following records not being reviewed and presented at trial: his prison records; his school records from Detroit, Michigan; records from the Autauga County Adolescence Center; records from the Department of Human Resources ("DHR"); his mother's hospital records; police records relating to his childhood home; his jail visitation records; and his father's military and prison records. However, Woodward failed to allege what information would have been discovered had those records been reviewed or how that information would have been mitigating. A bare allegation that counsel should have reviewed and presented certain records is not sufficient to satisfy the burden of pleading. See, e.g., Calhoun v. State, [Ms. CR-14-0779, April 29, 2016] ___ So. 3d ___, ___ (Ala. Crim. App. 2016) (holding that Rule 32 petitioner failed to sufficiently plead claim that trial counsel were ineffective for not obtaining "institutional records" where petitioner failed to plead, among other things, what information would have been uncovered had counsel obtained the records). We note that, with respect to his jail visitation records, Woodward did allege that they would have shown that his children had visited him while he was in jail awaiting trial. However, Woodward failed to allege any facts indicating how his children visiting him in jail would have affected the outcome of the penalty phase of his trial, especially in light of the fact that Woodward's

son, M.D.W., testified at the penalty phase that he had visited Woodward in jail after Woodward's arrest.

Because Woodward failed to satisfy his burden of pleading, summary dismissal of this claim of ineffective assistance of counsel was proper.

2.

Woodward also alleged in his petition that his counsel failed to investigate "key events and time periods that profoundly shaped and influenced [his] life." (C. 294.) Specifically, Woodward alleged that his counsel did not investigate or present evidence about the 2 years he lived in Detroit, Michigan -- when he was about 7 years old and again when he was about 10 years old -- even though counsel knew that he had lived in Detroit those 2 years. According to Woodward, had counsel properly investigated, counsel would have discovered compelling mitigating evidence that, while in Detroit, Woodward was "consistently exposed to drinking, drugs, and violence." (C. 296.)

In his petition, Woodward alleged that both his mother and sister could have testified about his time in Detroit had they been asked and he also identified 11 witnesses he claimed counsel should have called to testify about his time in Detroit.[24] Woodward alleged

---

[24] For purposes of this opinion, we need not recite the names of each of the additional witnesses nor specifically identify what each witness would have testified to. It is the the potential testimony as a whole, and not who would have said what, that is the crux of the issue. Thus, it is sufficient to note that Woodward identified these witnesses by name, stated how they were related to him or knew him, alleged that they would have been willing to testify on his

that these witnesses would have testified that the first time Wanda moved her children to Detroit, when Woodward was about seven years old and in the second grade, they lived with Wanda's mother, Estelle Ward ("Estelle"), in a dangerous, crime-ridden neighborhood. According to Woodward, these witnesses would have testified that shootings, carjackings, robberies, and fire bombs were a regular occurrence in the neighborhood; that the neighborhood was plagued by drug dealers and gang members; that many residents of the neighborhood abandoned their homes and walked away from their mortgages to escape the neighborhood; that the abandoned houses were first pillaged and then became home to squatters and transients until arsonists burned them down; that most of Woodward's family members and their friends carried guns for protection and feared going outside in the neighborhood; and that Woodward witnessed much of the above during the time he lived in Detroit. Woodward also alleged that these witnesses would have testified that the second time Wanda moved her children to Detroit, when Woodward was about 10 years old and in the fifth grade, they shared a duplex with friends, which was also located in a dangerous, crime-ridden neighborhood. Woodward alleged that these witnesses would have testified that there was "one drug house every few houses" throughout the block, that it was too dangerous for children in the neighborhood to play outside, and that there were

---

behalf, and alleged what testimony each would have provided had they been called to testify.

thefts, robberies, and drug dealing throughout the neighborhood. (C. 300.)

Woodward further alleged that these witnesses would have testified that Estelle was an alcoholic who had an "open door policy" for everyone and that her house was always full of people -- including relatives, friends, neighbors, drug dealers, and even homeless people -- who were always drinking, using drugs, and playing card games that often ended in fights and violence. (C. 304.) According to Woodward, these witnesses also would have testified that his uncle, Dwayne Ward ("Dwayne"), was a severe drug addict prone to violence and other criminal conduct that Woodward witnessed when he lived in Detroit. Woodward alleged that Dwayne committed thefts and robberies to support his drug habit and that he overdosed on heroin one time, which Woodward witnessed, and had to be taken to the hospital. Woodward also alleged that Dwayne often stole money from Estelle to buy heroin and that when she began locking her purse in a suitcase to prevent the thefts, Dwayne began physically assaulting her whenever she refused to give him money. Woodward often witnessed these assaults. Woodward also witnessed Estelle "body slam" Dwayne one time and then kick and punch Dwayne when he was on the ground. Woodward also described in his petition additional violent incidents involving Dwayne that he witnessed as a child: Dwayne stabbed Arthur Gordon, Estelle's boyfriend, and Gordon then shot at Dwayne; Dwayne physically attacked his girlfriend and when Wanda attempted to stop the attack, Dwayne tried to hit Wanda, missed, and hit Woodward's sister in the face; and Dwayne beat

Estelle with a baseball bat. Woodward also alleged that Dwayne once beat him in the head with a belt as punishment for playing in a nearby abandoned house.

In its order, the circuit court found that, even had the additional mitigating evidence Woodward pleaded in his petition been presented at trial, it would not have altered the balance of aggravating and mitigating circumstances because it was "merely cumulative" to the mitigating evidence presented at trial. (C. 1360.) The court explained: "In the penalty phase, the Court heard at length allegations concerning the father's abuse, how he sold drugs and was imprisoned for it, and how the mother had to flee to Detroit to protect herself and his children. The existence of more allegations of abuse and drugs in Detroit does not change the balance of the equation." (C. 1360-61.) On appeal, Woodward argues that the circuit court's finding employs an "unacceptably broad" definition of cumulative evidence that fails to take into account "the depth and quality of the new evidence." (Woodward's brief, pp. 35-37.) Specifically, Woodward argues that he "was exposed to a far greater degree of verbal and physical abuse, and emotional trauma, than trial counsel presented at the penalty phase" (Woodward's brief, p. 69), and that "[a]lthough the new evidence relates to the theme that [he] suffered violence and abuse as a child, it is not 'merely' cumulative [because] it paints Woodward's life in a far grimmer light than was presented at trial." (Woodward's brief, p. 72.)[25]

---

[25] Woodward also argues that the circuit judge erroneously based his finding on "the improper conclusion that [the new] evidence

Although we do not necessarily agree with the circuit court's finding that the additional mitigating evidence was "merely cumulative" to the evidence presented at trial, we nonetheless agree with the court's ultimate conclusion that the additional mitigating evidence would not have altered the balance of aggravating and mitigating circumstances in this case.

We have carefully examined the evidence presented at trial, the evidence presented at the sentencing hearing, and the evidence pleaded in Woodward's petition. There were two strong aggravating circumstances in this case and the mitigating evidence presented at trial was, as the trial court found in its sentencing order, "not very persuasive," especially in light of the additional evidence before the trial court at the sentencing hearing. (RDA, C. 1002.) The additional mitigating evidence pleaded in Woodward's petition was similar in kind to that presented at trial but was substantially more detailed and, as Woodward argues, painted Woodward's upbringing in a grimmer light. However, the additional mitigating evidence was confined to only two years in Woodward's life when he lived in Detroit and involved his experiences as a young child. At the time of the capital offense, Woodward was 33 years old. This Court has recognized that "[e]vidence of a difficult childhood has been characterized as a 'double-edged' sword," Davis v. State, 44 So. 3d 1118, 1141 (Ala. Crim. App. 2009), and that the "mitigation value" of a difficult childhood is highly questionable when the defendant is an adult. Washington v. State,

---

would not change his mind." (Woodward's brief, p. 73.) We rejected this argument in Part III.C. of this opinion, supra.

95 So. 3d 26, 45 (Ala. Crim. App. 2012). Indeed, "[w]hen a defendant is several decades removed from the abuse being offered as mitigation evidence its value is minimal." Callahan v. Campbell, 427 F.3d 897, 937 (11th Cir. 2005). See also Bolender v. Singletary, 16 F.3d 1547, 1561 (11th Cir. 1994) ("Given the details of this case, including among other things the fact that Bolender was twenty-seven years old at the time of the murders, 'evidence of a deprived and abusive childhood is entitled to little, if any mitigating weight" when compared to the aggravating factors.").

We have reweighed the evidence in aggravation against the totality of the evidence in mitigation, both that presented at trial and that pleaded in Woodward's petition, and we have no trouble concluding that the additional mitigating evidence would not have altered the balance of aggravating circumstances and mitigating circumstances in this case. This is so even assuming that the additional mitigating evidence would have swayed more, or even all, of the jurors to vote for life imprisonment without the possibility of parole. In light of the strength of the two aggravating circumstances and the relative weakness of the totality of the mitigating evidence, the additional weight to be afforded a unanimous jury recommendation of life imprisonment without the possibility of parole would not have altered the balance of aggravating and mitigating circumstances.

Therefore, trial counsel were not ineffective for not presenting evidence regarding Woodward's childhood experiences in Detroit, and summary dismissal of this claim of ineffective assistance of counsel was proper.

3.

Woodward further alleged in his petition that his trial counsel were ineffective for not calling a mitigation expert to testify at the penalty phase of the trial in order to provide the jury with "a coherent personal and social history" (C. 313), and to explain to the jury that Woodward "experienced many risk factors for violent criminal behavior at vulnerable periods in his life."[26] (C. 314.) Woodward alleged that counsel should have presented testimony from either the mitigation expert that counsel had retained to conduct the mitigation investigation, or another mitigation expert such as Lori James-Townes who, Woodward said, would have been available at the time of his trial. According to Woodward, had counsel presented testimony from an expert to provide a coherent theory of mitigation and to enlighten the jury about his risk factors for violent criminal conduct, "it is reasonably likely that the jury would have returned a unanimous

---

[26] Woodward listed the following 13 risk factors in his petition: (1) "being suddenly moved from Alabama to Detroit, and back again, multiple times"; (2) "being separated from each of his parents at critical developmental stages of his life"; (3) "witnessing domestic violence against his mother"; (4) "suffering parental abuse, both mental and physical"; (5) "sudden poverty, when his father was arrested and incarcerated"; (6) "being kicked out of the home, and rendered homeless, at only fourteen years old"; (7) "dropping out of school as a result of being rendered homeless"; (8) "exposure to alcohol and substance abuse while living in Detroit"; (9) "exposure to violence in the home while living in Detroit"; (10) "the murder of a friend and mentor"; (11) "criminal history of paternal family members"; (12) "his father's potential personality disorder"; and (13) "his father's family history." (C. 315.)

verdict for life without parole" and, in turn, that "the Court would have weighed mitigating factors more heavily than the aggravating factors, and would not have overridden the jury's recommendation of life without parole." (C. 316.)

The circuit court did not specifically address this claim in its order, and Woodward argues on appeal that he sufficiently pleaded this claim and that, therefore, he was entitled to an evidentiary hearing. We disagree.

To the extent that Woodward alleged that his counsel should have elicited testimony from an expert to provide a "coherent" theory in mitigation, as this Court recognized in Saunders v. State, [Ms. CR-13-1064, December 16, 2016] ___ So. 3d ___ (Ala. Crim. App. 2016):

> '"'[C]ounsel's method of presenting mitigation ... [is] clearly trial strategy." Hertz v. State, 941 So. 2d 1031, 1044 (Fla. 2006). See also People v. Ratliff, 41 Cal.3d 675, 697, 224 Cal.Rptr. 705, 715 P.2d 665, 678 (1986) ("[T]he manner of presenting evidence [is] one of trial tactics properly vested in counsel."). "[T]he presentation of mitigating evidence is a matter of trial strategy." State v. Keith, 79 Ohio St.3d 514, 530, 684 N.E.2d 47, 63 (1997). "Matters of trial tactics and trial strategy are rarely interfered with or second-guessed on appeal." Arthur v. State, 711 So. 2d 1031, 1089 (Ala. Crim. App. 1996), aff'd, 711 So. 2d 1097 (Ala. 1997).'

> "Clark v. State, 196 So. 3d 285, 315–16 (Ala. Crim. App. 2015). 'Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions.' Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000)."

___ So. 3d at ___. Woodward failed to allege sufficiently specific facts in his petition indicating why he believed his counsel's presentation of mitigating evidence was "incoherent," or what an expert could have testified to that would have made the mitigation presentation more "coherent." The only factual allegations Woodward included in his petition in this regard were that James-Townes believed that "the way the mitigation evidence was presented, was incomplete, poorly developed and presented, and lacked a coherent explanation or expert guidance as to its significance" (C. 314), and that a mitigation expert such as James-Townes "could have woven the facts together to tell a compelling story to provide meaning to [Woodward's] experiences, and to make a case for life." (C. 313.) Such bare and conclusory allegations are not sufficient to satisfy the burden of pleading.

To the extent that Woodward alleged that his counsel should have presented expert testimony about risk factors in his life, although Woodward identified those risk factors in his petition, his allegations regarding what testimony an expert could have presented were broad and conclusory. Woodward alleged that an expert could have testified that risk factors such as the ones in Woodward's life impair a person's "ability to cope or bounce back with resilience"

and render a person "unable to manage crises and conflicts in life" (C. 316); that "certain risk factors, such as poverty, parental abuse, and exposure to violence, make it much more likely that a person will engage in violent criminal behavior" (C. 315); that the "confluence of risk factors in Mr. Woodward's background dramatically increased the risk that he would engage in violent criminal conduct" (C. 316); and "that the numerous risk factors in Mario Woodward's life overwhelmed him and left him impaired and exceptionally vulnerable to engage in violent acts." (C. 316.) Woodward alleged no other facts in this regard.

Moreover, as pleaded, Woodward's claim appears to be that counsel should have presented expert testimony that he was prone to violent criminal conduct. Such testimony, however, clearly presents a double-edged sword. Although it may have provided a mitigating factor for the jury to consider, it also may have alienated the jury because it undoubtedly would have established that Woodward was a violent and dangerous person. Testimony that the defendant is a violent and dangerous person, especially from an expert, offers little reason to lessen a sentence, and this Court has held that "'[a]n ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword.'" Washington v. State, 95 So. 3d 26, 53 (Ala. Crim. App. 2012) (quoting Reed v. State, 875 So. 2d 415, 437 (Fla. 2004)).

For these reasons, summary dismissal of this claim of ineffective assistance of counsel was proper.

4.

Finally, Woodward alleged in his petition that his counsel should have presented evidence at the sentencing hearing to rebut some of the evidence introduced by the State. Woodward raised two claims in this regard in his petition. The circuit court did not specifically address either claim, and Woodward argues on appeal that the claims were sufficiently pleaded and that the circuit court erred in dismissing the claims without specifying the reasons for the dismissal. We disagree.

At the sentencing hearing, the State introduced into evidence recordings and transcripts of telephone calls that Woodward made to his father, Mark Woodward, while he was in jail awaiting trial. During one of the conversations, Mark expressed shock and dismay at the allegations of verbal and physical abuse against him that were made by Woodward's mother and sister. In response, Woodward said that his mother and sister were "crazy" and were "liable to say anything." (RDA, C. 1265-66.) The State argued that the conversation indicated that testimony about Woodward's abusive childhood was nothing more than "a plot to come in front of the jury to try to get on their sympathy to recommend life without parole" and that, therefore, the trial court should give little weight to Woodward's allegedly abusive childhood as a mitigating circumstance. (RDA, R. 1773.)

Woodward alleged in his petition that his counsel should have called to testify a domestic-abuse expert to rebut the inference from the telephone call that the testimony about his abusive childhood was fabricated.

According to Woodward, a domestic-abuse expert could have testified "that in an abusive relationship, the abuser often continues to control the abused person even after it appears the abuse has ended," that "Mark Woodward may have still been controlling Mr. Woodward's behavior," and that "it would be expected that Mr. Woodward would defend his abuser, and continue to try and please him." (C. 319.) Woodward alleged that either the mitigation expert that counsel had retained, or that expert's assistant, "could have filled" the role of a domestic-abuse expert. (C. 319.) However, Woodward failed to allege sufficiently specific facts in his petition regarding the qualifications of counsel's mitigation expert, or that expert's assistant, to testify as a domestic-abuse expert. In addition, Woodward's allegation is based on speculation that Mark "may have" been controlling Woodward some 20 years after the alleged abuse had ended and Woodward made only a bare allegation that "[d]efense counsel's failure to present such evidence prejudiced Mr. Woodward," without alleging any specific facts regarding how he was prejudiced. (C. 319.) "'It is well established that, in a claim of ineffective assistance of counsel, "[m]ere conjecture and speculation are not enough to support a showing of prejudice."'" McMillan v. State, [Ms. CR-14-0935, August 11, 2017] ___ So. 3d ___, ___ (Ala. Crim. App. 2017) (quoting Elsey v. Commissioner of Corr., 126 Conn.App. 144, 166, 10 A.3d 578, 593 (2011)) (additional citations omitted). Moreover, "[a] bare allegation that prejudice occurred without specific facts indicating how the petitioner was prejudiced is not sufficient" to satisfy the burden of pleading. Hyde v. State, 950 So. 2d 344, 356 (Ala. Crim. App. 2006). Therefore, this claim was not pleaded with

sufficient specificity to satisfy the requirements in Rule 32.3 and Rule 32.6(b).

As noted above, the State also presented evidence at the sentencing hearing indicating that Woodward had not filed an income-tax return in Alabama between 1996 and 2006 and there were no records indicating that he had any taxable income during that time; that Woodward had never been ordered to pay child support for his children; and that Woodward was not listed as the father on the birth certificates of two of his children. In addition, the State presented evidence that Woodward had an extensive criminal history involving guns and drugs, including a conviction for possession of marijuana in 1998, the same year his first child was born, and that when Woodward's apartment was searched after his arrest, police found over 100 grams of cocaine in a dresser drawer. Finally, the State introduced into evidence recordings and transcripts of telephone calls Woodward made to a friend and to his half-brother, who was a teenager at the time, while Woodward was in jail awaiting trial. During the conversation with his brother, Woodward advised his brother to stay out of trouble and advised his brother on how to pick up a girl. During the conversation with his friend, Woodward made statements indicating that he was still involved in dealing drugs, even while in jail. The State argued that all of this evidence rebutted any evidence presented at the penalty of the trial indicating that Woodward was a good father and role model for his children and, in fact, established that Woodward was a bad role model and that, although he "threw money" at his children and their mothers "to keep them happy," he never provided a home or paid

child support for his children, and "[n]ot once in his entire life did he show them the right way to do things." (RDA, R. 1768-69.) The State urged the trial court to give little weight to the mitigating circumstance asserted by Woodward that he was a good father who loved and provided for his children.

Woodward alleged in his petition that his counsel should have introduced into evidence the telephone calls he made to his children while he was in jail awaiting trial in order to show that he was very involved in his children's lives and continued to be after his incarceration and that he is, in fact, "exerting a positive influence on their lives." (C. 321.) Woodward alleged that, in these calls, he and his children expressed their love for one another, and he expressed his pride for his children when they made the honor roll in school or when they passed to the next grade in school. Woodward alleged that the calls would have shown his "humanity and his place in the human community" and would have allowed the trial court to hear him "in a natural setting" and to see him as a human being. (C. 321.) Woodward also alleged that his counsel should have introduced into evidence the visitor logs from the jail to show that his children visited him on several occasions and to establish his love for, and dedication to, his children. According to Woodward, "[h]ad defense counsel presented this powerful mitigation evidence, there is a reasonable probability that this Court would not have overridden the jury's ... advisory verdict of life imprisonment without parole." (C. 322.)

Once again, Woodward made only a bare allegation of prejudice without any specific facts indicating how he was prejudiced; that allegation was not sufficient to satisfy his burden of pleading. Moreover, we disagree with Woodward's characterization of this evidence as "powerful" and his allegation that this evidence would have refuted the State's evidence that he had not been a good provider and role model for his children. Although the content of the telephone calls, as pleaded by Woodward in his petition, would show that Woodward and his children discussed how the children were doing in school and would show how Woodward interacted with his children, the calls would not actually refute any of the evidence presented by the State at the sentencing hearing. The fact that Woodward loved his children and they loved him was not disputed by the State and, indeed, counsel presented truly powerful evidence of this fact by calling three of Woodward's young children to testify at the penalty phase of the trial. The State disputed only whether Woodward was a good role mode for his children and properly provided for them. The fact that Woodward spoke with his children on the telephone about their grades would not refute evidence that Woodward was never ordered to pay child support, that there was no record of his ever being legitimately employed, and that he had an extensive criminal history.[27] As the trial court noted in its sentencing

---

[27] Moreover, if the shockingly abusive and obscene language Woodward used during this telephone calls with his friend, his father, and his younger half-brother are any indication of his manner of speaking in a "natural setting," the calls would have

order: "If actions do, indeed, speak louder than words, then [Woodward] made a very poor parenting role model." (RDA, R. 1002.) Thus, even if this claim were sufficiently pleaded, we would have no trouble concluding that the presentation of this additional evidence about Woodward's relationship with his children would not have altered the balance of aggravating and mitigating circumstances in this case.

Woodward's claims that his trial counsel were ineffective for not presenting certain evidence at the sentencing hearing were insufficiently pleaded and/or without merit. Therefore, summary dismissal of these claims was proper.

V.

Finally, Woodward contends that the trial court's override of the jury's recommendation of life imprisonment without the possibility of parole was unconstitutional under the United States Supreme Court's opinions in Hurst v. Florida, 577 U.S. ___, 136 S.Ct. 616 (2016), and Ring v. Arizona, 536 U.S. 584 (2002). (Issue VIII in Woodward's brief.) Woodward did not raise this claim in his original petition or in his amended petition. In the amendment to his amended petition, Woodward alleged that "the combination of judicial override at trial and the assignment of this Rule 32 case to the trial judge results in an unfair process and violates Mr. Woodward's constitutional rights." (C. 1347.) However, it does not appear that Woodward ever directly challenged in the circuit court

---

supported, not refuted, the State's argument that Woodward was not a good role model for his children.

the constitutionality of the trial court's override. It is well settled that "[a]n appellant cannot raise an issue on appeal from the denial of a Rule 32 petition which was not raised in the Rule 32 petition." Arrington v. State, 716 So. 2d 237, 239 (Ala. Crim. App. 1997).

Moreover, even had this issue been properly raised and preserved in the circuit court, Woodward is not entitled to relief. Woodward raised this claim under Ring on direct appeal. See Woodward, 123 So. 3d at 1053-55. Therefore, it is precluded by Rule 32.2(a)(4), Ala. R. Crim. P. See Lee v. State, [Ms. CR-15-1415, February 10, 2017] ___ So. 3d ___, ___ (Ala. Crim. App. 2017). Moreover, this Court has held: (1) that the United States Supreme Court's opinion in Hurst does not apply retroactively on collateral review, see Reeves v. State, 226 So. 3d 711, 756-57 (Ala. Crim. App. 2016), and (2) that neither Hurst nor Ring rendered Alabama's former capital-sentencing scheme, including judicial override, unconstitutional. See State v. Billups, 223 So. 3d 954 (Ala. Crim. App. 2016), and Eatmon v. State, 992 So. 2d 64 (Ala. Crim. App. 2007). See also Ex parte Bohannon, 222 So. 3d 525 (Ala. 2016), and Ex parte Waldrop, 859 So. 2d 1181 (Ala. 2002).

We note that Woodward argues that, although the Alabama Supreme Court has upheld the facial constitutionality of Alabama's former judicial-override procedure, that procedure is nonetheless unconstitutional as applied to him because, he says, the trial court imposed the death sentence in his case based on facts not heard by the jury and, according to Woodward, the United States Supreme Court "held in Hurst that Ring requires courts to base death

sentences 'on a jury's verdict, not a judge's factfinding.'" (Woodward's brief, p. 99, quoting Hurst, 577 U.S. at ___, 136 S.Ct. at 624.) However, in Billups, supra, this Court specifically rejected this overly broad reading of Hurst, noting that "[t]he Court in Hurst ... 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." 223 So. 3d at 962. In addition, as this Court explained in rejecting Woodward's Ring claim on direct appeal:

> "The jury unanimously found the existence of two aggravating circumstances -- that Woodward had previously been convicted of a violent felony, § 13A–5–49(2), Ala. Code 1975, and that Woodward committed the capital murder to disrupt or hinder the lawful exercise of a governmental function or the enforcement of laws, § 13A–5–49(7), Ala. Code 1975. Only one aggravating circumstance must exist in order to impose a sentence of death, § 13A–5–45(f), Ala. Code 1975, and a jury's finding of just one aggravating circumstance complies with the requirement in Ring that a jury make a factual determination that makes a defendant eligible for the death penalty. Ex parte Waldrop, 859 So.2d at 1188–90. The process of weighing the aggravating and mitigating circumstances was for the sentencer, the trial court, to perform."

Woodward, 123 So. 2d at 1055. The trial court's override of the jury's sentencing recommendation and its imposition of death was not unconstitutional.

VI.

Based on the foregoing, the judgment of the circuit court summarily dismissing in part and denying in part Woodward's Rule 32 petition is affirmed.

AFFIRMED.

Windom, P.J., and Welch and Burke, JJ., concur. Joiner, J., concurs in the result.

APPENDIX D

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

Case No.: CC-2007-1388.60

[Filed October 9, 2015]

STATE OF ALABAMA	)
	)
V.	)
	)
MARIO DION WOODWARD	)
Defendant.	)
	)

ORDER

Woodward filed a Rule 32 petition, the State moved to dismiss, and a hearing on the motion was held on September 24, 2015. Defendant and his entourage of attorneys were present. The facts have been laid out previously and will not be repeated herein. Both sides favored the Court with excellent briefs and arguments.

Woodward's first allegation is that actual evidence of his innocence exists. He alleges that a biometrics expert, named Schenk[1], could examine the video of the shooting and, based on the image of the shooter's

[1] The Court notes with some bemusement that Schenk is touted by Woodward as not only a biometrics expert but also a radio frequency engineer, infra.

forearm and on the known proportions of the vehicle, derive a measurement of the shooter's wrist and forearm. According to Schenk, this measurement of the shooter's wrist and forearm is inconsistent with Woodward's actual measurements.

The main obstacle to going forward on this claim is that this is not new evidence as Woodward claims. The video, the vehicle's dimensions, and certainly Woodward's physical characteristics were readily available to Woodward from the outset of the prosecution. Rule 32.1(e) ARCrP. Furthermore, the Court has doubts as to the reliability of the evidence. The most glaring deficiency, as candidly noted by Woodward, is that the measurements of Woodward's forearm and wrist were taken approximately eight years after the murder shown in the video, and long after Woodward had been incarcerated. His physical characteristics have changed.

Woodward also casts this biometrics claim as one of ineffective assistance of counsel. The Court cannot agree that all reasonable attorneys would have employed such an expert; the existence of biometrics was unknown to this Court prior to this petition being filed. Finally, even if Mr. Schenk were a Nobel laureate, the evidence of Woodward's guilt was so overwhelming that Mr. Schenk's conclusions, even had they been made contemporaneous with the shooting, would not have changed the outcome.

Woodward's next contention is that defense counsel was ineffective for not more fully supporting the change of venue motion. Specifically, Woodward asserts that counsel could have presented evidence of

commentary (presumably on the internet) by Montgomery residents demonstrating the inflamed passions of the community. The burden of pleading on a Rule 32 petition is a very heavy one and the petition must clearly disclose the facts relied upon. This claim is not specifically pleaded. There is no specific allegation of additional facts that should have been presented to the Court. There is no allegation that the media coverage was biased, inaccurate, inflammatory, or prejudicial. The only reporting of which the Court is aware was factual; Officer Houts was murdered and Woodward stood accused.

Woodward also states that his attorneys should have filed a motion in limine as to his comment upon arrest that "I didn't shoot anybody". This contention fails for the simple explanation that said motion would not have been granted, particularly pre-trial. The statement was clearly relevant. Woodward also argues that defense counsel should have mitigated the impact of his statement by listing Tiffany McCord as a witness.[2] Woodward alleges that she would have testified that they had discussed his turning himself into police. It is curious that a man planning to turn himself into the police flees to Birmingham and then onward to Atlanta, even further from Montgomery. Perhaps he is geographically challenged. Regardless, this issue is a tempest in a teapot. If the statement could be explained, or if the statement had never come into evidence, the result does not change in light of the massive evidence amassed against Woodward, not the

[2] The issue of McCord's non-testimony was addressed at length on direct appeal.

least of which was the confession he made to three witnesses, all of them his friends.

Woodward alleges that a massive police presence poisoned the trial atmosphere. While there were several deputies present due to their obligation to provide court security, there is no allegation as to the number of Montgomery Police Department officers present and how many were in uniform. The Court was attuned to the potential problem that a massive police presence could have and checked to insure that no action needed to be taken in that regard. No overwhelming police presence was noted at any time and certainly did not impact any decision by the Court.

Woodward protests that there was an inadequate pre-trial investigation by defense counsel. He fails to allege specifically what a more thorough investigation would have uncovered noting only that the "circumstantial evidence in the record ... should have sparked a vigorous investigation of Mr. Woodward's account of what took place that day". ¶ 160 of the amended petition. Initially, the Court would point out that since Woodward declined to testify at any point in the proceedings, his account remains a mystery to all who must pass judgment on these proceedings. As noted by Woodward's current counsel; the evidence referenced is contained in the record and was known to Woodward's trial counsel. The non-evidence cited (coerced confessions and corruption) qualifies, at best, as unsupported innuendo and rank hearsay.

The next contention Woodward raises concerns evidence related to cell towers. He argues that the maps of cell towers introduced into evidence were

testimonial in nature and that he was unable to confront the witnesses who made the maps. He further asserts that the State's witnesses on this issue were not lay witnesses but experts. These contentions were soundly refuted by the appellate court on direct appeal.

Lastly, on the cell tower issue, Woodward maintains that the aforementioned Schenk could have testified as a radio frequency expert and opined that due to certain variables, knowing which cell tower received a call only allows for a conclusion that the caller was in an area approximately twenty miles from the tower. No witness testified to the contrary. The testimony at trial established that if a signal went to a particular tower, more likely than not, the caller was near the tower. However, call volumes, buildings, mountains, etc., could cause the signal to be forwarded to another nearby tower. Accordingly, Schenk's proposed testimony was cumulative to the actual testimony.

The final issue that Woodward asserts is the ineffectiveness of counsel during the penalty phase of the trial. Woodward first argues that a continuance should have been sought because his mitigation experts did not have adequate time to complete an investigation. It would not have been granted.

The remaining allegations of ineffectiveness can be summed up as the failure of the trial defense team to further investigate Woodward's history for mitigation purposes, particularly two years spent in Detroit.

Such an investigation may have shown that Woodward's father was mentally ill and that Woodward was exposed to drugs and violence when he

lived in Detroit. Again, such evidence is merely cumulative. In the penalty phase, the Court heard at length allegations concerning the father's abuse, how he sold drugs and was imprisoned for it, and how the mother had to flee to Detroit to protect herself and his children. The existence of more allegations of abuse and drugs in Detroit does not change the balance of the equation.

The bottom line is this. Two veteran criminal attorneys with significant death-penalty trial experience represented Woodward. The evidence of Woodward's guilt for the murder of Keith Houts was overwhelming, far exceeding any reasonable doubt. He was found guilty. No other attorney could have changed this result.

In the penalty phase, proving once again that no good deed goes unpunished, the attorneys were able to persuade the majority of the jury to recommend life without parole. The Court has already written as to its thoughts about the recommendation and the reasons therefore. However, for current purposes, the Court would note that trial counsel achieved an unexpectedly (to this observer) favorable result during the penalty phase, proving the effectiveness of their strategy and their execution of that strategy.

At the end of the day, under Alabama law, the decision of life versus death comes down to the trial judge. The trial judge is charged with weighing the aggravating and mitigating factors. Nothing Woodward has contended would change the final result. He proved not a single statutory mitigating factor. The jury recommendation is the only persuasive factor in his

favor. To come before the Court, at this juncture, and offer up the promise of more testimony concerning Woodward's upbringing is simply unavailing. It cannot outweigh the harsh truth that Mario Woodward has killed two people.

Lastly, Woodward has raised a Batson objection. Frankly, the Court is unsure of whether Woodward has made out a prima facie case. The State asserts that this claim is due to be dismissed because Woodward failed to assert that his trial attorneys' failure to raise a Batson objection was not a strategic decision. In fact, Woodward did so allege. ¶ 56 of the amended petition. Accordingly, an evidentiary hearing will be conducted on Batson issues. Counsel for Woodward are requested to call the Court's office and arrange a time for this hearing.

DONE this 9th day of October, 2015.

/s/ **TRUMAN M HOBBS**
CIRCUIT JUDGE