No. 23-6776
CAPITAL CASE

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT SHAWN INGRAM,
Petitioner,
v.
WARDEN,
HOLMAN CORRECTIONAL FACILITY,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S APPENDIX
VOLUME 1 of 1

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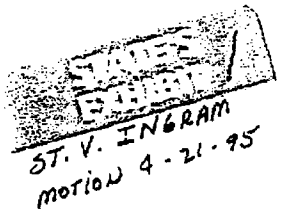
APPENDIX A

Colloquy concerning Ingram's refusal to comply with terms of his plea deal

step down. Go back to where you were. Ladies and gentlemen, it's going to be necessary that we be in recess until 1:00 p.m. While you are on recess do not discuss this case with anyone or let anybody discuss it with you or in your presence, and do not try to make up your mind about this case. Do not read any newspaper accounts or listen to any radio or watch any TV accounts. You can go with Mr. Dison at this time.



(COURT ADJOURNED FOR NOON RECESS)

FOLLOWING NOON RECESS COURT RECONVENED WITH THE DEFENDANT AND IS COUNSEL PRESENT IN OPEN COURT WHEREUPON THE FOLLOWING PROCEEDINGS WERE HAD OUTSIDE THE PRESENCE AND HEARING OF THE JURY:

THE COURT: You want to put something on?

MR. GIBBS: Yes, sir. We had an agreement, and in talking to him he is refusing to testify, so we need to do for him what we did this morning. That's Mr. Ingram.

THE COURT: Who is his lawyer?

MR. GIBBS: Mark and Jeb. We'll mark this Exhibit B. The other one was A.

COURT REPORTER: And this is Ingram?

THE COURT: Stand right there, please.

(CO-DEFENDANT, ROBERT SHAWN INGRAM, APPROACHES THE BENCH WITH HIS COUNSEL)

THE COURT: All right the State wanted to put something on the record?

MR. GIBBS: Yes, sir, Your Honor. This is something akin to what we did this morning. The State had previously in the trial of this case entered into an agreement with Robert Shawn Ingram, and I have a copy of that written agreement which is marked as State's Exhibit B for the motion, Your Honor. In that agreement Mr. Ingram agreed to testify and cooperate fully with the State and give a statement, and he did in fact give a statement admitting his participation in the kidnapping and murder of Gregory Hughley. In

return for his cooperation and truthful testimony the Defendant was to receive -- be allowed to plead guilty to the lesser included offense of Murder, and the agreement was that the State would recommend a sentence of life imprisonment. This morning and earlier this afternoon our office met with Mr. Ingram, and he had an opportunity to discuss the case with Mr. Nelson, and I believe Mr. Fannin as well, both of his attorneys. We have been informed by them by Mr. Ingram that he is not going to testify, will not testify pursuant to the agreement; and I believe that puts us in the same position we were as to the other witness, Your Honor. The agreement has been breached. I think we need to get the fact that Mr. Ingram is not going to testify on the record, and also I think Your Honor should advise him of the consequences. I know that Mr. Nelson and Mr. Fannin have done that. I think it might be helpful for the Court to do that as well, as you did this morning.

MR. RUMSEY: And further along that line -- I think there was a confession relative to that agreement also. You may have mentioned it.

MR. GIBBS: Oh, yes, sir. Pursuant to the agreement we had -- we now have a confession from Mr. Ingram. Again pursuant to the terms of the agreement he entered into with the State. After he has breached it, it will be used against him in any subsequent capital murder trial.

THE COURT: Do you want to say something for the record, Counsel?

MR. NELSON: Your Honor, Mr. Fannin and myself did talk with Shawn this morning, and we went over all the options and all the possible punishments; and I believe he understands them. He told us he did, and I feel he does, and he did tell us that he did not wish to testify.

THE COURT: Okay. I just want to ask a few questions relative to this document to make sure that there's no question in the record or henceforth about it. And your name is Robert Shawn Ingram, I believe?

DEFENDANT, INGRAM: Yes, sir.

THE COURT: This document that has been marked State's Exhibit B, this purports to be an agreement that you signed back on July 31,

1993. You remember signing that Mr. Ingram?

DEFENDANT, INGRAM: Yes, sir.

THE COURT: And I believe Mr. Surrett was present, and he witnessed it and also Mr. McBurnett with the Sheriff's Department was there.

DEFENDANT, INGRAM: Yes, sir.

THE COURT: Do you understand, and I am going to simplify this basically, that the State of Alabama has offered to allow you to plead to the charge of Murder, regular Murder, relative to the death of Mr. Hughley, if you complied with the agreement as set out in this document.

DEFENDANT, INGRAM: Yes, sir. I understand.

THE COURT: You understood that.

DEFENDANT, INGRAM: Uh-huh.

THE COURT: And at that time you made an agreement with the State of Alabama.

DEFENDANT, INGRAM: Yes, sir.

THE COURT: But now you are telling the Court that you desire to exercise your right to not testify and remain silent?

DEFENDANT, INGRAM: Yes, sir, I

do.

THE COURT: Okay, now let me ask you this. I am pretty sure your lawyer has explained this to you. Regular Murder charge would bring on maximum sentence of not more than life in the penitentiary to which could be added a fine of up to $20,000.00. That's a sentence with the possibility of parole which means that you could get parole in the future under the law provided you met certain categories and requirements. You understand that?

DEFENDANT, INGRAM: Yes, I understand.

THE COURT: Now the charge for which you are charged with by the Grand Jury of this county is a Capital Murder charge, and do you understand that if you are convicted of that charge that there is only two possible things that could happen to you relative to your punishment. One would be a sentence of life in prison without the possibility of parole which means you never get out. Be there the rest of your life. Or, the possibility of being sentenced to the electric chair

of the state of Alabama for punishment. Do you understand that?

DEFENDANT, INGRAM: Yes, sir.

THE COURT: Do you understand if you don't comply with the terms of this agreement that the State of Alabama is saying that they are going to prosecute you for Capital Murder?

DEFENDANT, INGRAM: Yes, sir.

THE COURT: And you also understand that your punishment could ultimately be death in the case for which you are charged --

DEFENDANT, INGRAM: Yes, sir, I understand.

THE COURT: Dependent upon the conviction by the jury and the recommendation and the Judge's order. You understand that?

DEFENDANT, INGRAM: Yes, sir.

THE COURT: Do you understand that you are deciding your fate relative to some extent relative to this case by what you are doing today?

DEFENDANT, INGRAM: Yes, sir, I do.

THE COURT: Now I am not saying

that you will be convicted of Capital Murder or anything like that. I'm saying what your penalty would be, but it's got to be one of those two things if you are convicted of Capital Murder, life imprisonment without the benefit of parole or death. You understand that?

DEFENDANT, INGRAM: Yes, sir.

THE COURT: And it is your desire of your own free will that you don't want to testify in this case, and you want to breach the agreement which you had entered into with the State of Alabama which is State's Exhibit B?

DEFENDANT, INGRAM: Yes, sir, I do.

THE COURT: Okay. This is your last chance now. You understand that?

DEFENDANT, INGRAM: Yes, I understand.

THE COURT: When you leave here it's my understanding the State of Alabama is considering this to be a breach of the agreement, and that they will proceed to prosecute you, and they will use or attempt to use these confessions that have been, that you've given in the case and

along with any other statements that may be pertinent in the case. You understand that?

DEFENDANT, INGRAM: Yes, sir, I understand.

THE COURT: Okay. I think it's pretty clear to the Court that he desires to exercise his right to remain silent, and he can go back to the facility now.

Who is the next witness for the State?

MR. RUMSEY: They are getting her.

MS. SABRINA MACK:

AFTER BEING FIRST DULY SWORN TO TELL THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH SO HELP HER GOD, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION BY MR. RUMSEY:

Q State your name for the ladies and gentlemen.

A Sabrina Mack.

Q And, Ms. Mack, where do you live?

A 1308 White Avenue.

Q And where is that? In Anniston?

STATE OF ALABAMA)
: AGREEMENT
TALLADEGA COUNTY)

This agreement entered into on this the 15th day of R.S.I. September, 1993, on behalf of the District Attorney's office and ROBERT SHAWN INGRAM.

There is presently being conducted an investigation in a Kidnapping Murder which took place in Munford, Alabama, on July 31, 1993, and the evidence shows that ROBERT SHAWN INGRAM was a participant in said crime.

It is agreed by the State of Alabama that if ROBERT SHAWN INGRAM meets the conditions hereinafter enumerated, and on a plea of guilt to the lesser charge of Murder of Gregory Huguley, the State of Alabama will recommend a life sentence.

In return for the recommendation heretofore enumerated by the State of Alabama, ROBERT SHAWN INGRAM agrees to perform the following conditions which are conditions precedent to this agreement being enforced against the State of alabama.

1. That ROBERT SHAWN INGRAM agrees to give a truthful sworn statement today concerning his involvement and his knowledge of the aforesaid crimes which

[redacted]

STATE'S EXHIBIT
ST. V. INGRAM
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occurred in Talladega County during July of 1993, including but not limited to the participants in said crime and certifies that the statement is true and correct.

2. That ROBERT SHAWN INGRAM will testify truthfully at all hearings, proceedings, trials or re-trials and will waive any 5th or 6th Amendment rights that he may have relative to his testimony at any hearing, proceeding, trial or re-trial or post conviction proceedings in State or Federal court.

3. That ROBERT SHAWN INGRAM agrees to cooperate with the State of Alabama in the investigation of said crimes and waives any rights referred to in paragraph two.

4. That ROBERT SHAWN INGRAM at any time, with reference to paragraph one and, understands and agrees, that if he gives any false answers or omits to tell anything or omits to tell everything he knows that this agreement is null and void.

5. ROBERT SHAWN INGRAM agrees to testify pursuant to paragraphs one and two against any other persons charged in said crimes. If he refuses to testify, or if he claims any rights and does not testify or if he testifies falsely this agreement is null and void and the original charge of Kidnapping Murder of Gregory Huguley can be reinstated against him. Even if he has plead guilty and been sentenced, the charges of Kidnapping Murder can be reinstated. ROBERT SHAWN INGRAM specifically waives any double jeopardy grounds or other rights secured by the 5th and 6th Amendments by the signing of this agreement.

6. ROBERT SHAWN INGRAM CERTIFIES that Dennis E. Surrett has explained this agreement to him and he fully understands this agreement and he is entering into this agreement freely and voluntarily.

If any of the aforesaid conditions are not performed then this agreement is null and void. If after the agreement is completed and performed and then ROBERT SHAWN INGRAM violates any of the terms at any time in the future then the agreement can be rescinded by the State of Alabama and his plea of guilt and sentence to the lesser charge of Murder of Gregory Huguley can be set aside and ROBERT SHAWN INGRAM can be prosecuted on the Kidnapping Murder which happened in Munford on, to-wit: July 31, 1993.

WITNESS:

Mabel M Surrett

/s Robert Shawn Ingram
ROBERT SHAWN INGRAM

Dennis E. Surrett
DISTRICT ATTORNEY'S OFFICE

APPENDIX B

October 8, 2013, order of the Circuit Court of Talladega County

IN THE CIRCUIT COURT OF TALLADEGA COUNTY, ALABAMA

2013 OCT -9 PM 1:28
BRIAN YORK
CIRCUIT CLERK

ROBERT SHAWN INGRAM,	)	
	)	
Petitioner,	)	
	)	
v.	)	CC-1994-260.60
	)	
STATE OF ALABAMA,	)	
	)	
Respondent.	)	

ORDER SUMMARILY DISMISSING THE CLAIMS IN INGRAM'S FOURTH AMENDED RULE 32 PETITION THAT ARE PROCEDURALLY BARRED FROM REVIEW, FAIL TO STATE A VALID CLAIM FOR RELIEF, AND/OR ARE INSUFFICIENTLY PLEADED

Having thoroughly reviewed and considered Ingram's fourth amended Rule 32 petition presented to the Court, the State of Alabama's answer, the State of Alabama's motion to dismiss, all of the pleadings that have been filed during the course of Ingram's Rule 32 proceeding, and the trial record on appeal, the Court enters this **ORDER** partially dismissing Ingram's third amended Rule 32 petition. In entering this **ORDER**, this Court emphasizes that is it not dismissing all of the claims in Ingram's petition.

In a separate Order, this Court will soon schedule an evidentiary hearing at which time Ingram and the State will have the opportunity to present evidence

regarding the claims in his petition that are not dismissed by this Order.

This Court makes the following findings of fact and conclusions of law in summarily dismissing the claims in Ingram's petition that are procedurally barred from review, fail to state a valid claim for relief or present a material issue of fact or law, and/or are insufficiently pleaded, under Rule 32.7(d) of the Alabama Rules of Criminal Procedure.

THE FACTS OF THE CRIME

The allegations asserted in Ingram's Rule 32 petition must be reviewed in the context of the evidence presented during his capital murder trial. See Thomas v. State, 766 So. 2d 860, 870 (Ala. Crim. App. 1998). The Alabama Court of Criminal Appeals set forth the following facts in its opinion affirming Ingram's conviction and sentence of death:

> The State's evidence showed the following: On July 31, 1993, Ingram, along with Anthony Boyd, Moneek Marcell Ackles, and Dwinaune Quintay Cox, kidnapped Gregory Huguley, by force and at gunpoint, from a public street in Anniston, took him to a ballpark in a rural area of Talladega County, and, while he was pleading for his life, taped him to a bench, doused him with gasoline, set him on fire, and burned him to death. The state's evidence showed that

Ingram was a principal actor in the murder, wielding the gun and using force to effect the kidnapping, pouring the gasoline on Huguley, and lighting the gasoline with a match. The evidence also shows that Huguley was abducted and killed because he failed to pay $200 for crack cocaine sold to him several days before the murder. The record further shows that after Huguley had been set on fire, the conspirators stood around for approximately 20 minutes and watched him burn to death. For a more detailed recitation of the facts of this case, see Boyd v. State, 715 So.2d 825 (Ala.Cr. App.1977), aff'd, 715 So.2d 852 (Ala.), cert. denied, 525 U.S. 968, 119 S.Ct. 416, 142 L.Ed.2d 338 (1998).

Ingram did not testify at either the guilt phase or the sentencing phase before the jury. He offered no evidence in his defense at the guilt phase. At the sentencing phase before the jury, he called eight witnesses, seven of whom were relatives who offered mitigation testimony about Ingram's family life and background and who asked the court to spare his life. At the sentencing phase before the trial judge, he called no witnesses and presented no evidence; however, when asked if he had anything to say before he was sentenced, he stated: "Well, I still be ask that my life be spared. I have a daughter that I've really never got to seen, and she just turned one last Sunday; and maybe some day in the future I hope to be with her and the rest of my family." (R. 1052.)

We note at the outset that Ingram does not question the sufficiency of the evidence to support his conviction. Nevertheless, we have reviewed the record as to sufficiency, as we are required to do in a death case, and we find that the evidence presented by the state was sufficient for the jury to find him guilty beyond a reasonable doubt of the capital

> offense charged in the indictment. In the trial court's order setting out the facts summarizing the crime and addressing Ingram's participation in it, the court stated, "The evidence introduced in the four-day trial, both direct and circumstantial evidence, overwhelmingly supported the jury's verdict." We agree.

Ingram v. State, 779 So. 2d 1225, 1238-39 (Ala. Crim. App. 1999). The findings by the Court of Criminal Appeals guide the Court in its resolution of the issues presented in the fourth amended Rule 32 petition. The Court is also relying on the trial transcript and record on appeal where necessary to support the Court's findings and the resolution of the amended Rule 32 petition.

INTRODUCTION

Many of the grounds for relief in Ingram's amended Rule 32 petition fail to meet the requirements of Rule 32.6(b), Ala.R.Crim.P., and are therefore precluded from this Court's review. Rule 32.6(b) provides:

> The petition must contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure 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.

Further:

> It is well established that a [Rule 32] petition … must contain more than mere naked allegations that a constitutional right has been denied. An evidentiary hearing on a … petition is required only if the petition is "meritorious on its face." A petition is "meritorious on its face" only if it contains a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the facts relied upon (as opposed to a general statement concerning the nature and effect of those facts) sufficient to show that the petitioner is entitled to relief if those facts are true.

Alderman v. State, 647 So. 2d 28, 33 (Ala. Crim. App. 1994), cert. denied, 647 So. 2d 28 (Ala. 1994), quoting, Moore v. State, 502 So. 2d 819, 820-21 (Ala. 1986)(citations omitted); See also Ex parte Land, 775 So. 2d 847, 852-53 (Ala. 2000)(stating that "a petitioner seeking post-conviction discovery … must meet the requirements of Rule 32.6(b)").

Also, Ingram presents claims that are procedurally defaulted from this Court's review. Rule 32.2(a),Ala.R.Crim.P., provides, in relevant part:

> The petitioner will not be given relief under this rule based upon any ground:
>
> ***

(2) which was raised or addressed at trial; or

(3) which could have been but was not raised at trial …; or

(4) which was raised or addressed on appeal …; or

(5) which could have been but was not raised on appeal …

"Alabama has never recognized any exceptions to the procedural default grounds contained in Rule 32, Ala. R. Crim. P." Hooks v. State, 822 So. 2d 476, 481 (Ala. Crim. App. 2000). Moreover, the Alabama appellate courts "have repeatedly stated that the procedural bars in Rule 32 apply equally to all cases, including those in which the death penalty has been imposed." Id. See also State v. Burton, 629 So. 2d 14, 20 (Ala. Crim. App. 1993).

Rule 32.3 of the Alabama Rules of Criminal Procedure provides, in pertinent part, 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." Ala. R. Crim. P. 32.3. Likewise, Rule 32.6(b) of the Alabama Rules of Criminal Procedure provides that a

Rule 32 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." Rule 32.6(b) further provides that "a bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings."

The Alabama Court of Criminal Appeals has explained the Rule 32 petitioner's burden of pleading as follows:

> 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) (emphasis in original). Thus, Rules 32.3 and 32.6(b) require that the petition itself disclose the specific facts relied upon in seeking relief.

Rule 32.7(d) of the Alabama Rules of Criminal Procedure provides, in pertinent part, as follows:

> If the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings, the court may either dismiss the petition or grant leave to file an amended petition.

In short, Rule 32.7(d) of the Alabama Rules of Criminal Procedure provides that a court may summarily dismiss claims in a petition that are procedurally barred from review, insufficiently pleaded, and/or fail to state a claim for relief or present a material issue of fact or law. See, e.g., Daniel v. State, 86 So. 3d 405, 419 (Ala. Crim. App. 2011) ("There was no material issue of

fact or law that would have entitled Daniel to relief; therefore, this claim was correctly dismissed.").

RESOLUTION OF GROUNDS FOR RELIEF

GROUND V

THE CLAIM THAT INGRAM'S RIGHT TO A FAIR TRIAL WAS DENIED BY THE ADMISSION OF PHOTOGRAPHS OF THE CRIME SCENE AND THE VICTIM AND THE PRESENCE OF THE VICTIM'S SEVERED HANDS AT TRIAL

This claim was already summarily dismissed by this Court on May 20, 2013.

GROUND VI

THE CLAIM THAT THE TRIAL COURT'S JURY INSTRUCTION ON THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE WAS UNCONSTITUTIONALLY VAGUE AND THE CLAIM THAT THE TRIAL COURT ERRED WHEN IT FOUND THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE

This claim was already summarily dismissed by this Court on May 20, 2013.

GROUND VII

THE CLAIM THAT THE TRIAL COURT VIOLATED THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE BY ONLY FINDING ONE MITIGATING CIRCUMSTANCE AND "REFUSING" TO GIVE WEIGHT TO THE MITIGATING EVIDENCE AT THE TRIAL

This claim was already summarily dismissed by this Court on May 20, 2013.

GROUND VIII

THE CLAIM THAT INGRAM'S RIGHT TO A JURY TRIAL AND TO HAVE A JURY DETERMINE THE FACTS INCREASING THE PRESCRIBED RANGE OF PUNISHMENT UNDER APPRENDI V. NEW JERSEY, 530 U.S. 466 (2000) AND RING V. ARIZONA, 2002 WL 1357257 (JUNE 24, 2002) WAS VIOLATED

This claim was already summarily dismissed by this Court on May 20, 2013.

GROUND X

THE CLAIM THAT THE TRIAL COURT VIOLATED INGRAM'S CONSTITUTIONAL RIGHTS WHEN IT TREATED INGRAM'S CO-DEFENDANT DIFFERENTLY THAN INGRAM

This claim was already summarily dismissed by this Court on May 20, 2013.

GROUND XI

THE CLAIM THAT THE PETITIONER'S SENTENCE WAS IN VIOLATION OF THE CONSTITUTION BECAUSE THE JURORS ALLEGEDLY ENGAGED IN PREMATURE DELIBERATIONS

(a) This claim is due to be dismissed because it was not specifically pleaded. The claim is therefore dismissed summarily under Rules 32.3 and 32.6(b). The Petitioner fails to name one juror who was involved in any improper deliberations, and he also fails to state when and where these deliberations occurred. Furthermore, he has failed to plead that any specific improper deliberations actually occurred, and has failed to plead that he was prejudiced in any way. Notably, he has cited to no Alabama caselaw concerning this claim.

Therefore, pursuant to Rule 32.3, 32.6 (b), and 32.7(d), Ala.R.Crim.P., this claim is dismissed.

CONCLUSION

Ingram is not entitled to an evidentiary hearing, or relief, on those claims in the petition that are procedurally barred from review and are thus ripe to be dismissed. Ingram is furthermore not entitled to an evidentiary hearing, or relief, on those claims in the

petition which are not supported by a "full disclosure of the factual basis" for such claims as required by Rule 32.6(b), Ala.R.Crim.P. In turn, Ingram is not entitled to discovery concerning the majority of his claims which are hereby found by this Court to be procedurally defaulted and/or fail to contain a sufficient factual basis.

Thus, at this time, this Court dismisses the above cited portions of Ingram's Rule 32 Petition based on the rules of preclusion contained in Rule 32.2 (a) and based on the failure of Ingram to present the "clear and specific statement of the grounds" as required by Rule 32.6(b), Ala.R.Crim.P.; many claims in petitioner's fourth amended petition were already dismissed on these grounds per my order of May 20, 2013. Thus, only those claims both concerning ineffective assistance of counsel and found exclusively in sections/grounds I, II, III, and IV and section/ground IX regarding Brady violations of Ingram's petition are ripe for any discovery and will be set for an evidentiary hearing by this Court in the near future.

Thus, it is hereby **ORDERED, ADJUDGED,** and **DECREED** that the claims in Petitioner Ingram's fourth amended Rule 32 petition that are identified above in this **ORDER** are **SUMMARILY DISMISSED,** including specifically Grounds V, VI, VII, VIII, X, and XI.

Done this the 8th day of October, 2013.

BRIAN P. HOWELL
CIRCUIT JUDGE

APPENDIX C

June 28, 2017, order of the Circuit Court of Talladega County

ELECTRONICALLY FILED
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61-CC-1994-000260.60
CIRCUIT COURT OF
TALLADEGA COUNTY, ALABAMA
BRIAN YORK, CLERK

IN THE CIRCUIT COURT OF TALLADEGA COUNTY, ALABAMA

ROBERT SHAWN INGRAM,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. CC-1994-260.60
	)	
STATE OF ALABAMA,	)	
	)	
Respondent.	)	

FINAL ORDER DENYING INGRAM'S FIFTH AMENDED RULE 32 PETITION

After thoroughly reviewing and considering Ingram's Third Amended Rule 32 Petition, his Fourth Amended Rule 32 Petition, and his Fifth Amended Rule 32 Petition; the State of Alabama's answers and motions to dismiss those petitions; the pleadings that have been filed during the course of Ingram's Rule 32 proceeding; the records in Ingram's appeals; and the testimony presented at Ingram's evidentiary hearing, this Court makes the following findings of fact and conclusions of law and hereby **DENIES** Ingram all post-conviction relief.

STATEMENT OF THE CASE

The procedural history of this case is lengthy and was set out, in part, by the Alabama Court of Criminal Appeals as follows:

> In 1995, Ingram was convicted of murder made capital because it was committed during the course of a kidnapping in the first degree or an attempt thereof, see § 13A-5-40(a)(1), Ala. Code 1975. By a vote of 11-1, the jury recommended that Ingram be sentenced to death for his conviction. The trial court followed the jury's recommendation and sentenced Ingram to death. This Court affirmed Ingram's conviction and sentence on appeal, Ingram v. State, 779 So. 2d 1225 (Ala. Crim. App. 1999) ("Ingram I"), and the Alabama Supreme Court affirmed this Court's judgment. Ex parte Ingram, 779 So. 2d 1283 (Ala. 2000) ("Ingram II"). This Court issued a certificate of judgment on September 26, 2000. The United States Supreme Court denied certiorari review on February 26, 2001. Ingram v. Alabama, 531 U.S. 1193, 121 S. Ct. 1194, 149 L. Ed. 2d 109 (2001).
>
> On February 1, 2002, Ingram filed a Rule 32 petition challenging his conviction and sentence on numerous grounds. In his prayer for relief, Ingram requested, among other things, that he be allowed discovery, that he be provided funds for expert and investigative expenses, and that he be permitted time to amend his petition. He also filed a separate motion for permission to proceed ex parte on any request for funds. On March 18, 2002, the State filed an answer and a motion for a partial summary dismissal. On April 18, 2002, Ingram filed an amended petition (hereinafter "first amended petition"), in which he reasserted the same claims raised in his original petition, raised an additional claim, and again requested that he be allowed discovery, that he be provided funds for

expert and investigative expenses, and that he be permitted time to further amend his petition. The State filed an answer and a motion for the summary dismissal of the first amended petition on July 26, 2002. On June 8, 2004, the circuit court adopted verbatim a proposed order that had been submitted by the State on May 20, 2004, summarily dismissing the first amended petition in its entirety. Ingram filed a notice of appeal on July 16, 2004. This Court affirmed the summary dismissal on appeal. Ingram v. State, 51 So. 3d 1094 (Ala. Crim. App. 2006) ("Ingram III").

Ingram petitioned the Alabama Supreme Court for certiorari review; that Court granted his petition and reversed this Court's judgment. Ex parte Ingram, 51 So. 3d 1119 (Ala. 2010) ("Ingram IV"). Noting that the circuit judge who ruled on Ingram's Rule 32 petition was not the judge who had presided over Ingram's trial, the Supreme Court determined that the circuit court's wholesale adoption of the State's proposed order constituted reversible error because the order contained patently erroneous statements, including statements that the circuit judge ruling on the petition had presided over Ingram's trial, which he had not; that the circuit judge had personally observed the performance of Ingram's trial counsel, which he had not; and that the circuit judge was basing his decision, in part, on events within his own personal knowledge of the trial of the case, of which he had no knowledge. Recognizing the general rule "that, where a trial court does in fact adopt [a] proposed order as its own, deference is owed to that order in the same measure as any other order of the trial court," the Supreme Court found that the "unusual" circumstances of the case rendered the general rule inapplicable. Ingram IV, 51 So. 3d at 1122-23. The Supreme Court then held that "the nature of the errors present in the June 8 order ... undermines any confidence that the trial court's findings of fact and conclusions of law are the product of the trial judge's independent judgment and that the June 8 order

reflects the findings and conclusions of that judge." 51 So. 3d at 1125.

Because "[i]t is axiomatic that an order granting or denying relief under Rule 32, Ala. R. Crim. P., must be an order of the trial court ... [i.e.,] must be a manifestation of the findings and conclusions of the court," Ingram IV, 51 So. 3d at 1122, the Alabama Supreme Court reversed this Court's affirmance of the circuit court's summary dismissal of Ingram's first amended petition and remanded the case to this Court for us "to remand it to the trial court to consider Ingram's pending motions and his [first amended] Rule 32 petition." 51 So. 3d at 1125. On remand from the Alabama Supreme Court, this Court reversed the circuit court's judgment and remanded the case "for proceedings that are consistent with the Alabama Supreme Court's opinion." Ingram v. State, 51 So. 3d 1126, 1126 (Ala. Crim. App. 2010) ("Ingram V"). This Court issued a certificate of judgment on May 28, 2010.

After remand, the circuit court scheduled a status conference for July 19, 2010. Ingram's counsel filed a motion to continue, and the circuit court continued the conference to October 15, 2010. On October 7, 2010, the State filed a proposed order summarily dismissing Ingram's first amended petition, denying his requests for discovery and funds, and denying his motion for permission to proceed ex parte on requests for funds. The circuit court conducted the status conference on October 15, 2010. At the conference, Ingram's counsel indicated that she wanted to file a second amended petition and that she needed time to conduct discovery. Counsel then indicated that the second amended petition had already been drafted and that, if the circuit court denied her time to conduct discovery, she would file the second amended petition "now." (R. 12.) The State objected to any amendments to the petition, arguing that allowing Ingram to file a second amended petition would be outside the scope of the Alabama Supreme Court's remand instructions and would violate Rule 32.7(b), Ala. R. Crim. P.,

which permits amendments only "prior to the entry of judgment," because judgment on Ingram's first amended petition had been entered on June 8, 2004. Ingram argued, on the other hand, that the June 8, 2004, judgment on the first amended petition had been reversed and, thus, that an amendment would be permissible regardless of any instructions. The circuit court requested that the parties submit briefs on the issue whether the court had the authority to allow Ingram to file a second amended petition. After further discussion, Ingram's counsel then indicated that she had not received the State's October 7, 2010, proposed order until the day of the status conference and asked if the court wanted a response to the proposed order. The court indicated that it "would be premature" for Ingram's counsel to respond to the proposed order or to submit any additional filings, presumably including a second amended petition, until the court determined whether it had the authority to permit Ingram to file an amended petition. (R. 21.)

On October 28, 2010, the State filed a brief with the circuit court, reiterating the arguments it had made at the status conference. On November 19, 2010, Ingram's counsel filed a reply to the State's October 28, 2010, brief, also reiterating the arguments she had made at the status conference. On December 1, 2010, the circuit court adopted the proposed order submitted by the State summarily dismissing Ingram's first amended petition in its entirety and denying all of Ingram's pending motions, including Ingram's request to file a second amended petition. In denying Ingram's request to file a second amended petition, the circuit court specifically found that it had no authority on remand to allow Ingram to file a second amended petition because to do so would be beyond the scope of the Alabama Supreme Court's remand instructions and because Rule 32.7(b) prohibits amendments to petitions after entry of judgment and judgment had been entered on Ingram's first amended petition on June 8, 2004. Ingram filed a timely motion to reconsider on December 21, 2010, arguing, among

> other things, that the circuit court erred in finding that it had no authority to allow him to file a second amended petition. With the motion to reconsider, Ingram also filed his second amended petition. The motion to reconsider was denied by operation of law 30 days after the circuit court's December 1, 2010, summary dismissal, or on January 3, 2011. See Loggins v. State, 910 So. 2d 146 (Ala. Crim. App. 2005) (recognizing motion to reconsider as a valid postjudgment motion in the context of a Rule 32 petition, but noting that such a motion does not extend the circuit court's jurisdiction beyond 30 days after the denial or dismissal of the Rule 32 petition). Ingram filed a timely notice of appeal on January 3, 2011.

Ingram v. State, 103 So. 3d 86, 88-90 (Ala. Crim. App. 2012) (footnote omitted) ("Ingram VI").[1]

As set forth above, Ingram appealed this Court's order summarily dismissing his first amended petition and alleged, among other things, that this Court erred when it denied his request to file his Second Amended Rule 32 petition. On August 24, 2012, the Alabama Court of Criminal Appeals, relying on Ex parte Apicella, 87 So. 3d 1150 (Ala. 2011), agreed with Ingram, reversed this Court's judgment summarily dismissing Ingram's First Amended Rule 32 Petition, and remanded this case "for proceedings consistent with [its] opinion." Ingram

[1]This Court adopts the naming conventions used by the Alabama Court of Criminal Appeals to reference the opinions in Ingram's previous appeals.

VI, 103 So. 3d at 97. The Court of Criminal Appeals issued a certificate of judgment on September 12, 2012.

Thereafter, this Court issued an order on September 13, 2012, instructing Ingram to file his amended Rule 32 petition within 60 days of this Court's order. Ingram, complying with this Court's instruction, filed his Third Amended Rule 32 Petition on November 1, 2012, and filed a motion requesting discovery. In his Third Amended Rule 32 Petition, Ingram set forth the following grounds for relief:

> Ground I -- His trial counsel were ineffective "during the plea negotiation phase of the representation."
>
> Ground II -- His trial counsel were ineffective "during the guilt-or-innocence phase of his trial."
>
> Ground III -- His trial counsel were ineffective "during the penalty phase of his trial and at the judge sentencing phase of the proceedings."
>
> Ground IV -- His appellate counsel were ineffective because his appellate counsel "fail[ed] to raise meritorious challenges to [his] convictions and death sentence base[d] on facts appearing on the face of the record."
>
> Ground V -- His "right to a fair trial" and his "right to be free from arbitrary and capricious imposition of the death penalty ... were violated by the presence of the victim's severed hands in the courtroom throughout the trial, and the admission of graphic, unnecessarily cumulative images of the crime scene and the victims."

> Ground VI -- The trial court erred "during the sentencing phase in instructing the jury to consider the aggravating circumstance that the capital offense was especially heinous, atrocious or cruel compared to other capital offenses" and "again in its sentencing order in determining that the offense was heinous, atrocious and cruel."
>
> Ground VII -- The trial court erred "when it found one statutory mitigating circumstance but 'no other statutory or non-statutory mitigating circumstances,' thus refusing to give any weight to the mitigating evidence that was presented during the sentencing proceeding."
>
> Ground VIII -- His "right to trial by jury, and to have a jury determine the facts increasing the prescribed range of penalties to which he was exposed ... was violated by the judicial determination of the presence of aggravating factors and the subsequent imposition of the sentence of death."
>
> Ground IX -- The State failed "to disclose exculpatory, material evidence."
>
> Ground X -- The trial court erred "when it arbitrarily treated [his] co-defendant differently than [him]."

After considering Ingram's Third Amended Rule 32 Petition, the State's Answer and Motion for Partial Dismissal, and Ingram's response to the State's motion for partial dismissal, this Court, on May 20, 2013, issued an order summarily dismissing Ground V, Ground VI, Ground VII, Ground VIII, and Ground X of Ingram's Third Amended Rule 32

Petition.[2] This Court also issued an order granting Ingram's motion for discovery, but, in so doing, explained that no party subject to the Court's discovery order "is required to produce documents covered by any applicable privilege or protection; furthermore, these parties are not required to create documentation for the purposes of turning it over for discovery." Additionally, this Court explained that any party that "withholds documents on the grounds that the documents are privileged or protected ... shall create a privilege log and provide it to Ingram and the State."

Thereafter, on June 20, 2013, Ingram filed his Fourth Amended Rule 32 Petition. In that petition, Ingram reasserted each of the grounds raised in his Third Amended Rule 32 Petition and added the following ground for relief:

> Ground XI -- His "death sentence was obtained in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution because the jurors engaged in premature deliberations on the issue of penalty."[3]

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[2]The basis for summarily dismissing each of these claims is discussed more thoroughly below.

[3]In his Fourth Amended Rule 32 Petition, Ingram acknowledged those grounds this Court summarily dismissed in its May 20, 2013, order. In so acknowledging, Ingram explained that he was "not asking the Court to revisit [those] ruling[s]," but was, instead, reasserting those claims only "to avoid any issue on appeal, or in subsequent proceedings, that the claim was abandoned."

On August 15, 2013, the State provided Ingram with discovery. On August 26, 2013, the State filed its answer to Ingram's Fourth Amended Rule 32 Petition. On October 4, 2013, the State filed a Motion for Partial Dismissal of Ingram's Fourth Amended Rule 32 Petition. After considering Ingram's Fourth Amended Rule 32 Petition and the State's responses to that petition, this Court, on October 9, 2013, issued an order explaining that it had previously summarily dismissed Ground V, Ground VI, Ground VII, Ground VIII, and Ground X. This Court, likewise, summarily dismissed the new ground (Ground XI).[4]

This Court then issued an order setting an evidentiary hearing for Ingram's remaining claims on November 26, 2013. This Court also instructed Ingram to provide the State with a witness list by November 1, 2013; to provide the State with both a list and copies of any exhibits he intended to introduce at the hearing by November 8, 2013; and to supply

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Additionally, in reasserting those grounds for postconviction relief that were not summarily dismissed by this Court's May 20, 2013, order, Ingram provided some additional factual allegations to support his claims.

[4]The basis for summarily dismissing Ground XI is discussed more thoroughly below.

the State with the name, curriculum vitae, and other discovery (as ordered by this Court's May 20, 2013, discovery order), of any expert witness that Ingram intended to call to testify at the hearing by "October 18, 2013, to allow the State time to retain any rebuttal experts." (Order, Oct. 9, 2013, p. 2.)

On October 15, 2013, Ingram filed a motion to continue the evidentiary hearing, contending that, among other things, discovery had not yet been completed in this case. According to Ingram, although the State provided him with discovery, he received only a "portion" of the District Attorney's file and "that partial file was not accompanied by a privilege log." On October 22, 2013, the State filed an objection to Ingram's motion to continue, explaining that it had provided to Ingram all discoverable information. Additionally, the State explained that, although it had already communicated with Ingram's counsel that all discoverable information had been provided, it sent Ingram's counsel "a more detailed privilege log concerning the items that were not turned over to Ingram." This Court granted Ingram's request for a continuance and reset the evidentiary hearing for January 14, 2014.

On October 25, 2013, Ingram filed a Motion to Compel Compliance with Discovery Order and Federal Constitutional

Law, or in the Alternative, Request for an In Camera Inspection of Government Files, in which Ingram alleged that the State's "privilege log" was insufficient to establish that the items that were withheld by the State were actually privileged. Ingram requested that this Court compel the State to provide a more detailed privilege log or to provide all undisclosed documents to this Court for an in camera inspection of those documents. On November 1, 2013, the State filed a response to Ingram's motion to compel, in which the State explained that it "is not opposed to this Court conducting an in camera review of the materials that are a part of the District Attorney's file in this case that were not turned over to [Ingram] during discovery in this matter and will arrange for them to be provided to the Court." On November 10, 2013, this Court granted, in part, Ingram's motion to compel, ordering the State to "provide a copy of those materials it has determined to be non-discoverable to this Court for an in camera review." On November 26, 2013, the State complied with this Court's order and provided this Court with digital copies of the items it had withheld from Ingram.

Ingram filed his Fifth Amended Rule 32 Petition on November 27, 2013. Ingram did not raise any new claims in that petition; rather, Ingram reiterated the claims previously raised and reordered some of the claims. Then, on December 26, 2013, Ingram filed a motion to continue the evidentiary hearing, in part, because this Court had not yet completed its in camera inspection of the documents withheld by the State.

The State filed its answer to Ingram's Fifth Amended Rule 32 Petition and its objection to Ingram's motion to continue on December 30, 2013. This Court, on January 6, 2014, issued an order granting Ingram's motion to continue and reset the evidentiary hearing for April 3, 2014.

On March 3, 2014, Ingram filed his witness list, indicating that he intended to call two expert witnesses--Deborah Denno and Russell Stetler--to testify at the hearing and attached the experts' curriculum vitae to his witness list.

The State filed a motion with this Court requesting that it be given access to Ingram on March 12, 2014. The State requested this access because Ingram alleged that his trial counsel was ineffective for failing to investigate "a variety

of mental health problems 'most likely resulting from exposure to lead, PCB[']s or other neurotoxins, and may have suffered other psychiatric disorders related to trauma." Additionally, the State requested this access to allow its expert witness--Dr. Karl Kirkland, Ph.D.--to examine Ingram "[i]n order to properly prepare for and possibly rebut any mental health testimony offered by Ingram's experts at the upcoming hearing." The State also filed a motion for partial dismissal of Ingram's Fifth Amended Rule 32 Petition.

On March 13, 2014, Ingram filed a motion in opposition to the State's request for access to Ingram, and, on March 18, 2014, filed another motion to continue the evidentiary hearing.

On March 21, 2014, this Court issued several orders. First, this Court issued an order denying Ingram's motion to continue. Second, this Court issued an order denying Ingram's motion for discovery, explaining that it had "reviewed numerous documents provided ... by the State of Alabama" and finding that "all discoverable and relevant materials have been provided to [Ingram]." Third, this Court issued an order granting the State's motion for access to Ingram. Finally,

this Court issued an order delineating those claims that would be presented at the evidentiary hearing.

On March 24, 2014, the State filed a Motion to Compel or Motion to Exclude asking this Court to compel Ingram's counsel to make Ingram available to the State's expert witness. The State alleged in the motion to compel that, when Dr. Kirkland arrived at Holman Prison to evaluate Ingram, under this Court's order granting the State access to Ingram, Ingram refused to speak with him "because he had been advised by his current counsel not to speak about his case." The State further explained:

> The State has chosen to rebut Ingram's claims concerning his mental health, and the claims of ineffective assistance of counsel that arise from them, by retaining its own expert to speak with and test Ingram. Without access to Ingram, the State will be completely unable to rebut evidence presented by Ingram via a tendered expert.

The State, relying on State v. Click, 768 So. 2d 417 (Ala. Crim. App. 1999), argued that it would "be placed in the ... untenable position of being unable to defend against the claims that Ingram raises in his petition if the State is not permitted access to Ingram in order to prepare a rebuttal to his claims," and, "if the State is not given access to Ingram, the State requests that this Court strike all of

Ingram's claims based upon any allegations concerning Ingram's mental health and exclude any testimony that is offered as being relevant or material to Ingram's mental health at the upcoming hearing."

Ingram, on March 25, 2014, filed a response to the State's motion to compel or exclude, alleging that the basis for the State's request for access to Ingram "was the need to secure evidence to 'rebut' expert testimony which the State alleged Ingram would present at the Rule 32 hearing." According to Ingram, he "has no expert testimony regarding Ingram's mental state to present because no mental health evaluation has ever been conducted in these Rule 32 proceedings." Moreover, Ingram argued that neither of his two expert witnesses "are psychologists or psychiatrists," they have never met Ingram, "and neither person is competent to opine on Mr. Ingram's mental state at the time of the offense or trial." Thus, Ingram contended, "the State's assertion that Ingram will present expert testimony at the hearing that will 'discuss aspects of his mental health' ... is patently incorrect."[5]

[5]As discussed more thoroughly below, this Court granted the State's motion to exclude.

On March 25, 2014, Ingram filed a petition for a writ of mandamus in the Court of Criminal Appeals, requesting that the Court of Criminal Appeals set aside this Court's March 21, 2014, order granting the State's motion for access to Ingram. On March 27, 2014, the Court of Criminal Appeals denied Ingram's petition, finding that "Ingram raised numerous claims of ineffective assistance of counsel related to counsel's failure to investigate and present a multitude of mitigation evidence at Ingram's sentencing hearing. As we noted in Click, the State would be placed in an 'untenable position' if it could not defend against a postconviction petitioner's claims. 768 So. 2d at 421."

Ingram then filed a petition for a writ of mandamus in the Alabama Supreme Court, requesting the Supreme Court to set aside this Court's order granting the State's motion for access to Ingram. The Supreme Court denied Ingram's petition on April 3, 2014.

While his petitions for writs of mandamus were pending, Ingram filed a motion to "seal and file" the documents the State provided to the Court for an in camera inspection "in order to protect Ingram's right to pursue a federal due process misconduct claim in subsequent state or federal

proceedings." The State filed an objection, arguing that "there is no need and no legal basis or procedure for these materials to be sealed and sent forward for review." The State also argued that the "District Attorney's file is intact and stored at the District Attorney's office--if during future 'state and federal collateral review[s]' of Ingram's case there be a showing that Ingram needs access to portions of that file, then the appropriate court could order such access." This Court agrees with the State.

On April 4, 2014, this Court conducted an evidentiary hearing in this case. At the outset of the hearing, this Court addressed the State's motion to exclude any testimony regarding Ingram's alleged mental-health issues and his expert witness' testimony. Additionally, Ingram informed this Court that he would be withdrawing certain claims.[6] Ingram, who was represented by counsel, then proceeded to put forth evidence to support his claims for relief--specifically, Ingram testified in his own behalf and called 11 other witnesses to testify in support of his allegations.

[6]The resolution of the State's motions as well as Ingram's decision to withdraw certain claims are discussed more thoroughly below.

THE FACTS OF THE CRIME

The allegations in Ingram's Rule 32 petition, and his amendments thereto, "must be reviewed in the context of the evidence presented during his capital murder trial." See Thomas v. State, 766 So. 2d 860, 870 (Ala. Crim. App. 1998). Although this Court takes judicial notice of the record in this case, the Alabama Court of Criminal Appeals, in its opinion affirming Ingram's capital-murder conviction and death sentence, accurately summarized the evidence presented at trial as follows:

> The State's evidence showed the following: On July 31, 1993, Ingram, along with Anthony Boyd, Moneek Marcell Ackles, and Dwinaune Quintay Cox, kidnapped Gregory Huguley, by force and at gunpoint, from a public street in Anniston, took him to a ballpark in a rural area of Talladega County, and, while he was pleading for his life, taped him to a bench, doused him with gasoline, set him on fire, and burned him to death. The state's evidence showed that Ingram was a principal actor in the murder, wielding the gun and using force to effect the kidnapping, pouring the gasoline on Huguley, and lighting the gasoline with a match. The evidence also shows that Huguley was abducted and killed because he failed to pay $200 for crack cocaine sold to him several days before the murder. The record further shows that after Huguley had been set on fire, the conspirators stood around for approximately 20 minutes and watched him burn to death. For a more detailed recitation of the facts of this case, see Boyd v. State, 715 So. 2d 825 (Ala. Cr. App. 1977), aff'd, 715 So. 2d 852 (Ala.), cert. denied, 525 U.S. 968, 119 S. Ct. 416, 142 L. Ed. 2d 338 (1998).

> Ingram did not testify at either the guilt phase or the sentencing phase before the jury. He offered no evidence in his defense at the guilt phase. At the sentencing phase before the jury, he called eight witnesses, seven of whom were relatives who offered mitigation testimony about Ingram's family life and background and who asked the court to spare his life. At the sentencing phase before the trial judge, he called no witnesses and presented no evidence; however, when asked if he had anything to say before he was sentenced, he stated: "Well, I still be ask that my life be spared. I have a daughter that I've really never got to seen, and she just turned one last Sunday; and maybe someday in the future I hope to be with her and the rest of my family." (R. 1052.)
>
> We note at the outset that Ingram does not question the sufficiency of the evidence to support his conviction. Nevertheless, we have reviewed the record as to sufficiency, as we are required to do in a death case, and we find that the evidence presented by the state was sufficient for the jury to find him guilty beyond a reasonable doubt of the capital offense charged in the indictment. In the trial court's order setting out the facts summarizing the crime and addressing Ingram's participation in it, the court stated, "The evidence introduced in the four-day trial, both direct and circumstantial evidence, overwhelmingly supported the jury's verdict." We agree.

Ingram I, 779 So. 2d at 1238-39. The findings by the Alabama Court of Criminal Appeals guide this Court in its resolution of the issues presented in Ingram's Third, Fourth, and Fifth Amended Rule 32 Petitions. Additionally, this Court relies

on the trial transcript and records on appeal where necessary to support this Court's findings.[7]

THE LEGAL STANDARD FOR REVIEWING POSTCONVICTION CLAIMS UNDER RULE 32, ALA. R. CRIM. P.

Rule 32.3 provides, in pertinent part, that "the petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief." In other words, Rule 32.3 places both the burden of pleading and the burden of proof in these proceedings on Ingram.

With respect to a petitioner's burden of pleading, Rule 32.6(b), Ala. R. Crim. P., specifies that a Rule 32 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." Rule 32.6(b) further provides that "a bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings." Thus, Rule

[7]Throughout this order, this Court cites portions of the record from Ingram's trial. This Court cites the clerk's record from Ingram's trial as follows: (Trial record, C. __.), and cites the court reporter's transcript from Ingram's trial as follows: (Trial record, R. __.). Additionally, this Court cites the transcript from the evidentiary hearing in this case as follows: (EH. __.).

32.6(b) requires that the petition itself disclose the facts relied upon in seeking relief. "In other words, it is not the pleading of a conclusion 'which, if true, entitle[s] the petitioner to relief.' It is the allegation of facts in pleading which, if true, entitles a petitioner to relief. After facts are pleaded, which, if true, entitle the petitioner to relief, the petitioner is then entitled to an opportunity, as provided in Rule 32.9, Ala. R. Crim. P., to present evidence proving those alleged facts." Boyd v. State, 913 So. 2d 1113, 1125 (Ala. Crim. App. 2003).

Rule 32.7(d), Ala. R. Crim. P., provides, in relevant part, as follows:

> If the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings, the court may either dismiss the petition or grant leave to file an amended petition.

Thus, Rule 32.7(d) gives circuit courts the discretion to summarily dismiss claims in a petition for postconviction relief that fail to satisfy the burden of pleading, fail to state a claim for relief, or fail to present a material issue

of fact or law. See, e.g., Fincher v. State, 724 So. 2d 87, 89 (Ala. Crim. App. 1998).

With respect to a petitioner's burden of proof, the Court of Criminal Appeals has explained:

> "When the circuit court conducts an evidentiary hearing, '[t]he 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.' ..."
>
> Marshall v. State, [182] So. 3d [573], [581] (Ala. Crim. App. 2014). Additionally, we recognize that, although the State has "the burden of pleading any ground of preclusion, ... once a ground of preclusion has been pleaded, the petitioner ... [has] the burden of disproving its existence by a preponderance of the evidence." Rule 32.3, Ala. R. Crim. P.

State v. Baker, 172 So. 3d 860, 865 (Ala. Crim. App. 2015). With these principles in mind, this Court addresses the claims raised in Ingram's Third, Fourth, and Fifth Amended Rule 32 Petitions.

SUMMARILY DISMISSED CLAIMS

I. Ingram's Third Amended Rule 32 Petition

This Court summarily dismissed grounds V, VI, VII, VIII, and X--as those claims appear in Ingram's third amended petition--pursuant to Rule 32.7(d), Ala. R. Crim. P., on May 20, 2013. These grounds for relief were summarily dismissed for the reasons set forth below.

In paragraphs 37-49 of the Third Amended Rule 32 Petition (Ground V), Ingram alleged that his "right to a fair trial ... and his right to be free from arbitrary and capricious imposition of the death penalty ... were violated by the presence of the victim's severed hands in the courtroom throughout the trial, and by the admission of graphic, unnecessarily cumulative images of the crime scene and the victim."

It is well settled that a trial court's decision to admit evidence is nonjurisdictional and is therefore subject to the grounds of preclusion set forth in Rule 32.2, Ala. R. Crim. P. See, e.g., Marshall v. State, 182 So. 3d 573, 621 (Ala. Crim. App. 2014) ("Claims challenging a trial court's decision to admit evidence, however, are nonjurisdictional and subject to the grounds of preclusion set forth in Rule

32.2, Ala. R. Crim. P. See Fortner v. State, 825 So. 2d 876, 880 (Ala. Crim. App. 2001) (holding that claims challenging the admission of evidence are waivable and are, therefore, nonjurisdictional).").

Ingram's contention concerning the "21 photographs of the victim" taken both at the crime scene and during the autopsy, is precluded from review under Rule 32.2(a)(2) and (4), Ala. R. Crim. P., because it was raised and addressed at trial and on appeal. See Ingram I, 779 So. 2d at 1273 ("We have examined the photographs introduced into evidence in this case, and applying the legal principles set out above to the facts of this case, we conclude that the trial court did not abuse its discretion in admitting the photographs into evidence at either the guilt phase or the sentencing phase at trial.") Ingram's claim concerning the presence of the victim's severed hands at trial, is precluded from review under Rule 32.2(a)(3) and (5), Ala. R. Crim. P., because it could have been, but was not, raised either at trial or on appeal.

Ground V of the Third Amended Rule 32 Petition was summarily dismissed pursuant to Rule 32.7(d), Ala. R. Crim.

P., because the claim was precluded from review pursuant to Rule 32.2 of the Alabama Rules of Criminal Procedure.

In paragraphs 43-44 in his Third Amended Rule 32 Petition (Ground VI), Ingram alleged that the trial court's jury instruction on the "especially heinous, atrocious, and cruel" aggravating circumstance was "unconstitutionally vague" and that the trial court's sentencing order determining "that the homicide was especially heinous, atrocious and cruel was similarly unconstitutional."

These claims are nonjurisdictional and are subject to the grounds of preclusion set forth in Rule 32.2, Ala. R. Crim. P. Each of the allegations are precluded from review under Rule 32.2(a)(3), Ala. R. Crim. P., because they could have been, but were not, raised and addressed at trial. Moreover, these claims are also precluded from review under Rule 32.2(a)(4), Ala. R. Crim. P., because they were addressed by the Alabama Court of Criminal Appeals in its opinion affirming Ingram's capital-murder conviction and death sentence. See Ingram I, 779 So. 2d at 1276-78.

Ground VI of the Third Amended Rule 32 Petition was summarily dismissed pursuant to Rule 32.7(d), Ala. R. Crim.

P., because the claim was precluded from review under Rule 32.2 of the Alabama Rules of Criminal Procedure.

In paragraphs 45-48 in his Third Amended Rule 32 Petition (Ground VII), Ingram alleged that the "trial court violated the Cruel and Unusual Punishment Clause of the Eighth Amendment when it found one statutory mitigating circumstance but 'no other statutory or non-statutory mitigating circumstances,' thus refusing to give any weight to the mitigating evidence that was presented during the sentencing proceeding."

This claim is nonjurisdictional and is therefore subject to the grounds of preclusion set forth in Rule 32.2, Ala. R. Crim. P. This claim is precluded from review under Rule 32.2(a)(3) and (5), Ala. R. Crim. P., because it could have been, but was not, raised either at trial or on appeal.

Additionally, as this Court explained in its May 20, 2013, order:

> Ingram did not specifically argue in his appeal that the trial court improperly gave no weight to mitigating evidence or "refused" to consider the evidence.
>
> However, Ingram did raise an argument that the trial court improperly weighed the mitigating evidence in his case on appeal, thus any claim concerning the trial court's findings based on the mitigating evidence before it at trial is

> procedurally barred from review because it was already raised and addressed on appeal. Ingram v. State, 779 So. 2d 1225, 1244-47 (Ala. Crim. App. 1999). Rule 32.2(a)(4), Ala. R. Crim. P., provides that relief cannot be given on a claim that was raised or addressed on appeal.
>
> The Court notes that, regarding this claim, "Ingram accepts the State's position that 'any claim concerning the trial court's findings based on the mitigating evidence before it at trial is procedurally barred from review because it was already raised and addressed on appeal.'" Ingram's Response to the State's motion for partial dismissal, p. 4.

Ground VI of the Third Amended Rule 32 Petition was summarily dismissed pursuant to Rule 32.7(d), Ala. R. Crim. P., because the claim was precluded from review pursuant to Rule 32.2 of the Alabama Rules of Criminal Procedure.

In paragraph 49 in his Third Amended Rule 32 Petition (Ground VIII), Ingram, relying on Ring v. Arizona, 536 U.S. 584 (2002), and Apprendi v. New Jersey, 530 U.S. 466 (2000), alleged that his "right to a trial by jury, and to have a jury determine the facts increasing the prescribed range of penalties to which he was exposed ... was violated by the judicial determination of the presence of aggravating factors and the subsequent imposition of the sentence of death."

This claim was insufficiently pleaded because Ingram did not specifically identify how Alabama's capital-murder

statute in fact violates the holding in either Apprendi or Ring. Thus, Ingram failed to satisfy his burden of pleading with regard to this claim. See Rule 32.3 and Rule 32.6(b), Ala. R. Crim. P.

Moreover, as explained in this Court's May 20, 2013, order:

> In addition, this claim should be dismissed as a matter of law because it is without merit. The Supreme Court of Alabama upheld Alabama's capital murder statute in Ex parte Waldrop, 859 So. 2d 1181 (Ala. 2002). In the instant case, the jury found during the guilt phase that Ingram committed capital murder during a kidnapping, a violation of Ala. Code, § 13A-5-40(a)(1). This capital offense corresponds to the aggravating circumstance set forth in Ala. Code, § 13A-5-49(4). Apart from the verdict of capital murder, therefore, the jury additionally found the existence of an aggravating circumstance beyond a reasonable doubt, rendering Ingram eligible for the death penalty under Ring. As the Supreme Court of Alabama found in Waldrop: "[T]he findings reflected in the jury's verdict alone exposed Waldrop to a range of punishment that had as its maximum the death penalty. This is all Ring and Apprendi require." Waldrop, at 1188.

This Court summarily dismissed Ground VIII pursuant to Rule 32.7(d), Ala. R. Crim. P., because the claim was insufficiently pleaded and is without merit.

In paragraphs 52-55 in his Third Amended Rule 32 Petition (Ground X), Ingram alleged that the trial court "violated [his] Fourteenth Amendment Equal Protection rights when it

arbitrarily treated [his] co-defendant differently than [him]."

This claim is nonjurisdictional and is therefore subject to the grounds of preclusion set forth in Rule 32.2, Ala. R. Crim. P. This claim is precluded from review under Rule 32.2(a)(3) and (5), Ala. R. Crim. P., because it could have been, but was not, raised either at trial or on appeal. Accordingly, this Court summarily dismissed Ground X pursuant to Rule 32.7(d), Ala. R. Crim. P., in its May 20, 2013, order.

II. Ingram's Fourth Amended Rule 32 Petition

This Court summarily dismissed Ground XI--as that ground appears in Ingram's Fourth Amended Rule 32 Petition--on October 9, 2013. Ingram alleged in paragraph 58 of his Fourth Amended Rule 32 Petition that his "death sentence was obtained in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the jurors engaged in premature deliberations on the issue of penalty." The totality of Ingram's allegations as to this claim were as follows:

> During the guilt-or-innocence phase of petitioner's trial, some jurors began to discuss what the sentence would be in the event that petitioner were found guilty. Before hearing any evidence in mitigation of punishment (or even all of the first phase evidence), some jurors stated to other jurors

> that petitioner should be sentenced to death. This led to a more general discussion of what the sentence should be if petitioner was found guilty. Because the jurors engaged in pre-mature deliberations, petitioner's death sentence must be vacated.

(Ingram's Fourth Amended Petition, p. 39.) As explained in this Court's October 9, 2013, order:

> This claim is due to be dismissed because it was not specifically pleaded. The claim is therefore dismissed summarily under Rules 32.3 and 32.6(b). The Petitioner fails to name one juror who was involved in any improper deliberations, and he also fails to state when and where these deliberations occurred. Furthermore, he has failed to plead that any specific improper deliberations actually occurred, and has failed to plead that he was prejudiced in any way. Notably, he has cited no Alabama caselaw concerning this claim.
>
> Therefore, pursuant to Rule 32.3, 32.6(b), and 32.7(d), Ala. R. Crim. P., this claim is dismissed.

See, e.g., Woods v. State, CR-10-0695, 2016 WL 717375, at *15 (Ala. Crim. App. 2016) (holding that the circuit court correctly summarily dismissed a juror-misconduct claim as insufficiently pleaded when Woods failed "to identify the jurors and the actions he alleged constituted juror misconduct").

CLAIMS FOR WHICH AN EVIDENTIARY HEARING WAS GRANTED

After Ingram filed his Fifth Amended Rule 32 petition, this Court issued an order that it would conduct an evidentiary hearing on only the following grounds for

postconviction relief, as set out in Ingram's Fifth Amended Rule 32 Petition: Ground I, Ground II, Ground III, Ground IV, and Ground VI.[8] On April 4, 2014, this Court conducted an evidentiary hearing on the above-listed grounds for postconviction relief. At that hearing, Ingram, who was represented by counsel, testified in his own behalf. Additionally, Ingram elicited testimony from the following witnesses: The Honorable Jeb S. Fannin, who served as one of Ingram's trial and appellate counsel; Rose Bush; Paula Bush; June Allred; Glenda Jackson; Shussler Ware; Felicia Stewart; Kumira Lemon; Calvin Ingram; Joyce Elston; and Carla Ingram.

For the reasons set forth below, this Court denies each of the above-listed grounds for postconviction relief.

INGRAM'S ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL

In Grounds I-IV of his Third, Fourth, and Fifth Amended Rule 32 Petitions, Ingram alleged that both his trial and

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[8]Grounds I-IV in Ingram's Fifth Amended Rule 32 Petition correspond with Grounds I-IV in both his Third and Fourth Amended Rule 32 Petitions. Ground VI, on the other hand, does not; rather, that ground appears in Ingram's Third and Fourth Amended Rule 32 Petitions as Ground IX. In addressing the claims presented at the evidentiary hearing, this Court refers to the specific allegations and grounds raised in Ingram's Fifth Amended Rule 32 Petition because those allegations are the final and latest expression of Ingram's claims.

appellate counsel were ineffective in several respects. As discussed more thoroughly below, however, Ingram failed to satisfy his burden of establishing that his counsels' performance was in any way deficient and that he was prejudiced by their alleged deficient performance. Because he failed to prove that he was denied the effective assistance of counsel, Ingram's ineffective-assistance-of-counsel claims are hereby denied.

Before addressing each of Ingram's specific claims of ineffective assistance of counsel, however, this Court recognizes the following well-settled principles:

To prevail on a claim of ineffective assistance of counsel the petitioner must satisfy the following two-pronged test articulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 687 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires 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.

In other words, the petitioner must prove both (1) that his counsel's performance was deficient and (2) that the petitioner was prejudiced by his counsel's deficient performance. See, e.g., State v. Gissendanner, CR-09-0998, 2015 WL 6443194, *3 (Ala. Crim. App. 2015) (opinion on application for rehearing) (recognizing that, under Strickland, the petitioner must prove both deficient performance and prejudice). The United States Supreme Court explained that the benchmark for judging any claim of ineffectiveness must be "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 687. "Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356 (2010).

Regarding the first prong of the Strickland analysis, the petitioner must prove, by a preponderance of the evidence, see Rule 32.3, Ala. R. Crim. P., that his counsel's performance was deficient. "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. Crim. App. 1994) (quoting Strickland, 466 U.S. at 688). A Court that is "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. Once the petitioner identifies "'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." Dobyne v. State, 805 So. 2d 733, 742-44 (Ala. Crim. App. 2000) (quoting Bui v. State, 717 So. 2d 6, 12-13 (Ala. Cr. App. 1997)).

When reviewing a claim of ineffective assistance of counsel, Courts must "indulge a strong presumption that counsel's conduct was appropriate and reasonable," and "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." See Hallford v. State, 629 So. 2d 6, 9 (Ala. Cr. App. 1992).

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133-134, 102 S. Ct. 1558, 1574-1575, 71 L. Ed. 2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Michel v. Louisiana, supra, 350 U.S., at 101, 76 S. Ct., at 164. 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. See Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U. L. Rev. 299, 343 (1983).

Strickland, 466 U.S. at 689-90.

Because counsel's conduct is presumed to have been reasonable, the analysis under Strickland "'has nothing to do with what the best lawyers would have done ... [or] what most good lawyers would have done.'" Grayson v. Thompson, 257 F.3d 1194, 1216 (11th Cir. 2001) (quoting White v. Singletary, 972 F. 2d 1218, 1220-21 (11th Cir. 1992)). The question is,

instead, "whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial." Id. (quoting White, 972 F. 2d at 1220-21). In other words, "in order to show that counsel's performance was unreasonable, the petitioner must establish that no competent counsel would have taken the action that his counsel did take." Id.

Regarding the second prong of the Strickland analysis, even if the petitioner demonstrates that his counsel's performance was 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. "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 ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 697.

Recently, the Alabama Court of Criminal Appeals recognized:

> "The purpose of ineffectiveness review is not to grade counsel's performance. See Strickland [v. Washington], [466 U.S. 668,] 104 S. Ct. [2052] at 2065 [(1984)]; see also White v. Singletary, 972 F.2d 1218, 1221 (11th Cir. 1992) ('We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.'). ... To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.' Burger v. Kemp, 483 U.S. 776, 107 S. Ct. 3114, 3126, 97 L. Ed. 2d 638 (1987)."
>
> Chandler v. United States, 218 F.3d 1305, 1313 (11th Cir. 2000) (footnote omitted).

Gissendanner, No. CR-09-0998, 2015 WL 6443194, at *5-6.

Furthermore,

> [i]t is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions, or inactions, of counsel that occurred outside the record. Indeed, 'trial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective.' Rylander v. State, 101 S.W. 3d 107, 111 (Tex. Crim. App. 2003). This

> is so because it is presumed that counsel acted reasonably[.]

Broadnax v. State, 130 So. 3d 1232, 1255 (Ala. Crim. App. 2013) (emphasis added). When "'"the record is silent as to the reasoning behind counsel's actions, the presumption of effectiveness is sufficient to deny relief on [an] ineffective assistance of counsel claim."' Dunaway v. State, [198] So. 3d [530], [547] (Ala. Crim. App. 2009) (quoting Howard v. State, 239 S.W.3d 359, 367 (Tex. App. 2007)), [rev'd on other grounds Ex parte Dunaway, 198 So. 3d 567 (Ala. 2014)]." Broadnax, 130 So. 3d at 1256.

Finally, because Ingram cites the "ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases" to scrutinize his counsels' performance, this Court recognizes that, "'the ABA Guidelines may 'provide guidance as to what is reasonable in terms of counsel's representation, [but] they are not determinative.' Jones v. State, 43 So. 3d 1258, 1278 (Ala. Crim. App. 2007)." Miller v. State, 99 So. 3d 349, 396 (Ala. Crim. App. 2011). See also, McWhorter v. State, 142 So. 3d 1195, 1238-39 (Ala. Crim. App. 2011) (recognizing that the ABA Guideline provide only guidance as to what is reasonable concerning counsel's representation; they are not determinative).

With these principles in mind, this Court addresses each of Ingram's ineffective-assistance-of-counsel claims, and hereby makes the following findings of fact and conclusions of law regarding those claims.

Ground I

In his Third, Fourth, and Fifth Amended Rule 32 Petitions, Ingram alleged that his trial counsel were ineffective because, he said, his trial counsel "failed to undertake reasonable efforts to persuade [him] to honor the terms of his plea agreement." (Ingram's Fifth Amended Rule 32 Petition, p. 10, ¶ 6.)

On September 15, 1993, Ingram entered into a negotiated plea agreement with the State of Alabama, in which Ingram, in return for cooperating with the State's investigation and testifying against his codefendants, could plead guilty to the lesser-included offense of murder and the State would recommend that he receive a sentence of life imprisonment. (Trial record, C. 33-35.) The agreement also provided that, if Ingram failed to perform any of the conditions in the agreement, the agreement would be "null and void." (Trial record, C. 35.) Thereafter, Ingram was called to testify at

Anthony Boyd's trial but exercised his right to remain silent. The State then sought permission to proceed against Ingram for capital murder as charged in his indictment, which the circuit court granted. (Trial record, C. 36-37.)

In paragraphs 3-10 of his Fifth Amended Rule 32 Petition, Ingram alleged that, "[d]espite the certainty of conviction, trial counsel failed to undertake reasonable efforts to persuade Mr. Ingram to honor the terms of his plea agreement." (Ingram's Fifth Amended Rule 32 Petition, p. 10, ¶ 6.) Specifically, Ingram alleged that his counsel were ineffective because, he said, they "only met briefly with [him] prior to the announcement of his refusal to testify against" Boyd; they "did not inform him of other key considerations, including the inevitability he would be convicted of capital murder on the basis of his own incriminating statements and the other evidence in the prosecution's possession"; and they "failed to arrange for members of Mr. Ingram's family to talk with him concerning his decision not to honor the agreement." Additionally, Ingram alleged that his counsel were ineffective because they "failed to ask the Court for more time in which to explain in detail the consequences of [his] actions to him, or to find

others who could assist in persuading Mr. Ingram that the only rational course of conduct under the circumstances was to fulfill the terms of the plea agreement."

Ingram, however, failed to prove that his counsels' performance regarding their attempt to persuade him to honor his agreement with the State was in any way deficient. Indeed, the record on direct appeal and the evidence presented at the evidentiary hearing in this case demonstrated that, Ingram's trial counsel, in the time leading up to Boyd's trial, "made [Ingram] aware of the evidence and his chances." (EH. 44.) Despite being advised of the evidence against him and "his chances," Ingram, when called to testify against Boyd, refused to cooperate with the State and, instead, exercised his right to remain silent.

Although Ingram testified at the evidentiary hearing that, before Boyd's trial, he informed his counsel that he would not testify against Boyd (EH. 85), Ingram's trial counsel, Jeb Fannin, contradicted Ingram's testimony, explaining that he did not know that Ingram was going to back out of the negotiated agreement with the State until the moment he took the stand and announced that he would not

testify against Boyd (EH. 72)--a decision Fannin thought was a mistake. (EH. 45.)

When Ingram announced that he would not testify against Boyd, Ingram was given the opportunity to discuss that decision with his trial counsel. Fannin testified that, during that discussion, Ingram told them that he "felt like nobody was going to testify against anybody else." (EH. 45.) According to Ingram, he "felt" that way because, while he was sharing a cell with his co-defendants, Marcell Ackles came up with the idea that if they all remained silent they would "all go home." (EH. 84.) Additionally, Ingram explained that he was reluctant to testify against Boyd because, he said, he did not want to be labeled a "snitch" because "you don't last in the penitentiary when you get a label like that." (EH. 85.)

Fannin stated that they advised Ingram that he should honor the plea agreement with the State and explained to him what could happen to him if he did not testify against Boyd --i.e., that he could receive the death penalty--and further stated that Ingram understood what they were telling him. In short, Ingram's trial counsel urged him to honor the agreement. Ingram, however, was "so adamant in his decision,

we just can't twist his arm and make him testify." (EH. 74.) Fannin further testified that, if he felt that getting a family member to help persuade him to honor the agreement would have changed Ingram's decision, he would have sought them out.

After Ingram met with his trial counsel, he had a colloquy with the trial court, the State, and his counsel, during which the following exchange occurred:

> [Prosecutor One]: ... Your Honor. This is something akin to what we did this morning. The State had previously entered into an agreement with Robert Shawn Ingram .... In that agreement Mr. Ingram agreed to testify and cooperate fully with the State and give a statement, and he did in fact give a statement admitting his participation in the kidnapping and murder of Gregory Hughley. ... This morning and earlier this afternoon our office met with Mr. Ingram, and he had an opportunity to discuss the case with Mr. Nelson, and I believe Mr. Fannin as well, both of his attorneys. We have been informed by them by Mr. Ingram that he is not going to testify, will not testify pursuant to the agreement; and I believe that puts us in the same position we were as to the other witness, Your Honor. The agreement has been breached. I think we need to get the fact that Mr. Ingram is not going to testify on the record, and also I think Your Honor should advise him of the consequences. I know that Mr. Nelson and Mr. Fan[n]in have done that. I think it might be helpful for the Court to do that as well, as you did this morning.
>
> [Prosecutor Two]: And further along that line --I think there was a confession relative to that agreement also. You may have mentioned it.

[Prosecutor One]: Oh, yes, sir. Pursuant to the agreement we had--we now have a confession from Mr. Ingram. Again pursuant to the terms of the agreement he entered into with the State. After he has breached it, it will be used against him in any subsequent capital murder trial.

The Court: Do you want to say something for the record, counsel?

[Nelson]: Your Honor, Mr. Fan[n]in and myself did talk with Shawn this morning, and we went over all the options and all the possible punishments; and I believe he understands them. He told us he did, and I feel he does, and he did tell us that he did not wish to testify.

....

The Court: Do you understand, and I am going to simplify this basically, that the State of Alabama has offered to allow you to plead guilty to the charge of murder, regular murder, relative to the death of Mr. Hughley, if you complied with the agreement as set out in this document.

[Ingram]: Yes, sir. I understand.

....

The Court: And at that time you made an agreement with the State of Alabama.

[Ingram]: Yes, sir.

The Court: But now you are telling the Court that you desire to exercise your right to not testify and remain silent?

[Ingram]: Yes, sir, I do.

(Record on direct appeal, C. 61-66.) Thereafter, the trial court read to Ingram his capital-murder indictment, explained

to him the possible punishments he faced if he chose to not honor the agreement with the State, and asked him the following:

> The Court: Do you understand that you are deciding your fate relative to some extent relative to this case by what you are doing today?
>
> [Ingram]: Yes, sir, I do.
>
> ....
>
> The Court: Okay. This is your last chance now. You understand that?
>
> [Ingram]: Yes, I understand.
>
> The Court: When you leave here it's my understanding the State of Alabama is considering this to be a breach of the agreement, and that they will proceed to prosecute you, and they will use or attempt to use these confessions that have been, that you've given in this case along with any other statements that may be pertinent in the case. You understand that?
>
> [Ingram]: Yes, sir, I understand.
>
> The Court: Okay. I think it's pretty clear to the Court that he desires to exercise his right to remain silent, and he can go back to the facility now.

(Record on direct appeal, C. 67-69.)

Although Ingram testified at the evidentiary hearing that, had his counsel done something more--for example, bring in members of his family to persuade him to honor the agreement--he would have honored the agreement, this Court is

not convinced that there was anything his trial counsel could have done to persuade him to change his mind.

Indeed, Ingram blindsided his trial counsel with his decision to not testify against Boyd. Despite being blindsided with such a decision, Ingram's trial counsel met with Ingram, explained to him the consequences of his decision, and told him that if he did not take the deal one of his other codefendants would. Ingram, however, was "adamant" that he would not testify against Boyd because, he believed, if he and his codefendants all remained silent they would be acquitted. Additionally, Ingram believed that testifying against Boyd would label him as a "snitch." After explaining to Ingram the consequences of his decision to not testify, Ingram was brought in front of the circuit court and was again informed of the consequences of his decision and was specifically told that his confession would be used against him. Ingram, however, insisted that he would not testify.

Because Ingram's trial counsel met with Ingram, advised him of the consequences of his decision, warned him that one of his codefendants would take the State's offer if he did not want to take it, and urged him to honor his agreement

with the State, this Court finds that trial counsels' actions were reasonable. Thus, trial counsel were not ineffective.

Furthermore, regarding his allegation that his trial counsel should have arranged for members of his family to persuade him to honor his agreement with the State, Ingram failed to prove that claim. Indeed, although Ingram's brother, Calvin, his sister, Carla, and his aunt, Joyce Elston, all testified that, if they had been given a chance, they would have attempted to persuade Ingram to honor his agreement with the State (EH. 167, 176-77, and 188-89), there was no evidence presented at the hearing that they were, in fact, near enough to (or inside) the courthouse when Ingram made his decision to not testify. In other words, Ingram presented no evidence that, given that his decision to not testify against Boyd occurred in the middle of Boyd's trial, his family members could have arrived at the courthouse in the short amount of time that counsel had to meet with Ingram to persuade Ingram to honor his agreement. Although Fannin could not recall how much time they had been given to speak with Ingram, the record on appeal indicates that the events that transpired after Ingram's decision to not testify occurred relatively quickly. Additionally, there was nothing

offered at the evidentiary hearing to demonstrate that the trial court would have waited for Ingram's family to arrive to attempt to persuade him to testify against Boyd.

Furthermore, there is no way to do anything more than speculate as to whether Ingram's family members would have been successful in their attempts to persuade him to honor his plea agreement, especially given that neither his counsel, nor the judge presiding over Boyd's trial (who told Ingram he was "deciding [his] fate") were able to convince him to honor the agreement.

Regarding his allegation that his trial counsel were ineffective for failing to ask the Court for "more time" to explain to him the consequences of his decision to not fulfill his obligations under the plea agreement, Ingram again failed to satisfy his burden of proof. Indeed, although his trial counsel testified at the evidentiary hearing, Ingram's Rule 32 counsel did not ask Ingram's trial counsel why they did not request "more time" from the trial court to persuade Ingram to honor the plea agreement.[9] Thus, the record is

[9]Moreover, in addition to not establishing counsels' reasoning behind not requesting such a continuance, Ingram failed to present any evidence and, thus, prove that the trial court would have given Ingram the time his counsel allegedly should have requested--especially in light of the fact that

silent as to the reasoning behind trial counsel's actions, and because "'the record is silent as to the reasoning behind counsel's actions, the presumption of effectiveness is sufficient to deny relief on [this] ineffective assistance of counsel claim.'" Dunaway v. State, 198 So. 3d 530, 547 (Ala. Crim. App. 2009) (quoting Howard v. State, 239 S.W.3d 359, 367 (Tex. App. 2007)), rev'd on other grounds Ex parte Dunaway, 198 So. 2d 567 (Ala. 2014).

Finally, it is clear, based on the evidence presented at the evidentiary hearing and from the record on appeal, that Ingram, acting in concert with his codefendants, made a voluntary decision to not honor his agreement with the State --a decision about which he was "adamant." Although Ingram may regret his decision, his counsel did all that was constitutionally required of them when they attempted to persuade him to honor his agreement with the State.

Accordingly, this Court denies Ground I of Ingram's Fifth Amended Rule 32 Petition.

Ground II

Ingram's decision to not honor the agreement with the State occurred on the second day of Boyd's capital-murder trial. Therefore, Ingram failed to prove that his counsels' decision to not request "more time" prejudiced him.

In his Third, Fourth, and Fifth Amended Rule 32 Petitions, Ingram alleged that his trial counsel were ineffective "during the guilt-or-innocence phase of his trial." (Ingram's Fifth Rule 32 Petition, p. 13, ¶¶ 11-24.) Specifically, Ingram alleged that his trial counsel failed "to independently investigate or otherwise prepare an adequate defense to the State's capital murder charge" (Ingram's Fifth Amended Rule 32 Petition, p. 13, ¶ 13); failed "to adequately cross-examine the State's witnesses with information in their possession" (Ingram's Fifth Amended Rule 32 Petition, p. 14, ¶¶ 14-16); and failed to "present, adequately argue, and obtain favorable rulings on numerous motions and objections, and to object to inadmissible evidence." (Ingram's Fifth Amended Rule 32 Petition, p. 16, ¶¶ 17-24.)

Although given an opportunity to prove these allegations at the evidentiary hearing, Ingram's Rule 32 counsel informed this Court and the State at the outset of that hearing that Ingram was "withdrawing" his claims in Ground II "having to do with ineffective assistance of counsel at the guilt or innocence phase of the proceeding" (EH. 20), and, consistent with his decision to withdraw that ground, presented no

evidence in support of those allegations at the hearing. Because Ingram chose to withdraw his allegations set forth in Ground II and chose not to present any evidence with regard to those allegations, Ingram abandoned those claims and, thus, those claims are denied. See, e.g., Hooks v. State, 21 So. 3d 772, 788 (Ala. Crim. App. 2008) ("Hooks abandoned these claims because he presented no evidence at the evidentiary hearing to support them. 'As we stated in Payne v. State, 791 So. 2d 383, 399 (Ala. Crim. App. 1999) (opinion on return to remand): "Because it appears that [the appellant] did not present evidence at the evidentiary hearing with regard to [certain] claims ..., we conclude that he has abandoned these claims and we will not review them."' Burgess v. State, 962 So. 2d 272, 301 (Ala. Crim. App. 2005). See also Brooks v. State, 929 So. 2d 491 (Ala. Crim. App. 2005).").

Ground III

In his Third, Fourth, and Fifth Amended Rule 32 Petitions, Ingram alleged that his trial counsel were ineffective "during the penalty phase of his trial and at the judge sentencing phase of the proceedings." (Ingram's Fifth Amended Rule 32 Petition, p. 21, ¶¶ 25-36.) According to Ingram, his trial counsel failed to both investigate possible

mitigating evidence and present certain mitigating evidence to the jury.

Before addressing Ingram's specific allegations, however, this Court recognizes the following well-settled principles for examining claims that counsel were ineffective for failing to investigate and present possible mitigating evidence:

The type of cases in which courts have granted claims of ineffective assistance of counsel alleging that counsel failed to investigate possible mitigation evidence have generally "been limited to those situations in which defense counsel have totally failed to conduct such an investigation." McWhorter v. State, 142 So. 3d 1195, 1245 (Ala. Crim. App. 2011) (internal quotations omitted). As to claims of ineffective assistance of counsel that do "not involve a failure to investigate but, rather, petitioner's dissatisfaction with the degree of his attorney's investigation, the presumption of reasonableness imposed by Strickland will be hard to overcome." Id.

Additionally, "'a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to

counsel's judgments.'" Wiggins v. Smith, 539 U.S. 510, 521-22 (2003) (quoting Strickland, 466 U.S. at 690-91). "'A lawyer can almost always do something more in every case. But the Constitution requires a good deal less than maximum performance.'" Ray v. State, 80 So. 3d 965, 984 (Ala. Crim. App. 2011) (quoting Atkins v. Singletary, 965 F.2d 952, 960 (11th Cir. 1992)). Furthermore, "'[t]he attorney's decision not to investigate must not be evaluated with the benefit of hindsight, but accorded a strong presumption of reasonableness.'" Ray, 80 So. 3d at 984 (quoting Mitchell v. Kemp, 762 F.2d 886, 889 (11th Cir. 1985)). The reasonableness of counsels' investigation involves "'not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.'" Ray, 80 So. 3d at 984 (quoting St. Aubin v. Quarterman, 470 F.3d 1096, 1101 (5th Cir. 2006), quoting in part Wiggins, 539 U.S. at 527).

Moreover, the "'[t]he decision of what mitigating evidence to present during the penalty phase of a capital case is generally a matter of trial strategy.'" McWhorter, 142 So. 3d at 1247 (quoting Hill v. Mitchell, 400 F.3d 308, 331 (6th Cir. 2005)). Indeed, courts have recognized that

trial counsel is "'afforded broad authority in determining what evidence will be offered in mitigation'" and "'that post-conviction proceedings were designed to redress denials or infringements of basic constitutional rights and were not intended as an avenue for simply retrying the case.'" McWhorter, 142 So. 3d at 1246 (quoting Jells v. Mitchell, 538 F.3d 478, 489 (6th Cir. 2008)) (internal citations omitted). Additionally, "'the failure to present evidence which is merely cumulative to that which was presented at trial is, generally speaking, not indicative of ineffective assistance of trial counsel.'" Id.

> "'"Prejudicial ineffective assistance of counsel under Strickland cannot be established on the general claim that additional witnesses should have been called in mitigation. See Briley v. Bass, 750 F.2d 1238, 1248 (4th Cir. 1984); see also Bassette v. Thompson, 915 F.2d 932, 941 (4th Cir. 1990). Rather, the deciding factor is whether additional witnesses would have made any difference in the mitigation phase of the trial." Smith v. Anderson, 104 F. Supp. 2d 773, 809 (S.D. Ohio 2000), aff'd, 348 F.3d 177 (6th Cir. 2003). "There has never been a case where additional witnesses could not have been called." State v. Tarver, 629 So. 2d 14, 21 (Ala. Crim. App. 1993).'"

McWhorter, 142 So. 3d at 1247 (quoting Hunt v. State, 940 So. 2d 1041, 1067-68 (Ala. Crim. App. 2005)). Before a court

> "'can assess the reasonableness of counsel's investigatory efforts, we must first determine the nature and extent of

> the investigation that took place....' Lewis v. Horn, 581 F.3d 92, 115 (3d Cir. 2009). Thus, '[a]lthough [the] claim is that his trial counsel should have done something more, we [must] first look at what the lawyer did in fact.' Chandler v. United States, 218 F.3d 1305, 1320 (11th Cir. 2000)."

Broadnax, 130 So. 3d at 1248.

Marshall v. State, 182 So. 3d 573, 595-98 (Ala. Crim. App. 2014).

Finally, this Court notes that "[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 ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695.

Thus, consistent with the above-quoted principles, this Court begins its analysis of Ingram's claim that his trial counsel were ineffective for failing to investigate and present mitigation evidence by, first, setting out the evidence that trial counsel did, in fact, present during the penalty phase of Ingram's trial.

At trial, Ingram was represented by Jeb Fannin and Mark Nelson. As the Court of Criminal Appeals explained, during the penalty phase of Ingram's trial, his trial counsel

> called eight witnesses to testify, including his mother, who was permitted to testify by deposition because she had recently undergone surgery for a brain tumor. Ingram's mother, Dorothy Ackles, testified that Ingram was born in Brooklyn, New York; that he had been healthy as a child but had had to undergo surgery because he was bowlegged; that he had two brothers and one sister; that he had been an excellent student and athlete; that he had been a quiet and obedient child; and that he always had a positive influence on others. Ackles also testified that Ingram had a daughter who was 11 months old at the time of her deposition. She asked the jury to spare her son's life.

Ingram III, 51 So. 3d 1094, 1113 (Ala. Crim. App. 2006) (footnotes omitted), rev'd on other grounds Ingram IV, 51 So. 3d 1119 (Ala. 2010). Additionally, his trial counsel called his brother, Calvin; Felicia Stewart; Willie P. Taylor; Mary Jones; Anthony Parker; Joyce Elston; and Carla, his sister. Much like Ingram's mother's deposition testimony, these witnesses testified that Ingram was a good child who minded his mother; that he was quiet and well-mannered; that he had a lot of friends and was well-liked in the community; that he played basketball and was athletic; that he interacted well with the children in his life and the children in his community; that he did well in school and made good grades;

and that the jury should spare his life and sentence him to life without the possibility of parole.

Additionally, before turning to Ingram's specific claims of penalty-phase ineffective assistance of counsel, this Court recognizes that trial counsel had a difficult task during their penalty-phase presentation. Indeed, the very jury they had to persuade to sentence Ingram to life imprisonment without the possibility of parole had just convicted Ingram of a capital offense, in which the State's evidence established that Ingram and his codefendants kidnapped Gregory Huguley by force and at gunpoint; took him to a ball park; and, while he was pleading for his life, duct taped him to a bench, doused him with gasoline, set him on fire. Ingram and his codefendants then watched Gregory Huguley burn to death for approximately 20 minutes.

After considering the evidence presented at trial in both the guilt phase and penalty phase of Ingram's trial and the evidence presented in the evidentiary hearing, this Court makes the following findings of fact and conclusions of law regarding Ingram's penalty-phase ineffective assistance of counsel claims:

A. Ingram's allegation that his trial counsel were ineffective for failing to investigate possible mitigation evidence

In his Fifth Amended Rule 32 petition, Ingram alleged that his trial counsel failed to investigate and discover certain mitigation evidence. According to Ingram, because his counsel failed to properly investigate possible mitigation evidence, "substantial mitigating evidence was not discovered, and, because it was not discovered, it was not presented to the jury that recommended [Ingram] be sentenced to death." (Ingram's Fifth Amended Rule 32 Petition, pp. 23-24.) This claim is without merit.

As set out above, claims alleging that counsel was ineffective for failing to investigate and discover mitigation evidence begins by determining the "'nature and extent of the investigation that took place....' Lewis v. Horn, 581 F.3d 92, 115 (3d Cir. 2009). Thus, '[a]lthough [the] claim is that his trial counsel should have done something more, we [must] first look at what the lawyer did in fact.' Chandler v. United States, 218 F.3d 1305, 1320 (11th Cir. 2000)." Marshall, 182 So. 3d at 598 (quoting Broadnax, 130 So. 3d at 1248).

Here, at the evidentiary hearing, Ingram's trial counsel, Fannin, testified that he and his co-counsel, Nelson, jointly investigated Ingram's case. In so doing, they interviewed witnesses at the scene of the kidnapping and went to the location where Ingram and his codefendants burned Huguley. Additionally, Fannin explained that he talked to Ingram's family and Ingram, and, because of the nature of the case, they thought it would be a good idea to request a mental evaluation of Ingram, which evaluation indicated that Ingram did not have any mental-health issues. Although his trial counsel "did not have a good feeling about the penalty phase" of Ingram's trial, they hoped that could "put on enough mitigation evidence to keep" from having the death penalty imposed on Ingram. (EH. 53.)

According to Fannin, the strategy during mitigation was to demonstrate that Ingram did not have a significant criminal history, that he was a good child, that he was good in school, that he was well-liked in his community, that his family loved him, that his friends loved him, and that he was a young man when the offense occurred. (EH. 55.) Although Fannin acknowledged that they did not hire an investigator or a mitigation expert, he stated that they spoke with Ingram's

family members, who assisted them in obtaining the names of people who would testify on Ingram's behalf. (EH. 53.) Fannin, fearing that Ingram's mother's health would not allow her to testify at Ingram's trial, arranged for her testimony to be taken by videotaped deposition. In her deposition, Ingram's mother discussed Ingram's background, medical issues, and educational history, and asked the jury to spare her son's life.

As set out above, Fannin and Nelson deployed this strategy during the penalty phase of Ingram's trial by calling eight witnesses to testify, including Ingram's mother's videotaped deposition. The testimony from these witnesses touched on each of the areas that Fannin explained they wanted to focus on in mitigation. Counsels' strategy was successful to a degree, convincing one juror to recommend a sentence of life without the possibility of parole.

Based on the evidence presented at the evidentiary hearing and the record on appeal, this Court finds that this is not a case in which counsel failed in their duty to investigate possible mitigating evidence or failed to adequately investigate possible mitigating evidence to present to the jury during the penalty phase of Ingram's

trial. Rather, it is clear that trial counsel had a reasonable mitigation strategy and investigated that strategy by interviewing Ingram's family and friends. Although Ingram correctly alleges, and this court recognizes, that trial counsel could have interviewed more and different witnesses, "'"[t]here has never been a case where additional witnesses could not have been called." State v. Tarver, 629 So. 2d 14, 21 (Ala. Crim. App. 1993).'" Marshall, 182 So. 3d at 598 (quoting McWhorter v. State, 142 So. 3d 1195, 1247 (Ala. Crim. App. 2011) (quoting Hunt v. State, 940 So. 2d 1041, 1067-68 (Ala. Crim. App. 2005))). The fact that other possible witnesses exist, however, is not a basis on which to find that counsel was ineffective (this Court addresses the substance of the allegedly omitted mitigation evidence below). Thus, this Court finds that counsels' investigation into possible mitigation evidence was both adequate and reasonable. Consequently, Ingram's trial counsel were not ineffective in their investigation into possible mitigation evidence.

Additionally, although Ingram alleged as a sub-issue to this claim in his Fifth Amended Rule 32 Petition that his trial counsel were ineffective for failing to "secure the

assistance of a mitigation investigator or a social worker" and Fannin testified at the evidentiary hearing that he did not hire such an expert, Ingram failed to present any evidence at the evidentiary hearing establishing which mitigation expert or social worker he should have hired, what that expert would have testified to, and that the expert would have been available to testify during the penalty phase of Ingram's trial.[10] Ingram, therefore, failed to prove this claim during the evidentiary hearing. Moreover, "'[h]iring a mitigation specialist in a capital case is not a requirement of effective assistance of counsel.'" Daniel v. State, 86 So. 3d 405, 437 (Ala. Crim. App. 2011) (quoting Phillips v. Bradshaw, 607 F.3d 199, 207-08 (6th Cir. 2010)).

Accordingly, Ingram's claim that his trial counsel were ineffective for failing to investigate and discover mitigation evidence is denied.

B. Ingram's claim that his trial counsel "failed to investigate and present relevant aspects of petitioner's background, medical history, educational

[10]The claim raised in Ingram's Fifth Amended Rule 32 Petition, likewise, did not set forth any facts establishing the specific name of any witness in this area of expertise, what that person's testimony would have been, or that they would have been available to testify at trial. Thus, this allegation failed to satisfy the pleading requirement set forth in Rule 32.6(b), Ala. R. Crim. P.

history, and other life experiences that could be considered by the jury in mitigation of punishment."

In paragraph 29 of his Fifth Amended Rule 32 Petition, Ingram alleged that his trial counsel were ineffective because they "failed to investigate and present relevant aspects of [his] background, medical history, education history, and other life experiences that could be considered by the jury in mitigation of punishment." (Ingram's Fifth Amended Rule 32 Petition, p. 23.) Although this Court has found that Ingram's trial counsels' investigation into possible mitigation evidence was reasonable, this Court turns now to the specific mitigation evidence, Ingram says, his counsel should have presented to the jury.

i. Family Background

In his petition, Ingram alleged that trial counsel failed to investigate and present evidence of Ingram's childhood "living in housing projects in Brooklyn, New York," which was "substandard" and possibly "contaminated with lead"; that, while in Brooklyn, Ingram "witnessed many acts and crimes of violence, and was himself the victim of crimes of violence" --specifically, that he had been "'jumped' by a group of boys"

and had to be hospitalized; and that Ingram witnessed acts of domestic violence between his mother and two different live-in boyfriends "when they became drunk." Ingram, however, failed to prove that his counsels' performance was deficient when they did not present this specific evidence of Ingram's family background to the jury.

Indeed, the totality of the questions to Ingram's trial counsel during the evidentiary hearing regarding Ingram's family background was as follows:

> [Ingram's Rule 32 Counsel]: What about the circumstances of his upbringing?
>
> [Mr. Fannin]: Well, we talked to his mother about when he was a child and some of the circumstances of his youth. I can't recall what she said, but I remember talking to her about that.
>
> [Ingram's Rule 32 Counsel]: Any other witnesses or sources of information on that topic outside of her?
>
> [Mr. Fannin]: His sister may have talked about his childhood. I can't specifically recall.
>
> [Ingram's Rule 32 Counsel]: Would there have been anyone beside those two?
>
> [Fannin]: Not that I can recall. I'm not saying there were not, but I can't recall.

(EH. 55-56.) Additionally, Fannin conceded that they did not investigate the presence of "neurotoxins" in the area in which Ingram grew up.

Ingram failed to ask his trial counsel whether he had gained evidence from any of the witnesses that he had spoken to in preparation for the penalty phase of Ingram's trial about the specific areas of Ingram's family background mentioned in Ingram's Rule 32 petition--i.e., his witnessing acts of violence in Brooklyn, his getting "jumped" by a group of boys in Brooklyn, his living in "substandard" housing in Brooklyn, and his witnessing acts of domestic violence between his mother and her boyfriends. Because Ingram's Rule 32 counsel failed to ask his trial counsel whether trial counsel was aware of these specific aspects of Ingram's family background, this Court cannot determine whether Ingram's trial counsel either knew of these parts of Ingram's background and made a strategic choice to not present that evidence, or whether trial counsel did not present this evidence simply because they did not know of the existence of these aspects of Ingram's background. Thus, the record is silent as to the reasoning behind counsels' actions and, thus, "'"the presumption of effectiveness is sufficient to deny relief on [an] ineffective assistance of counsel claim."' Dunaway v. State, [198] So. 3d [530], [547] (Ala. Crim. App. 2009) (quoting Howard v. State, 239 S.W.3d 359, 367 (Tex.

App. 2007))." Broadnax v. State, 130 So. 3d 1232, 1255-56 (Ala. Crim. App. 2013).

Additionally, Ingram failed to prove that he was prejudiced by his trial counsels' failure to present this specific evidence of Ingram's family background. Indeed, this Court is not convinced that, even if his trial counsel had presented such evidence, there would be a reasonable probability that the "sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695. For example, although Ingram's brother, Calvin, and his sister, Carla, testified at the evidentiary hearing that their mother's boyfriend--Walter Davis--would get into physical altercations, that testimony would have opened the door for the State to point out that Ingram's sister grew up in the same environment but had not committed a capital murder and, thus, would have undermined Ingram's mitigation case. See, e.g., Grayson v. Thompson, 257 F.3d 1194, 1227 (11th Cir. 2001) ("The fact that Grayson was the only child to commit such a heinous crime also may have undermined defense efforts to use his childhood in mitigation.") Such evidence was, at best, a double-edged sword, and "'[a]n ineffective assistance

claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword.' Reed v. State, 875 So. 2d 415, 437 (Fla. 2004)." Washington v. State, 95 So. 3d 26, 53 (Ala. Crim. App. 2012).

Because the record is silent as to trial counsels' reasoning behind not presenting certain evidence as to Ingram's family background to the jury, Ingram did not prove that the failure to present that evidence prejudiced him. Thus, this claim is denied.

ii. Medical history

In paragraph 29 of his Fifth Amended Rule 32 Petition, Ingram alleged that his trial counsel were ineffective for failing to investigate and present as mitigation evidence Ingram's "medial history."

Although Ingram, in his Fifth Amended Rule 32 Petition, did not specifically allege what physical impairment he had suffered from that his trial counsel should have either investigated or presented to the jury during the penalty phase of his trial,[11] his sister, Carla, testified during the

[11]Thus, this claim is insufficiently pleaded. Regardless, this Court makes specific, written findings of

evidentiary hearing that Ingram had "braces on his legs" because Ingram's "legs were turned in." (EH. 180.) This evidence, however, was cumulative to evidence Ingram's trial counsel presented to the jury during the penalty phase of Ingram's trial. Specifically, in her videotaped deposition, Ingram's mother explained that, as a child, Ingram was healthy but was "bowlegged." According to his mother, Ingram had to be taken to Birmingham to "straighten" his legs up and had to keep going back for three years.

Thus, the evidence Ingram alleged his counsel should have presented at trial, was, in fact, presented during the penalty phase of his trial. "'[T]he failure to present evidence which is merely cumulative to that which was presented at trial is, generally speaking, not indicative of ineffective assistance of trial counsel. State v. Combs (1994), 100 Ohio App. 3d 90, 105, 652 N.E.2d 205.'" McWhorter v. State, 142 So. 3d 1195, 1246 (Ala. Crim. App. 2011) (quoting Jells v. Mitchell, 538 F.3d 478, 489 (6th Cir. 2008)).

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fact as to this claim. See Ex parte McCall, 30 So. 3d 400 (Ala. 2008).

Additionally, in addressing this claim, this Court addresses only Ingram's allegations as to his physical health. This Court addresses Ingram's allegations of mental-health issues below.

Moreover, this Court finds that the failure to present this cumulative evidence did not prejudice Ingram. Accordingly, this claim is denied.

C. Ingram's allegation that his trial counsel failed to investigate and present evidence that Ingram suffered from "various mental health impairments."

In his Fifth Amended Rule 32 Petition, Ingram alleged that his trial counsel were ineffective for failing to investigate and present "various mental health impairments." (Ingram's Fifth Amended Rule 32 Petition, p. 26.) His allegations in this regard center around two topics: (1) his educational history, and (2) his exposure to lead and polychlorinated biphenyls ("PCBs"). This Court will address each allegation in turn.

Before doing so, however, this Court recognizes that, although Ingram's Fifth Amended Rule 32 Petition alleges that Ingram had suffered from "various mental health impairments," before his trial, Ingram's trial counsel requested that Ingram receive a mental-health evaluation. The trial court granted that request and Ingram was evaluated by Michael H. Quay, M.S., who concluded that Ingram "does not appear to

suffer from any form of mental illness, nor does he exhibit suicidal ideations. Overall, he is well oriented, expressed himself well verbally, and appears to be of average to above average intelligence." (Trial record, C. 27.)

Additionally, as discussed more thoroughly below, although Ingram alleged that his counsel were ineffective for failing to investigate and present evidence of various mental-health issues, Ingram's Rule 32 counsel has not presented this, or any other, Court with any evidence that demonstrates that Ingram does, in fact, suffer from any mental-health impairment. In fact, because Ingram made allegations that were premised on his actually having a mental-health issue, the State moved this Court to allow its own mental-health expert to examine Ingram, which this Court granted. When the State's mental-health expert went to examine him, however, Ingram, on the advice of his Rule 32 counsel, refused to make himself available to the State's expert. Ingram remained steadfast in his refusal to meet with the State's mental-health expert up until and through the evidentiary hearing.

With these facts in mind, this Court makes the following findings of fact and conclusions of law regarding this claim.

i. Educational history

In paragraph 29 of his Fifth Amended Rule 32 Petition, Ingram alleged that his trial counsel were ineffective for failing to present evidence of Ingram's "educational history." Later, in paragraph 32 of his Fifth Amended Rule 32 Petition, Ingram explained:

> Had his trial counsel taken even the rudimentary step of interviewing his teachers--which they did not--they would have discovered that he struggled academically from the time he entered school, and that his grades were very low. His inability to process or retain information was not due to lack of effort, but to an inability to learn. Because of his learning difficulties, he was both placed in classes for the lowest performers, including the Constantine Appalachian Program (CAP) to help struggling students, which was a form of special education, and was also referred for testing in the second grade for learning disabilities. This type of referral was rare in Anniston when [Ingram] was in school, and indicated significant educational problems which persisted throughout his school years until he eventually dropped out of school in the 10th grade.

(Ingram's Fifth Amended Rule 32 Petition, p. 26.)

Regarding their investigation into Ingram's educational history, Ingram's trial counsel were only asked if trial counsel had considered information about Ingram's performance in school, to which trial counsel responded, "I can't recall. It would be in the record if we had" (EH. 55); and asked whether trial counsel had met with any of Ingram's teachers

or other school personnel, to which trial counsel responded, "I can't remember." (EH. 55.) Ingram's Rule 32 counsel, however, did not ask trial counsel whether he researched Ingram's educational history as it relates to any alleged mental-health issues.

Although Ingram did not ask his trial counsel questions related to Ingram's educational history as it relates to any alleged mental-health issues, Ingram did question June Allred--Ingram's second grade teacher--and Glenda Jackson--his CAP teacher--regarding these allegations.

Allred testified that, at the time Ingram was in second grade, she was employed at Johnston Elementary School in the Anniston City School System teaching second grade. Although she did not remember Ingram, Allred confirmed that she "filled out a referral for him to be evaluated for special services," to see if Ingram needed "more additional help than he gets in the ordinary classroom."[12] (EH. 122.) According to Allred, she referred Ingram to be evaluated because, she said, "he was not able to perform on grade level"--something she seldom did for second graders. Allred stated that, at the time of

[12]Ingram admitted, without objection, Ingram's school records as "Petitioner's Exhibit 3."

Ingram's trial she lived in Anniston, but Ingram's trial counsel did not contact her; had they done so she would have been willing to talk to them.

On cross-examination, Allred conceded that she did not specifically remember why she referred Ingram for testing. Additionally, Allred explained that she did not remember that the evaluation indicated that Ingram was not in need of special services. Indeed, the documents Ingram admitted as Petitioner's Exhibit 3 included a letter dated December 20, 1978, which letter was titled "Notification that Student is not Exceptional and not Eligible for Special Education," wherein it was explained that Ingram "is not in need of special programs and services as outlined in the state and federal legislation related to exceptional students." (Emphasis in original).

Glenda Jackson testified that she taught at Constantine Elementary School from 1982-1984, and had Ingram as one of her students. According to Jackson, Ingram rarely got into trouble, but his "biggest problem" was that he did not "finish his work, and [she] had to call his mother, and his mother would come to the school." (EH. 130.) Jackson explained that the classroom in which she taught Ingram was a "combined

classroom" for children "whose academic level was lower." (EH. 131.) Jackson explained that the idea behind the program was to put students together who were academically on a similar level as opposed to putting them together based on age. Jackson stated that Ingram was in the fifth grade but was paired with fourth grade children because his academic level was on par with fourth grade--not fifth grade. Jackson stated that Ingram struggled in school. Jackson, like Allred, testified that Ingram's trial counsel did not contact her, but, had they done so, she would have been willing to speak with them.

On cross-examination, Jackson confirmed that the "combined classroom" approach was not a special education program. Jackson, on redirect examination, explained that the program was for children who "did not meet the criteria" for special education "according to the testing that's done for special education kids." (EH. 138.) Jackson further explained that the program was designed "to catch those kids who were not special ed but who were not on the regular level academically but who fell in between where they needed added attention, added help, added assistance so that they excel well in life." (EH. 138-39.)

Although Ingram contends that his trial counsel were ineffective for failing to discover and present the mitigating evidence offered by both Allred and Jackson--specifically, that his educational background demonstrated that he had mental-health issues--that claim fails for at least three reasons.

First, portions of Jackson's testimony were cumulative to other testimony presented during the penalty phase of Ingram's trial. Specifically, as set out above, Jackson testified that Ingram did not get into much trouble and that Ingram was well-mannered. This testimony was cumulative to the penalty-phase testimony of Ingram's sister, Carla, who explained that Ingram was a good and respectful child and did what he was supposed to do. Additionally, Jackson's testimony was cumulative to the penalty-phase testimony of Felicia Stewart, who explained that Ingram was both quiet and "mannerable." (Trial record, R. 950.) Because portions of Jackson's testimony would have been merely cumulative to other testimony presented during the penalty phase of Ingram's trial, this Court finds that his trial counsel were not ineffective for failing to present that testimony. See, e.g., McWhorter v. State, 142 So. 3d 1195, 1238 (Ala. Crim.

App. 2011) (holding that trial counsel is not ineffective for failing to present mitigation evidence that was cumulative to other testimony presented during the penalty phase of trial).

Second, where their testimony was not cumulative to other testimony presented during the penalty phase of Ingram's trial, Jackson's and Allred's testimony contradicted certain testimony presented during the penalty phase of Ingram's trial. Indeed, large portions of both Jackson's and Allred's testimony during the evidentiary hearing focused on Ingram's academic struggles. Specifically, that he needed additional attention, that he did not finish his work, and that he operated on a lower academic level. This testimony is in direct conflict with the penalty-phase testimony of Ingram's aunt, Joyce Elston, his sister, Carla, and his mother, Dorothy Ackles, who testified during the penalty phase of Ingram's trial that Ingram was a good student, that he made good grades in school, that he and his sister would do their homework together, and that he was an excellent child in school and liked school.[13] Because Allred's and Jackson's testimony at the evidentiary hearing would have, in part, contradicted

[13]In her videotaped deposition, Ingram's mother even displayed some of Ingram's report cards.

testimony presented during the penalty phase of Ingram's trial, his trial counsel were not ineffective for failing to present testimony of the portions of Jackson's and Allred's testimony that indicated that Ingram struggled academically.

Finally, although Ingram alleged that his counsel were ineffective for failing to present evidence that Ingram was in a special-education class and that he had been referred for testing in the second grade for learning disabilities, these allegations were either not supported by the evidence presented at the evidentiary hearing or did not demonstrate that Ingram, in fact, had any learning disability or mental-health impairment. Indeed, although Ingram did present evidence that he was referred for testing in the second grade for special education, the result of that testing (as demonstrated by his own exhibit) was that he did not qualify for special-education classes. Additionally, although Ingram alleged that his "combined classroom" experience with Jackson was a "form of special education," Jackson's testimony at the evidentiary hearing established that the "combined-classroom" approach was not a form of special education. Because Ingram's allegations regarding "special education" were not supported by the evidence presented at the evidentiary hearing, Ingram

failed to satisfy his burden of proof as to this claim. Thus, this Court finds that Ingram's counsel were not ineffective for failing to present this evidence during the penalty-phase of Ingram's trial. Further, there is no evidence before this Court that Ingram is actually impaired.

Moreover, Ingram failed to demonstrate that, had his trial counsel presented the above-discussed testimony, there existed a reasonable probability that the "sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695. Indeed, this Court is not convinced that, had this testimony been presented, Ingram would have been sentenced any differently. Again, the facts of this case are horrifying and gruesome, and presenting mitigation evidence that Ingram may have had some academic struggles would not have detracted from the aggravating circumstances in this case, including that Ingram chose to burn Gregory Huguley to death with a crowd of onlookers.

Accordingly, this Court holds that Ingram's trial counsel were not ineffective when it did not present the above-discussed mitigation evidence during the penalty phase of Ingram's trial. Therefore, this claim is denied.

ii. Exposure to lead and PCBs

In paragraph 31 of his Fifth Amended Rule 32 Petition, Ingram alleged that his trial counsel were ineffective for failing to investigate, develop, and present evidence that Ingram "suffered from low cognitive functioning and neurological impairments (i.e., brain damage) most likely resulting from exposure to lead, PCBs or other neurotoxins." (Ingram's Fifth Amended Rule 32 Petition, p. 25.) In paragraph 33 of his Fifth Amended Rule 32 Petition, Ingram explained:

> [T]he need for a comprehensive mental health evaluation was further amplified by the fact that he was raised in poverty in the housing projects of Anniston, Alabama and New York City. Post-conviction counsel's preliminary investigation has revealed that a number of children in these projects, including children in the same projects where petitioner lived, suffered from lead poisoning, which is known to cause brain damage and other psychiatric disorders. Furthermore, [Ingram] was raised in areas of Anniston which were contaminated by polychlorinated biphenyls (PCBs) as a result of intentional environmental pollution by various chemical companies, including Monsanto. Exposure to PCBs can cause a variety of health problems, including learning difficulties and neurological impairments. Studies have shown that even exposure to low levels of PCBs can cause developmental delays, behavioral problems, memory deficits, low I.Q., and other cognitive and neurological problems. [Ingram] was at a higher risk than other children to have deficits related to PCB exposure because his mother at clay when she was pregnant. She had an eating disorder ("pica"), and ingested clay (unknown to her at the time) from areas polluted by PCBs. In utero exposure to PCBs is especially harmful to

> brain development. As a child, [Ingram] also swam in creeks, streams, and ponds near the Monsanto plant which were known to contain toxic PCB levels. Based on [Ingram's] known life history and other evidence uncovered by undersigned counsel during the preliminary investigation with limited resources and no expert assistance, [Ingram] has clear neurological impairments, as a result of neurotoxin exposure and other psychiatric impairments, e.g., post-traumatic stress disorder and depression. Because the totality of the mitigation evidence, especially the evidence of [Ingram's] mental and neurological impairments, would have cast his culpability in a different and much less aggravated light, there exists a reasonable probability that, but for counsel's omissions, the result of [Ingram's] sentencing trial would have been different.

(Ingram's Fifth Amended Rule 32 Petition, pp. 27-28) (citations and footnotes omitted.) Ingram is not entitled to relief on this claim for two reasons.

First, this claim, as pleaded in his Fifth Amended Rule 32 petition, does not satisfy the burden of pleading. Indeed, the above-quoted allegations are merely speculative. That is, Ingram did not allege that he does in fact suffer from being poisoned by either lead or PCBs; rather, he alleged only that it is possible that he was exposed to such substances. At the outset of the evidentiary hearing, Ingram's Rule 32 counsel confirmed the speculative nature of this allegation and conceded that Ingram has never been tested for exposure to

these substances.[14] Such speculative allegations are insufficient to demonstrate that trial counsel were ineffective. Additionally, Ingram's allegations do not demonstrate that his trial counsel knew that Ingram suffered from a mental-health issue at the time of his trial (in fact, the mental-health examination conducted before trial indicated he did not have such issues). Finally, Ingram's allegations include a one-sentence statement that the result of the sentencing may have been different if this evidence were presented during the penalty phase of his trial, which is merely a bare allegation of prejudice.

Second, Ingram voluntarily waived any postconviction relief as to this claim. As set out above, Ingram alleged that he suffered from mental-health issues because of his possible exposure to lead and PCBs. According to Ingram, his counsel were ineffective for failing to investigate and present evidence of his mental-health issues that were

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[14]In his allegations to support this claim, Ingram implicitly chides this Court for failing to provide him with funds for expert assistance in this case. As the Court of Criminal Appeals noted in its order denying Ingram's petition for a writ of mandamus, however, "[t]his Court has on numerous occasions held that postconviction petitioners are not entitled to funds to hire experts. See James v. State, 61 So. 3d 357 (Ala. Crim. App. 2010), and the cases cited therein."

related to his exposure to these substances. In other words, to prove his allegation that his counsel were ineffective for failing to investigate and present evidence of his mental-health issues, Ingram would have to, in fact, prove that he suffered from a mental-health issue. To state it another way, if Ingram does not suffer from any mental-health issues, his counsel could not have been ineffective for failing to investigate and present mitigation evidence of such issues, as no such evidence would exist.

As set out in the procedural history of this case, because Ingram's ineffective-assistance-of-counsel claim was premised on his having a mental-health impairment, the State requested that this Court order that Ingram make himself available to the State's expert witness for a mental-health evaluation so the State could be prepared to rebut Ingram's mental-health-impairment claims. Ingram objected to that request and, ultimately, filed a petition for a writ of mandamus with the Court of Criminal Appeals. The Court of Criminal Appeals denied Ingram's petition finding, in part, that this Court did not "abuse [its] considerable discretion in granting the State's motion for access to Ingram." His

petition for a writ of mandamus filed in the Alabama Supreme Court was, likewise, rejected.

At the outset of the evidentiary hearing on Ingram's Rule 32 petition, Ingram's counsel informed this Court that they were not going to make Ingram available to the State's expert witness. Based on that information, this Court excluded Ingram from presenting any evidence at the hearing that Ingram did, in fact, suffer from a mental-health impairment (or that he possibly suffered, as was his allegations, from such an impairment) because of his exposure to lead or PCBs.[15]

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[15]Notably, this Court did not prevent Ingram from presenting evidence that his trial counsel should have investigated whether Ingram had been exposed to the presence of lead or PCBs; rather, this Court excluded only that evidence that would demonstrate that Ingram suffered some mental-health impairment because of that exposure.

During the evidentiary hearing, however, the only evidence that Ingram presented during the hearing that touched on Ingram's possible exposure to lead or PCBs was a single question addressed to Ingram's trial counsel asking whether trial counsel conducted any investigation into "neurotoxins [being] present in the area where Mr. Ingram grew up," to which trial counsel responded, "No, sir." (EH. 57.) This single question does not satisfy Ingram's burden of proof as to the allegation that his counsel were ineffective for failing to investigate the presence of lead or PCBs where Ingram was raised. In fact, the question posed to trial counsel did not even reference either lead or PCBs specifically; instead, it referenced only "neurotoxins" generally.

This Court's decision to exclude such testimony was based on the holding in State v. Click, 768 So. 2d 417 (Ala. Crim. App. 1999), in which the Court of Criminal Appeals addressed an analogous secenario. In Click, Click filed a Rule 32 petition, in which he alleged, among other things, that his trial counsel was ineffective. At the evidentiary hearing on his petition, the State attempted to call Click as a witness to testify concerning the allegations he raised in his petition. Click, however, refused to testify citing his Fifth Amendment privilege against self-incrimination. The circuit court then denied the State's request to compel Click to testify at the hearing and, in response, the State filed a petition for a writ of mandamus.

The Court of Criminal Appeals held that Rule 32 proceedings are "civil in nature" and is "commenced by the defendant's filing a petition for postconviction relief in the county where he was convicted." Click, 768 So. 2d at 419. The Court explained that, although the Fifth Amendment privilege against self-incrimination applies in civil proceedings, the question that must be answered is whether Click faces "criminal liability because of his testimony at the postconviction hearing," which liability is "real and

appreciable." Id. at 420. Examining this question, the Court of Criminal Appeals held:

> Here, Click has been convicted and sentenced, and his conviction has been affirmed on direct appeal. He voluntarily filed a postconviction petition. The possibility that Click will face criminal liability by answering questions about his trial counsel's performance in this postconviction proceeding is " remote and improbable." See Barone, supra. Certainly, the State would be put in an untenable position if it could not call the petitioner to the stand to refute the allegations that he alone has asserted in his petition. The drafters of Rule 32, Ala. R. Crim. P., were aware of such possible difficulties when they drafted Rule 32.9(b), which specifically gives the State the right to call the petitioner as a witness at the hearing.

Click, 768 So. 2d at 421 (emphasis added).

Similarly, here, Ingram has been convicted and sentenced and his conviction and sentence have been affirmed on direct appeal. Additionally, like in Click, Ingram voluntarily filed a Rule 32 petition in this Court alleging, among other things, that his trial counsel were ineffective. One basis for that claim was that his trial counsel failed to discover and present certain mitigation evidence relating to Ingram's alleged mental-health impairments. Because Ingram voluntarily injected his mental-health issues into this postconviction proceeding, he cannot both attempt to prove that claim and prevent the State from being able to rebut

that claim by refusing to make himself available to be examined by the State's expert witness. Indeed, if Ingram were allowed to both attempt to prove his mental-health claim and refuse to meet with the State's mental-health expert, Ingram would, similar to Click, be placing the State in an "untenable position." That is, the State would be unable to rebut any evidence produced by Ingram that even hinted at the possibility that he had a mental-health impairment.

Because Ingram's Rule 32 counsel refused to make Ingram available for examination by the State's mental-health expert, Ingram voluntarily waived this claim. This Court therefore finds that this claim is waived and denied.

D. Ingram's allegation that his trial counsel failed to investigate and present evidence of Ingram's record during his pretrial incarceration

In paragraphs 34-35 of his Fifth Amended Rule 32 Petition, Ingram alleged that his trial counsel were ineffective because his trial counsel failed to investigate and present evidence of Ingram's "good behavior while incarcerated and his institutional adaptability." (Ingram's Fifth Amended Rule 32 Petition, p. 28.) According to Ingram,

such evidence "is a powerful factor in mitigation of punishment" and there exists "no legitimate, reasonable strategic reason for failing to show the jury that [Ingram] had adjusted to incarceration during the many months of his pre-trial confinement, or that he would be a non-violent prisoner if sentenced to life without parole." (Ingram's Fifth Amended Rule 32 Petition, p. 29.) Ingram, however, failed to prove that his counsel were deficient in failing to investigate or present this evidence and failed to prove that his counsels' failure to present such evidence prejudiced him.

Specifically, one of Ingram's trial counsel testified that he visited Ingram in jail and that, to his knowledge, Ingram did not get in trouble while he was waiting for trial. (EH. 34.) Additionally, Ingram's Rule 32 counsel admitted as an exhibit records from the Alabama Department of Corrections indicating that Ingram had no disciplinaries while incarcerated in Talladegea County Jail (a fact stipulated to by the State). Ingram's Rule 32 counsel, however, did not ask Ingram's trial counsel the reason they did not present such "mitigating evidence" during the penalty phase of Ingram's trial. Thus, the record is silent as to the reasoning behind

counsels' actions and "'"the presumption of effectiveness is sufficient to deny relief on [an] ineffective assistance of counsel claim."' Dunaway v. State, [198] So. 3d [530], [547] (Ala. Crim. App. 2009) (quoting Howard v. State, 239 S.W.3d 359, 367 (Tex. App. 2007))." Broadnax v. State, 130 So. 3d 1232, 1255-56 (Ala. Crim. App. 2013).

Regardless, such evidence is, at best, a double-edged sword because had his trial counsel presented such evidence it simply would have called attention to the fact that Ingram was incarcerated before trial. "'An ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword.' Reed v. State, 875 So. 2d 415, 437 (Fla. 2004)." Washington v. State, 95 So. 3d 26, 53 (Ala. Crim. App. 2012). Additionally, such evidence has been described as, at best, "minimally mitigating," see State v. Spears, 184 Ariz. 277, 279, 908 P. 2d 1062 (1996).

Moreover, this Court finds that Ingram failed to prove that he suffered prejudice because of his trial counsels' failure to present as mitigation evidence his "good behavior while incarcerated and his institutional adaptability." Given the aggravating circumstances in this case, this Court

finds that there does not exist a reasonable probability that the "sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. 695.

Accordingly, this claim is denied.

E. Ingram's allegation that his trial counsel failed to object during the State's penalty-phase closing argument

In paragraph 36 of his Fifth Amended Rule 32 Petition, Ingram alleged that his trial counsel were ineffective because his trial counsel "failed to object to improper summation comments by the prosecutor, including argument that capital punishment is 'self-defense.'"[16] (Ingram's Fifth Amended Rule 32 Petition, p. 30.) Ingram, however, presented no evidence at the evidentiary hearing to prove this claim.

Indeed, although one of his trial counsel testified at the evidentiary hearing, Ingram neither asked him about the

[16]In this paragraph, Ingram also injects an allegation that his trial counsel were ineffective for failing to object to certain arguments made by the State during the guilt phase of Ingram's trial. As explained above, however, Ingram did not present any evidence at the evidentiary hearing touching on his trial counsels' alleged deficiencies during the guilt-phase of Ingram's trial. The allegation he interjects here is no different. Because Ingram failed to present any evidence as to this specific allegation, he failed to satisfy his burden of proof. Thus, this claim is denied.

allegedly improper comments from the State, nor did he ask him why he did not raise an objection to the allegedly improper comments. Because Ingram failed to put forth any evidence as to either the allegedly improper arguments or trial counsels' reasoning for not objecting to that argument, the record is silent as to this claim. Thus, this Court finds that Ingram failed to satisfy his burden of proof as to this specific allegation.

Regardless, the premise underlying Ingram's claim of ineffective assistance of counsel--that the State's capital-punishment-as-self-defense argument was improper--was specifically addressed by the Alabama Court of Criminal Appeals in its opinion affirming Ingram's conviction and sentence and held to be a proper argument. Indeed, after quoting the State's allegedly improper argument and placing it in context of the entire proceeding, the Court of Criminal Appeals held:

> The prosecutor's remarks in his closing argument to the jury in the guilt phase and in the sentencing phase, which we have set out above, were clearly a general appeal for law enforcement when viewed in context of his entire argument. They were well within the latitude allowed prosecutors in making such arguments; they were not improper.

Ingram I, 779 So. 2d at 1269. "'An attorney's failure to raise a meritless argument ... cannot form the basis of a successful ineffective assistance of counsel claim because the result of the proceeding would not have been different had the attorney raised the issue.'" Hooks v. State, 21 So. 3d 772, 785 (Ala. Crim. App. 2008) (quoting United States v. Kimler, 167 F.3d 889, 893 (5th Cir. 1999)). Thus, this claim is denied.

Based on the foregoing reasons, this Court denies each of Ingram's allegations that his trial counsel were ineffective during the penalty phase of his trial.

Ground IV

In his Third, Fourth, and Fifth Amended Rule 32 Petitions, Ingram alleged that his appellate counsel were ineffective because, he said, his appellate counsel failed "to raise meritorious challenges to [Ingram's] death sentence based on facts appearing on the face of the record." (Ingram's Fifth Amended Rule 32 Petition, p. 31, ¶¶ 37-38.) Specifically, Ingram alleged that, because "the trial judge, rather than the jury, determined the facts necessary to increase [his] sentence from life without parole to death," his appellate counsel should have challenged his sentence under Ring and Apprendi. According to Ingram, because

"Apprendi was decided on June 26, 2000--three days after the Alabama Supreme Court's June 23, 2000, decision affirming the conviction and sentence in this case, and within [the] 14-day window for seeking rehearing of that decision," his appellate counsel were ineffective because they "failed to seek rehearing on the ground that [his] sentence violates Apprendi."

As an initial matter, this Court notes that

> "The standards for determining whether appellate counsel was ineffective are the same as those for determining whether trial counsel was ineffective." Jones v. State, 816 So. 2d 1067, 1071 (Ala. Crim. App. 2000), overruled on other grounds, Brown v. State, 903 So. 2d 159 (Ala. Crim. App. 2004). "The process of evaluating a case and selecting those issues on which the appellant is most likely to prevail has been described as the hallmark of effective appellate advocacy." Hamm v. State, 913 So. 2d 460, 491 (Ala. Crim. App. 2002). As this Court explained in Thomas v. State, 766 So. 2d 860 (Ala. Crim. App. 1998), aff'd, 766 So. 2d 975 (Ala. 2000), overruled on other grounds, Ex parte Taylor, 10 So. 3d 1075 (Ala. 2005):
>
> > "As to claims of ineffective appellate counsel, an appellant has a clear right to effective assistance of counsel on first appeal. Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985). However, appellate counsel has no constitutional obligation to raise every nonfrivolous issue. Jones v. Barnes, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983). The United States Supreme Court has recognized that '[e]xperienced advocates since time beyond memory have

> emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.' Jones v. Barnes, 463 U.S. at 751-52, 103 S. Ct. 3308. Such a winnowing process 'far from being evidence of incompetence, is the hallmark of effective advocacy.' Smith v. Murray, 477 U.S. 527, 536, 106 S. Ct. 2661, 91 L. Ed. 2d 434 (1986). Appellate counsel is presumed to exercise sound strategy in the selection of issues most likely to afford relief on appeal. Pruett v. Thompson, 996 F.2d 1560, 1568 (4th Cir. 1993), cert. denied, 510 U.S. 984, 114 S. Ct. 487, 126 L. Ed. 2d 437 (1993). One claiming ineffective appellate counsel must show prejudice, i.e., the reasonable probability that, but for counsel's errors, the petitioner would have prevailed on appeal. Miller v. Keeney, 882 F.2d 1428, 1434 and n.9 (9th Cir. 1989)."

766 So. 2d at 876.

Reeves v. State, No. CR-13-1504, 2016 WL 3247447, at *26-27 (Ala. Crim. App. June 10, 2016).

Here, at the evidentiary hearing, Ingram's appellate counsel, when asked by Ingram's Rule 32 counsel if he had considered raising "a new issue based on" Apprendi "through a petition for rehearing in the Alabama Supreme Court" (EH. 58), testified that he did not remember if he even knew about Apprendi at that time. Although Ingram's counsel, in effect, conceded that the did not raise an Apprendi claim in his application for rehearing in the Alabama Supreme Court,

Ingram is still not entitled to relief on his claim of ineffective assistance of appellate counsel. Ingram's claim fails for, at least, two reasons.

First, Ingram failed to demonstrate that his appellate counsels' performance was constitutionally deficient by not raising an Apprendi issue on appeal or in his application for rehearing to the Alabama Supreme Court. As Ingram points out in his Fifth Amended Rule 32 Petition, both the Alabama Court of Criminal Appeals and the Alabama Supreme Court issued opinions affirming Ingram's conviction and sentence in this case before the United States Supreme Court issued its decision in Apprendi. Thus, to raise such a claim in his principal brief in either the Alabama Court of Criminal Appeals or the Alabama Supreme Court, Ingram's appellate counsel would have had to predict a change in the law, and appellate counsel "'cannot be held to be ineffective for failing to forecast changes in the law.'" Reeves v. State, CR-13-1504, 2016 WL 3247447, *36 (Ala. Crim. App. 2016) (quoting Dobyne v. State, 805 So. 2d 733, 748 (Ala. Crim. App. 2000)).

Additionally, Ingram's appellate counsel could not have raised such a claim in his application for rehearing in the

Alabama Supreme Court. Indeed, the Alabama Supreme Court has recognized that "[t]he well-settled rule of [the Supreme Court] precludes consideration of arguments made for the first time on rehearing." Water Works & Sewer Bd. of City of Selma v. Randolph, 833 So. 2d 604, 608 (Ala. 2002) (opinion on application for rehearing) (citing Ex parte Lovejoy, 790 So. 3d 933 (Ala. 2000)). Thus, even if Ingram's appellate counsel had raised an Apprendi claim in an application for rehearing in the Alabama Supreme Court, that Court would have been "constrained to deny the application." Randolph, 833 So. 2d at 609. Counsel is not ineffective for complying with a "well-settled rule" of the Alabama Supreme Court.

Second, even if Ingram's appellate counsel could have raised such a claim in his principal brief on appeal or in his application for rehearing in the Alabama Supreme Court, that claim would have failed as a matter of law because his death sentence does not violate either Apprendi or Ring.

During the guilt phase of Ingram's trial, the jury found that the State had proved beyond a reasonable doubt that Ingram had committed capital murder during a kidnapping, see § 13A-5-40(a)(1), which offense corresponds to the aggravating circumstance set forth in § 13A-5-49(4), Ala.

Code 1975. Thus, apart from the verdict of capital murder, the jury additionally found the existence of an aggravating circumstance beyond a reasonable doubt, rendering Ingram eligible for the death penalty under Apprendi and Ring. See Ex parte Waldrop, 859 So. 2d 1181, 1188 (Ala. 2002) ("[T]he findings reflected in the jury's verdict alone exposed Waldrop to a range of punishment that had as its maximum the death penalty. This is all Ring and Apprendi require.").

Because counsel is not ineffective for failing to raise a meritless claim, see Carruth v. State, 165 So. 3d 627, 649 ("[T]his claim is meritless and counsel was not ineffective for failing to raise it on appeal."), Ingram's claim that his appellate counsel was ineffective for failing to raise an Apprendi claim on appeal is denied.

INGRAM'S CLAIM THAT THE STATE VIOLATED BRADY V. MARYLAND, 373 U.S. 83 (1963)

In his Third, Fourth, and Fifth Amended Rule 32 Petitions, Ingram alleged that he "was denied his right to a fair trial by the prosecution's failure to disclose exculpatory, material evidence in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution." (Ingram's Fifth Amended Rule 32

Petition, p. 36, ¶ 43-44.) Specifically, Ingram alleged that, he believed,

> the State had in its possession information that Anthony Boyd, not [Ingram], was the main instigator of the offense due to the victim's drug debts to him, not to [Ingram]. Furthermore, the State also had information that Boyd, not [Ingram], was the person who set the victim on fire. Also on information and belief, the State had evidence of other crimes and bad acts committed by Anthony Boyd (including involvement in illegal dog fights and gang activity), that made it substantially more likely that he, not [Ingram], was the ringleader in his capital crime. The State also had evidence that impeached the veracity of some of the witnesses who testified that [Ingram] was the main instigator of the offense and/or ignited the fire, including information that some of the witnesses had previously provided information to law enforcement in exchange for favorable treatment, and information indicating that some prosecution witnesses were interviewed on multiple occasions and were threatened with prosecution or other adverse consequences if they failed to support the State's theory of the case. Had it been disclosed in accordance with Brady and its progeny, there is a reasonable probability that the suppressed information would have changed the result at trial by altering the balance of aggravating and mitigating circumstances in favor of a determination that death was not the appropriate sentence for [Ingram's] role in the offense.

(Ingram's Fifth Amended Rule 32 Petition, pp. 37-38, ¶ 44 (footnote omitted).)

At the outset of the evidentiary hearing, Ingram's Rule 32 counsel advised this Court that "there is nothing in what [they] have been provided that [they] would say falls within

the materiality of that" claim. (EH. 22.) Thus, Ingram advised this Court that he was not going to pursue this claim at the evidentiary hearing. Accordingly, this Court finds that Ingram voluntarily abandoned this claim and, therefore, it is deemed waived and denied.

CONCLUSION

This Court has reviewed each of Ingram's claims and has found no error that would warrant setting aside his capital-murder conviction or death sentence. Thus, for the reasons stated above, this Court finds that Ingram is not entitled to postconviction relief pursuant to Rule 32, Ala. R. Crim. P.

Accordingly, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that those claims raised in Ingram's Third, Fourth, and Fifth Amended Rule 32 Petition, that were not previously summarily dismissed by this Court's May 13, 2013, and October 9, 2013, orders are hereby **DENIED.**

Done this the 28th day of June, 2017.

s/Brian P. Howell
BRIAN P. HOWELL
CIRCUIT JUDGE

APPENDIX D

September 13, 2019, memorandum opinion of the Alabama Court of Criminal Appeals

REL: September 13, 2019

Court of Criminal Appeals

State of Alabama
Heflin-Torbert Judicial Building
300 Dexter Avenue
Montgomery, Alabama 36104

MARY B. WINDOM
Presiding Judge
J. ELIZABETH KELLUM
J. CHRIS McCOOL
J. WILLIAM COLE
RICHARD J. MINOR
Judges

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MEMORANDUM

CR-17-0774 Talladega Circuit Court CC-94-260.60

Robert Shawn Ingram v. State of Alabama

WINDOM, Presiding Judge.

Robert Shawn Ingram appeals the denial in part and dismissal in part of his petition for postconviction relief filed pursuant to Rule 32, Ala. R. Crim. P., in which he attacked his June 1995 conviction for capital murder in the death of Gregory Huguley. See § 13A-5-40(a)(1), Ala. Code 1975. By a vote of 11-1, the jury recommended that Ingram be sentenced to death. The trial court accepted the jury's recommendation and sentenced Ingram to death for his capital-

murder conviction. On August 27, 1999, this Court affirmed Ingram's conviction and sentence. Ingram v. State, 779 So. 2d 1225 (Ala. Crim. App. 1999) ("Ingram I"). This Court's judgment on direct appeal was affirmed by the Alabama Supreme Court on June 23, 2000. Ex parte Ingram, 779 So. 2d 1283 (Ala. 2000) ("Ingram II"). On February 26, 2001, the Supreme Court of the United States denied Ingram's petition for writ of certiorari.

Ingram's postconviction challenge has taken a more winding path:

> "On February 1, 2002, Ingram filed a Rule 32 petition challenging his conviction and sentence on numerous grounds. In his prayer for relief, Ingram requested, among other things, that he be allowed discovery, that he be provided funds for expert and investigative expenses, and that he be permitted time to amend his petition. He also filed a separate motion for permission to proceed ex parte on any request for funds. On March 18, 2002, the State filed an answer and a motion for a partial summary dismissal. On April 18, 2002, Ingram filed an amended petition (hereinafter 'first amended petition'), in which he reasserted the same claims raised in his original petition, raised an additional claim, and again requested that he be allowed discovery, that he be provided funds for expert and investigative expenses, and that he be permitted time to further amend his petition. The State filed an answer and a motion for the summary dismissal of the first amended petition on July 26, 2002. On June 8, 2004, the circuit court adopted verbatim a proposed order that had been submitted by the State on May 20, 2004, summarily dismissing the first amended petition in its entirety. Ingram filed a notice of appeal on July 16, 2004. This Court affirmed the summary dismissal on appeal. Ingram v. State, 51 So. 3d 1094 (Ala. Crim. App. 2006) ('Ingram III').
>
> "Ingram petitioned the Alabama Supreme Court for certiorari review; that Court granted his petition and reversed this Court's judgment. Ex parte

Ingram, 51 So. 3d 1119 (Ala. 2010) ('Ingram IV'). Noting that the circuit judge who ruled on Ingram's Rule 32 petition was not the judge who had presided over Ingram's trial, the Supreme Court determined that the circuit court's wholesale adoption of the State's proposed order constituted reversible error because the order contained patently erroneous statements, including statements that the circuit judge ruling on the petition had presided over Ingram's trial, which he had not; that the circuit judge had personally observed the performance of Ingram's trial counsel, which he had not; and that the circuit judge was basing his decision, in part, on events within his own personal knowledge of the trial of the case, of which he had no knowledge. Recognizing the general rule 'that, where a trial court does in fact adopt [a] proposed order as its own, deference is owed to that order in the same measure as any other order of the trial court,' the Supreme Court found that the 'unusual' circumstances of the case rendered the general rule inapplicable. Ingram IV, 51 So. 3d at 1122-23. The Supreme Court then held that 'the nature of the errors present in the June 8 order ... undermines any confidence that the trial court's findings of fact and conclusions of law are the product of the trial judge's independent judgment and that the June 8 order reflects the findings and conclusions of that judge.' 51 So. 3d at 1125.

"Because '[i]t is axiomatic that an order granting or denying relief under Rule 32, Ala. R. Crim. P., must be an order of the trial court ... [i.e.,] must be a manifestation of the findings and conclusions of the court,' Ingram IV, 51 So. 3d at 1122, the Alabama Supreme Court reversed this Court's affirmance of the circuit court's summary dismissal of Ingram's first amended petition and remanded the case to this Court for us 'to remand it to the trial court to consider Ingram's pending motions and his [first amended] Rule 32 petition.' 51 So. 3d at 1125. On remand from the Alabama Supreme Court, this Court reversed the circuit court's judgment and remanded the case 'for

proceedings that are consistent with the Alabama Supreme Court's opinion.' Ingram v. State, 51 So. 3d 1126, 1126 (Ala. Crim. App. 2010) ('Ingram V'). This Court issued a certificate of judgment on May 28, 2010.

"After remand, the circuit court scheduled a status conference for July 19, 2010. Ingram's counsel filed a motion to continue, and the circuit court continued the conference to October 15, 2010. On October 7, 2010, the State filed a proposed order summarily dismissing Ingram's first amended petition, denying his requests for discovery and funds, and denying his motion for permission to proceed ex parte on requests for funds. The circuit court conducted the status conference on October 15, 2010. At the conference, Ingram's counsel indicated that she wanted to file a second amended petition and that she needed time to conduct discovery. Counsel then indicated that the second amended petition had already been drafted and that, if the circuit court denied her time to conduct discovery, she would file the second amended petition 'now.' (R. 12.) The State objected to any amendments to the petition, arguing that allowing Ingram to file a second amended petition would be outside the scope of the Alabama Supreme Court's remand instructions and would violate Rule 32.7(b), Ala. R.Crim. P., which permits amendments only 'prior to the entry of judgment,' because judgment on Ingram's first amended petition had been entered on June 8, 2004. Ingram argued, on the other hand, that the June 8, 2004, judgment on the first amended petition had been reversed and, thus, that an amendment would be permissible regardless of any instructions. The circuit court requested that the parties submit briefs on the issue whether the court had the authority to allow Ingram to file a second amended petition. After further discussion, Ingram's counsel then indicated that she had not received the State's October 7, 2010, proposed order until the day of the status conference and asked if the court wanted a response to the proposed order. The court indicated that it 'would be premature' for Ingram's

counsel to respond to the proposed order or to submit any additional filings, presumably including a second amended petition, until the court determined whether it had the authority to permit Ingram to file an amended petition. (R. 21.)

"On October 28, 2010, the State filed a brief with the circuit court, reiterating the arguments it had made at the status conference. On November 19, 2010, Ingram's counsel filed a reply to the State's October 28, 2010, brief, also reiterating the arguments she had made at the status conference. On December 1, 2010, the circuit court adopted the proposed order submitted by the State summarily dismissing Ingram's first amended petition in its entirety and denying all of Ingram's pending motions, including Ingram's request to file a second amended petition. In denying Ingram's request to file a second amended petition, the circuit court specifically found that it had no authority on remand to allow Ingram to file a second amended petition because to do so would be beyond the scope of the Alabama Supreme Court's remand instructions and because Rule 32.7(b) prohibits amendments to petitions after entry of judgment and judgment had been entered on Ingram's first amended petition on June 8, 2004. Ingram filed a timely motion to reconsider on December 21, 2010, arguing, among other things, that the circuit court erred in finding that it had no authority to allow him to file a second amended petition. With the motion to reconsider, Ingram also filed his second amended petition. The motion to reconsider was denied by operation of law 30 days after the circuit court's December 1, 2010, summary dismissal, or on January 3, 2011. See Loggins v. State, 910 So. 2d 146 (Ala. Crim. App. 2005) (recognizing motion to reconsider as a valid postjudgment motion in the context of a Rule 32 petition, but noting that such a motion does not extend the circuit court's jurisdiction beyond 30 days after the denial or dismissal of the Rule 32 petition). Ingram filed a timely notice of appeal on January 3, 2011."

Ingram v. State, 103 So. 3d 86, 88-90 (Ala. Crim. App. 2012) ("Ingram VI"). After this Court's reversal in Ingram VI, Ingram filed a third amended petition for postconviction relief on November 5, 2012. The State filed an answer on December 31, 2012, and on May 20, 2013, the circuit court issued an order dismissing a portion of the claims raised in Ingram's third amended petition. On June 25, 2013, Ingram filed a fourth amended petition for postconviction relief, which was followed by the State's answer on August 26, 2013. On October 9, 2013, the circuit court issued an order dismissing one of the claims raised in Ingram's fourth amended petition. Ingram's final amended petition, his fifth, was filed on December 2, 2013. The State filed its answer on December 30, 2013, and on March 21, 2014, the circuit court issued an order dismissing two of the claims raised in Ingram's fifth amended petition and granting an evidentiary hearing on the five remaining claims. An evidentiary hearing was held April 3-4, 2014. On June 28, 2017, the circuit court issued an order dismissing and/or denying Ingram's remaining claims. On October 23, 2017, Ingram filed a second Rule 32 petition seeking an out-of-time appeal from the denial in part and dismissal in part of his first Rule 32 petition.[1] Ingram's second Rule 32 petition was granted on April 4, 2018, and this appeal of the circuit court's judgment in his first Rule 32 petition follows.

In this Court's opinion on direct appeal, it set out the following facts surrounding Ingram's convictions:

> "On July 31, 1993, Ingram, along with Anthony Boyd, Moneek Marcell Ackles, and Dwinaune Quintay Cox, kidnapped Gregory Huguley, by force and at gunpoint, from a public street in Anniston, took him to a ballpark in a rural area of Talladega County, and,

[1]Rule 32 counsel for Ingram alleged that, because he was not a member of the Alabama State Bar, he was ineligible to enroll in the AlaFile system, and that, as a result, he did not automatically receive notice of court filings. Rule 32 counsel alleged that he first learned of the circuit court's order denying Ingram's first Rule 32 petition after the time for filing an appeal had lapsed. The State did not oppose Ingram's request for an out-of-time appeal.

> while he was pleading for his life, taped him to a bench, doused him with gasoline, set him on fire, and burned him to death. The state's evidence showed that Ingram was a principal actor in the murder, wielding the gun and using force to effect the kidnapping, pouring the gasoline on Huguley, and lighting the gasoline with a match. The evidence also shows that Huguley was abducted and killed because he failed to pay $200 for crack cocaine sold to him several days before the murder. The record further shows that after Huguley had been set on fire, the conspirators stood around for approximately 20 minutes and watched him burn to death."

Ingram I, 779 So. 2d at 1278 (footnotes omitted).

Standard of Review

Ingram appeals the circuit court's dismissal in part and denial in part of his petition for postconviction relief attacking his capital-murder conviction and sentence of death. According to Rule 32.3, Ala. R. Crim. P., Ingram has the sole burden of pleading and proving that he is entitled to relief. Rule 32.3, Ala. R. Crim. P., provides:

> "The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief. The state shall have the burden of pleading any ground of preclusion, but once a ground of preclusion has been pleaded, the petitioner shall have the burden of disproving its existence by a preponderance of the evidence."

When it reviewed Ingram's claims on direct appeal, this Court applied a plain-error standard of review and examined every issue regardless of whether the issue was preserved for appellate review. See Rule 45A, Ala. R. App. P. However, the plain-error standard does not apply when evaluating a ruling on a postconviction petition, even when the petitioner has been sentenced to death. See Ferguson v. State, 13 So. 3d 418, 424 (Ala. Crim. App. 2008); Waldrop v. State, 987 So. 2d 1186 (Ala. Crim. App. 2007); Hall v. State, 979 So. 2d 125

(Ala. Crim. App. 2007); Gaddy v. State, 952 So. 2d 1149 (Ala. Crim. App. 2006). "The standard of review this Court uses in evaluating the rulings made by the trial court is whether the trial court abused its discretion." Hunt v. State, 940 So. 2d 1041, 1049 (Ala. Crim. App. 2005) (citing Elliott v. State, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992)). However, "[t]he sufficiency of pleadings in a Rule 32 petition is a question of law. 'The standard of review for pure questions of law in criminal cases is de novo. Ex parte Key, 890 So. 2d 1056, 1059 (Ala. 2003).'" Ex parte Beckworth, 190 So. 3d 571, 573 (Ala. 2013) (quoting Ex parte Lamb, 113 So. 3d 686, 689 (Ala. 2011)). Further, the circuit court granted Ingram an evidentiary hearing on some of the claims raised in his petition. The circuit court's credibility determinations with respect to these claims are entitled to great deference:

> "'The resolution of ... factual issue[s] required the trial judge to weigh the credibility of the witnesses. His determination is entitled to great weight on appeal.... "When there is conflicting testimony as to a factual matter ..., the question of the credibility of the witnesses is within the sound discretion of the trier of fact. His factual determinations are entitled to great weight and will not be disturbed unless clearly contrary to the evidence."'
>
> "Calhoun v. State, 460 So. 2d 268, 269–70 (Ala. Crim. App. 1984) (quoting State v. Klar, 400 So. 2d 610, 613 (La. 1981))."

Brooks v. State, 929 So. 2d 491, 495-96 (Ala. Crim. App. 2005). Last, "[t]his Court may affirm the judgment of the circuit court for any reason, even if not for the reason stated by the circuit court." Acra v. State, 105 So. 3d 460, 464 (Ala. Crim. App. 2012).

With these principles in mind, this Court reviews the claims raised by Ingram in his brief to this Court.

I.

Ingram first argues that the circuit court erred in denying his claims of ineffective assistance of trial counsel. Ingram was represented at trial by the Honorable Jeb Fannin, who now serves as a Talladega District Judge, and Mark Nelson.

> "In Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the United States Supreme Court set out the test for determining when counsel's performance is so inadequate that a defendant's Sixth Amendment right to counsel is violated. ...
>
> "....
>
> "In its analysis, the Supreme Court defined a fair trial as one in which 'evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding' and stated that '[t]he right to counsel plays a crucial role.' 466 U.S. at 685, 104 S. Ct. 2052. The Supreme Court recognized that a criminal defendant's right to counsel is the right to effective assistance of counsel.
>
> "The Strickland Court established the benchmark for judging any claim of ineffectiveness as 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' 466 U.S. at 686, 104 S. Ct. 2052. ...
>
> "The Supreme Court then set what has become known as the Strickland test for judging whether counsel rendered ineffective assistance:
>
> > "'First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed 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. 2052.
>
> "The Strickland Court reasoned that, '[i]n any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable, but they are only guides.' 466 U.S. at 688, 104 S. Ct. 2052."

Ex parte Gissendanner, [Ms. 1160762, Jan. 4, 2019] ___ So. 3d ___, ___ (Ala. 2019).

A.

In Ground I of Ingram's Fifth Amended Petition, Ingram asserted that trial counsel were ineffective during the plea-negotiation phase of their representation. On September 15, 1993, Ingram entered into a plea agreement with the State; in exchange for his cooperation with the investigation and testifying against his co-defendants, the State agreed to offer him a guilty plea to murder with a recommended sentence of life in prison. As part of that cooperation, Ingram acknowledged his role in Huguley's kidnapping and murder. Ingram, though, failed to honor the agreement by refusing to testify at the trial of his co-defendant Boyd. Ingram pleaded that he declined to testify primarily because Ackles had told him "that if they all refused to testify, the State could not convict any of them, i.e., 'nobody talks, everybody walks.'" On March 31, 1995, the State moved to void Ingram's plea agreement. The State's motion was granted and Ingram subsequently stood trial for and was convicted of capital

murder.

Ingram pleaded in his petition that, given the overwhelming evidence of his guilt, trial counsel were ineffective for failing to do more to persuade him to honor his plea agreement. Specifically, Ingram asserted that trial counsel failed to discuss with him the inevitability of his conviction, failed to arrange for his trusted family members to meet with him so that they could convince him to honor the plea agreement, and failed to ask the trial court for more time to persuade Ingram to honor the plea agreement. Ingram asserted that these failures were unreasonable under the circumstances.

At the evidentiary hearing, Judge Fannin testified that he had been hopeful Ingram would honor his plea agreement and that he did not learn of Ingram's intent to refuse to testify until Boyd's trial. Upon Ingram's announcing his intent, Judge Fannin and Nelson met privately with Ingram. Although Judge Fannin could not remember specifically, he stated that he would have reviewed with Ingram the possible outcomes of a trial. Judge Fannin testified that he disagreed with Ingram's plans and urged him to honor his plea agreement. Yet, "[Ingram] was the defendant, and he's so adamant in his decision, we just can't twist his arm and make him testify." (R. 79.) Judge Fannin could not recall whether he had considered involving one of Ingram's family members in the attempt to get Ingram to honor his plea agreement.

Ingram identified two reasons for his decision not to testify against Boyd. First, Ingram stated that Ackles proposed to his co-defendants that, "if everybody be quiet, we all go home." (R. 90.) Second, Ingram explained that he did not "want to get that label of snitch. You know, you don't last in the penitentiary when you get a label like that. I didn't never want that label carried on me in the penitentiary." (R. 90.) According to Ingram, he informed his trial counsel prior to Boyd's trial that he did not intend to testify and they did not pressure him to change his mind. Ingram added that trial counsel never explained to him the strength of the evidence against him or the likely result of a trial. Ingram testified that if trial counsel had explained to him that his conviction for capital murder as well as Boyd's were certain, he would have honored the plea agreement.

Ingram also stated trial counsel did not engage any of his family members to speak with him, but that he would have followed the advice of his sister Carla Ingram or his aunt Joyce Elston. Both Carla and Elston testified that, if they had been contacted, they would have been willing to aid trial counsel in their attempt to convince Ingram to honor his plea agreement.

In denying this claim, (C. 948-56), the circuit court reviewed the colloquy the trial court had conducted with Ingram about the ramifications of his decision and credited the testimony of Judge Fannin with respect to trial counsel's efforts to coax Ingram into honoring the plea agreement. The circuit court found trial counsel's actions to be reasonable. With respect to Ingram's claim regarding his family members, the circuit court considered opinions regarding their ability to influence Ingram as speculative, and found that Ingram had failed to offer any evidence that the family members would have been available to meet with Ingram at the time trial counsel were efforting to change Ingram's mind. Relatedly, the circuit court found that there was no evidence offered that the trial court would have waited on Ingram's family members to arrive at the courthouse on the day of Boyd's trial to speak with Ingram, and that Ingram failed to ask Judge Fannin why he did not seek a continuance from the trial court for more time to speak with Ingram; thus, Judge Fannin's reasoning was entitled to a presumption of effectiveness.

On appeal, Ingram raises a number of challenges to the circuit court's findings on this issue. Specifically, he asserts that the circuit court erred in finding trial counsel's actions reasonable, erred in finding that he had failed to prove that his trial counsel could have and should have arranged for him to speak with his sister or aunt, erred in finding that he had failed to prove that his trial counsel should have sought more time to speak with him about honoring the plea agreement, and erred in finding that he had failed to prove prejudice.

Wading through all of Ingram's specific claims on this issue is unnecessary, however. The following finding is fatal to Ingram's claim:

> "Although Ingram testified at the evidentiary

> hearing that, had his counsel done something more -- for example, bring in members of his family to persuade him to honor the agreement -- he would have honored the agreement, this Court is not convinced that there was anything his trial counsel could have done to persuade him to change his mind."

(C. 952-53; emphasis added.) In other words, the circuit court found that Ingram failed to prove that any of the actions he asserted trial counsel should have undertaken would have made any difference in the outcome. Thus, Ingram failed to prove that he was prejudiced by trial counsel's alleged ineffectiveness. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Strickland, 466 U.S. 697. The circuit court, as the finder of fact, was free to reject Ingram's self-serving testimony on this point as well as the testimony of Carla and Elston. After all, if Ingram had honored his plea agreement, he likely faced a sentence of life in prison. Yet, Ingram testified that he did not honor his plea agreement, in part, because he did not "want to get that label of snitch. You know, you don't last in the penitentiary when you get a label like that." (R. 90.) Because serving time in prison was inevitable and Ingram "never" wanted to be known as a "snitch" in prison, it was reasonable for the circuit court to conclude that Ingram would not have honored his plea agreement regardless of trial counsel's actions.

The circuit court's findings of fact are entitled to great deference and are supported by the record. Brooks, 929 So. 2d at 495-96 (citations and quotations omitted). Because Ingram failed to prove that he was prejudiced by trial counsel's alleged ineffectiveness, this issue does not entitle him to any relief.

B.

In Ground III of Ingram's Fifth Amended Petition, Ingram asserted that trial counsel were ineffective in their development and presentation of mitigation evidence. Ingram alleged in his petition that trial counsel failed to investigate and present evidence that he suffered from low cognitive functioning and neurological impairments; evidence of his substandard living conditions, which exposed him to

lead and other environmental toxins; evidence of his good behavior during his pretrial incarceration; and evidence of his family background.

> "'While counsel has a duty to investigate in an attempt to locate evidence favorable to the defendant, "this duty only requires a reasonable investigation." Singleton v. Thigpen, 847 F.2d 668, 669 (11th Cir. (Ala.) 1988), cert. denied, 488 U.S. 1019, 109 S. Ct. 822, 102 L. Ed. 2d 812 (1989) (emphasis added). See Strickland, 466 U.S. at 691, 104 S. Ct. at 2066; Morrison v. State, 551 So. 2d 435 (Ala. Cr. App. 1989), cert. denied, 495 U.S. 911, 110 S. Ct. 1938, 109 L. Ed. 2d 301 (1990). Counsel's obligation is to conduct a "substantial investigation into each of the plausible lines of defense." Strickland, 466 U.S. at 681, 104 S. Ct. at 2061 (emphasis added). "A substantial investigation is just what the term implies; it does not demand that counsel discover every shred of evidence but that a reasonable inquiry into all plausible defenses be made." Id., 466 U.S. at 686, 104 S. Ct. at 2063.
>
> > "'"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information."'

"Jones v. State, 753 So. 2d 1174, 1191 (Ala. Crim. App. 1999).

> "'"[T]he scope of the duty to investigate mitigation evidence is substantially affected by the defendant's actions, statements, and instructions. As the Supreme Court explained in Strickland, the issue of what investigation decisions are reasonable 'depends critically' on the defendant's instructions ...." Cummings v. Secretary, Dep't of Corr., 588 F.3d 1331, 1357 (11th Cir. 2009)." Cummings v. Secretary, Dep't of Corr., 588 F.3d 1331, 1357 (11th Cir. 2009).'
>
> "James v. State, 61 So. 3d 357, 364 (Ala. Crim. App. 2010)."

Washington v. State, 95 So. 3d 26, 40-41 (Ala. Crim. App. 2012). Further,

> "'As an initial matter, we "must recognize that trial counsel is afforded broad authority in determining what evidence will be offered in mitigation." State v. Frazier (1991), 61 Ohio St. 3d 247, 255, 574 N.E.2d 483. We also reiterate that post-conviction proceedings were designed to redress denials or infringements of basic constitutional rights and were not intended as an avenue for simply retrying the case. [Laugesen] v. State, [(1967), 11 Ohio Misc. 10, 227 N.E.2d 663] supra; State v. Lott, [(Nov. 3, 1994), Cuyahoga App. Nos. 66388, 66389, 66390] supra. Further, the failure to present evidence which is merely cumulative to that which was presented at trial is, generally speaking, not indicative of ineffective assistance of trial counsel. State v. Combs (1994), 100 Ohio App. 3d 90, 105, 652 N.E.2d 205.'
>
> "Jells v. Mitchell, 538 F.3d 478, 489 (6th Cir. 2008).

> "'"[C]ounsel is not required to present all mitigation evidence, even if the additional mitigation evidence would not have been incompatible with counsel's strategy. Counsel must be permitted to weed out some arguments to stress others and advocate effectively." Haliburton v. Sec'y for the Dep't of Corr., 342 F.3d 1233, 1243-44 (11th Cir. 2003) (quotation marks and citations omitted); see Herring v. Sec'y, Dep't of Corr., 397 F.3d 1338, 1348-50 (11th Cir. 2005) (rejecting ineffective assistance claim where defendant's mother was only mitigation witness and counsel did not introduce evidence from hospital records in counsel's possession showing defendant's brain damage and mental retardation or call psychologist who evaluated defendant pre-trial as having dull normal intelligence); Hubbard v. Haley, 317 F.3d 1245, 1254 n.16, 1260 (11th Cir. 2003) (stating this Court has "consistently held that there is 'no absolute duty ... to introduce mitigating or character evidence'" and rejecting claim that counsel were ineffective in failing to present hospital records showing defendant was in "borderline mentally retarded range") (brackets omitted) (quoting Chandler [v. United States], 218 F.3d [1305] at 1319 [(11th Cir. 2000)]).'
>
> "Wood v. Allen, 542 F.3d 1281, 1306 (11th Cir. 2008). 'The decision of what mitigating evidence to present during the penalty phase of a capital case is generally a matter of trial strategy.' Hill v. Mitchell, 400 F.3d 308, 331 (6th Cir. 2005)."

Dunaway v. State, 198 So. 3d 530, 547 (Ala. Crim. App. 2009), rev'd on other grounds by Dunaway v. State, 198 So. 3d 567 (Ala. 2014).

"Although Petitioner's claim is that his trial counsel should have done something more, we first look at what the

lawyer[s] did in fact." Chandler v. United States, 218 F.3d 1305, 1320 (11th Cir. 2000). During the penalty phase, trial counsel presented the testimony of seven family members and one friend. The witnesses portrayed Ingram as a good, friendly person. Ingram was described as a quiet and well-mannered youth who was always respectful to his mother. Carla Parker, Ingram's sister, and Dorothy Ackles, Ingram's mother, testified that Ingram had been a good student, and a number of witnesses spoke of Ingram's success in athletics, which came despite his suffering from a leg malformation that required his use of leg braces as a small child. Multiple witnesses testified to Ingram's positive relationships with their children and their desire for Ingram to live so that he could maintain those relationships. This included Ingram's relationship with his own daughter, who was an infant at the time of trial. The jury was also made aware of Dorothy Ackles's suffering from brain cancer. Dorothy Ackles was too weak to travel to court, so she was permitted to testify through a videotaped deposition. Parker testified that she did not believe her mother could survive the stress of Ingram's being sentenced to death.

The circuit court made the following findings regarding trial counsel's mitigation strategy:

> "Here, at the evidentiary hearing, Ingram's trial counsel, Fannin, testified that he and his co-counsel, Nelson, jointly investigated Ingram's case. In so doing, they interviewed witnesses at the scene of the kidnapping and went to the location where Ingram and his codefendants burned Huguley. Additionally, Fannin explained that he talked to Ingram's family and Ingram, and, because of the nature of the case, they thought it would be a good idea to request a mental evaluation of Ingram, which evaluation indicated that Ingram did not have any mental-health issues. Although his trial counsel 'did not have a good feeling about the penalty phase' of Ingram's trial, they hoped that could 'put on enough mitigation evidence to keep' from having the death penalty imposed on Ingram. [(R. 58.)]
>
> "According to Fannin, the strategy during mitigation was to demonstrate that Ingram did not

> have a significant criminal history, that he was a good child, that he was good in school, that he was well-liked in his community, that his family loved him, that his friends loved him, and that he was a young man when the offense occurred. [(R. 60.)] Although Fannin acknowledged that they did not hire an investigator or a mitigation expert, he stated that they spoke with Ingram's family members, who assisted them in obtaining the names of people who would testify on Ingram's behalf. [(R. 58-59.)] Fannin, fearing that Ingram's mother's health would not allow her to testify at Ingram's trial, arranged for her testimony to be taken by videotaped deposition. In her deposition, Ingram's mother discussed Ingram's background, medical issues, and educational history, and asked the jury to spare her son's life.
>
> "As set out above, Fannin and Nelson deployed this strategy during the penalty phase of Ingram's trial by calling eight witnesses to testify, including Ingram's mother's videotaped deposition. The testimony from these witnesses touched on each of the areas that Fannin explained they wanted to focus on in mitigation. Counsel's strategy was successful to a degree, convincing one juror to recommend a sentence of life without the possibility of parole."

(C. 966-67.) The circuit court concluded that "trial counsel had a reasonable mitigation strategy and investigated that strategy by interviewing Ingram's family and friends." (C. 968.)

Ingram raises several arguments on appeal, which this Court will address in turn.

1.

Ingram first argues that the circuit court found trial counsel's mitigation investigation reasonable only because it believed that "the right to effective assistance in developing and presenting mitigation is violated only when '"defense counsel have totally failed to conduct [a mitigation]

investigation."'" [(C. 959.)] (quoting McWhorter v. State, 142 So. 3d 1195, 1245 (Ala. Crim. App. 2011)) (emphasis added)." Ingram's brief, at 35.) This is a mischaracterization of the circuit court's findings. Indeed, the circuit court found that this was not an instance in which trial counsel "'totally failed'" to conduct a mitigation investigation, but it did not state that counsel could be ineffective only after a total failure to investigate. (C. 959.) Instead, the circuit court recognized:

> "The type of cases in which courts have granted claims of ineffective assistance of counsel alleging that counsel failed to investigate possible mitigation evidence have generally 'been limited to those situations in which defense counsel have totally failed to conduct such an investigation.'" McWhorter v. State, 142 So. 3d 1195, 1245 (Ala. Crim. App. 2011) (internal quotations omitted). As to claims of ineffective assistance of counsel that do 'not involve a failure to investigate but, rather, petitioner's dissatisfaction with the degree of his attorney's investigation, the presumption of reasonableness imposed by Strickland will be hard to overcome.' Id."

(C. 959; emphasis added). The foregoing clearly contemplates the possibility of finding counsel ineffective even in situations in which counsel engages in a mitigation investigation. The circuit court's order properly stated the law in reviewing claims such as Ingram's.

2.

Ingram argues that trial counsel's "inquiry into Ingram's background and social history was limited to conversations (of unknown depth or duration) with two witnesses, Ingram's mother and sister." (Ingram's brief, at 37.) Ingram's assertion that trial counsel's conversations were "of unknown depth or duration" ignores that it was his burden, not the State's, to demonstrate that trial counsel were ineffective. See Rule 32.3, Ala. R. Crim. P. To the extent the assertion is true, it is because Ingram failed to meet his burden of proof on this matter. Second, the broader assertion -- that trial counsel's inquiry into Ingram's background and social history

was limited to conversations with Ingram's mother and sister -- is speculative, as it assumes the efforts of Nelson. However, the record does not indicate the extent of Nelson's investigation because Ingram did not call him as a witness.

3.

Ingram argues that the circuit court erred in finding that trial counsel's investigation was adequate. Ingram suggests a number of avenues that should have been pursued by trial counsel.

a.

Ingram argues that trial counsel failed to investigate and to present evidence of his academic history. Ingram alleged that trial counsel made no effort to speak to Ingram's teachers or to learn about his academic abilities. Ingram asserted in his petition that had trial counsel conducted a reasonable investigation into his educational history, they would have learned that he struggled academically, not due to a lack of effort, but rather due to an inability to learn. Also, Ingram asserts, trial counsel would have learned that he at one time was enrolled in a form of special education, and that he had been referred in second grade for testing regarding possible learning disabilities.

The circuit court made the following findings with respect to Ingram's educational history:

> "Regarding their investigation into Ingram's educational history, Ingram's trial counsel were only asked if trial counsel had considered information about Ingram's performance in school, to which trial counsel responded, "I can't recall. It would be in the record if we had" [(R. 60.)]; and asked whether trial counsel had met with any of Ingram's teachers or other school personnel, to which trial counsel responded, "I can’t remember." [(R. 60.)] Ingram’s Rule 32 counsel however, did not ask trial counsel whether he researched Ingram's educational history as it relates to any alleged mental-health issues.

"Although Ingram did not ask his trial counsel questions related to Ingram's educational history as it relates to any alleged mental-health issues, Ingram did question June Allred -- Ingram's second grade teacher -- and Glenda Jackson -- his [Constantine Appalachian Program ("CAP")] teacher -- regarding these allegations.

"Allred testified that, at the time Ingram was in second grade, she was employed at Johnston Elementary School in the Anniston City School System teaching second grade. Although she did not remember Ingram, Allred confirmed that she 'filled out a referral for him to be evaluated for special services,' to see if Ingram needed 'more additional help than he gets in the ordinary classroom.' [(R. 127.)] According to Allred, she referred Ingram to be evaluated because, she said, 'he was not able to perform on grade level' -- 'something she seldom did for second graders. Allred stated that, at the time of Ingram's trial she lived in Anniston but Ingram's trial counsel did not contact her; had they done so she would have been willing to talk to them.

"On cross-examination, Allred conceded that she did not specifically remember why she referred Ingram for testing. Additionally, Allred explained that she did not remember that the evaluation indicated that Ingram was not in need of special services. Indeed, the documents Ingram admitted as Petitioner's Exhibit 3 included a letter dated December 20, 1978, which letter was titled 'Notification that Student is not Exceptional and not Eligible for Special Education,' wherein it was explained that Ingram 'is <u>not</u> in need of special programs and services as outlined in the state and federal legislation related to exceptional students.' (Emphasis in original).

"Glenda Jackson testified that she taught at Constantine Elementary School from 1982-1984, and had Ingram as one of her students. According to Jackson, Ingram rarely got into trouble, but his 'biggest problem' was that he did not 'finish his

> work, and [she] had to call his mother, and his mother would come to the school.' [(R. 135.)] Jackson explained that the classroom in which she taught Ingram was a 'combined classroom' for children 'whose academic level was lower.' [R. 136.)] Jackson explained that the idea behind the program was to put students together who were academically on a similar level as opposed to putting them together based on age. Jackson stated that Ingram was in the fifth grade but was paired with fourth grade children because his academic level was on par with fourth grade -- not fifth grade. Jackson stated that Ingram struggled in school. Jackson, like Allred, testified that Ingram's trial counsel did not contact her, but, had they done so, she would have been willing to speak with them.
>
> "On cross-examination, Jackson confirmed that the 'combined classroom' approach was not a special education program. Jackson, on redirect examination, explained that the program was for children who 'did not meet the criteria' for special education 'according to the testing that's done for special education kids.' [(R. 143.)] Jackson further explained that the program was designed 'to catch those kids who were not special ed but who were not on the regular level academically but who fell in between where they needed added attention, added help, added assistance so that they excel well in life.' [(R. 143-44.)]"

(R. 978-81.) The circuit court found that certain portions of Jackson's testimony -- that Ingram was not a troublemaker and that he was well-mannered -- were cumulative to testimony actually presented during the penalty phase. "'[F]ailing to introduce additional mitigation evidence that is only cumulative of that already presented does not amount to ineffective assistance.' Jalowiec v. Bradshaw, 657 F.3d 293, 319 (6th Cir. 2011) (citing Nields v. Bradshaw, 482 F.3d 442, 454 (6th Cir. 2007))." Stallworth v. State, 171 So. 3d 53, 79 (Ala. Crim. App. 2013). The circuit court also found that portions of Allred's and Jackson's testimony that related to Ingram's academic difficulties conflicted with the penalty-

phase testimony of Joyce Elston, Carla Parker, and Dorothy Ackles, who testified to Ingram's succeeding in school. See Connor v. Secretary, Florida Dept. of Corrections, 713 F.3d 609, 626 (11th Cir. 2013) (holding trial counsel acted reasonably in omitting evidence that would have contradicted other evidence presented at penalty phase). Finally, the circuit court found lacking Ingram's evidence that he was referred for testing for a learning disability and that he was enrolled in special education:

> "Indeed, although Ingram did present evidence that he was referred for testing in the second grade for special education, the result of that testing (as demonstrated by his own exhibit) was that he did not qualify for special-education classes. Additionally, although Ingram alleged that his 'combined classroom' experience with Jackson was a 'form of special education,' Jackson's testimony at the evidentiary hearing established that the 'combined-classroom' approach was not a form of special education."

(C. 984.)

b.

Ingram argues that trial counsel failed to investigate and to present evidence of Ingram's exposure as a child to lead and other environmental toxins. Ingram pleaded in his petition that postconviction counsel had uncovered evidence that children who lived in the housing projects of Anniston, Alabama, and New York City, as Ingram had, suffered from lead poisoning. Also, postconviction counsel had learned that the area in Anniston in which Ingram was raised had been contaminated by polychlorinated biphenyls ("PCBs") as a result of intentional environmental pollution by chemical companies. Ingram asserted that he was at higher risk than most because his mother consumed clay, which was contaminated by PCBs, while she was pregnant. Ingram alleged that exposure to lead and PCBs can cause a number of health problems, such as learning difficulties, behavioral problems, and neurological

impairments.[2]

The circuit court made the following findings regarding this claim:

> "[T]his claim, as pleaded in his Fifth Amended Rule 32 petition, does not satisfy the burden of pleading. Indeed, the ... allegations are merely speculative. That is, Ingram did not allege that he does in fact suffer from being poisoned by either lead or PCBs; rather, he alleged only that it is possible that he was exposed to such substances. At the outset of the evidentiary hearing, Ingram's Rule 32 counsel confirmed the speculative nature of this allegation and conceded that Ingram has never been tested for exposure to these substances. Such speculative allegations are insufficient to demonstrate that trial counsel were ineffective. Additionally, Ingram's allegations do not demonstrate that his trial counsel knew that Ingram suffered from a mental health issue at the time of his trial (in fact, the mental health examination conducted before trial indicated he did not have such issues). Finally, Ingram's allegations include a one-sentence statement that the result of the sentencing may have been different if this evidence were presented during the penalty phase of his trial, which is merely a bare allegation of prejudice."

(C. 987-88.) Ingram has not challenged on appeal the circuit court's finding that he failed to meet his burden of pleading this claim. The circuit court also found, for reasons that will be discussed more fully herein, that Ingram voluntarily waived any postconviction relief as to this claim.

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[2]Ingram cited in his petition several scientific articles in support of this claim. (C. 572-73.) The articles were published in years ranging from 1996 to 2012. Ingram was convicted and sentenced in 1995.

c.

Ingram argues that trial counsel failed to investigate and to present evidence of his good behavior during his pretrial incarceration. At the evidentiary hearing, the State conceded that Ingram had a good disciplinary record while awaiting trial. Ingram asserts that evidence of prison adaptability is inherently mitigating and that there was no reasonable, strategic reason for failing to present it during the penalty phase.

The circuit court acknowledged Judge Fannin's testimony that, to his recollection, Ingram did not get into trouble while incarcerated prior to trial. Yet, Ingram "did not ask [Judge Fannin] the reason they did not present such 'mitigating evidence' during the penalty phase of Ingram's trial. Thus, the record is silent as to the reasoning behind counsel's actions and '"'the presumption of effectiveness is sufficient to deny relief on [an] ineffective assistance of counsel claim.'"'" (R. 994-95; quoting Broadnax v. State, 130 So. 3d 1232, 1255-56 (Ala. Crim. App. 2013), quoting in turn Dunaway v. State, 198 So. 3d 530, 547 (Ala. Crim. App. 2009), quoting in turn Howard v. State, 239 S.W.3d 359, 367 (Tex. App. 2007)). Further, "counsel is not required to present all mitigation evidence, even if the additional mitigation evidence would not have been incompatible with counsel's strategy. Counsel must be permitted to weed out some arguments to stress others and advocate effectively." McWhorter v. State, 142 So. 3d 1195, 1246 (Ala. Crim. App. 2011) (citations and quotations omitted). The circuit court also found that such evidence was minimally mitigating and would have called attention to the fact that Ingram was incarcerated while awaiting trial. (R. 995.)

d.

Ingram argues that trial counsel failed to investigate and to present evidence of his family background. Specifically, Ingram asserts that trial counsel should have investigated evidence that his mother cohabitated with two boyfriends who were violent alcoholics and that his childhood was marked by poverty and violence.

The circuit court made the following findings regarding

this claim:

> "In his petition, Ingram alleged that trial counsel failed to investigate and present evidence of Ingram's childhood 'living in housing projects in Brooklyn, New York,' which was 'substandard' and possibly 'contaminated with lead'; that, while in Brooklyn, Ingram 'witnessed many acts and crimes of violence, and was himself the victim of crimes of violence' -- specifically, that he had been '"jumped" by a group of boys' and had to be hospitalized; and that Ingram witnessed acts of domestic violence between his mother and two different live-in boyfriends 'when they became drunk.' Ingram, however, failed to prove that his counsel's performance was deficient when they did not present this specific evidence of Ingram's family background to the jury.
>
> "Indeed, the totality of the questions to Ingram's trial counsel during the evidentiary hearing regarding Ingram's family background was as follows:
>
> > "[Ingram's Rule 32 Counsel]: What about the circumstances of his upbringing?
> >
> > "[Mr. Fannin]: Well, we talked to his mother about when he was a child and some of the circumstances of his youth. I can't recall what she said, but I remember talking to her about that.
> >
> > "[Ingram's Rule 32 Counsel]: Any other witnesses or sources of information on that topic outside of her?
> >
> > "[Mr. Fannin]: His sister may have talked about his childhood. I can't specifically recall.
> >
> > "[Ingram's Rule 32 Counsel]: Would there have been anyone beside those two?

> "[Mr. Fannin]: Not that I can recall. I'm not saying there were not, but I can't recall.

"[(R. 60-61.)] Additionally, Fannin conceded that they did not investigate the presence of "neurotoxins" in the area in which Ingram grew up.

"Ingram failed to ask his trial counsel whether he had gained evidence from any of the witnesses that he had spoken to in preparation for the penalty phase of Ingram's trial about the specific areas of Ingram's family background mentioned in Ingram's Rule 32 petition -- i.e., his witnessing acts of violence in Brooklyn, his getting 'jumped' by a group of boys in Brooklyn, his living in 'substandard' housing in Brooklyn, and his witnessing acts of domestic violence between his mother and her boyfriends. Because Ingram's Rule 32 counsel failed to ask his trial counsel whether trial counsel was aware of these specific aspects of Ingram's family background, this Court cannot determine whether Ingram's trial counsel either knew of these parts of Ingram's background and made a strategic choice to not present that evidence, or whether trial counsel did not present this evidence simply because they did not know of the existence of these aspects of Ingram's background. Thus, the record is silent as to the reasoning behind counsel's actions and, thus, '"'the presumption of effectiveness is sufficient to deny relief on [an] ineffective assistance of counsel claim.'" Dunaway v. State, [198] So. 3d [530], [547] (Ala. Crim. App. 2009) (quoting Howard v. State, 239 S.W.3d 359, 367 (Tex. App. 2007)).' Broadnax v, State, 130 So. 3d 1232, 1255-56 (Ala. Crim. App. 2013).

"Additionally, Ingram failed to prove that he was prejudiced by his trial counsel's failure to present this specific evidence of Ingram's family background. Indeed, this Court is not convinced that, even if his trial counsel had presented such evidence, there would be a reasonable probability that the 'sentencer ... would have concluded that

> the balance of aggravating and mitigating circumstances did not warrant death.' Strickland, 466 U.S. at 695. For example, although Ingram's brother, Calvin, and his sister, Carla, testified at the evidentiary hearing that their mother's boyfriend -- Walter Davis -- would get into physical altercations, that testimony would have opened the door for the State to point out that Ingram's sister grew up in the same environment but had not committed a capital murder and, thus, would have undermined Ingram's mitigation case. See, e.g., Grayson v. Thompson, 257 F.3d 1194, 1227 (11th Cir. 2001) ('The fact that Grayson was the only child to commit such a heinous crime also may have undermined defense efforts to use his childhood in mitigation.'). Such evidence was, at best, a double-edged sword, and [a]n ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword." Reed v. State, 875 So. 2d 415, 437 (Fla. 2004).'" Washington v. State, 95 So. 3d 26, 53 (Ala. Crim. App. 2012)."

(C. 970-74.) Additionally, this Court notes that offering evidence of the alleged violence of Dorothy Ackles's boyfriends would appear to conflict with trial counsel's strategy.[3] Ingram's mother was too ill to attend his trial, so trial counsel traveled to her and had her deposition videotaped to ensure that she was not only heard but also seen by the jury. Also, Carla Parker told the jury that she did

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[3]Ingram's specific evidence on the violence of his mother's boyfriends was limited. Carla Parker testified only to one specific incident in which his mother's boyfriend was drunk and struck her in the face. She alluded generally to law enforcement's being summoned on other occasions. (R. 186-88.) Kelvin Ingram, Ingram's brother, testified generally that his mother's boyfriend was "[v]iolent at times" and that he and his siblings had "to run down the street a couple nights" until his mother and law enforcement arrived. (R. 168-69.) Joyce Elston testified that Dorothy Ackles and her boyfriend would "get into it," but she had no knowledge of law enforcement's involvement in the disputes. (R. 178-79.)

not believe her mother could survive the stress of Ingram's being sentenced to death. Thus, there is no question that trial counsel sought to portray Dorothy Ackles as a sympathetic figure to make her plea of mercy more meaningful. It seems, then, unreasonable to expect trial counsel also to malign Dorothy Ackles by offering evidence that she exposed Ingram and her other children to men Ingram alleged to be violent alcoholics. See Whatley v. Warden, Georgia Diagnostic and Classification Center, 927 F.3d 1150, 1178 (11th Cir. 2019) (holding that offering evidence that petitioner's great-uncle raped his mother "no doubt conflicts with the mitigation strategy" of painting a positive picture of his great-uncle, who raised him).

e.

Ingram argues that trial counsel failed to investigate and to present evidence from non-family witnesses to further pursue the themes raised during the penalty phase. At the evidentiary hearing, Ingram presented the testimony of friends who testified to his good character and nonviolent nature. Schuessler Ware, a former coach of Ingram, testified to Ingram's athletic talents. Ingram acknowledges that this evidence was similar to what was offered by trial counsel, but argues that the evidence had non-cumulative value because it came from witnesses outside of his family and, in Ware's case, from a respected member of the community.

Ingram has cited no authority in his brief to support his assertion that this evidence should not be considered cumulative merely because it came from friends instead of family members. Again, "'failing to introduce additional mitigation evidence that is only cumulative of that already presented does not amount to ineffective assistance.' Jalowiec v. Bradshaw, 657 F.3d 293, 319 (6th Cir. 2011) (citing Nields v. Bradshaw, 482 F.3d 442, 454 (6th Cir. 2007))." Stallworth, 171 So. 3d at 79 (Ala. Crim. App. 2013).

4.

The circuit court's findings of fact regarding the reasonableness of trial counsel's investigation and presentation of mitigation evidence are supported by the record. Based on those findings, the circuit court determined

that Ingram failed to carry his burden to prove that trial counsel were ineffective. This Court finds no error in the circuit court's application of the law to its findings of fact. As such, this issue does not entitle Ingram to any relief.

5.

Ingram also argues that the circuit court erred in its weighing of the newly-presented mitigation evidence. Ingram asserts that a reviewing court must reweigh the aggravating evidence against the totality of mitigating evidence -- both the evidence adduced at trial and the evidence offered in the postconviction proceeding. See Williams v. Taylor, 529 U.S. 362, 397-98 (2000). Ingram argues that the circuit court erroneously "sub-divided Ingram's mitigation into discrete categories ... and declared each category individually insufficient to establish prejudice. (Ingram's brief, at 42.) Correctly analyzed, Ingram argues, the totality of his mitigation evidence demonstrates that he was prejudiced by trial counsel's alleged ineffectiveness.

This Court disagrees with Ingram's view of the circuit court's treatment of the totality of the mitigating evidence. While it is true that the circuit court addressed Ingram's specific categories of mitigation individually, it is not clear that the circuit court's handling of the totality of the mitigation evidence was erroneous. Indeed, before presenting its findings of fact and conclusions of law regarding Ingram's claims of ineffective assistance of counsel during the penalty phase, the circuit court stated that it had "consider[ed] the evidence presented at trial in both the guilt phase and penalty phase of Ingram's trial and the evidence presented in the evidentiary hearing." (C. 964.)

To the extent Ingram asks this Court to reweigh the totality of the mitigation evidence, Ingram has failed to establish that he was prejudiced by trial counsel's alleged ineffectiveness in the penalty phase. Initially, this Court notes that the circuit court found, and this Court agrees, that much of the mitigation that Ingram pleaded trial counsel should have investigated and presented was either insufficiently supported by evidence at the evidentiary

hearing, or was cumulative to or contradicted evidence actually presented during the penalty phase. In other words, in assessing the totality of the mitigating evidence, there was little to add from Ingram's postconviction proceedings. Additionally, this Court agrees with the circuit court's assessment that "trial counsel had a difficult task during their penalty-phase presentation." (C. 964.) The circuit court stated:

> "Indeed, the very jury they had to persuade to sentence Ingram to life imprisonment without the possibility of parole had just convicted Ingram of a capital offense, in which the State's evidence established that Ingram and his codefendants kidnapped Gregory Huguley by force and at gunpoint; took him to a ball park; and, while he was pleading for his life, duct taped him to a bench, doused him with gasoline, and set him on fire. Ingram and his codefendants then watched Gregory Huguley burn to death for approximately 20 minutes."

(C. 964.) Two aggravating circumstances were found to exist -- that the capital offense was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing, or attempting to commit a kidnapping and that the capital offense was especially heinous, atrocious or cruel, compared to other capital offenses. After weighing the State's strong case of aggravation against the totality of the mitigating evidence offered at trial and proven by Ingram during his postconviction proceedings, this Court concludes that Ingram failed to demonstrate that there was a reasonable probability that the outcome of his penalty phase would have been different.

Regardless, the circuit court found that Ingram's trial counsel were not ineffective in the penalty phase. This Court has found no error in the circuit court's judgment. Thus, any error in the circuit court's analysis of prejudice would be harmless. See Strickland, 466 U.S. at 697 (holding that "there is no reason for a court deciding an ineffective assistance claim ... to address both components of the inquiry if the defendant makes an insufficient showing on one"). As such, this issue does not entitle Ingram to any relief.

II.

Ingram argues that the circuit court erred in denying his allegations that trial counsel were ineffective for failing to investigate and to present evidence of neurological impairments as a result of Ingram's alleged exposure to lead and PCBs. The circuit court found these allegations to be speculative. Ingram, though, argues that this decision was erroneous in light of the circuit court's denying him funds for expert assistance to develop, to plead, and to prove these allegations.

Ingram sought in the circuit court $4,000 to retain a mental-health expert who specializes in neuropsychological assessments; $5,000 to retain a forensic psychologist or psychiatrist; and $3,500 to retain Pamela Blume Leonard, a social worker with expertise in social history investigations in capital cases. (Mandamus, Attachment 7.)[4] Ingram's motion asserted that he had been exposed as a child to lead and other heavy metals, as well as PCBs, and that he could not fully develop additional facts and testimony without funds for expert assistance. The circuit court denied Ingram's motion without explanation. Ingram proposes on appeal two alternative theories for relief.

First, Ingram argues that the circuit court's decision to deny him funds for expert assistance was questionable. Although Ingram concedes that the circuit court's decision denying him funds for expert assistance comports with the "most natural reading" of James v. State, 61 So. 3d 357 (Ala. Crim. App. 2010), Ingram argues that the circuit court's denial is "out of step with Supreme Court jurisprudence," which seeks to ensure "that full factual development of a claim takes place in state court channels." (Ingram's brief, at 51; citing Martinez v. Ryan, 566 U.S. 1 (2012), and Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992)).

[4]Many of the documents relevant to this claim and the claim to follow are not included in the record on appeal. They are, however, included as attachments to Ingram's mandamus petition filed with this Court on March 25, 2014. See Ex parte Robert Shawn Ingram, CR-13-0898.

In James, this Court stated:

"'Because the law is clear that Rule 32 petitioners are not entitled to funds to hire experts to assist in postconviction litigation, ex parte or otherwise, the trial court did not err in denying the motion. Boyd v. State, 913 So. 2d 1113 (Ala. Crim. App. 2003).' Johnson v. State, [Ms. CR-05-1805, Sept. 28, 2007] ___ So. 3d ___, ___ (Ala. Crim. App. 2007), [vacated on other grounds by Johnson v. Alabama, 137 S. Ct. 2292 (2017)]. See also Bush v. State, [92 So. 3d 121] (Ala. Crim. App. 2009); Burgess v. State, 962 So. 2d 272 (Ala. Crim. App. 2005); Boyd v. State, 913 So. 2d 1113 (Ala. Crim. App. 2003); Williams v. State, 783 So. 2d 108 (Ala. Crim. App. 2000); Ford v. State, 630 So. 2d 111 (Ala. Crim. App. 1991); Hubbard v. State, 584 So. 2d 895 (Ala. Crim. App. 1991).

> "'Contrary to McGahee's assertions, the trial court was not obliged to allow him to proceed ex parte in his request for funds to pursue his postconviction claims. McGahee's reliance on Ake v. Oklahoma[, 470 U.S. 68, 105 S. Ct. 1087, (1985)] is misplaced because postconviction proceedings pursuant to Rule 32, Ala. R. Crim. P., are not criminal in nature. McGahee, himself, pursued this discretionary legal action against the State of Alabama, and the action is civil in nature. See Hamm v. State, 913 So. 2d 460, 471 (Ala. Crim. App. 2002), and cases cited therein. This Court held that the fundamental fairness mandated by the Due Process Clause does not require the trial court to approve funds for experts at a postconviction proceeding. Hubbard v. State, 584 So. 2d 895, 900 (Ala. Crim. App. 1991). Moreover, this Court has specifically held that Ake is not applicable in postconviction proceedings. Ford v. State, 630 So. 2d 111, 112 (Ala. Crim. App. 1991), aff'd, 630 So. 2d 113

(Ala. 1993). See also Williams v. State, 783 So. 2d 108 (Ala. Crim. App. 2000), aff'd, 662 So. 2d 929 (Ala. 1992) (table).

"'McGahee's reliance on Ex parte Moody, 684 So. 2d 114 (Ala. 1996), is misplaced. In Moody, the Alabama Supreme Court held that "an indigent criminal defendant is entitled to an ex parte hearing on whether expert assistance is necessary, based on the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution." 684 So. 2d at 120. As discussed above, for purposes of this proceeding, McGahee is not "an indigent criminal defendant." Instead, he is a convicted capital murderer who, in Rule 32 proceedings, is a civil petitioner with the burden of proving that he is entitled to relief on the grounds alleged in the petition he filed. Moody does not support McGahee's argument here. McGahee is not entitled to any relief on this claim of error. The trial court did not err when it denied an ex parte hearing on McGahee's request for funds.'

"McGahee v. State, 885 So. 2d 191, 229 (Ala. Crim. App. 2003)."

James, 61 So. 3d at 383. See also White v. State, [Ms. CR, April 12, 2019] ___ So. 3d ___, ___ (Ala. Crim. App. 2019) ("'Since a post-conviction petitioner does not have a constitutional right to appointed counsel ... there is no constitutional obligation to provide post-conviction counsel with investigative resources .... Where no constitutional right is implicated, the decision to appoint an expert, or to authorize funds to hire an expert, rests within the sound discretion of the circuit court.'" (quoting People v. Richardson, 189 Ill. 2d 401, 422, 245 Ill. Dec. 109, 727 N.E.2d 362, 375 (2000))).

The cases on which Ingram relies involve federal habeas proceedings and do not apply to state postconviction

proceedings. The circuit court committed no error in denying Ingram's motions for funds for experts to assist in the postconviction proceedings.

In the alternative, Ingram argues that if the circuit court's decision was not erroneous, then the circuit court should have declined to entertain Ingram's claims. Ingram asserts that it "should have been obvious to the circuit court both that nothing resembling a fully developed factual record could be made without access to experts, and that a proper Strickland analysis was impossible." (Ingram's brief, at 53.) Thus, Ingram argues, "it was error for the circuit court to reach and resolve the merits." (Ingram's brief, at 53.)

As a point of clarification, the circuit court did not deny Ingram's claim based on its merits. Instead, the claim was dismissed because Ingram failed to meet his burden of pleading the claim. (C. 987.) The circuit court also found that Ingram waived the claim based on his refusal to make himself available to the State for a mental examination. (C. 987-93.)

In any case, this particular argument is not properly before this Court. Ingram did not assert below that the circuit court should refrain from ruling on this particular claim of ineffective assistance of counsel. Therefore, this argument is not preserved for appellate review. See Boyd v. State, 913 So. 2d 1113, 1123 (Ala. Crim. App. 2003) ("The general rules of preservation apply to Rule 32 proceedings." (citations omitted)). As such, this issue does not entitle Ingram to any relief.

III.

Ingram argues that the circuit court erred in finding that he waived his claim that trial counsel were ineffective for failing to investigate and to present evidence that he suffered from neurological impairments as a result of exposure as a child to lead and PCBs. Ingram asserts that he did not waive this claim, but "had it stripped from him by the circuit court as a sanction for refusing to submit to an unlawful State-sponsored mental health evaluation." (Ingram's brief, at 55.)

According to Ingram, "it was clear that development of the most important, probative and persuasive evidence in support of his claim[s] would require assistance from experts in other disciplines, i.e., individuals with advanced professional training and experience in, e.g., psychiatry, neuropsychology, and/or neurology." (Ingram's brief, at 55.) Thus, Ingram moved on several occasions for funds for expert assistance. Ingram's motions were denied. Nevertheless, Ingram was able to obtain the assistance of two experts, both of whom offered their services pro bono.

One month prior to Ingram's scheduled evidentiary hearing, he submitted to the circuit court a witness list and an updated exhibit list. The witness list identified his two expert witnesses -- Russell Stetler and Dr. Deborah Denno. (Mandamus, Attachment 12.) Among the exhibits were maps of Ingram's childhood residences and a local chemical plant, and affidavits from Stetler and Dr. Denno. (Mandamus, Attachment 13.) Stetler's affidavit indicated that he intended to offer evidence regarding the prevailing standards of a mitigation investigation at the time of Ingram's trial. The affidavit included Stetler's opinions regarding the standard of care in capital mental-health evaluations and a trial counsel's duty to investigate potential exposure to lead and other neurotoxins in 1995. Dr. Denno's affidavit indicated that she intended to present evidence regarding the cognitive and behavioral effects of early exposure to lead.

The State, in turn, moved the circuit court to grant the State's mental-health expert access to Ingram to prepare for and possibly rebut any mental-health testimony offered by Ingram's experts at the upcoming hearing. (Mandamus, Attachment 1.) Ingram objected to the State's motion, arguing that there was no provision under Rule 32, Ala. R. Crim. P., for the State to demand access, and that granting access might compromise Ingram's constitutional rights to silence, to counsel, and to a reliable review of his death sentence. (Mandamus, Attachment 2.) Additionally, Ingram argued that there was no need for rebuttal evidence because Ingram had never been granted funds for an expert evaluation of his own and neither of his experts had conducted an evaluation or intended to offer evidence regarding his competency to stand trial, his mental state at the time of the offense, or his present mental state. The circuit court granted the State's

motion. (Mandamus, Attachment 3.)

Ingram filed a petition for a writ of mandamus with this Court, asking this Court to direct the circuit court to vacate its order granting the State access to him. On March 27, 2014, this Court denied Ingram's petition. Ex parte Ingram, CR-13-0898. Ingram then sought relief from the Alabama Supreme Court. On April 3, 2014, the Alabama Supreme Court likewise denied Ingram's petition. Ex parte Ingram, No. 1130691.

At the beginning of the evidentiary hearing, the State informed the circuit court that Ingram had "refused to cooperate with our expert at the time under advice of counsel." (R. 7.) The State moved "to exclude all of the claims that concern mental health." (R. 8.) Rule 32 counsel acknowledged that he had advised Ingram to be non-compliant. The circuit court ruled that, due to Ingram's refusal to cooperate, he would be precluded from presenting any evidence "that would involve mental impairment." (R. 13.)

On appeal, Ingram challenges the circuit court's finding that he waived his claim that trial counsel were ineffective for failing to investigate and to present evidence that he suffered from neurological impairments as a result of exposure as a child to lead and PCBs. In support of his claim regarding the finding of waiver, he argues that the circuit court erred by granting the State's motion for access to him and by excluding his evidence at the evidentiary hearing. Yet, waiver was an alternative holding; the circuit court also dismissed this particular claim because it was insufficiently pleaded in Ingram's petition. (C. 987.) Because this claim was insufficiently pleaded, Ingram was not entitled to an opportunity to present evidence in support of it. See Boyd, 913 So. 2d at 1125 ("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." (some emphasis added)). Thus, there was no error in the circuit court's preventing Ingram from presenting evidence in

support of this insufficiently pleaded claim.[5]

Moreover, Ingram has not challenged the circuit court's finding that this specific claim was insufficiently pleaded. This Court has held that the failure to challenge an alternative holding results in a waiver of the issue on appeal. See Jackson v. State, 127 So. 3d 1251, 1255-56 (Ala. Crim. App. 2010), and the cases cited therein. As such, Ingram has waived on appeal his claim that trial counsel were ineffective for failing to investigate and to present evidence that he suffered from neurological impairments as a result of exposure as a child to lead and PCBs.

IV.

Ingram argues that the circuit court erred denying his claim that he was denied his right to have a jury determine the facts increasing the prescribed range of penalties to which he was exposed. Ingram asserts that because Alabama's capital-sentencing scheme allows for the trial court to weigh the aggravating and mitigating factors and to impose a sentence of life or death, the scheme violates the holdings of Apprendi v. New Jersey, 530 U.S. 466 (2000), Ring v. Arizona, 536 U.S. 584 (2002), and Hurst v. Florida, 136 S. Ct. 616 (2016). The circuit court dismissed this claim as being insufficiently pleaded and without merit. (C. 292-93.)

In Ex parte Bohannon, 222 So. 3d 525 (Ala. 2016), the Alabama Supreme Court held that Alabama's capital-sentencing scheme was consistent with the holdings of Apprendi, Ring, and Hurst:

> "As previously recognized, Apprendi holds that any fact that elevates a defendant's sentence above the range established by a jury's verdict must be determined by the jury. Ring holds that the Sixth Amendment right to a jury trial requires that a jury 'find an aggravating circumstance necessary for imposition of the death penalty.' Ring, 536 U.S. at

[5]Also, Ingram can show no infringement of a constitutional right based on the circuit court's granting the State's motion for access as no examination ever occurred.

> 585. Hurst applies Ring and reiterates that a jury, not a judge, must find the existence of an aggravating factor to make a defendant death-eligible. Ring and Hurst require only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty -- the plain language in those cases requires nothing more and nothing less. Accordingly, because in Alabama a jury, not the judge, determines by a unanimous verdict the critical finding that an aggravating circumstance exists beyond a reasonable doubt to make a defendant death-eligible, Alabama's capital-sentencing scheme does not violate the Sixth Amendment."

Bohannon, 222 So. 3d at 532.

The Alabama Supreme Court has considered and rejected Ingram's claim. See id.; see also Wimbley v. State, 238 So. 3d 1268 (Ala. Crim. App. 2016). The circuit court did not err in dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P. As such, this claim does not entitle Ingram to any relief.

V.

Ingram argues that the circuit court erred in denying his allegations that he received ineffective assistance of appellate counsel. In Ground IV of Ingram's Fifth Amended Petition, Ingram asserted that appellate counsel were ineffective for failing to raise meritorious challenges to his death sentence based on facts appearing on the face of the record. Specifically, Ingram asserted that appellate counsel were ineffective for failing to raise claims that his rights were violated by the jury's failing to find, unanimously and beyond a reasonable doubt, all elements which rendered him eligible for a death sentence; and by the jury's failing to make unanimously the ultimate weighing devision which resulted in his death sentence. The circuit court denied this claim as being without merit.

In Reeves v. State, 226 So. 3d 711 (Ala. Crim. App. 2016), this Court stated:

> "'The standards for determining whether

appellate counsel was ineffective are the same as those for determining whether trial counsel was ineffective.' Jones v. State, 816 So. 2d 1067, 1071 (Ala. Crim. App. 2000), overruled on other grounds, Brown v. State, 903 So. 2d 159 (Ala. Crim. App. 2004). 'The process of evaluating a case and selecting those issues on which the appellant is most likely to prevail has been described as the hallmark of effective appellate advocacy.' Hamm v. State, 913 So. 2d 460, 491 (Ala. Crim. App. 2002). As this Court explained in Thomas v. State, 766 So. 2d 860 (Ala. Crim. App. 1998), aff'd, 766 So. 2d 975 (Ala. 2000), overruled on other grounds, Ex parte Taylor, 10 So. 3d 1075 (Ala. 2005):

> "'As to claims of ineffective appellate counsel, an appellant has a clear right to effective assistance of counsel on first appeal. Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985). However, appellate counsel has no constitutional obligation to raise every nonfrivolous issue. Jones v. Barnes, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983). The United States Supreme Court has recognized that "[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. at 751–52, 103 S. Ct. 3308. Such a winnowing process "far from being evidence of incompetence, is the hallmark of effective advocacy." Smith v. Murray, 477 U.S. 527, 536, 106 S. Ct. 2661, 91 L. Ed. 2d 434 (1986). Appellate counsel is presumed to exercise sound strategy in the selection of issues most likely to afford relief on appeal. Pruett v. Thompson, 996 F.2d 1560, 1568 (4th Cir. 1993), cert. denied, 510 U.S. 984, 114 S. Ct. 487, 126 L. Ed. 2d 437 (1993). One claiming ineffective appellate counsel must show

> prejudice, i.e., the reasonable probability that, but for counsel's errors, the petitioner would have prevailed on appeal. Miller v. Keeney, 882 F.2d 1428, 1434 and n.9 (9th Cir. 1989).'
>
> "766 So. 2d at 876."

Reeves, 226 So. 3d at 745-46.

Ingram's claim is, in effect, a claim that appellate counsel were ineffective for failing to raise an Apprendi claim. Judge Fannin, who also served as appellate counsel, was asked at the evidentiary hearing whether he had considered raising an issue on appeal based on Apprendi. Judge Fannin answered, "I can't recall. I don't remember that, and I don't even know if we had known about that ruling in Apprendi at that time. I just can't remember." (R. 63-64.)

Apprendi was decided by the Supreme Court of the United States on June 26, 2000 -- three days after the Alabama Supreme Court affirmed Ingram's conviction and sentence. "The well-settled rule of [the Alabama Supreme] Court precludes consideration of arguments made for the first time on rehearing." Water Works and Sewer Bd. Of City of Selma v. Randolph, 833 So. 2d 604 (Ala. 2002) (citing Ex parte Lovejoy, 790 So. 2d 933, 938-39 (Ala. 2000)). Consequently, if appellate counsel had raised this claim in his brief on rehearing, it would not have been considered. And, as discussed herein, the claim would have been without merit even if it had been raised. Appellate counsel cannot be held ineffective for failing to raise a meritless claim. See Jackson v. State, 133 So. 3d 420, 453 (Ala. Crim. App. 2009) ("'[B]ecause the underlying claims have no merit, the fact that Magwood's lawyer did not raise those claims cannot have resulted in any prejudice to Magwood.'" (quoting Magwood v. State, 689 So. 2d 959, 974 (Ala. Crim. App. 1996))).

Accordingly, the judgment of the circuit court is affirmed.

AFFIRMED.

McCool and Minor, JJ., concur. Kellum, J., concurs in

the result. Cole, J., recuses.