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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2006-2007

CR-05-1805

ToForest Onesha Johnson

v.

State of Alabama

Appeal from Jefferson Circuit Court
(96-386.60)

McMILLAN, Judge.

The appellant, ToForest Onesha Johnson, appeals the trial court's summary dismissal of his Rule 32, Ala. R. Crim. P., petition.

In August 1998, Johnson was convicted in the Jefferson Circuit Court of the murder of William G. Hardy, a Jefferson County deputy sheriff, while Deputy Hardy was on duty or "because of some official or job-related act or performance," an offense made capital by § 13A-5-40(a)(5), Ala. Code 1975. The jury recommended by a vote of 10-2 that the death sentence be imposed. The trial court accepted the jury's recommendation and sentenced Johnson to death. This court affirmed the conviction and sentence. Johnson v. State, 823 So. 2d 1 (Ala. Crim. App. 2001). The Alabama Supreme Court denied Johnson's petition for writ of certiorari. Ex parte Johnson, 823 So. 2d 57 (Ala. 2001).

On direct appeal of Johnson's conviction and death sentence, this court summarized the evidence presented at Johnson's trial:

> "The evidence adduced at trial tended to show the following. On July 19, 1995, between 12:30 a.m. and 1:00 a.m., Deputy Hardy was shot and killed in the parking lot of a hotel in Birmingham. Deputy Hardy had been working a second job as a nighttime security guard at the hotel. Deputy Hardy was paid by the hotel while 'moonlighting' as a security guard, but he wore his deputy's uniform and drove his patrol car to the hotel.
>
> "Barry Rushakoff, the night manager of the hotel, testified that at approximately 12:30 a.m.,

he heard two 'popping noises' coming from the rear parking lot of the hotel. (R.335.) Rushakoff attempted to contact Deputy Hardy, who carried a portable radio with him, to investigate the noises, but Deputy Hardy did not respond. Rushakoff stated that he then received telephone calls from several guests of the hotel who reported that they had heard gunshots in the rear parking lot. Rushakoff telephoned emergency 911 to report the shots and to get backup support for Deputy Hardy. Rushakoff again attempted to contact Deputy Hardy over the radio, without success. Rushakoff then began walking to the rear of the hotel. On his way, Rushakoff passed a table in the atrium of the hotel where Deputy Hardy often sat. On the table, Rushakoff saw Deputy Hardy's radio, a cup of coffee, and a cigarette burning in an ashtray. When Rushakoff reached the glass doors at the rear of the hotel, he saw Deputy Hardy's body lying in the rear parking lot. Rushakoff returned to the front desk and telephoned 911 a second time to report that Deputy Hardy had been injured. Rushakoff stated that while he was on the telephone with the 911 operator, a guest of the hotel, Leonard Colvin, came to the front desk to inquire about car keys that Michael Ansley, his stepson, was supposed to have left for him earlier in the evening. Rushakoff had the keys at the front desk, and he gave them to Mr. Colvin. After completing the 911 call, Rushakoff went to the rear parking lot to wait for police to arrive. According to Rushakoff, he did not see anyone, other than Deputy Hardy, in the parking lot while he was waiting for the police.

"Larry Osborne was a guest at the hotel on the night of July 18-19, 1995. He was staying in a third-floor room facing the rear parking lot. Osborne testified that he was awakened in the middle of the night by a gunshot. He looked at the clock, which reflected 12:40 a.m., and within a few seconds heard a second gunshot. Osborne stated that he went to the window of his room and looked at the rear

parking lot. He did not see anyone in the lot, but he did see a car directly under his window slowly pull out of the lot without its headlights on. Osborne described the car as an early 1980s model General Motors vehicle that appeared to be 'greenish.'(R.398.) He stated, however, that the parking lot was illuminated by sodium vapor lights that cast a yellow tint on everything in the parking lot and that could have affected his perception of the color of the vehicle. Osborne stated that he remained in his hotel room until the ambulance arrived and Deputy Hardy's body became visible in the spotlight. He then went down to the parking lot and was later questioned by police.

"Annie Colvin testified that she and her husband, Leonard Colvin, were also guests at the hotel on July 18-19, 1995. Colvin stated that she was driving her son's red Lexus coupe on July 18 and that she parked it in the parking lot at approximately 9:00 p.m. Her son, Michael Ansley, was supposed to drop off his second car, a gold Lexus sedan, pick up the red Lexus, and leave the keys to the gold Lexus at the hotel for Colvin sometime that evening. Colvin stated that she was awakened that night by gunshots and immediately woke her husband. Her husband went downstairs and retrieved the keys to the gold Lexus from the front desk of the hotel. The night manager, Rushakoff, stated that Ansley had dropped off the set of keys for Colvin at the front desk of the hotel at approximately 11:30 p.m. on July 18, 1995. Rushakoff stated that Ansley was driving a red sports car at the time.

"Several law-enforcement officers from Homewood, Birmingham, and Jefferson County Sheriff's Department responded to the 'double ought' dispatch, meaning officer down, that resulted from Rushakoff's second 911 call. Officer Rett Tyler with the Homewood Police Department was the first officer to arrive on the scene. Officer Tyler stated that

when he arrived, he saw the body of a deputy sheriff in the rear parking lot. Although he did not know Deputy Hardy personally, Officer Tyler stated that he recognized the Jefferson County deputy's uniform. When Officer Tyler arrived, Deputy Hardy was still breathing, but was unconscious as a result of bullet wounds to the head. Officer Tyler stated that Deputy Hardy's pistol was still in its holster. At this point, several other officers and emergency personnel began arriving on the scene. The emergency personnel worked on Deputy Hardy briefly and then transported him to a hospital, where he ultimately died.

"Dr. Robert Brissie, chief medical examiner for Jefferson County, performed an autopsy on Deputy Hardy on July 19, 1995. The initial exterior examination of Deputy Hardy's body and clothes revealed a bullet hole in the front of Deputy Hardy's hat that corresponded to an entrance wound on the front of Deputy Hardy's forehead and a bullet hole in the back of the hat that corresponded to an exit wound on the back of Deputy Hardy's head. Dr. Brissie stated that the soot pattern on Deputy Hardy's hat and face indicated that the shot to the forehead was fired from between 12 and 20 inches away. In addition, the autopsy revealed that the bullet entered Deputy Hardy's forehead at approximately a 15-degree upward angle. Dr. Brissie's examination also revealed a wound to the little finger and base of the thumb of Deputy Hardy's left hand, and to Deputy Hardy's left jaw. Dr. Brissie stated that, in his opinion, a single bullet passed through the tip of the left small finger, entered and exited the base of the left thumb and then entered Deputy Hardy's left lower lip and jaw. However, he stated that it was possible that the wounds to the left hand and the left jaw were caused by two bullets rather than one. Dr. Brissie stated that Deputy Hardy died from multiple gunshot wounds.

"Testimony showed that during the initial investigation of the scene several different descriptions of automobiles that had been seen leaving the area were given to police and dispatched to the local police departments. One BOLO ('be on the lookout') was issued for a white Caprice automobile with two to three occupants; another was issued for a black vehicle. In addition, during the investigation, Sgt. Charlie Richardson, an evidence technician with the Jefferson County Sheriff's Department, discovered two 9mm shell casings in the parking lot. Sgt. Richardson stated that ballistics tests indicated that both shell casings had been fired from the same weapon. The weapon used to kill Deputy Hardy was never recovered.

"James Evans, a patrol officer with the Homewood Police Department, testified that at approximately 4:00 a.m. on July 19, 1995, he received a dispatch to investigate a suspicious vehicle at a motel in Homewood; the vehicle matched the BOLO issued for a black vehicle. When he arrived at the motel, Officer Evans saw a 1972 black Monte Carlo automobile in the parking lot. A black male, later identified at Johnson, was standing by the driver's side door; another black male, later identified as Ardragus Ford, was seated in the front passenger seat of the car; a black female, later identified at Latanya Henderson, was seated in the backseat; and another black female, later identified as Yolanda Chambers, was exiting the motel. After approaching the vehicle, Officer Evans and his partner moved Johnson to the rear of the vehicle and attempted to remove Ford from the passenger seat. Because Ford was paralyzed, he was unable to get out of the vehicle until his wheelchair was retrieved from the trunk. The suspects were patted down, and Johnson was subsequently arrested on an outstanding warrant unrelated to the shooting of Deputy Hardy. A taxi was called for Ford, Henderson, and Chambers because none of them could produce a driver's license, but

the vehicle was not searched or towed; it remained in the motel parking lot.

"Latanya Henderson testified that Yolanda Chambers telephoned her at home several times between 10:30 p.m. and 11:00 p.m. on July 18, 1995. At approximately 2:00 a.m. on July 19, 1995, Henderson said, Chambers, Johnson, and Ford arrived at her home in Ford's vehicle and asked her to go with them to get something to eat. She agreed, and the four individuals drove to the motel. Henderson stated that she was carrying a .25 caliber handgun in her purse and that she also saw Johnson carrying a gun that night; she did not describe Johnson's gun. According to Henderson, when they pulled into the parking lot of the motel, they saw a police car behind them. Henderson stated that Johnson hid his gun underneath the dashboard of the car and that she got out of the car and hid her gun under the tire of another car parked in the parking lot. Henderson testified that the gun remained hidden when she left the scene, but that several days later, she told the police about her gun and it was retrieved from the parking lot. Henderson stated that she did not see Chambers, Ford, and Johnson until 2:00 a.m. on July 19, 1995, and that she was not at the hotel when Deputy Hardy was shot. In addition, Henderson stated that she had previously been charged with hindering prosecution in relation to Deputy Hardy's murder, but that the charge had been dismissed the morning of her testimony.

"Over objection, the State also presented evidence that Johnson had made several telephone calls in August 1995 from the Jefferson County jail that were overheard by a woman named Violet Ellison. Ellison testified that during these calls, she heard Johnson speak about the murder of Deputy Hardy and admit to shooting Deputy Hardy in the head.

"Johnson presented two alternative defenses at trial. First, through the testimony of Yolanda

Chambers, Johnson asserted that, although he was present when Deputy Hardy was shot, he was not involved in the shooting and did not know the shooting was going to happen. Chambers testified that she was with Johnson, Ardragus Ford, and Latanya Henderson at the hotel on the night of July 18-19, 1995. She stated that when Deputy Hardy came out of the hotel, Ford, without warning, shot him once. Startled, Chambers looked away, and then heard a second gunshot. Chambers stated that she did not see who fired the second shot. Chambers admitted to lying to the police on several occasions during the investigation, and implicating several different people in Deputy Hardy's murder. Chambers testified that on different occasions she had told police that a man named Omar Berry had shot Deputy Hardy; that a man named Quintez Wilson had shot Deputy Hardy; and that Johnson had shot Deputy Hardy. Chambers also testified that she had told police (and she had testified at several different proceedings) that Deputy Hardy was murdered because he came out to the rear parking lot of the hotel and saw a drug deal being consummated. In addition, Chambers testified that she had told police that she, Johnson, Ford, and Henderson were at the hotel to rob Michael Ansley. However, she stated that all of her previous statements to the police and her previous testimony at different proceedings were lies and that this time she was telling the truth.

"Second, through the testimony of Montrice Dunning and Christi Farris, Johnson asserted an alibi defense. Dunning and Farris both testified that on a Tuesday night in July 1995, they were at 'Tee's Place,' a nightclub. They arrived at approximately 11:00 p.m. and left at approximately 2:00 a.m. Both stated that they saw Johnson at the nightclub several times between 11:00 p.m. and 2:00 a.m. and that Johnson walked them to their vehicle at 2:00 a.m. when they left. In addition, both stated that Johnson was wearing a navy blue 'Tommy Hilfiger' brand shirt with stripes on the collar.

> (R.849; 872.) A mugshot of Johnson, taken when he was arrested in the early morning hours of July 19, 1995, was introduced into evidence by the defense. In the photograph, Johnson is wearing a navy blue 'Tommy Hilfiger' brand shirt with stripes on the collar. On cross-examination, Dunning stated that she did not know which Tuesday night in July she had seen Johnson at the nightclub, but that Johnson's defense counsel had told her that it was on July 18, 1995. Farris stated on cross-examination that she was positive that it was on the second Tuesday in July when she had seen Johnson at the nightclub. We take judicial notice that the second Tuesday in July 1995 was July 11, 1995, one week before Deputy Hardy was killed on July 19, 1995.'

Johnson v. State, 823 So. 2d 1 at 9-13.

On April 30, 2003, Johnson, through counsel, Ty Alper, filed a Rule 32, Ala. R. Crim. P., petition in the Jefferson Circuit Court. Along with his Rule 32 petition and filing fee, Johnson also filed a "Motion to Proceed in Forma Pauperis"; a "Motion for Leave to Proceed Ex Parte, In Camera, and on a Sealed Record with Regard to Applications for Expert and Investigative Assistance"; a "Motion for a Complete Recordation"; and a "Motion for Appointment of Ty Alper as Counsel." Johnson subsequently filed two amended petitions. On June 16, 2005, the State filed its answer to Johnson's second amended petition.

On October 24, 2005, Johnson filed several motions, including a "Rule 32.6(d) Motion to Transfer Case to a Different Judge"; a "Motion for Leave to Amend"; and a "Third Amended Petition for Relief From Conviction and Sentence of Death Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure." On April 27, 2006, the State filed a motion requesting that the circuit court schedule a hearing on Johnson's motion to transfer the case to a different judge. On May 24, 2006, the circuit court denied Johnson's motion to transfer the case to a different judge.

The court granted Johnson's motion for complete recordation and denied his "Motion for Leave to Proceed Ex Parte, In Camera, and on a Sealed Record with regard to Applications for Expert and Investigative Assistance." The court also denied Johnson's motion for leave to amend his Rule 32 petition a third time. The circuit court then summarily dismissed Johnson's petition. Johnson then filed a notice of appeal from the circuit court's dismissal of his petition.

I.

Johnson contends that the trial court erred in denying his motion to transfer his case to a different judge in a

separate circuit, because of bias and a possible lack of impartiality. In support of his claim, Johnson contends that because the trial judge's brother worked in the office of the Jefferson County Sheriff's Department and held political aspirations, the trial judge should have avoided the appearance of bias or prejudice and disqualified himself from the proceedings. Additionally, he argues the trial judge exhibited bias when it allegedly made improper factual determinations and unsupported accusations in dismissing his petition. In support of his claim, he argues the trial judge demonstrated bias and prejudice toward his case, when it labeled his questioning, regarding the character of a State's witness, Steve Saxon, as "libelous." Johnson also contends that the trial court called his counsel "liars." Further, he argues the trial judge conducted its own investigation of court records to defeat his claim that he was entitled to a transfer of his case to a different judge. Lastly, he argues that the trial judge should have disqualified himself because he signed an order instructing the State to pay witness Violet Ellison reward money and could therefore be considered to be a "material witness."

All judges are presumed to be impartial and unbiased. Ex parte Grayson, 665 So. 2d 986 (Ala. Crim. App. 1995). "The burden is on the party seeking recusal to present evidence establishing the existence of bias or prejudice." Ex parte Melof, 553 So. 2d 554, 557 (Ala. 1989).

Canon 3.C, Alabama Canons of Judicial Ethics, states:

> "(1) A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned, including but not limited to instances where:
>
> > "(a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> >
> > "(b) He served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer in the matter, or the judge or such lawyer has been a material witness concerning it."

"The Alabama Supreme Court in Ex parte Duncan, 638 So.2d 1332, 1334 (Ala.), cert. denied, ___ U.S. ___, 115 S. Ct. 528, 130 L. Ed.2d 432 (1994), stated the following about Canon 3c):

> "'Under Canon 3(C)(1), Alabama Canons of Judicial Ethics, recusal is required "when facts are shown which make it reasonable for members of the public or a party, or counsel opposed to question the impartiality of the judge." Acromag-Viking v. Blalock, 420 So. 2d 60, 61 (Ala. 1982).

> Specifically, the Canon 3(C)test is: "Would a person or ordinary prudence in the judge's position knowing all of the facts known to the judge find that there is a reasonable basis for questioning the judge's impartiality?" Matter of Sheffield, 465 So. 2d 350, 356 (Ala. 1984). The question is not whether the judge was impartial in fact, but whether another person, knowing all of the circumstances, might reasonably question the judge's impartiality--whether there is an appearance of impropriety. Id.; see Ex parte Balogun, 516 So. 2d 606 (Ala. 1987); see, also, Hall v. Small Business Administration, 695 F.2d 175 (5th Cir. 1983).'
>
> "'Canon 3(C)(1) does not require disqualification upon mere allegations of bias that are not supported by substantial fact; and the party seeking recusal must come forward with evidence establishing the existence of bias or prejudice.' Blankenship v. City of Hoover, 590 So. 2d 245, 251 (Ala. 1991)."

Ex parte Grayson, 665 So. 2d at 986-87.

Initially, we note that although Johnson, in his Rule 32 petition, challenged the trial judge's bias and lack of impartiality stemming from the trial judge's brother's employment in the sheriff's department, he did not raise the issue on appeal; therefore, it is not before this court for appellate review. Rule 28(a)(10), Ala. R. App. P. Assuming for the sake of argument, however, that the issue was properly before this court, Johnson has made no showing that the trial

judge could not try the case against him impartially and without bias. In fact, in his motion to transfer the case to a different Judge, Johnson acknowledged that he "does not suggest that [the trial judge] has done anything wrong or improper in the handling of these proceedings." See Tatum v. Carrell, 897 So. 2d 313, 325 (Ala. Civ. App. 2004) (a party's concession in his motion to recuse that he was making "no suggestion of improprieties" weighed against recusal). Johnson presented no evidence that the judge's brother knew the victim, was involved in the investigation of the victim's murder, or that the two had spoken about any on going investigation. The mere possibility that a bias on the part of the trial judge might exist, while unsupported by any substantial fact, is insufficient to warrant the trial judge's recusal. Because Johnson failed to present any evidence establishing a bias or prejudice on the part of the trial judge, anywhere in the entire proceeding, his motion was properly denied.

Next, Johnson's allegation that the trial court made improper factual determinations and unsupported accusations in dismissing his petition is a conclusory allegation unsupported

by any substantial fact. In its order, dismissing the petition, the trial court refutes Johnson's allegation that it at any time during the proceedings called counsel for the petitioner "liars." The trial court acknowledges that it informed defense counsel that the continual berating of a State's witness, Steve Saxon, could be considered "libelous" and "defamatory." However, this language does not indicate any bias on the part of the trial court in dismissing the claim relating to the State's witness as it might relate to a claim of ineffective assistance of counsel. Again, this is an allegation unsupported by any substantial evidence. Moreover, nothing in the record, including the trial court's order, indicates that the trial court conducted its own "investigation" to defeat Johnson's request for a transfer of the case to a different judge. The trial court, in its order, stated that "there were one hundred sixty-two (162) capital murder, felony murder and manslaughter trials which were conducted [between 1995 and 1998]," and that "[a]ll of these wrongful deaths were violent tragedies and, as such, received media attention;" however, that statement, without more, in no way supports the allegation that the trial court conducted its

own independent, "biased" investigation in dismissing any of Johnson's claims, including his request for a transfer of the case to a different judge.

Last, Johnson claims that the trial judge was a "material witness," because it signed the order paying a State's witness, Violet Ellison, a cash reward. Johnson argues that because the fact of the reward is the basis for a claim in his petition, the trial judge is a material witness with extra-judicial knowledge of that claim. The record indicates that Johnson's argument was not, but could have been, raised at trial and on appeal. Because it was not, it was procedurally precluded from appellate review. Rule 32.2 (a)(3) and (5), Ala. R. Crim. P. Assuming the issue was preserved, the trial judge would not have been considered a "material witness" merely because it signed the order authorizing the payment of the reward money to Ms. Ellison. See Callahan v. State, 557 So. 2d 1292, 1307 (Ala. Crim. App. 1989) ("a 'material witness' is 'a witness who gives testimony going to some fact affecting the merits of the cause and about which no other witness might testify.'") Because there were numerous witnesses, including the district attorney, who could testify

as to the particulars of the reward money, and because the order spoke for itself, Johnson's argument was without merit.

II.

Johnson contends that the State did not comply with Brady v. Maryland, 373 U.S. 83 (1963), because, he says, it failed to disclose several pieces of evidence, including evidence that a key witness for the State, Violet Ellison, was motivated to testify because of a large cash reward and other evidence including statements made to police, that could potentially have been used to impeach the witness. Additionally, Johnson claimed that Katrina Ellison, Violet Ellison's daughter, told police about three-way telephone conversations, during which Johnson denied having anything to do with Deputy Hardy's murder and that trial counsel was never informed of the conversations. He also claimed that the police had spoken to Fatuma Robinson and Kamillah Robinson, who stated that Johnson had telephoned them from jail and had denied any involvement in the murder; that Quintez Wilson, another suspect in the shooting, had passed a lie detector test indicating that he had not participated in the shooting and trial counsel was never informed of the fact; that none of

the evidence establishing Quintez Wilson's innocence had been provided to defense counsel; that the State never informed trial counsel that the car in which Johnson was riding on the night of the murder was searched and no incriminating evidence was found; that trial counsel was never told that a cab driver, John Renfroe, was parked near the entrance to the hotel when he heard gunshots, and observed a white Chevy Malibu automobile speed away from the parking light with its lights off; and that Yolanda Chambers told police that codefendant Ardragus Ford shot Deputy Hardy twice and that Johnson did not participate in the shooting.

In denying Johnson's claims, the trial court stated:

> "Petitioner's claims have no merit. Firstly, his claims are precluded pursuant to Rule 32.2(a)(3), Ala. R. Crim. P. because they could have been raised at trial, but were not. Secondly, his claims are precluded pursuant to Rule 32.2(a)(5), Ala. R. Crim. P. because they could have been raised on appeal, but were not. This Court would also point out that while Petitioner has made numerous allegations of 'withheld exculpatory evidence,' he has provided this Court with nothing which would warrant relief. (See Rule 32.2, Ala. R. Crim. P.) It has been found that 'To establish a Brady violation, a defendant must show that (1)the prosecution suppressed evidence, (2)the evidence suppressed was favorable to the defendant or was exculpatory, and (3) the evidence suppressed was material to the issue at trial. Ex parte Kennedy, 472 So. 2d 1106 (Ala. 1985), cert. denied, 474 U.S.

> 975, 106 S. Ct. 340, 88 L. Ed 2d 325 (1985). "Materiality" requires a finding that, had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.' Coral v. State, 628 So. 2d 954, 979 (Ala. Crim. App. 1992), aff'd, 628 So. 2d 1004 (Ala. 1993), cert. denied, 511 U.S. 1012, 114 S. Ct. 1387, 128 L. Ed 2d 61 (1994). Petitioner's claims are nothing more than bare, unsubstantiated allegations. (See Rule 32.6 (b), Ala. R. Crim. P.) Petitioner has failed to meet his required burden of proof relative to these claims."

Johnson admits, in his brief to this Court, that the information regarding Ms. Ellison's motivation to testify amounted to impeachment evidence. It is well-settled that newly discovered evidence under Rule 32.1(e)(3), Ala. R. Crim. P., allows relief on Brady claims only where "[t]he facts do not merely amount to impeachment evidence." See also Payne v. State, 791 So. 2d 383 (Ala. Crim. App. 1999). As evidenced by the trial court's order, Johnson's Brady claims are procedurally barred because he failed to satisfy the requirements of Rule 32.1(e) and because of the preclusionary grounds of Rule 32.2(a)(3) and (5), Ala. R. Crim. P.

III.

Johnson argues that his conviction and sentence are unconstitutional because, he says, he is actually innocent.

The trial court held that this issue was procedurally precluded from review because it was raised and addressed at trial and on appeal. Rule 32.2(a)(2) and (4), Ala. R. Crim. P. Johnson, however, claims that his motion for a judgment of acquittal, made both at the close of the State's case and at the close of his defense, did not preclude or dispose of this issue because, he says, the motion addressed only whether Deputy Hardy was "on duty" when he was murdered, and not Johnson's innocence. However, the issue of Johnson's innocence was raised when he pleaded "not guilty" and stood trial. Moreover, the denial of Johnson's motion for a judgment of acquittal, challenging the sufficiency of the evidence, including his claim of innocence, was raised at trial and on direct appeal and decided adversely to him. See Johnson v. State, 823 So. 2d 1, 40 (Ala. Crim. App. 2001).

IV.

Johnson contends that his conviction and sentence must be overturned because of newly discovered evidence. In support of his argument, Johnson reiterates the same claims of newly discovered evidence that he used to support his claim of a Brady violation.

The trial court, in its order, properly recognized that Johnson, in his claim asserting newly discovered evidence, had raised no distinct or additional claims from his Brady violation claims and dismissed the argument based on his failure to meet his burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle him to relief. See Rule 32.1(e)(1), Rule 32.2, Rule 32.6(b), Ala. R. Crim. P.

V.

Johnson contends that the trial court erred in dismissing his claims regarding the court's failure to strike two jurors for cause. Because this issue was raised and addressed at trial and on appeal, it is procedurally precluded from review. Rule 32.2(a)(2)and (4), Ala. R. Crim. P.

VI.

Johnson makes several different arguments, other than ineffective-assistance-of-counsel claims, that are procedurally barred in this Rule 32 proceeding. The following arguments are procedurally barred:

1. That the State introduced "rank, untrue hearsay" against him;

2. That the State knowingly introduced false testimony against him at trial;

3. That the State knowingly presented a prosecution theory against him that was inconsistent with the theory used against his codefendant, Ardragus Ford;

4. That the trial court improperly considered a youthful offender adjudication and arrests that had not resulted in convictions; and

5. That lethal injection and electrocution as methods of carrying out the death sentence are unconstitutional.

Issues 1 and 2 are barred because they could have been, but were not, raised at trial and on direct appeal. Rule 32.2(a)(3) and (5), Ala. R. Crim. P. Issues 3 and 4 are barred because they were raised and addressed on direct appeal either before this Court or the Alabama Supreme Court. See Rule 32.2(a)(4), Ala. R. Crim. P. Issue 5 was barred because it was raised and addressed at trial, and could have been, but was not, raised on direct appeal. Rule 32.2(a)(2) and (5), Ala. R. Crim. P.

VII.

Johnson contends that the procedural bars under the Alabama Rules of Criminal Procedure governing postconviction proceedings should not apply to him. In support of his claim, he argues that this Court should reject the procedural bars

that apply to many of his claims as "violative of the principles of fundamental fairness embodied in the Constitution."

This Court has held numerous times that procedural bars in postconviction relief apply to all cases, even those involving the death penalty. Hooks v. State, 822 So. 2d 476, 481 (Ala. Crim. App. 2000)("Alabama has never recognized any exceptions to the procedural default grounds contained in Rule 32, Ala. R. Crim. P.") State v. Tarver, 629 So. 2d 14, 19 (Ala. Crim. App. 1993)("The procedural bars of Rule 32 apply with equal force to all cases, including those in which the death penalty has been imposed").

Johnson also contends that it was improper for the trial court sua sponte to raise procedural bars. The record reveals that the State's "Answer to Johnson's Second Amended Petition," pleads all the grounds of preclusion with specificity. Moreover, the trial court acknowledged, in its order, that it had considered the pleadings of the respective parties, including the State's "Answer to Johnson's Second Amended Petition," in making its findings of fact. The trial court further stated throughout its order that the third

amended petition, filed by Johnson, is basically a "verbatim reproduction" of both his first amended petition and his second amended petition.

VIII.

Johnson argues that the trial court erred in denying three motions that accompanied his Rule 32 motion. First, he argues that the trial court erred in denying his motion to proceed ex parte in camera, and on a sealed record with regard to applications for expert and investigative assistance. 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).

Next, Johnson's second motion, a motion for the appointment of counsel, was properly denied because Johnson is not entitled to appointed counsel in his postconviction proceeding. See Deas v. State, 844 So. 2d 1286 (Ala. Crim. App. 2002) (the appointment of counsel in a Rule 32 proceeding is discretionary with the trial court). Additionally, as the trial court noted in its order, Johnson was represented by Ty

Alper and his non-profit law firm, who along with this motion, filed three other motions in addition to the Rule 32 petition. Johnson failed to demonstrate that court-appointed counsel was "necessary to assert or protect the rights of the petitioner," pursuant to Rule 32.7(c),Ala. R. Crim. P. Therefore, the trial court did not abuse its discretion in denying the motion.

Last, Johnson's third motion, a motion for leave to proceed in forma pauperis, was properly denied as moot. The record reveals that counsel for Johnson has already paid the requisite $154 filing fee, and Johnson's prison account reveals that his deposits between April 2002 and April 2003 totaled $1,230. Hence, the trial court concluded that he had sufficient funds available to pay his filing fee.

IX.

Johnson contends the trial court's order dismissing his petition was insufficient. More particularly, he argues that in dismissing many of his claims, the trial court incorrectly phrased Johnson's pleading inadequacies as a failure to meet his "burden of proof." Additionally, Johnson argues the trial court dismissed many of his claims as "insufficiently

specific" even though, he alleges, many of his claims are lengthy and sufficiently specific to meet the requirements of Rule 32.2 and 32.6(b).

Although the trial court often used the phrase "burden of proof," it is clear from the trial court's order that it meant "burden of pleading and proof," as stated in Rule 32.3, Ala. R. Crim. P. Rule 32.3, Ala. R. Crim. P., provides, in relevant part:

> "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."

Rule 32.6(b), Ala. R. Crim. P., provides:

> "The petition must contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings."

Bare allegations of fact and conclusions of law in a Rule 32 petition are not sufficient to warrant further proceedings on the petition. Rule 32.2, Ala. R. Crim. P.; Rule 32.6(b), Ala. R. Crim. P. Instead, a petitioner must plead his claims with specificity and fully disclose the factual basis for

those claims. It is clear from the language in the trial court's order, including its adoption of much of the language contained in the State's "Answer to the Second Amended Petition" on the issue whether Johnson had sufficiently pleaded and proven his claims, that it was aware of Johnson's burden at the pleading stage and that it found that the majority of his allegations were insufficient to warrant further proceedings. Cf. Borden v. State, 891 so. 2d 393 (Ala. Crim. App. 2002).

Johnson contends that many of his arguments should not have been dismissed under Rule 32.6(b), because they were "lengthy" claims; however, this does not necessarily mean that they were sufficiently specific to warrant further proceedings. In this case, they were not.

X.

Johnson contends that the trial court erred in dismissing his ineffective-assistance-of-trial-counsel claims.

To prevail on a claim of ineffective assistance of counsel the petitioner must satisfy the standard articulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). The petitioner must show

(1)that counsel's performance was deficient and (2) that he was prejudiced as a result of the deficient performance.

> "'Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.'
>
> "[Strickland v. Washington,]466 U.S.at 689 104 S.Ct. 2052 (citations omitted.) As the United States Supreme Court further stated:
>
> "'[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonably precisely to the extent that reasonably professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes

> particular investigations unnecessary. In any ineffectiveness case, 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.'
>
> "466 U.S. at 690-91, 104 S.Ct. 2052. 'An accused is entitled "'not [to] errorless counsel, and not [to] counsel judged ineffective by hindsight, but [to] counsel reasonably likely to render and rendering reasonably effective assistance.'"' Bui v. State, 717 So. 2d 6, 27 (Ala. Crim. App. 1997), quoting Thompson v. State, 615 So. 2d 129, 134 (Ala. Crim. App. 1992), quoting in turn Haggard v. Alabama, 550 F.2d 1019, 1022 (5th Cir. 1977)."

Adkins v. State, 930 So. 2d 524, 534-35 (Ala. Crim. App. 2001).

A.

Johnson raised the following ineffective-assistance-of-trial-counsel claims, which the trial court found were procedurally barred from review:

1. That trial counsel was ineffective, in part, because of inadequate resources available for his defense;

2. That trial counsel was ineffective for entrusting the investigation of the case to a "brain-damaged, suicidal, racist, alcoholic homeless man with an IQ of 63;"

3. That the lack of a competent investigation prejudiced Johnson in several significant ways;

4. That trial counsel performed deficiently in failing to call various experts during the trial phase;

5. That trial counsel was ineffective for failing to object to the manner of execution; and

6. That trial counsel failed to present "extensive mitigating evidence" that it failed to uncover.

Because all of the aforementioned claims were raised on direct appeal before this Court, they were properly dismissed by the trial court. See Rule 32.2(a)(4), Ala. R. Crim. P.

B.

Johnson raised several ineffective-assistance-of-counsel claims regarding trial counsel's conduct during the pretrial stage and during the guilt and penalty phases of the trial proceedings. The following ineffective-assistance claims were were insufficiently pleaded, pursuant to Rule 32.6(b), Ala. R. Crim. P., and were therefore, properly dismissed by the trial court:

1. That trial counsel failed to file a motion seeking the recusal of the trial judge;

2. That trial counsel failed "to establish on the record the very large presence of uniformed sheriff's deputies who were in the courtroom during the trial, and in failing to file a motion to prohibit the officers from attending the trial;

3. That trial counsel failed to move for a transfer of the case to another judge;

4. That trial counsel failed to make certain Batson arguments, so that the trial and appellate court could discern the basis for the Batson motion;

5. That trial counsel failed to include juror information on the record on appeal;

6. That trial counsel failed to argue that certain aspects of Alabama's death penalty are unconstitutional;

7. That trial counsel, during the guilt phase, failed to object to prosecutorial misconduct and should have asked for curative measures as to prosecutorial comments made during opening and closing statements;

8. That trial counsel failed to object to the mention of Johnson's outstanding arrest warrant;

9. That trial counsel failed to object to the introduction of hearsay statements by State's witness, Latanya Henderson;

10. That trial counsel failed to call John Renfroe as a witness[1] (The trial court noted that Johnson alleges in a separate Brady claim, that his lawyers were never told about Mr. Renfroe, or given a copy of his statement);

11. That trial counsel failed to object when the State knowingly introduced false testimony;

12. That trial counsel failed to object to the introduction of hearsay evidence offered by Officer James Evans;

13. That trial counsel failed to move to prohibit the jury from considering an aggravating circumstance that, Johnson argues, was unsupported by the evidence;

14. That trial counsel failed to object to the trial court's penalty phase instructions;

15. That trial counsel failed to introduce evidence indicating that the 1971 Monte Carlo that Johnson had been in on the night of the murder was found;

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[1]The trial court noted that Johnson alleges in a separate Brady claim that his lawyers were never told about Mr. Renfroe or given a copy of his statement.

16. Trial counsel failed to introduce evidence of Quintez Wilson's innocence[2] (In a separate Brady claim, Johnson argues that his lawyers were not aware of this information); and

17. Trial counsel, during the penalty phase, failed to adequately prepare three mitigation witnesses who testified.

XI.

The appellant contends that he received ineffective-assistance-of-appellate counsel on the following grounds:

A.

The following ineffective-assistance-of-appellate-counsel claims are procedurally barred from review:

1. That appellate counsel failed to object to the trial court's improper consideration of criminal activity that had not resulted in a conviction to negate a statutory mitigating circumstance of no prior criminal history;

2. That appellate counsel failed to object to the manner of execution; and

3. That appellate counsel failed to raise on appeal that lethal injection and electrocution are unconstitutional per se and unconstitutional as performed by the State of Alabama.

Because the underlying arguments forming the basis of these ineffective-assistance-of-appellate counsel claims were raised and addressed on direct appeal, both on the merits and as grounds for claims of ineffective assistance of trial

[2]In a separate Brady claim, Johnson argues that his lawyers were not aware of this information.

counsel, the trial court found that the aforementioned claims were precluded from review. Rule 32.2(a)(4), Ala. R. Crim. P.

B.

Johnson raised several claims regarding ineffective-assistance-of-appellate-counsel, which were dismissed by the trial court because there were insufficiently pleaded, pursuant to Rule 32.6(b), Ala. R. Crim. P. Those claims are as follows:

1. That appellate counsel failed to raise the claim that the State knowingly introduced false evidence;

2. That appellate counsel failed to raise the claim that the jury was improperly permitted to consider an aggravating circumstance for which there was no supporting evidence;

3. That appellate counsel failed to state specifically in the petition for rehearing in this Court, and in the petition for certiorari to the Alabama Supreme Court that this Court had applied the wrong standard of review on Johnson's Batson claim;

4. That appellate counsel failed to supplement the record post-trial with the following items: evidence of the State's inconsistent prosecution at the trials of Johnson and his co-defendant; the presence of law enforcement officials; the race of prospective jurors; the names of the jurors who had prior arrests; and the juror strike sheet;

5. That appellate counsel failed to raise on direct appeal, the claim that the trial court's instructions during the penalty phase were erroneous; and

6. That appellate counsel failed to raise a claim that this Court erred in finding that the evidence supported the

jury's finding that Deputy Hardy was "on duty" when he was murdered.

A review of the record indicates that Johnson failed to raise these claims with sufficient specificity.

XII.

The State agrees with Johnson that he sufficiently pleaded the following claims in his petition and, therefore, requests that the Court remand this cause to the trial court to conduct an evidentiary hearing on these particularized claims. The claims, numbered as they are in Johnson's petition, are as follows:

XIX(E)(4). That trial counsel failed to object to, and file a motion to dismiss the case against Johnson, due to the State's inconsistent theories of prosecution at Johnson's and codefendant, Ardragus Ford's trial;

XIX(E)(8). That trial counsel failed to order transcripts from the previous trials or to ask the court to provide them at no costs because of what Johnson says is his indigent status;

XIX(F)(1). That trial counsel failed to call several alibi witnesses who testified at Johnson's first trial, which ended in a mistrial;

XIX(F)(2). That trial counsel failed to call several alibi witnesses who testified at codefendant Ford's first trial;

XIX(F)(3). That trial counsel failed to call several alibi witnesses, who were never contacted by the investigator

or trial counsel, even though they were known or could have been discovered through a competent investigation;

XIX(F)(4). That trial counsel failed to adequately prepare two alibi witnesses called at Johnson's trial, and erred in choosing the particular witnesses, after considering their friendship and kinship to Johnson;

XIX(F)5). That trial counsel failed to call Marshall Cummings, who testified at Johnson's first trial;

XIX(F)(7). That trial counsel presented inconsistent and mutually exclusive defenses at trial without making any attempt to reconcile them;

XIX(F)(8). That trial counsel failed to establish how widely-publicized the reward offer was and that it would have been extremely unlikely for Violet Ellison to be unaware of the reward offer;

XIX(F)(9. That trial counsel called Yolanda Chambers as a witness, knowing her testimony was false;

XIX(F)(10). That trial counsel failed to call several witnesses, who would testify that Violet Ellison sat with Patricia Hardy, Deputy Hardy's widow, during Ardragus Ford's previous trials;

XIX(F)(12). That trial counsel failed to object to the State's introduction into evidence of the program from Deputy Hardy's funeral;

XIX(F)(24). That trial counsel failed to call witnesses who would have testified that Fred Carter, an inmate, routinely impersonated Johnson, as well as other inmates, when talking to girls on the telephone, and "lied" about his crimes in an attempt to sound "tough"; and

XIX (H). That trial counsel failed to present any mitigating evidence at the sentencing hearing.

Additionally, the State, in its brief to this Court, responds that because the trial court did not mention the following claims in its order dismissing Johnson's petition, the case must be remanded to the trial court to clarify the grounds under which they were dismissed:

XIX(F)(21). That trial counsel unreasonably failed to introduce evidence that Quintez Wilson was at a friend's house at the time Deputy Hardy was killed, and could not have participated in the murder. Counsel unreasonably failed to introduce evidence that the State had dismissed all charges against Quintez Wilson, which evidence would have rebutted the State's theory at trial that Johnson and Wilson committed the murder together.

XIX (F)(22). That trial counsel failed to introduce evidence that Omar Berry was at a friend's house, along with Quintez Wilson, at the time Deputy Hardy was murdered, which evidence rebutted the State's evidence that Johnson and Wilson committed the murder together;

XIX(F)(23). That trial counsel failed to seek to introduce Johnson's audiotaped interrogation by police, to rebut Violet Ellison's testimony;

XX (15). That appellate counsel failed to raise the claim that this Court failed to conduct an adequate proportionality review; and

XX (16). That appellate counsel failed to raise the claim that the Alabama Supreme Court's alteration of Rule 39, Ala. R. App. P., violated his rights to due process and equal protection.

XIII.

Johnson has failed to raise on appeal the following claims contained in his Rule 32 petition: VII, VIII, XIII, XV, XIX(E)(6), XIX(E)(11), XX(2), XX(4), XX(5), XX(7), XX(13), XX (14), XX(17), XXIII, And XXIV. Because Johnson has failed to pursue these claims on appeal, they are not before this Court for appellate review. See McLin v. State, 840 So. 2d 937, 943 (Ala. Crim. App. 2002) ("Those claims that [the appellant] presented in his petition, but does not pursue on appeal are deemed to be abandoned").

Because of the foregoing deficiencies in the trial court's order disposing of Johnson's amended petition, we must remand this cause for further proceedings. On remand, the trial court shall conduct an evidentiary hearing on those claims and enter specific written findings, including any ground of preclusion, with regard to each of the claims presented at the hearing. The return to remand shall include a transcript of the proceedings. Return to remand should be made to this Court within 70 days of the release of this opinion.

REMANDED WITH INSTRUCTIONS.

Wise, J., concurs. Baschab, P.J., and Shaw and Welch, JJ., concur in the result.