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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2010-2011

CR-08-0405

Jerry Devane Bryant

v.

State of Alabama

Appeal from Houston Circuit Court
(CC-97-403.60)

KELLUM, Judge.

Jerry Devane Bryant, an inmate on death row at Holman Correctional Facility, appeals the circuit court's summary dismissal of his petition for postconviction relief filed pursuant to Rule 32, Ala. R. Crim. P.

In 1998, Bryant was convicted of the murder of Donald Hollis made capital because it was committed during the course of a kidnapping, see § 13A-5-40(a)(1), Ala. Code 1975, and was sentenced to death. This Court affirmed Bryant's conviction and sentence on direct appeal. Bryant v. State, 951 So. 2d 702 (Ala. Crim. App. 1999). The Alabama Supreme Court affirmed Bryant's conviction, but reversed his death sentence, and remanded the case to this Court to remand the case to the trial court for a new penalty-phase trial. Ex parte Bryant, 951 So. 2d 724 (Ala. 2002). In accordance with the Supreme Court's instructions, this Court remanded the case for a new penalty-phase trial. Bryant v. State, 951 So. 2d 732 (Ala. Crim. App. 2003). After a new penalty-phase trial, Bryant was again sentenced to death, and this Court affirmed his sentence. Id. (opinion on return to remand). The Alabama Supreme Court denied certiorari review, and this Court issued a certificate of judgment on September 29, 2006. The United States Supreme Court subsequently denied certiorari review on April 2, 2007. Bryant v. Alabama, 549 U.S. 1324 (2007).

Bryant timely filed his Rule 32 petition on September 26, 2007, raising numerous claims, including several claims of

ineffective assistance of counsel. The State filed an answer and a motion to dismiss Bryant's petition on January 10, 2008. On February 21, 2008, Bryant filed a "Motion for Discovery of Institutional Files, Records, and Information Necessary to a Fair Rule 32 Evidentiary Hearing," wherein he requested numerous items. (C. 389.) The circuit court denied the request on February 26, 2008, with a notation on the case-action summary stating "Motion denied. This is postjudgment not pretrial." (C. 426.) Bryant filed an amended petition on March 21, 2008, in which he reasserted the claims raised in his original petition, expanding on some of them with additional factual pleadings, and raised additional claims as well. The State filed an answer and a motion to dismiss the amended petition on May 21, 2008. Bryant filed a response to the State's answer and motion to dismiss on August 21, 2008, and on October 3, 2008, he filed a motion for reconsideration of his discovery request, which motion was denied by the circuit court on October 13, 2008, with a notation on the case-action summary simply stating "Motion to Reconsider Discovery Order denied." (C. 756.) On October 27, 2008, the circuit court issued an order summarily dismissing all the

claims in Bryant's amended petition[1] on the grounds that the claims were insufficiently pleaded, were meritless on their face, or were procedurally barred. Bryant filed a motion to reconsider on November 21, 2008, which the circuit court denied on December 3, 2008. Bryant filed a notice of appeal on December 4, 2008.

In our original opinion affirming Bryant's conviction and the death sentence initially imposed, this Court set out the facts of the crime as follows:

> "The State's evidence tended to show the following. On January 27, 1997, Donald Hollis and his cousin Bert Brantley drove from Newville to an Auto Zone automobile parts store in Dothan, where Brantley purchased transmission fluid sealer to repair his car. Brantley testified that he and Hollis left Newville in Hollis's car at approximately 7:00 p.m. After leaving Auto Zone, at about 8:00 p.m., Hollis and Brantley were driving down Wheat Street in Dothan when they heard someone whistle at them. Brantley testified that Hollis turned his car around and then stopped, and that Bryant and another man, Ricky Vickers, approached the car. Soon after, Vickers left, and Hollis, Brantley, and Bryant had a conversation. According to Brantley, Bryant asked him and Hollis if they had been drinking, and Hollis said that they had not, but that he would go buy some beer. Bryant told Hollis to get the beer and to come back and pick him

[1]Because Bryant's amended petition included all the claims from his original petition, the circuit court's order addressed the claims as found in the amended petition.

up in 30 minutes. After buying the beer, Hollis returned and picked up Bryant, and the three men drove around while Brantley and Bryant drank beer.

"Brantley testified that they drove to his house in Newville, where the three of them went inside, drank beer, and talked. Brantley said that Bryant mentioned doing some drugs, but that Hollis and Brantley told Bryant that they did not do drugs. The three men then left Brantley's house and drove back to Dothan. After driving around Dothan for a while, Hollis drove Bryant back to the house where they had picked him up. Brantley testified that when they reached the house, Bryant did not get out of the car and that Bryant said he had something he wanted to talk to Hollis about. Hollis asked Bryant what it was, but Bryant did not say anything. Brantley further testified that he said he would turn his head and look out the window while Bryant talked to Hollis. Brantley said that he then heard a gasp, and when he turned back around, Bryant, who was in the backseat, was holding a gun to Hollis's head. According to Brantley, Bryant said, 'This is what it's all about.' (R. 458.) Bryant told Brantley to get out of the car. Brantley initially refused, but when Bryant became angry and said to him, 'Nigger, get out of the car,' Brantley got out of the car and stood beside the passenger's door for several minutes. (R. 459.) Hollis then rolled down his window and told Brantley that he would be back in a few minutes. Hollis and Bryant drove off.

"Brantley testified that he waited around 10 minutes for Hollis to return, but that he got scared and walked to a service station down the road. Brantley used the telephone at the service station to call his sister to come and pick him up. Brantley also tried to reach Hollis by calling him on Hollis's cellular telephone. Brantley testified that Bryant answered the telephone and told Brantley that Hollis was with Bryant's brother. Bryant wanted to know where Brantley was so that he could

come and get him. Brantley called Hollis's cellular telephone several more times; each time he got Bryant. Brantley told Bryant that he was going to telephone the police, and Bryant said that he did not want any trouble. Brantley's sister then arrived to pick Brantley up, and they telephoned the police.

"Ricky Vickers testified that on the evening of January 27, 1997, he saw Bryant leave with Hollis in Hollis's car. Vickers testified that later that same night Bryant returned to his house in Hollis's car, but that Bryant was alone. Vickers later went riding with Bryant in the car, and Bryant told Vickers that Hollis was with a friend of Bryant's. Bryant and Vickers went to 'Mickey's,' a nightclub. When Bryant and Vickers left the club, the police were standing around Hollis's car. Vickers walked off, and Bryant picked him up several blocks away from the club in Hollis's car. Vickers testified that Bryant had said he wanted him to help him do something. Vickers stated that Bryant told him that Bryant had done something, and that he 'had to kill the victim.' (R. 524.) Vickers testified that Bryant had a gun and told him that if he did not help him, he was 'going to do Vickers.' (R. 526.) The two men then went back to Vickers's house, where they each got a pair of gloves. Bryant then drove to where Hollis's body was located. Vickers testified that after Bryant put some clothes and towels in the trunk of Hollis's car, they put Hollis's body in the trunk.

"Vickers testified that he and Bryant drove to Greenwood, Florida, to the home of Raymond Mathis. Mathis rode around with Bryant and Vickers in Hollis's car, and Bryant and Mathis discussed selling Hollis's cellular telephone. According to Vickers, Mathis said that he knew someone who would give them crack in exchange for the cellular telephone. After Bryant traded Hollis's cellular telephone for crack, the men returned to Mathis's

house, and Bryant told Mathis that there was a body in the trunk. Bryant wanted to know where he could dump the body. Bryant, Vickers, and Mathis left Mathis's house, drove down a dirt road, and dumped Hollis's body. Bryant and Vickers then drove to Tallahassee, Florida, where they tried unsuccessfully to sell Hollis's car. Bryant and Vickers returned to Dothan, and abandoned Hollis's car, after cleaning the inside and wiping away any fingerprints. Vickers testified that they then looked for the 'other guy' (Brantley) because Bryant believed that Brantley could identify him. According to Vickers, Bryant planned to kill Brantley. Raymond Mathis testified to essentially the same facts as did Vickers.

"Lori Ann Andrews, Bryant's girlfriend, testified that on January 29, 1997, Bryant and Vickers arrived at her apartment in a black car that she had never seen before. Bryant asked her if she would pick him up at his mother's house in a few minutes. Bryant and Vickers left, and Andrews picked Bryant up as he had requested, and they went back to her apartment. Andrews further testified that the police came to her apartment to arrest Bryant that evening, and that when they knocked on the door, Bryant tried to give her a set of keys. The keys were later identified at trial as belonging to Hollis.

"Testimony at trial further revealed that a bloodstain on Bryant's blue jeans was consistent with a mixture of Bryant's blood and Hollis's blood. Bloodstains found inside the trunk of Hollis's car and on the bumper and taillight of the car were consistent with Hollis's blood.

"In his statement to police, Bryant initially denied any involvement in Hollis's murder. However, he eventually admitted to being with Hollis in Hollis's car, but he claimed that Hollis left with a 'guy named Terry Johnson' and that he let Bryant

> use his car. Bryant said that he saw Johnson later that night and that Johnson had asked him to move Hollis's body. Bryant stated that he agreed to do it for a substantial amount of cocaine, and he got Vickers to help him dump the body in Florida. Bryant denied shooting Hollis, but said that he was with Johnson when Johnson shot Hollis. When giving his statement, Bryant was asked why it took so many shots (three shots to the head) to kill the victim. According to testimony from the police officer taking the statement, Bryant said 'Man, I don't know, I think I need help. Sometimes I am just not Jerry.' (R. 788.) According to the officer, Bryant then put his head down, covered his ears, and refused to talk anymore."

951 So. 2d at 706-08.

Standard of Review

"[W]hen the facts are undisputed and an appellate court is presented with pure questions of law, that court's review in a Rule 32 proceeding is de novo." Ex parte White, 792 So. 2d 1097, 1098 (Ala. 2001). "However, where there are disputed facts in a postconviction proceeding and the circuit court resolves those disputed facts, '[t]he standard of review on appeal ... is whether the trial judge abused his discretion when he denied the petition.'" Boyd v. State, 913 So. 2d 1113, 1122 (Ala. Crim. App. 2003) (quoting Elliott v. State, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992)). "On direct appeal we reviewed the record for plain error; however, the

plain-error standard of review does not apply to a Rule 32 proceeding attacking a death sentence." Ferguson v. State, 13 So. 3d 418, 424 (Ala. Crim. App. 2008).

Moreover, "there exists a long-standing and well-reasoned principle that we may affirm the denial of a Rule 32 petition if the denial is correct for any reason." McNabb v. State, 991 So. 2d 313, 333 (Ala. Crim. App. 2007). That general rule is limited only by due-process constraints that "require some notice at the trial level, which was omitted, of the basis that would otherwise support an affirmance, such as when a totally omitted affirmative defense might, if available for consideration, suffice to affirm a judgment." Liberty Nat'l Life Ins. Co., v. University of Alabama Health Servs. Found., P.C., 881 So. 2d 1013, 1020 (Ala. 2003). In the context of Rule 32 proceedings, "the language of Rule 32.3 [placing the burden on the State to plead any ground of preclusion in Rule 32.2] ... has created the narrow due-process constraint discussed in Liberty National," McNabb, 991 So. 2d at 334, by making the preclusions in Rule 32.2 affirmative defenses and prohibiting this Court from sua sponte applying those preclusions for the first time on appeal. See Ex parte

Clemons, [Ms. 1041915, May 4, 2007] ___ So. 3d ___ (Ala. 2007). Thus, although the preclusions in Rule 32.2 "apply with equal force to all cases, including those in which the death penalty has been imposed,'" Nicks v. State, 783 So. 2d 895, 901 (Ala. Crim. App. 1999) (quoting State v. Tarver, 629 So. 2d 14, 19 (Ala. Crim. App. 1993)), only if those affirmative defenses are asserted by the State or found by the circuit court may this Court apply them on appeal.

I.

Before addressing the specific claims raised in Bryant's petition and on appeal, we first address preliminary arguments Bryant makes on appeal regarding the conduct of the Rule 32 proceedings and procedural errors he claims the circuit court made in summarily dismissing his amended petition.

A.

First, Bryant contends that, in summarily dismissing his amended petition, the circuit court "improperly blurred what he must plead to survive summary dismissal with what he must ultimately prove to win on the merits." (Bryant's brief, at p. 20.) Specifically, Bryant argues that references in the circuit court's order to "conclusions of fact" and "factual

conclusions and opinions which are substantially mere allegations" show that the circuit court improperly placed a burden of proof on him at the pleading stage of the proceedings. Bryant also argues that the circuit court erred in making findings on the merits of some of his ineffective-assistance-of-counsel claims without first affording him an evidentiary hearing and an opportunity to prove those claims. He further argues that, in making some of its findings on the merits, the circuit court improperly "overstat[ed] the burden of proof" to establish ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984). (Bryant's brief, at p. 23.) Bryant raised these arguments in his postjudgment motion to reconsider. Therefore, they are properly before this Court for review.

It is well settled that a postconviction "claim may not be summarily dismissed because the petitioner failed to meet his burden of proof at the initial pleading stage, a stage at which the petitioner has only the burden to plead." Johnson v. State, 835 So. 2d 1077, 1080 (Ala. Crim. App. 2001). As this Court explained in Ford v. State, 831 So. 2d 641 (Ala. Crim. App. 2001):

> "[A]t the pleading stage of Rule 32 proceedings, a Rule 32 petitioner does not have the burden of proving his claims by a preponderance of the evidence. Rather, at the pleading stage, a petitioner must provide only 'a clear and specific statement of the grounds upon which relief is sought.' Rule 32.6(b), Ala. R. Crim. P. Once a petitioner has met his burden of pleading so as to avoid summary disposition pursuant to Rule 32.7(d), Ala. R. Crim. P., he is then entitled to an opportunity to present evidence in order to satisfy his burden of proof."

831 So. 2d at 644.

However, the burden of pleading is a heavy one. Pursuant to Rule 32.3, Ala. R. Crim. P., "the petitioner has the burden of pleading ... the facts necessary to entitle the petitioner to relief." Rule 32.6(b), Ala. R. Crim. P., requires that the petition "contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings." As this Court explained in Boyd v. State, 913 So. 2d 1113 (Ala. Crim. App. 2003):

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

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

913 So. 2d at 1125.

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

Hyde v. State, 950 So. 2d 344, 356 (Ala. Crim. App. 2006). Moreover, "the pleading requirements of Rule 32 apply equally to capital cases in which the death penalty has been imposed." Taylor v. State, [Ms. CR-05-0066, October 1, 2010] ___ So. 3d ___, ___ (Ala. Crim. App. 2010). After thoroughly reviewing the circuit court's order, we conclude that the court did not confuse the burden of pleading with the burden of proof. Although at times inartfully worded, the circuit court's order properly applied the heavy burden of pleading as set forth

above.[2] Therefore, Bryant's argument that the circuit court confused the burden of pleading with the burden of proof is meritless.

In addition, a circuit court may, in some circumstances, summarily dismiss a postconviction petition based on the merits of the claims raised therein. Rule 32.7(d), Ala. R. Crim. P., provides:

> "If the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings, the court may either dismiss the petition or grant leave to file an amended petition. Leave to amend shall be freely granted. Otherwise, the court shall direct that the proceedings continue and set a date for hearing."

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[2]We note that Bryant argues in his reply brief that if the pleading requirements of Rule 32 are as stringent as explained above then those requirements are fundamentally unfair, arbitrary, and deny him due process. However, "an appellant may not raise a new issue for the first time in a reply brief." Woods v. State, 845 So. 2d 843, 846 (Ala. Crim. App. 2002). "As a general rule, issues raised for the first time in a reply brief are not properly subject to appellate review." Ex parte Powell, 796 So. 2d 434, 436 (Ala. 2001). Because this issue was not raised in the circuit court or in Bryant's initial brief but was raised for the first time in Bryant's reply brief, it is not properly before this Court for review and will not be considered.

"'Where a simple reading of the petition for post-conviction relief shows that, assuming every allegation of the petition to be true, it is obviously without merit or is precluded, the circuit court [may] summarily dismiss that petition.'" Bishop v. State, 608 So. 2d 345, 347-48 (Ala. 1992) (emphasis added) (quoting Bishop v. State, 592 So. 2d 664, 667 (Ala. Crim. App. 1991)(Bowen, J., dissenting)). See also Hodges v. State, [Ms. CR-04-1226, March 23, 2007] ___ So. 3d ___, ___ (Ala. Crim. App. 2007) (a postconviction claim is "due to be summarily dismissed [when] it is meritless on its face").

Moreover, "a judge who presided over the trial or other proceeding and observed the conduct of the attorneys at the trial or other proceeding need not hold a hearing on the effectiveness of those attorneys based upon conduct that he observed." Ex parte Hill, 591 So. 2d 462, 463 (Ala. 1991).

> "'"In some cases, recollection of the events at issue by the judge who presided at the original conviction may enable him summarily to dismiss a motion for postconviction relief." Little v. State, 426 So. 2d 527, 529 (Ala. Cr. App. 1983). "If the circuit judge has personal knowledge of the actual facts underlying the allegations in the petition, he may deny the petition without further proceedings so long as he states the reasons for the denial in a written order."

> Sheats v. State, 556 So. 2d 1094, 1095 (Ala. Cr. App. 1989).'"

Ray v. State, 646 So. 2d 161, 162 (Ala. Crim. App. 1994) (quoting Norris v. State, 579 So. 2d 34, 35 (Ala. Crim. App. 1991) (Bowen, J., dissenting)). In this case, the judge who ruled on Bryant's petition was the same judge who presided over Bryant's original trial and over his second penalty-phase trial. Therefore, we find no error on the part of the circuit court in summarily dismissing some of Bryant's claims on the merits.[3]

Finally, we reject Bryant's argument that the circuit court improperly applied a stricter burden to establish ineffective assistance of counsel than that espoused in Strickland, supra. As explained more thoroughly below, under Strickland, a petitioner must establish: (1) that counsel's performance was deficient; and (2) that the petitioner was prejudiced by counsel's deficient performance. To establish prejudice, a petitioner must establish that there is a reasonable probability that, but for counsel's alleged errors,

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[3]Although we find it unnecessary to reach the merits of the claims the circuit court addressed, this does not alter the circuit court's ability to summarily dismiss a Rule 32 petition on the merits.

the result of the proceeding would have been different. As explained in Part II of this opinion, the heavy burden of pleading as set forth above applies to ineffective-assistance-of-counsel claims. Although the circuit court's statements in its order that the facts alleged by Bryant in some of his claims of ineffective assistance of counsel "would not necessarily have made any difference" in the outcome of the trial, do not exactly teach the specific language used in Strickland, after thoroughly reviewing the order, we do not believe that the circuit court applied an incorrect burden to assess Bryant's ineffective-assistance-of-counsel claims, and Bryant's argument to the contrary is meritless.

B.

Bryant also contends that the circuit court erred in considering his ineffective-assistance-of-counsel claims "on a piecemeal basis," instead of considering all the claims cumulatively. (Bryant's brief, at p. 25.) He argues that "Alabama law does not permit piecemeal treatment of an ineffective-assistance claim," and that "[t]he Alabama Supreme Court has 'condemned and rejected' the proposition that a

trial court should not consider the cumulative effect of error." (Bryant's brief, at p. 25.)

Initially, we note that Bryant did not raise this argument in his postjudgment motion to reconsider. "The general rules of preservation apply to Rule 32 proceedings." Boyd v. State, 913 So. 2d 1113, 1123 (Ala. Crim. App. 2003). In addition, although Bryant did assert a claim at the conclusion of his amended petition that the cumulative effect of all the errors alleged in his petition, i.e., both his numerous substantive claims and his numerous ineffective-assistance-of-counsel claims, entitled him to relief, he did not specifically assert a claim in his petition that the cumulative effect of his counsels' alleged errors entitled him to relief. A circuit court cannot be expected to address a claim not raised in the Rule 32 petition, and "[a]n appellant cannot raise an issue on appeal from the denial of a Rule 32 petition which was not raised in the Rule 32 petition." Arrington v. State, 716 So. 2d 237, 239 (Ala. Crim. App. 1997). Therefore, this argument is not properly before this Court for review.

Moreover, even if this argument were properly before this Court, it is meritless. Bryant's reliance on the Alabama Supreme Court's opinions in Ex parte Bryant, 951 So. 2d 724 (Ala. 2002), Ex parte Woods, 789 So. 2d 941 (Ala. 2001), and Ex parte Tomlin, 540 So. 2d 668 (Ala. 1988), for the proposition that this Court must always examine the cumulative effect of alleged errors is misplaced. All of those opinions involved direct appeals from capital-murder convictions and sentences of death -- appeals that involved substantive issues that had been raised on appeal, not ineffective-assistance-of-counsel claims -- and appeals in which the plain-error rule applied. See Rule 45A, Ala. R. App. P. However, as noted above, the plain-error rule does not apply in appeals from the dismissal of Rule 32 petitions, even in cases in which the death penalty has been imposed, and Bryant's argument here is based on claims of ineffective assistance of counsel, not substantive claims.

Furthermore, it is well settled in Alabama that an ineffective-assistance-of-counsel claim is a general claim that consists of several different allegations or subcategories, and, for purposes of the pleading requirements

in Rule 32.3 and Rule 32.6(b), "[e]ach subcategory is [considered] a[n] independent claim that must be sufficiently pleaded." Coral v. State, 900 So. 2d 1274, 1284 (Ala. Crim. App. 2004), overruled on other grounds, Ex parte Jenkins, 972 So. 2d 159 (Ala. 2005). As this Court explained in Taylor v. State, [Ms. CR-05-0066, October 1, 2010] ___ So. 3d ___ (Ala. Crim. App. 2010):

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

> deficiencies or on procedural grounds. Therefore, even if a cumulative-effect analysis were required by Alabama law, that factor would not eliminate Taylor's obligation to plead each claim of ineffective assistance of counsel in compliance with the directives of Rule 32."

___ So. 3d at ___ (emphasis added). Because, as explained below, the majority of Bryant's ineffective-assistance-of-counsel claims were properly summarily dismissed because they were insufficiently pleaded, a cumulative-error analysis here would not encompass all of Bryant's claims of ineffective assistance of counsel. Therefore, the circuit court did not err in not considering all of Bryant's claims of ineffective assistance of counsel cumulatively.

II.

Bryant contends that the circuit court erred in summarily dismissing several of his claims of ineffective assistance of counsel because, he says, those claims were sufficiently pleaded and were meritorious on their face and thus entitled him to an evidentiary hearing. (Issues II and V.A. in Bryant's brief.) For the reasons explained below, we find that the most of Bryant's ineffective-assistance-of-counsel claims were properly summarily dismissed by the circuit court. However, we agree with Bryant as to three of his claims of

ineffective assistance of counsel, and we must remand this case for further proceedings on those claims.

As noted above, when reviewing a petitioner's claims of ineffective assistance of counsel, we apply the standard articulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). The petitioner must establish: (1) that counsel's performance was deficient; and (2) that the petitioner was prejudiced by counsel's deficient performance.

> "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."

Strickland, 466 U.S. at 687.

"To meet the first prong of the test, the petitioner must show that his counsel's representation fell below an objective standard of reasonableness. The performance inquiry must be whether counsel's assistance was reasonable, considering all

the circumstances." Ex parte Lawley, 512 So. 2d 1370, 1372 (Ala. 1987). "'This court must avoid using "hindsight" to evaluate the performance of counsel. We must evaluate all the circumstances surrounding the case at the time of counsel's actions before determining whether counsel rendered ineffective assistance.'" Lawhorn v. State, 756 So. 2d 971, 979 (Ala. Crim. App. 1999) (quoting Hallford v. State, 629 So. 2d 6, 9 (Ala. Crim. App. 1992)). "A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689.

> "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, 133-34 (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, [350 U.S. 91], at 101 [(1955)]. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way."

Strickland, 466 U.S. at 689.

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

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

To establish the second prong of the test, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of

the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. "When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Id. at 695.

In addition, as noted above, the burden of pleading a claim in a Rule 32 petition is a heavy one. This is equally true when it comes to pleading a claim of ineffective assistance of counsel.

> "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).

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

A.

Bryant contends that he sufficiently pleaded his claim that trial counsel at his first trial were ineffective[4] for not conducting adequate voir dire of the jury venire in order to discover that one veniremember, J.K., who ultimately sat on his jury, was biased. In his amended petition, Bryant alleged the following with respect to this claim:

> "Mr. Yarbrough failed to adequately voir dire a juror [J.K.] who failed to respond to Mr. Yarbrough's question as to whether any of the venire had ties to law enforcement or knew anyone in law

[4]The records from Bryant's direct appeals reflect that Bryant was represented at his first trial by Derek Yarbrough, Deborah Seagle, and Gene Spencer. On his first appeal, Bryant was represented by Michael Crespi, Deanna Higginbotham, and John Byrd. At his second penalty-phase trial, Bryant was represented by Michael Crespi and John Byrd. On appeal from the second penalty-phase trial, Bryant was represented by Michael Crespi and Deanna Higginbotham. See Hull v. State, 607 So. 2d 369, 371 (Ala. Crim. App. 1992) (noting that this court may take judicial notice of its own records).

> enforcement. Had Mr. Yarbrough adequately questioned [J.K.], Mr. Yarbrough would have discovered that this individual had applied to the Drug Enforcement Agency and been denied a job and that this denial affected him for the rest of his life. Mr. Yarbrough would have discovered that ever since his rejection, this juror harbored an obsession with law enforcement. Mr. Yarbrough would have also discovered that this juror was a police fanatic who drove the same make and model of cars as unmarked police cars, kept numerous police scanners in his car, and followed the police to crime scenes. Mr. Yarbrough would have easily discovered that this juror had preconceived ideas about the truthfulness of fellow officers of the law. Mr. Yarbrough would have likely discovered that the potential juror was someone who advocated law enforcement and possessed potential biases worthy of disqualification from the jury.
>
> "However, defense counsel failed to adequately voir dire the venire member to see if there were any prejudices that might ultimately disqualify the venire member for cause. In fact, this venire member himself was surprised to have been left on the jury. This was clearly an abdication of counsel's duty to guarantee his client a right to a fair trial by adequately performing a voir dire on the jury panel and seriously prejudiced Bryant. Trial counsel's enumerated failures in voir dire denied Bryant his constitutional right to a fair and impartial jury. There was no strategic reason for such errors and Bryant should be granted a new trial."

(C. 461-62.)

This claim was not sufficiently pleaded. First, although Bryant repeatedly stated in his amended petition that counsel did not "adequately" question juror J.K., he failed to

specifically identify what additional questions he believes counsel should have asked the venire, or J.K. in particular, that would have revealed any bias on the part of J.K. See, e.g., Beckworth v. State, [Ms. CR-07-0051, May 1, 2009] ___ So. 3d ___ (Ala. Crim. App. 2009). Second, although Bryant alleged that counsel asked the venire whether anyone "had ties to law enforcement or knew anyone in law enforcement," he failed to allege what additional questions, if any, his counsel asked on this issue or what questions, if any, were asked by the prosecutor or the trial court on this issue. Finally, while Bryant made bare and conclusory allegations that J.K. had an "obsession" with law enforcement, had "preconceived ideas about the truthfulness of fellow officers of the law," and "advocated law enforcement," he failed to allege sufficiently specific facts indicating that J.K.'s alleged feelings about law enforcement "rose to the level of bias that would have supported a challenge for cause or that would have resulted in counsel's exercising a peremptory strike against" J.K. Beckworth, ___ So. 3d at ___. Indeed, Bryant did not even allege that counsel would have challenged J.K. for cause or used a peremptory strike to remove J.K. from

the jury had counsel known of J.K.'s alleged "obsession" and "preconceived ideas."

We note that Bryant alleges additional, and more specific, facts in his brief on appeal regarding this claim. However, these factual allegations were not included in his petition or amended petition; therefore, they are not properly before this Court for review and will not be considered. See, e.g., Bearden v. State, 825 So. 2d 868, 872 (Ala. Crim. App. 2001) ("Although Bearden attempts to include more specific facts regarding his claims of ineffective assistance of counsel in his brief to this Court, those allegations are not properly before this Court for review because Bearden did not include them in his original petition before the circuit court."). See also Hodges v. State, [Ms. CR-04-1226, March 23, 2007] ___ So. 3d ___ (Ala. Crim. App. 2007), and Hyde v. State, 950 So. 2d 344 (Ala. Crim. App. 2006).

Because this claim failed to satisfy the pleading requirements in Rule 32.3 and Rule 32.6(b), summary dismissal was proper under Rule 32.7(d).[5]

[5]Although this was not the reason for the circuit court's summary dismissal of this claim -- the circuit court dismissed the claim as meritless -- we may nonetheless affirm the

B.

Bryant contends that he sufficiently pleaded in his amended petition his claim that trial counsel at his first trial and trial counsel at his second penalty-phase trial were ineffective for not properly investigating and preparing for Bryant's trials.[6] Specifically, he argues that he sufficiently pleaded that his trial counsel (1) failed to investigate the blood spatter at the scene where Hollis was killed and to retain a blood-spatter expert; (2) failed to investigate the blood found on his blue jeans and retain a DNA expert; and (3) failed to investigate the two used condoms found at the scene where Hollis was killed and to retain a DNA expert to have the two condoms tested for DNA.[7]

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circuit court's judgment on this ground. See McNabb v. State, 991 So. 2d 313 (Ala. Crim. App. 2007).

[6]In his original petition, Bryant split this claim into two separate claims -- one relating to trial counsel at his first trial and one relating to trial counsel at his second penalty-phase trial. In his amended petition, Bryant merged the two into a single claim, and we address it as such.

[7]Although in making his argument on appeal Bryant refers in his brief to paragraphs 64-77 of his amended petition, he makes only the above three arguments on appeal. Those three arguments are contained in paragraphs 66-71 of the amended petition. Paragraphs 64 and 65 are introductory paragraphs setting forth law and do not contain separate claims of ineffective assistance of counsel. Paragraphs 72-77 in the

In his amended petition, Bryant alleged the following facts with respect to this claim:

> "Both trial and resentencing counsel failed to investigate the [lack of] physical evidence in the case. Neither Mr. Yarbrough nor Mr. Crespi ever retained a blood spatter expert who could analyze the crime scene and Bryant's clothing to determine whether the blood spatter found was consistent with the type of wounds Donald Hollis sustained. Trial testimony revealed that blood spatter was found on a building, on trees, and on the ground in the area where the murder occurred. During the trial and resentencing trial, the medical examiner testified that Donald Hollis was shot three times at close range. However, only a minuscule amount of blood (a drop the size of an eraser on a pencil) was found on Bryant's clothing. And, the State could not even conclusively demonstrate that the minuscule amount of blood was Hollis' blood, but rather was a combination of Hollis' and Bryant's blood. In spite of the gross contradiction between the State's evidence and medical testimony, neither trial nor resentencing counsel retained a blood spatter expert to independently analyze the crime scene and Bryant's clothing to determine whether the blood spatter found on Bryant was consistent with the types of wounds Donald Hollis sustained.
>
> "Had trial or resentencing counsel procured a blood spatter expert to examine the evidence, the expert would have conducted tests to recreate the crime. Based on that recreation, the expert may have testified that a person who shoots another at close proximity should have a significant amount of

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amended petition include additional claims regarding counsel's alleged failure to investigate other possible leads besides the three Bryant argues on appeal, but Bryant makes no argument in his brief on appeal about those claims. See Part II.G. of this opinion.

blood on his person. Or the expert may have testified that where the gun shot wounds create blood spatter in the pattern as on and proximity to the building at the location where Hollis was shot, the shooter would have a significant amount of blood on his clothing or, at a minimum, more than a minuscule drop of blood that cannot even be attributed solely to the victim. Counsels' failure to procure a blood spatter expert fell below the objective standard of reasonableness and seriously prejudiced Bryant because the expert may have presented potentially exculpatory evidence. But for counsel's failure to call a blood spatter expert, there is a reasonable likelihood that Bryant would have been acquitted or would have avoided a death sentence. At the time of Bryant's original and resentencing trials, numerous blood spatter experts were available to testify, including Captain Tom Bevel, owner of TBI LLC located in Oklahoma, and Gary Rini, forensic science consultant located in Cleveland, Ohio. Had counsel followed these investigative leads, both trial counsel and resentencing counsel could have uncovered evidence that contradicted the State's case which may have undermined the State's ability to sentence Bryant to death.

"... As of the filing of this Amended Petition, the Court has denied Bryant discovery of physical evidence but once discovery is allowed, Bryant fully intends to retain a forensic expert to investigate the blood spatter evidence.

"During the first trial, the State's expert testified that as a result of DNA testing he believed the tiny blood spot found on Bryant's pants was a mixture of Bryant's and the victim's blood. The expert, however, testified that he could not be absolutely sure. Mr. Yarbrough presented no expert in his case-in-chief to contradict or provide the jury an alternative explanation regarding the blood and to whom it belonged. Furthermore, resentencing

counsel did not present an expert on DNA evidence. A DNA expert would have evaluated the viability of obtaining a positive DNA match on such a small amount of blood. Had the DNA expert indicated that it was impossible to obtain a reliable DNA result on this sample, it would have removed the one piece of physical evidence tying Bryant to Hollis' homicide. As of the filing of this Amended Petition, the Court has refused Bryant discovery of physical evidence but once discovery is allowed, Bryant fully intends to retain a forensic expert to investigate DNA evidence.

"Furthermore, both trial and resentencing counsel (as well as the police) believed that the crime was sexually motivated, but neither counsel conducted an adequate investigation into any possible connections regarding the sexual undertone of this crime. Two used condoms were found at the scene of the crime that undoubtedly contained DNA of a person or persons involved in the crime, but counsel failed to get the condoms tested, or file appropriate motions regarding this evidence.

"The failure of both trial counsel and resentencing counsel to present an expert on DNA evidence is below the objective standard of reasonableness and seriously prejudiced Bryant because the expert may have presented exculpatory evidence. According to Mr. Yarbrough's notes, Cellmark Diagnostics, Inc., a forensic laboratory located in Germantown, Maryland, was available and willing to do DNA testing on the evidence in this case. But for counsel's failure to call a DNA expert, there is a reasonable likelihood that Bryant would have been acquitted or would have avoided a death sentence. Had counsel followed these investigative leads, both trial counsel and resentencing counsel could have challenged the aggravating circumstances relied on by the State to sentence Bryant to death."

(C. 465-68.)

With respect to this claim as it relates to Bryant's counsel at his second penalty-phase trial, we find the claim to be meritless on its face. The only issue at the second penalty-phase trial was what sentence Bryant should receive for his capital-murder conviction. Bryant's guilt as to the crime had already been determined in the first trial and could not be attacked at the second penalty-phase trial. The investigation and evidence Bryant asserted that his counsel should have conducted and presented at his second penalty-phase trial -- a blood-spatter expert and a DNA expert -- would have, as Bryant alleged in his petition, challenged the State's evidence of his guilt of the crime, not what punishment he should receive. However, the Alabama Supreme Court has held that "[r]esidual doubt is not a mitigating circumstance" to be considered at the penalty phase of a capital trial. Ex parte Lewis, 24 So. 3d 540, 544 (Ala. 2009). In addition, this Court specifically held on appeal from Bryant's second penalty-phase trial that the trial court had correctly denied Bryant's request for a jury instruction on residual doubt. Therefore, this claim is meritless insofar

as it relates to Bryant's counsel at his second penalty-phase trial.

However, with respect to this claim as it relates to Bryant's counsel at his first trial, we find this claim to be sufficiently pleaded and meritorious on its face. Bryant did not merely make a bare allegation that his constitutional rights had been violated or state mere conclusions of law. He identified the specific experts he believed counsel should have retained (even naming the specific experts who were available at the time of his first trial), alleged what he believed those experts could have discovered and testified to had they been retained, and explained how the lack of testimony from such experts prejudiced his defense. In light of the nature of these claims and the circuit court's blanket denial of Bryant's discovery request, we fail to see what additional information Bryant could have possibly alleged. Therefore, we conclude that Bryant pleaded sufficiently specific facts with respect to these claims to satisfy the pleading requirements in Rule 32.3 and Rule 32.6(b) and to entitle him to an opportunity to prove these claims at an evidentiary hearing.

C.

Bryant also contends that he sufficiently pleaded his claim that his trial counsel at his first trial were ineffective for not properly investigating and presenting evidence to support a motion to suppress the first statement he made to police. Specifically, he argues that he pleaded sufficient facts indicating that he had requested a lawyer before his first interrogation the night he was arrested, that the request was ignored by the police, and that his trial counsel knew about the request but failed to investigate or present evidence of that request in order to suppress that first statement or his second statement, made to police the next day.

In his amended petition, Bryant alleged the following with respect to this claim:

> "During the pre-trial phase of Bryant's trial, Mr. Yarbrough moved to suppress the second interrogation (captured on tape) conducted by the Dothan Police Department on January 30, 1997. Counsel was granted a hearing on his motion to suppress Bryant's second statement. Counsel, however, failed to present critical evidence that unquestionably would have resulted in the suppression of the first statement (taken on January 29, 1997 and unrecorded, but about which Sgt. Stanley was allowed to testify) and could have affected the outcome on the motion to suppress

ruling. Specifically, Counsel failed to present evidence by Sheiliah Gayle Bryant McCree that Bryant had asked for an attorney prior to the January 29 police interrogation. Although McCree did not overhear any part of the second interrogation on January 30, her testimony regarding what occurred with respect to the first statement would have buttressed Bryant's multiple requests during the second interrogation for a lawyer.

"On the night of January 29, 1997, the night of Bryant's first interrogation by the Dothan Police Department, he phoned his sister Sheiliah Gayle Bryant McCree. Their conversation took place on speakerphone with Sgt. Stanley in the room. Bryant told Sheiliah Bryant they were accusing him of capital murder. She advised Bryant to ask for an attorney and not to say anything until he received one. The speakerphone remained on after she and Bryant said goodbye. She then heard Bryant ask for cigarettes and a lawyer. The police told Bryant they would get him a lawyer, but continued the interrogation and told him he needed to 'answer their questions.' After approximately thirty seconds, someone realized the speaker was still on, and ended the call. Ms. McCree told Bryant's attorney what she had overheard. That attorney had to withdraw due to a conflict of interest. Ms. McCree subsequently told court appointed attorneys Mr. Motley and Mr. Yarbrough about the portion of the interrogation that she had overheard[.] Ms. McCree's testimony about what she overheard and Sgt. Stanley's refusal to honor Bryant's exercise of his right certainly provided grounds for excluding the entirety of Bryant's January 29, 1997 statement. Without that statement, the State would have had no basis for asserting that Bryant made a comment during the interrogation which the police took as an admission of killing Hollis. (According to Sgt, Stanley, in response to Stanley's question regarding why Bryant shot Hollis three times and what was on Bryant's mind, Bryant responded 'I don't know, I

think I need help.... Sometimes I am just not Jerry.')

"In addition, during the second interrogation, which was tape-recorded, Bryant consistently asked for a lawyer. The police ignored his requests and continued asking him questions, despite Bryant's very clear and repeated invocation of his right to counsel.

"In spite of being in possession of such critical information, Mr. Yarbrough failed to move to suppress the first (un-recorded) statement, to call Ms. McCree to testify at the suppression hearing, and to introduce this critical piece of evidence of a constitutional violation under Miranda v. Arizona, 384 U.S. 436 (1966). Subsequently, the motion to suppress the second statement was denied in substantial part (the first 66 pages of the written transcript from the January 30, 1997 interrogation were not suppressed, even though Bryant had requested a lawyer numerous times prior to page 66 of the transcript) and Bryant's interrogation and statements were admitted at trial through Sgt. Stanley's testimony. Had Mr. Yarbrough called Ms. McCree to testify, there is a reasonable likelihood that the court would have excluded Bryant's statements from trial. Ms. Bryant's testimony would have demonstrated that Bryant sought counsel immediately upon arrest and therefore none of the statements he made were voluntary and freely given.

"Mr. Yarbrough's failure to provide critical evidence at the suppression hearing prejudiced Bryant because Bryant's statements were admitted at trial. Mr. Yarbrough's actions cannot be attributed to reasonable trial strategy.

"But for counsel's failure to provide critical evidence at the suppression hearing there is a reasonable probability that Bryant would have been

> acquitted or would have avoided a death sentence. Mr. Yarbrough's failure to provide crucial evidence to exclude Bryant's statement constitutes ineffective assistance of counsel that severely prejudiced Bryant."

(C. 474-76.)

We also find this claim to be sufficiently pleaded and meritorious on its face. Bryant alleged with specificity counsel's omission that he believed constituted deficient performance -- not moving to suppress his first statement to police and not calling his sister to testify to establish that that first statement was obtained in violation of his right to counsel -- and he alleged with specificity how he was prejudiced by counsel's omission -- that his first statement would likely have been suppressed thereby negating the State's ability to argue that his first statement included a confession to the crime. Therefore, Bryant pleaded sufficiently specific facts with respect to this claim to satisfy the pleading requirements in Rule 32.3 and Rule 32.6(b) and to entitle him to an opportunity to prove this claim at an evidentiary hearing.

D.

Bryant contends that he sufficiently pleaded his claims that trial counsel at his first trial and trial counsel at his second penalty-phase trial were ineffective for failing to adequately impeach Ricky Vickers's testimony, and that trial counsel at his second penalty-phase trial were ineffective for failing to adequately challenge Vickers's unavailability -- which ultimately led to Vickers's testimony from Bryant's first trial being read to the jury at the second penalty-phase trial.

In his amended petition, Bryant alleged the following with respect to these claims:

> "Mr. Yarbrough failed to properly impeach State's witness Ricky Vickers [at his first trial] by: (1) not pointing out the major inconsistencies between prior statements made by Vickers; (2) not adequately exploring what the State offered to Vickers in exchange for his cooperation and testimony; (3) not revealing Vickers'[s] previous felony convictions; and (4) not pointing out Vickers'[s] general lack of character for truthfulness.
>
> "Vickers gave a statement to Sergeant Jim Stanley on January 30, 1997 and gave another statement to Sergeant David Jay on January 31, 1997.

Both these statements differed from each other and from the story that Vickers ultimately told on the stand during Bryant's original trial.

"For example, at trial, Vickers testified that Bryant drove to the house of a person who Vickers identified at trial as being Raymond Mathis. Vickers said that Bryant and Mathis discussed the sale of the cell phone, following which Mathis carried the phone to 'some guy' in exchange for some dope. In his January 29 and 30, 1997 statements to the police, Vickers never mentioned anything about going to Raymond Mathis's house or Mathis's involvement with the cell phone. In fact, in his January 29 and 30 statements, Vickers never mentioned anything about the cell phone (other than Bryant talking on the cell phone) or Bryant selling the cell phone until January 30, when the police asked whether Bryant still had the cell phone when they left the body on the dirt road. In response, Vickers gave varying answers before finally settling on saying that he thought, but could not be sure since he was on drugs, that Bryant had pulled off at a store and given a man standing on the corner at the store the cell phone in exchange for some drugs. In his January 31 statement, Vickers gave yet a different version of the event. Vickers said that Bryant went to Mathis's house, gave Mathis the cell phone, Mathis gave Bryant directions to the house of a woman, Mathis went into the woman's house, and when Mathis returned to the car, he no longer had the cell phone but did have some dope. Again, Mr. Yarbrough did not highlight any of these inconsistencies.

"Vickers also testified at trial that Mathis told him and Bryant where they could leave a body; knew there was a body in the car; rode with them and

identified the dirt road where they could leave the body, and got out of the car and watched while Vickers and Bryant removed the body from the trunk and placed it on the hill. In his January 29 statement to the police, Vickers never mentioned anything about Mathis's involvement in moving the body.

"At trial, Vickers testified that he was with Bryant when Bryant parked the car. In his January 30 statement to the police, Vickers outright denied being with Bryant when Bryant parked the car. In that same statement, Vickers also said that he did not, at any time during the night, hold the gun that Bryant allegedly had been holding or possessed during the entire time he was with Vickers. In his January 31 statement, however, Vickers admitted holding the gun.

"Mr. Yarbrough also failed to adequately explore what the State offered to Vickers in exchange for his cooperation and testimony. While Mr. Yarbrough did question Vickers, Mr. Yarbrough's examination was grossly inadequate. Mr. Yarbrough's examination of Vickers on this issue consisted of whether he had been convicted of selling dope and brief questioning regarding whether capital murder charges had been dropped against Vickers in exchange for his testimony. Mr. Yarbrough failed to question and impeach Vickers using his prior bad acts which would have revealed Vickers['s] extensive history of drug use and would have emphasized Vickers['s] overwhelming incentive to cut a deal with the prosecutor.

"Although the police initially questioned Vickers for murder, the State subsequently reduced the charge to hindering prosecution. The District

Attorney's standard procedure when seeking the cooperation of a witness who had other criminal charges pending was to get the guilty plea prior to the witness's testimony and then schedule the sentencing hearing for some time after the case in which the witness would testify. Depending on 'how good' the prosecutor determined the witness's testimony to be, the prosecutor would determine the recommended sentence for the witness in his criminal case. The prosecutor followed the same procedure when dealing with Vickers. Trial counsel's failure to discover and impeach Ricky Vickers's testimony in this regard could not be considered strategic.

"Mr. Yarbrough also failed to call character witnesses to testify to Vickers'[s] character for truthfulness; residents of the Bottoms neighborhood would have testified that Vickers had an acute drug problem and therefore his statements were unreliable and that he was generally an untruthful person. These character witnesses would have also testified that Vickers was clearly under the influence of drugs during his testimony at trial.

"But for Mr. Yarbrough's failures described above, there is a reasonable probability that Bryant would have been acquitted or would have avoided a death sentence. Mr. Yarbrough's deficient performance fell below the objective standard of reasonableness and prejudiced Bryant because Mr. Yarbrough permitted biased and unreliable testimony against Bryant.

"....

"Resentencing counsel failed to effectively challenge the State's proffer of Ricky Vickers's trial transcript instead of live testimony because

Ricky Vickers was 'unavailable' to testify under Ala. R. Evid. 804(a)(5). (R. 11-19; R. 316-18 Remand.) The Alabama Supreme Court stated in Ex parte Scroggins, 727 So. 2d 131 (Ala. 1998), that the prosecution must make 'a good faith effort to obtain the presence of the declarant at trial' in order to offer the statement of a witness who is not present at trial and satisfy the right of confrontation. The State must exercise due diligence in its attempt to procure the presence of a witness. Johnson v. State, 623 So. 2d 444 (Ala. Crim. App. 1993). The court imposes a high standard for proving that such due diligence took place. The party seeking to introduce the declarant's statement has to show that it is unable to procure the declarant's attendance either by legal process or by other reasonable means. Williams v. Calloway, 281 Ala. 249, 251-52, 201 So. 2d 506, 508 (Ala. 1967).

"Resentencing counsel was ineffective for failing to demonstrate to the Court that the State did not exercise due diligence in its search for Ricky Vickers. On the first day of [the second penalty-phase] trial, the State indicated that it would be offering the transcript of Vickers's prior trial testimony because Vickers could not be located during the previous weekend. (R. 11-12 Remand.) Resentencing counsel never pointed out that the State did not exercise due diligence in procuring Vickers for trial. Resentencing counsel failed to point out that the 'Bottoms', the neighborhood where Vickers resided, spans just a couple of streets and thus it would have been very easy for the Houston County Sheriff's Office to canvass the neighborhood in search of Vickers. Resentencing counsel did not argue that the State had failed to meet the due diligence standard by questioning only those people

closest to Vickers, who had strong motives to keep his whereabouts secret.

"In fact, resentencing counsel was aware of Vickers's whereabouts and knew of individuals who could testify to Vickers's location. In fact, in a recent interview with Vickers, he stated that he remembers being in the Bottoms and that he was accessible at the time that Bryant's resentencing hearing occurred. This alone, establishes the fact that the State did not exercise due diligence in attempting to procure Vickers for trial. Resentencing counsel were ineffective because they should have requested a recess to procure witnesses, including Vickers himself, to testify to Vickers's whereabouts and demonstrate that the State did not exercise due diligence in its search for Vickers.

"While resentencing counsel did not bear the burden of producing Vickers for trial, resentencing counsel did have the responsibility to demonstrate that the State's search for Vickers fell below the standard of due diligence. Resentencing counsel was ineffective because they did not challenge whether the State had met its burden to show that Vickers was 'unavailable' when the facts clearly demonstrated that Vickers was available to testify. This failure is particularly acute because Vickers's hearsay testimony is the only evidence linking Bryant to the alleged sale of Hollis's cell phone. The sale of the cell phone is one of only two aggravating factors on which the State relied in seeking the death penalty. Removal of Vickers's hearsay testimony was crucial to Bryant's defense.

"Resentencing counsel was also ineffective by not impeaching Vickers's trial testimony with prior inconsistent statements made by Vickers on several

> other occasions, including statements made to police on January 29 and 30, 1997. Resentencing counsel only focused on Vickers's prior convictions to impeach Vickers; this was not effective because Vickers's previous convictions were revealed during his transcript testimony. (R. 386-395 Remand.) In fact, the State did not even object to the introduction of an additional conviction because he didn't think the admission of additional convictions would 'make a big difference anyway.' (R- 392-95 Remand.) Resentencing counsel acted ineffectively because he did not offer Vickers'[s] prior inconsistent statements to police that demonstrate that Vickers clearly changed his story on a number of occasions. (A full description of Vickers'[s] inconsistent statements is located at [paragraphs] 91 to 93, supra [as quoted above]).
>
> "But for counsel's failure to effectively challenge the state's proffer of Vickers'[s] testimony and his failure to properly impeach Vickers, there is a reasonable likelihood that Bryant would have avoided a death sentence. Counsel's deficient performance fell below the objective standard of reasonableness and prejudiced Bryant by allowing biased testimony against Bryant."

(C. 476-83.)

In denying the claim that trial counsel at his first trial did not effectively cross-examine Ricky Vickers, the circuit court stated in its order that "[t]he record reflects a vigorous cross-examination of Vickers on all of the area[s] complained of." (C. 759.) However, the circuit court did not

specifically address the numerous things Bryant alleged in his amended petition could have been used to attack Vickers's credibility, nor did it make any finding regarding whether counsel's performance in this regard was deficient or whether counsel's performance prejudiced Bryant. Therefore, we cannot say that the circuit court actually addressed this claim in Bryant's petition. In addition, we find that this claim was sufficiently pleaded to satisfy the requirements in Rule 32.3 and Rule 32.6(b). Bryant alleged the specific omissions by counsel that he believed constituted deficient performance, and he specifically pleaded in his petition the importance of Vickers's testimony to the State's case and how counsel's omissions in attacking Vickers's credibility prejudiced his defense. Therefore, Bryant is entitled to an opportunity to prove this claim at an evidentiary hearing.

In denying the claim that trial counsel at his second penalty-phase trial did not effectively challenge Vickers's unavailability or effectively impeach Vickers with his prior statements to police, the circuit court stated in its order:

> "Defense counsel made every effort to [keep out of evidence Vickers's testimony from his first trial] at the second trial unsuccessfully before this Court. Such issue is deemed moot as such was decided adversely to the Defendant on the issues raised before the Appellate Court. The fact that Vickers might have been present somewhere in the City of Dothan at the actual time of trial, although unknown to the Police, does not contravene requirements of unavailability."

(C. 759.)

First, the circuit court did not address at all that portion of the claim that counsel was ineffective for not introducing into evidence Vickers's prior statements to police to impeach his testimony. That portion of the claim, however, was sufficiently pleaded to satisfy the requirements in Rule 32.3 and Rule 32.6(b). Bryant alleged the specific omission of counsel that he believed constituted deficient performance -- the failure to introduce Vickers's prior statements to police (which content was fully set out in the facts portion of Bryant's petition) -- and alleged specific facts indicating how the failure to impeach Vickers, whose testimony was the only evidence of one of the two aggravating circumstances found to exist, prejudiced him.

Second, the circuit court found that portion of the claim relating to counsel's challenge to Vickers's unavailability to be moot because it had been raised and rejected by both the trial court and this Court. However, the circuit court failed to recognize that Bryant's claim was based on additional evidence that he claimed was not, but should have been, presented to the trial court and this Court regarding Vickers's unavailability, and it did not specifically address the impact of that additional evidence in relation to counsel's performance under the two-pronged Strickland test. Therefore, we cannot say that the circuit court sufficiently addressed this claim. Moreover, Bryant identified the specific omissions of counsel that he believed constituted deficient performance in this regard, and alleged specific facts indicating how he was prejudiced by that performance, thus satisfying the pleading requirements in Rule 32.3 and Rule 32.6(b).

Accordingly, Bryant is entitled to an opportunity to prove his claim that trial counsel at his second penalty-phase

trial did not effectively challenge Vickers's unavailability or effectively impeach Vickers with his prior statements to police at an evidentiary hearing.

E.

Bryant contends that he sufficiently pleaded his claim that trial counsel at his second penalty-phase trial were ineffective for not adequately arguing their Batson v. Kentucky, 476 U.S. 79 (1986), motion.

In his amended petition, Bryant alleged the following with respect to this claim:

> "When four of seven African American jurors were struck by the prosecution during the resentencing jury venire, Mr. Crespi failed to effectively argue that a Batson violation occurred. Mr. Crespi offered no evidence that the jurors were struck only because of race and that the State's statements and questions indicated an intent to discriminate against African-American jurors.
>
> "Mr. Crespi had the facts sufficient to make a prima facie case of purposeful discrimination and acted ineffectively by not doing so. The facts that Mr. Crespi could have brought to the Court's attention but failed to do so include the following: the venire for Bryant's trial consisted of 80 members; eighteen members of the jury venire were African American, a ratio of 23%; the prosecution eliminated the African Americans quickly, using four

of their first nine strikes to eliminate all but three African Americans. These facts demonstrate a prima facie case of discrimination because it shows that the Court and the prosecution struck 80% of African Americans from Bryant's jury venire.

"Furthermore, Mr. Crespi practices criminal law in Houston County and is therefore familiar with the prosecutors involved in Bryant's case, yet resentencing counsel failed to mention to the Court that Houston County prosecutors have a history of Batson violations. Appellate courts have found that the Houston County prosecutor involved in Bryant's case, Gary Maxwell, Chief Assistant to the District Attorney for Houston County, discriminated in violation of Batson in at least seven reported cases. See McCray v. State, 738 So. 2d 911, 914 (Ala. Crim. App. 1998); Ashley v. State, 651 So. 2d 1096, 1101 (Ala. Crim. App. 1994); Andrews v. State, 624 So. 2d 1095, 1099 (Ala. Crim. App. 1993); Williams v. State, 620 So. 2d 82, 86 (Ala. Crim. App. 1993); Roger v. State, 593 So. 2d 141 (Ala. Crim. App. 1991); Friedman v. State, 654 So. 2d 50 (Ala. Crim, App. 1994); Bush v. State, 615 So. 2d 137 (Ala. Crim. App. 1992). Had Mr. Crespi brought this issue before the court he would have established a prima facie case of discrimination based on past conduct by the state's attorney in using peremptory strikes to eliminate African Americans from the jury venire. Ex parte Branch, 526 So. 2d 609, 622-23 (Ala. 1987).

"Resentencing counsel was ineffective by failing to argue that the prosecution had a history of using peremptory challenges solely to remove African-American jurors. Resentencing counsel's deficient performance fell below the objective standard of reasonableness and prejudiced Bryant

> because Mr. Crespi prevented Bryant from obtaining a fair and impartial jury, and therefore Bryant should be granted a new trial. ..."

(C. 462-64.)

This claim was clearly not sufficiently pleaded. Bryant alleged in his petition statistics -- the number and percentage of African-Americans struck by the State and the number and percentage of African-Americans on the venire -- and pointed out the Houston County District Attorney's Office history of racial discrimination. See, e.g., Lewis v. State, 24 So. 3d 480 (Ala. Crim. App. 2006), aff'd, 24 So. 3d 540 (Ala. 2009), and the cases cited therein. Although he made a bare allegation that "the State's statements and questions indicated an intent to discriminate against African-American jurors," he failed to allege what statements and questions by the State indicated a discriminatory intent. Nor did he allege any facts indicating that the African-Americans struck by the State shared only the characteristic of race, that there was a lack of meaningful voir dire directed at African-American jurors, or that African-American jurors and

Caucasian jurors were treated differently. Statistics, even coupled with the Houston County District Attorney's Office history of discrimination, are simply not sufficient to establish a prima facie case of discrimination. See, e.g., Sharifi v. State, 993 So. 2d 907 (Ala. Crim. App. 2008).

Therefore, because Bryant failed to plead sufficient facts indicating a prima facie case of racial discrimination in the State's use of its peremptory strikes, summary dismissal of this claim was proper under Rule 32.7(d).

F.

Bryant also contends that he sufficiently pleaded several additional claims of ineffective assistance of counsel raised in his amended petition. Specifically, Bryant contends that he sufficiently pleaded the following claims:

> (1) That Derek Yarbrough was ineffective because he did not have the requisite five years' experience in trying criminal cases required by § 13A-5-54, Ala. Code 1975;
>
> (2) That Yarbrough's inexperience resulted in his "ineffectively challeng[ing] the State's investigation and presentation of its case during the guilt phase of Mr. Bryant's trial" (Bryant's brief, at p. 98);

> (3) That Yarbrough did not bring to the trial court's attention or preserve for appellate review "the fact that a juror and a key witness, Sergeant Jim Stanley of the Dothan Police, had contact during trial" (Bryant's brief, at p. 99);
>
> (4) That trial counsel at his second penalty-phase trial were ineffective for not effectively investigating and presenting mitigating evidence;
>
> (5) That trial counsel at his second penalty-phase trial were ineffective for not challenging "key aspects of the State's case" (Bryant's brief, at p. 100);
>
> (6) That counsel on appeal from his second penalty-phase trial were ineffective for not raising on appeal claims of prosecutorial misconduct; and
>
> (7) That counsel on appeal from his second penalty-phase trial were ineffective for not "effectively and adequately challeng[ing] the State's case on appeal" (Bryant's brief, at p. 101).

However, Bryant's argument in this regard fails to satisfy the requirements in Rule 28(a)(10), Ala. R. App. P. Although Bryant makes a cursory argument, previously rejected in Part I.A. of this opinion, that the circuit court applied an improper burden of proof at the pleading stage of the Rule 32 proceedings, he does nothing else but simply state, in cursory fashion, the claims from the petition he believes were

sufficiently pleaded with citations to either the page number in the record where the claims are located or to the paragraph numbers in his amended petition wherein the claims are located. He makes no argument regarding why he believes these claims were sufficiently pleaded nor does he cite to any specific authority in support of his argument that the claims were improperly dismissed -- his only citation to authority in this entire portion of his brief is to Strickland, supra. This Court recently addressed a similar issue in Taylor v. State, [Ms. CR-05-0066, October 1, 2010] ___ So. 3d ___ (Ala. Crim. App. 2010):

> "We are aware that application of Rule 28(a)(10) to find a waiver of arguments in an appellate brief has been limited to those cases in which the appellant presents general assertions and propositions of law with few or no citations to relevant legal authority, resulting in an argument consisting of undelineated general propositions unsupported by sufficient legal authority or argument. Although Rule 28(a)(10) is to be cautiously applied, it has been applied recently by the Alabama Supreme Court and by this Court when appropriate. E.g., Ex parte Theodorou, [Ms. 1090393, June 30, 2010] ___ So. 3d ___ (Ala. 2010); Jefferson County Comm'n v. Edwards, 32 So. 3d 572 (Ala. 2009); Slack v. Stream, 988 So. 2d 516 (Ala. 2008); James v. State, [Ms. CR-04-0395, March 26,

2010] ___ So. 3d ___ (Ala. Crim. App. 2006) (opinion on remand from Alabama Supreme Court); Scott v. State, [Ms. CR-06-2233, March 6, 2010] ___ So. 3d ___ (Ala. Crim. App. 2010); Baker v. State, [Ms. CR-06-1723, Dec. 18, 2009] ___ So. 3d ___ (Ala. Crim. App. 2009); Lee v. State, 44 So. 3d 1145 (Ala. Crim. App. 2009); Bush v. State, [Ms. CR-03-1902, May 29, 2009] ___ So. 3d ___ (Ala. Crim. App. 2009); and Franklin v. State, 23 So. 3d 694 (Ala. Crim. App. 2008).

"In Scott v. State, this Court stated:

"'"Recitation of allegations without citation to any legal authority and without adequate recitation of the facts relied upon has been deemed a waiver of the arguments listed." Hamm v. State, 913 So. 2d 460, 486 (Ala. Crim. App. 2002). "An appellate court will consider only those issues properly delineated as such and will not search out errors which have not been properly preserved or assigned. This standard has been specifically applied to briefs containing general propositions devoid of delineation and support from authority or argument." Ex parte Riley, 464 So. 2d 92, 94 (Ala. 1985) (citations omitted). "When an appellant fails to cite any authority for an argument on a particular issue, this Court may affirm the judgment as to that issue, for it is neither this Court's duty nor its function to perform an appellant's legal research." City of Birmingham v. Business Realty Inv. Co., 722 So. 2d 747, 752 (Ala. 1998).'

"Scott v. State, ___ So. 3d at ___. See also Hamm v. State, 913 So. 2d 460, 486 n.11 (Ala. Crim. App. 2002) ('Applying the federal counterpart to Alabama's Rule 28, Ala. R. App. P., the United States Court of Appeals for the Eighth Circuit stated, "[W]e regularly decline to consider cursory or summary arguments that are unsupported by citations to legal authorities. See United States v. Wadlington, 233 F.3d 1067, 1081 (8th Cir. 2000); United States v. Gonzales, 90 F.3d 1363, 1369 (8th Cir.1996); see also United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991) ('Judges are not like pigs, hunting for truffles buried in briefs.')." U.S. v. Stuckey, 255 F.3d 528, 531 (8th Cir. 2001).').

"As the State correctly argues in its brief on appeal, many 'arguments' in Taylor's brief consist of little more than a cursory summary of the claims from the petition. ...

"....

"Clearly, Taylor's cursory summary of the allegations of the petition -- with a citation only to the paragraphs of the petition in many arguments of the brief, and in other portions of the brief only to paragraphs of the petition and undelineated general principles of law -- does not comport with Rule 28(a)(10). For many of the issues raised in the brief, Taylor presents no discussion of the facts or the law in the form of an argument demonstrating why the circuit court's dismissal of the specific claims was in error. Accordingly, we hold that Taylor has waived for purposes of appellate review in this Court those arguments in his brief ... that fail to comply with the requirements of Rule 28(a)(10)."

___ So. 3d at ___.

Here, too, we find that Bryant's cursory summary of the claims in his petition with no specific discussion of the facts or law in the form of an argument as to why he believes these claims were improperly summarily dismissed, with only citations to page or paragraph numbers, and with only a single citation to general legal authority is not sufficient to comply with Rule 28(a)(10). Therefore, those claims of ineffective assistance of counsel set out above are deemed to be waived.

Moreover, even if Bryant's brief in this regard did satisfy the requirements in Rule 28(a)(10), we have thoroughly reviewed Bryant's amended petition and we find that all the claims of ineffective assistance of counsel listed above were insufficiently pleaded to satisfy the requirements in Rule 32.3 and Rule 32.6(b) and, thus, summary dismissal of those claims was proper under Rule 32.7(d).

G.

Finally, we note that Bryant raised several additional ineffective-assistance-of-counsel claims in his amended petition that he does not pursue in his brief on appeal. Specifically, Bryant raised the following claims in his amended petition:

> (1) That trial counsel at his first trial were ineffective for not attempting to rehabilitate veniremembers who were removed by the trial court during general qualifications;
>
> (2) That trial counsel at his first trial were ineffective for not "tak[ing] exception" to the trial court's removal of veniremembers from the panel (C. 462);
>
> (3) That trial counsel at his first trial were ineffective for not objecting to the fact that the trial court's rulings on the challenges for cause were not being included in the record on appeal;
>
> (4) That trial counsel at his first trial were ineffective for not objecting to the trial court's striking of a veniremember when, he said, that veniremember had been rehabilitated;
>
> (5) That trial counsel at his first trial and at his second penalty-phase trial were ineffective for

not properly investigating and retaining a gun-powder-residue expert;

(6) That trial counsel at his first trial and at his second penalty-phase trial were ineffective for not investigating whether Bryant typically carried the type of gun used to kill Hollis;

(7) That trial counsel at his first trial and at his second penalty-phase trial were ineffective for not investigating whether Hollis was with a woman at an apartment at the time the police spoke with Bryant outside of Mickey's nightclub;

(8) That trial counsel at his first trial and at his second penalty-phase trial were ineffective for not investigating and finding a woman named "Squeaky" who was allegedly with Bryant at the time the police spoke with him outside of Mickey's nightclub;

(9) That trial counsel at his first trial and at his second penalty-phase trial were ineffective for not investigating whether Hollis and Brantley were familiar with the neighborhood in which they picked up Bryant, were homosexual, and often "trolled" that neighborhood looking for sexual partners (C. 470);

(10) That trial counsel at his first trial and at his second penalty-phase trial were ineffective for not investigating whether Raymond Mathis was also known as Terry Johnson or whether a Terry Johnson, who, Bryant claimed, lived in Dothan and had an extensive criminal history, was the person who had shot Hollis;

> (11) That trial counsel at his second penalty-phase trial were ineffective for not challenging the trial court's submission to the jury of the aggravating circumstance that the murder was committed for pecuniary gain;
>
> (12) That appellate counsel on appeal from his first trial were ineffective for not raising in the motion for a new trial and then on appeal a claim that trial counsel were ineffective; and
>
> (13) That appellate counsel on appeal from his second penalty-phase trial were ineffective for not raising in a motion for a new trial and then on appeal a claim that trial counsel were ineffective.

Because none of these claims are argued by Bryant in his brief on appeal, they are deemed abandoned and will not be considered by this Court. See, e.g., Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995) ("We will not review issues not listed and argued in brief.").

III.

Bryant contends that the circuit court erred in summarily dismissing his claim that the State violated Brady v. Maryland, 373 U.S. 83 (1963), by not turning over to the defense for DNA testing the two used condoms found at the

scene of Hollis's murder. He maintains that this claim was sufficiently pleaded in his petition, was meritorious on its face, and entitled him to a new trial.

In his amended petition, Bryant alleged the following with respect to this claim:

> "The State also[8] violated Brady by failing to turn over used condoms found at the scene of the crime, so counsel could pursue DNA testing. The first prong of Brady is satisfied because the used condoms were not turned over to trial counsel when he requested them from the police. In fact the police destroyed or lost control of the condoms before the defense had an opportunity to test them. The second prong of Brady is satisfied because the DNA evidence would demonstrate the nature of the activities at the crime scene, indicating consensual sex was the purpose of the visit and not kidnapping as suggested by the prosecution. The third prong of Brady is satisfied because the condoms are a material piece of evidence to show that the victim

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[8]Bryant raised two Brady claims in his petition. He does not pursue on appeal the first claim -- that the State violated Brady by not producing Ricky Vickers as a witness for the second penalty-phase trial. Therefore, that claim is deemed abandoned and will not be considered by this Court. See, e.g., Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995) ("We will not review issues not listed and argued in brief.").

> was not kidnapped or that there was a person other than Bryant at the crime scene at the time of the murder. Finally, the Brady claim is not procedurally barred because trial counsel never confirmed that evidence was destroyed. The very nature of the claim -- the State's failure to turn over information -- implicitly precludes a finding that the claim was available to trial counsel at trial or on appeal. As such, Mr. Bryant's claim that the State failed to disclose exculpatory and impeachment evidence in violation of Brady and Giglio [v. United States, 405 U.S. 150 (1972),] is cognizable and should be considered by this Court. To date, Bryant has been denied discovery by this Court; therefore, Bryant cannot confirm or deny the destruction of the condoms."

(C. 504.)[9]

In its response to Bryant's amended petition, the State asserted that this claim was precluded by Rule 32.2(a)(3) and (5), Ala. R. Crim. P., because it could have been, but was

[9]We note that Bryant makes a much more extensive argument regarding this claim in his brief on appeal -- spanning some 15 pages -- than he did in his amended petition, and he includes detailed factual allegations in his brief. However, because the factual allegations and arguments Bryant includes in his brief on appeal were not included in his petition or amended petition, they are not properly before this Court and will not be considered. See Bearden v. State, 825 So. 2d 868 (Ala. Crim. App. 2001).

not, raised and addressed at trial and on appeal. In its order, the circuit court found this claim to be insufficiently pleaded. We agree with both the State and the circuit court.

> "To [establish] a Brady violation, a defendant must show that '"(1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material to the issues at trial."' Johnson v. State, 612 So. 2d 1288, 1293 (Ala. Cr. App. 1992), quoting Stano v. Dugger, 901 F.2d 898, 899 (11th Cir. 1990), cert. denied, Stano v. Singletary, 516 U.S. 1122, 116 S.Ct. 932, 133 L.Ed.2d 859 (1996). See Smith v. State, 675 So. 2d 100 (Ala. Cr. App. 1995). '"The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."' Johnson, 612 So. 2d at 1293, quoting United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985)."

Freeman v. State, 722 So. 2d 806, 810 (Ala. Crim. App. 1998).

However, as this Court explained in Payne v. State, 791 So. 2d 383 (Ala. Crim. App. 1999):

> "Because this Brady claim was first presented in a Rule 32 petition, Payne can obtain relief only if it involves 'newly discovered evidence.' Newly

discovered evidence is defined under Rule 32.1, Ala. R. Crim. P., as follows:

> "'Subject to the limitations of Rule 32.2, any defendant who has been convicted of a criminal offense may institute a proceeding in the court of original conviction to secure appropriate relief on the ground that:
>
> "'....
>
> "'(e) Newly discovered material facts exist which require that the conviction or sentence be vacated by the court, because:
>
> "'(1) The facts relied upon were not known by petitioner or petitioner's counsel at the time of trial or sentencing or in time to file a post-trial motion pursuant to Rule 24, or in time to be included in any previous collateral proceeding and could not have been discovered by any of those times through the exercise of reasonable diligence;
>
> "'(2) The facts are not merely cumulative to other facts that were known;
>
> "'(3) The facts do not merely amount to impeachment evidence;
>
> "'(4) If the facts had been known at the time of trial or of sentencing, the

> result probably would have been different; and
>
> "'(5) The facts establish that petitioner is innocent of the crime for which petitioner was convicted or should not have received the sentence that petitioner received.'
>
> "Rule 32.1(e), Ala. R. Crim. P. We note that because of the conjunctive 'and' between (4) and (5), Payne must meet all five prerequisites of Rule 32.1(e), Ala. R. Crim. P., in order to prevail."

791 So. 3d at 397.

Here, Bryant failed to plead sufficient facts indicating that the two used condoms constituted newly discovered evidence under Rule 32.1(e). Indeed, not only did Bryant not even mention Rule 32.1(e) in his amended petition, he admitted in his amended petition that his counsel at his first trial was, in fact, aware of the existence of the two used condoms -- he stated in his amended petition that his counsel requested discovery of the condoms. Counsel could not very well request discovery of evidence of which counsel was unaware. A Brady violation involves "the discovery, after

trial, of information favorable to the accused that had been known to the prosecution but unknown to the defense." United States v. Bagley, 473 U.S. 667, 678 (1985) (emphasis added). Contrary to Bryant's apparent belief, "not turn[ing] over" evidence is not the equivalent of suppressing evidence for purposes of Brady.

Because Bryant failed to plead any facts indicating that the two used condoms were unknown to the defense and that they constituted newly discovered evidence obtained after his first trial, this claim is precluded by Rule 32.2(a)(3) and (5) because it could have been, but was not, raised and addressed at trial and on appeal.[10] See Davis v. State, 44 So. 3d 1118 (Ala. Crim. App. 2009); Beckworth v. State, [Ms. CR-07-0051, May 1, 2009] ___ So. 3d ___ (Ala. Crim. App. 2009); Smith v.

[10]We note that, contrary to Bryant's assertion in his petition, whether the State destroyed or lost evidence is a separate and distinct issue from whether the State suppressed evidence. The key issue in a Brady claim is whether the defense was aware of the existence of the evidence, not whether the evidence had been destroyed.

State, [Ms. CR-05-0561, September 26, 2008] ___ So. 3d ___ (Ala. Crim. App. 2008); Madison v. State, 999 So. 2d 561 (Ala. Crim. App. 2006); and Boyd v. State, 913 So. 2d 1113 (Ala. Crim. App. 2003). Therefore, summary dismissal of this claim was proper under Rule 32.7(d).

IV.

Bryant also contends that the circuit court erred in summarily dismissing his claims of juror misconduct. He argues that his claims were sufficiently pleaded and were meritorious on their face and thus entitled him to an evidentiary hearing. In his amended petition, Bryant raised three claims of juror misconduct; we address each in turn.

A.

First, Bryant alleged that, during voir dire for his first trial, juror J.K. failed to answer questions truthfully. Bryant alleged the following with respect to this claim:

"Bryant's right to a fair and impartial jury was violated due to a juror's failure to respond truthfully to questions on voir dire. When a juror fails to truthfully answer questions on voir dire the defendant is deprived of his right to wisely exercise peremptory strikes. Ex parte O'Leary, 438 So. 2d 1372, 1373 (Ala. 1983); Ex parte Ledbetter, 404 So. 2d 731, 733 (Ala. 1981); Tomlin v. State, 695 So. 2d 157, 169 (Ala. Crim. App. 1996); see also United States V. Perkins, 748 F.2d 1519, 1531 (11th Cir. 1984).

"This juror's failure to respond truthfully to critical questions posed by defense counsel on voir dire violated Bryant's right to due process and a fair and impartial jury under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, the Alabama Constitution, and Alabama State Law. See Tomlin v. State, 695 So. 2d 157, 169 (Ala. Crim. App. 1996); McDonough Power Equipment v. Greenwood, 464 U.S. 548, 556 (1984) (finding constitutional violation where jurors deliberately deceive court about a matter which would constitute a valid basis for challenge of juror).

"Juror [J.K.] did not disclose material information on voir dire. During the original trial in 1997, trial counsel asked if any juror had any connection to law enforcement. While Juror [J.K.] indicated that he knew someone involved in law enforcement, he completely failed to mention that he was a deputy reserve officer. His failure to reveal that he was a reserve officer prevented Mr. Yarbrough from asking additional questions to

> uncover whether Juror [J.K.] could be impartial in spite of his background as a reserve deputy. In fact, Juror [J.K.] has had a long history of involvement with law enforcement. Juror [J.K.] had applied to the Drug Enforcement Agency and been denied a job and that [sic] this denial affected him for the rest of his life. Juror [J.K.] was obsessed with law enforcement and clearly could not be an impartial member of the jury. Juror [J.K.] is a police fanatic[,] drives the same make and model as unmarked police cars, keeps numerous police scanners in his car, and follows the police to crime scenes. Juror [J.K.] is clearly someone who would have advocated law enforcement and possessed potential biases worthy [sic] and tainted the jury with his views. Juror [J.K.'s] misconduct was only discovered upon investigation related to Bryant's Rule 32 Petition.
>
> "The misconduct of the juror deprived Bryant of his constitutional rights, including his right to be tried by an impartial jury and his rights to due process, a fair trial, an impartial jury, equal protection, and a reliable sentencing protected by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the Alabama Constitution, and Alabama law."

(C. 505-06.)[11]

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[11]We note that, again, Bryant includes more specific facts in his brief on appeal than he did in his amended petition. However, because those facts were not included in his amended petition, they are not properly before this Court and will not

This claim was not sufficiently pleaded. Although Bryant alleged that J.K. failed to mention that he "was a deputy reserve officer" when the question was asked whether any juror had any connection to law enforcement, Bryant failed to allege exactly when J.K. was a deputy reserve officer, i.e., whether J.K. was a reserve officer at the time of Bryant's trial or at some point in his past. The fact that J.K. may have been a reserve officer at some point in his past does not necessarily constitute the failure to answer truthfully the question as phrased by Bryant in his petition. Bryant alleged in his amended petition only generally that counsel asked "if any juror had any connection to law enforcement."[12] However, he

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be considered in evaluating this claim. See Bearden v. State, 825 So. 2d 868 (Ala. Crim. App. 2001).

[12]We note that, in its order, the circuit court phrased the question as follows: "Does anyone, either themselves, or a close family member, or a good friend, work in law enforcement?" (C. 761.) However, that is not the question Bryant alleged in his amended petition was not answered truthfully, and we will not look beyond Bryant's actual pleadings in order to create a claim.

failed to plead exactly what the question was that he believed was not answered truthfully by J.K. The question allegedly propounded by counsel -- as phrased by Bryant in his amended petition -- was ambiguous, at best, regarding the timing of the juror's "connection" to law enforcement, i.e., whether counsel wanted to know if any juror had any connection to law enforcement at the time of the trial or whether counsel wanted to know if any juror had any connection at any point in their lives. In examining a juror-misconduct claim based on a juror's failure to answer questions truthfully, the phrasing of the exact question asked is critical. Bryant's bare pleadings are simply not sufficient to indicate that J.K. failed to answer truthfully during voir dire.

In addition, even assuming Bryant's pleadings were sufficient to establish that J.K. failed to answer truthfully during voir dire, Bryant failed to plead sufficient facts indicating prejudice. In Hooks v. State, 21 So. 3d 772 (Ala. Crim. App. 2008), this Court explained:

"To prevail on a claim of juror misconduct, the petitioner must establish that he 'might have been prejudiced' by the jurors' failure to respond truthfully to a question posed on voir dire. See Ex parte Stewart, 659 So. 2d 122 (Ala. 1993).

> "'It is true that the parties in a case are entitled to true and honest answers to their questions on voir dire, so that they may exercise their peremptory strikes wisely. See Fabianke v. Weaver, 527 So. 2d 1253 (Ala. 1988). However, not every failure to respond properly to questions propounded during voir dire "automatically entitles [the defendant] to a new trial or reversal of the cause on appeal." Freeman v. Hall, 286 Ala. 161, 166, 238 So. 2d 330, 335 (1970); see also Dawson v. State, [710 So. 2d 472] at 474 [(Ala. 1997)]; and Reed v. State, [547 So. 2d 596 (Ala. 1989)]. As stated previously, the proper standard to apply in determining whether a party is entitled to a new trial in this circumstance is "whether the defendant might have been prejudiced by a veniremember's failure to make a proper response." Ex parte Stewart, 659 So. 2d [122] at 124 [(Ala. 1993)]. Further, the determination of whether a party might have been prejudiced, i.e., whether there was probable prejudice, is a matter within the trial court's discretion.'

"Ex parte Dobyne, 805 So. 2d 763, 771-72 (Ala. 2001) (footnote omitted)."

21 So. 3d at 780-81. The might-have-been-prejudiced standard, although on its face a light standard, actually requires more than simply showing that juror misconduct occurred. "[T]he question whether the jury's decision might have been affected is answered not by a bare showing of juror misconduct, but rather by an examination of the circumstances particular to the case." Ex parte Apicella, 809 So. 2d 865, 871 (Ala. 2001). Thus, "[i]n applying this standard we look at 'the temporal remoteness of the matter inquired about, the ambiguity of the question propounded, the prospective juror's inadvertence or willfulness in falsifying or in failing to answer, the failure of the juror to recollect, and the materiality of the matter inquired about.'" Hooks, 21 So. 2d at 781 (quoting DeBruce v. State, 890 So. 2d 1068, 1078 (Ala. Crim. App. 2003), overruled on other grounds, Ex parte Jenkins, 972 So. 2d 159 (Ala. 2005)).

Here, although the matter inquired about -- the jurors' connection to law enforcement -- is material, as noted above,

the question propounded (as phrased by Bryant in his amended petition) was ambiguous, Bryant failed to plead any facts indicating the period of J.K.'s reserve-deputy status, and Bryant made no allegation whatsoever that J.K.'s failure to reveal his reserve-deputy status was in any way willful or intentional. Under these circumstances, we simply cannot say that this claim satisfies the pleading requirements in Rule 32.3 and Rule 32.6(b). Therefore, summary dismissal of this claim was proper under Rule 32.7(d).

B.

Second, Bryant argued that, during deliberations at his second penalty-phase trial, the jury foreman coerced the jury into voting for death by insinuating that by casting any other vote the jurors would be violating the law. Bryant alleged the following with respect to this claim:

> "The coercion of jurors by the juror foreperson during the sentencing phase of Bryant's trial violated Bryant's right to due process and a fair and impartial jury as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, the Alabama Constitution, and Alabama law. See Hallmark v Allison, 451 So. 2d 270, 271-72 (Ala. 1984); Clark-Mobile Counties Gas Dist. v. Reeves, 628 So. 2d 368, 370 (Ala. 1993); Ala. Const. Art. I, § 6;

see also Ala. Code § 15-17-5(a)(2) (establishing jury misconduct as a ground for granting a motion for a new trial in criminal cases).

"A juror misconduct claim is cognizable where the misconduct 'might have unlawfully influenced that juror and others with whom he deliberated, and might have unlawfully influenced its verdict rendered.' Roan v. State, 143 So. 2d 454, 460 (Ala. 1932); Ex Parte Troha, 462 So. 2d 953, 954 (Ala. 1984). Even in circumstances in which the evidence is ambiguous, it sufficiently supports this 'light' burden. Troha, 462 So. 2d at 954. If a showing is made that the verdict might have been affected by the misconduct, the misconduct need not have actually controlled or dominated the jury's verdict. See Holland v. State, 588 So. 2d 543, 549 (Ala. Crim. App. 1991).

"There were several instances of juror misconduct that occurred during Bryant's resentencing trial. First, there is evidence that the jury foreperson coerced other members of the jury to vote for death. At the beginning of jury deliberations, one woman indicated that she could not vote to put Bryant to death. The jury foreperson responded to her and stated that during jury voir dire she had indicated that she would be able to impose the death penalty, in spite of her religious beliefs. The foreperson went on to say that either the juror was lying now or had lied to the prosecutor, which was against the law. The foreperson's coercive manner caused a second juror on the panel to believe that a vote against the death penalty was against the law, thereby prompting that juror to vote for death, when in fact that juror did not want to give Bryant a death sentence."

(C. 507-08.)

This claim fails to state a material issue of fact or law upon which relief could be granted. It is well settled that "matters that the jurors bring up in their deliberations are simply not improper under Alabama law, because the law protects debates and discussions of jurors and statements they make while deliberating their decision." Sharrief v. Gerlack, 798 So. 2d 646, 653 (Ala. 2001). "Rule 606(b), Ala. R. Evid., recognizes the important 'distinction, under Alabama law, between 'extraneous facts,' the consideration of which by a jury or jurors may be sufficient to impeach a verdict, and the 'debates and discussions of the jury,' which are protected from inquiry." Jackson v. State, [Ms. CR-06-1026, November 13, 2009] ___ So. 3d ___, ___ (Ala. Crim. App. 2009) (quoting Sharrief, supra at 652). "[T]he debates and discussions of the jury, without regard to their propriety or lack thereof, are not extraneous facts." Sharrief, 798 So. 2d at 653. Thus, "affidavit[s or testimony] showing that extraneous facts influenced the jury's deliberations [are] admissible; however, affidavits concerning 'the debates and discussions of the case by the jury while deliberating thereon' do not fall within this exception." CSX Transp., Inc. v. Dansby, 659 So. 2d 35,

41 (Ala. 1995) (quoting Alabama Power Co. v. Turner, 575 So. 2d 551, 557 (Ala. 1991)). In terms of this claim of juror misconduct, the allegedly coercive statements made by the jury foreperson and the impact those statements may have had on the jury in its deliberations are not extraneous facts. Therefore, they are insulated from inquiry and cannot form the basis of a valid claim for relief under Rule 32.

As this Court noted in addressing a similar issue in Jones v. State, 753 So. 2d 1174 (Ala. Crim. App. 1999):

> "[W]e reject Jones's claim that his 'death sentence was the result of coercive influences brought into the jury deliberations which were outside the scope of the evidence and judicial control.' (Appellant's brief at p. 97.) Specifically, he argues that a juror's statement that 'if we give him life that maybe in a few years that he would be up for parole' improperly persuaded others to sentence him to death. (R. 275-76.)
>
> "Testimony at the Rule 32 hearing indicated that before reaching its 12-0 advisory verdict recommending a sentence of death, the jury voted several times. Several ballots resulted in a 10-2 determination to recommend death. One of the two individuals who initially voted against death testified that she changed her vote in favor of death after J.M. made the statement regarding parole.
>
> "'A juror cannot impeach his verdict by later explaining why or how the juror arrived at his or her decision.' Adair v. State, 641 So. 2d 309, 313 (Ala. Cr. App. 1993).

"Moreover, Rule 606(b), Ala. R. Evid., provides, in pertinent part:

> "'Upon an inquiry into the validity of a verdict or indictment, a juror may not testify in impeachment of the verdict or indictment as to any matter or statement occurring during the course of the jury's deliberations or the effect of anything upon that or any other juror's mind or emotions as influencing the juror as to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.'

"We find no merit to Jones's claim because it was based on prohibited testimony. A consideration of the claim would destroy the integrity of the jury system, encourage the introduction of unduly influenced juror testimony after trial, and discourage jurors from freely deliberating, and inhibit their reaching a verdict without fear of post-trial harassment, publicity, or scrutiny. See Ex parte Neal, 731 So. 2d 621 (Ala. 1999); and Barbour v. State, 673 So. 2d 461, 469-470 (Ala. Cr. App. 1994), aff'd, 673 So. 2d 473 (Ala. 1995), cert. denied, 518 U.S. 1020, 116 S.Ct. 2556, 135 L.Ed.2d 1074 (1996)."

753 So. 2d at 1203-04 (footnote omitted). Similarly, here, a consideration of this claim of juror misconduct -- which is

based entirely on the debate and deliberations of the jury -- "would destroy the integrity of the jury system, encourage the introduction of unduly influenced juror testimony after trial, and discourage jurors from freely deliberating, and inhibit their reaching a verdict without fear of post-trial harassment, publicity, or scrutiny." 753 So. 2d at 1204. Therefore, this claim fails to state a material issue of fact or law upon which relief could be granted, and summary dismissal was proper under Rule 32.7(d).[13]

C.

Finally, Bryant argued that, during deliberations at his second penalty-phase trial, the jury foreman informed the jury of extraneous facts, specifically that the trial court had previously sentenced Bryant to death for his capital-murder convictions, which, Bryant claimed, unlawfully influenced the jury's sentencing verdict. Bryant alleged the following with respect to this claim:

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[13]Although this was not the reason for the circuit court's dismissal of this claim -- the circuit court found the claim to be insufficiently pleaded -- we may nonetheless affirm the circuit court's judgment on this ground. See, e.g., McNabb v. State, 991 So. 2d 313 (Ala. Crim. App. 2007).

> "Second, it is clear that this same foreperson brought extraneous information into the jury deliberations. This information related to Bryant's previous trial, and the foreperson used this information to coerce reluctant jurors to vote for death. The foreperson indicated that Bryant's death sentence was a foregone conclusion because Judge Jackson had previously sentenced Bryant to death. The foreperson should not have known about Bryant's previous death sentence and the jury certainly should not have considered this incredibly prejudicial information during deliberations.
>
> "This is significant because in making the decision to impose the death penalty, the jury acts as a unit. See Ex parte McNabb, 887 So. 2d 998, 1006 (Ala. 2004). Thus[,] the misconduct of one of its members cannot be segregated. The prejudicial atmosphere created by the misconduct of even one juror is impossible to eradicate and injuriously affected the substantial rights of the defendant. See Holland, 588 So. 2d at 547."

(C. 508.)

This claim was not sufficiently pleaded. Although Bryant alleged that the jury foreperson informed the jurors of extraneous information -- that Bryant had previously been sentenced to death based on earlier capital-murder convictions -- he made nothing more than a bare allegation that this information "coerce[d] reluctant jurors to vote for death." He failed to assert how many allegedly "reluctant jurors" were on the jury, what the vote of the jury was in relation to the death sentence, or even to name a single juror who he believed

was "reluctant" to vote for death but who nonetheless voted for death based on the extraneous information. Therefore, he failed to satisfy the pleading requirements in Rule 32.3 and Rule 32.6(b), and summary dismissal of this claim was proper under Rule 32.7(d).

V.

Finally, Bryant contends that the circuit court also erred in summarily dismissing several of the substantive claims for relief in his amended petition. (Issues V.B. - V.F. in Bryant's brief.) Specifically, Bryant argues that the circuit court erred in summarily dismissing the following claims:

> (1) That he was denied his right to a fair trial at his second penalty-phase trial as a result of prosecutorial misconduct;
>
> (2) That he was denied his right to confrontation at his second penalty-phase trial as a result of Ricky Vickers's absence;
>
> (3) That he was denied his right to counsel when he was allegedly questioned by police after he had asked for an attorney;
>
> (4) That the State violated Batson v. Kentucky, 476 U.S. 79 (1986), at his second penalty-phase trial; and

> (5) That Alabama's method of execution constitutes cruel and unusual punishment.[14]

Bryant argues that these claims in his amended petition were sufficiently pleaded and meritorious on their face and thus entitled him to an evidentiary hearing.

We find it unnecessary to address whether these claims were sufficiently pleaded under Rule 32.3 and Rule 32.6(b) because we agree with the State's argument in its response to Bryant's petition, and in its brief on appeal, that these claims were precluded by various provisions in Rule 32.2. Specifically, claims (1) and (3), as set out above, are precluded by Rule 32.2(a)(5), because they could have been, but were not, raised and addressed on appeal, and claims (2), (4), and (5), as set out above, are precluded by Rule 32.2(a)(4), because they were raised and addressed on appeal. Therefore, summary dismissal of these claims was proper under Rule 32.7(d).

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[14]We note that Bryant does not pursue in his brief on appeal the final claim in his amended petition that the cumulative effect of all the claims in his petition entitled him to a new trial. Therefore, that claim is deemed abandoned and will not be considered by this Court. See, e.g., Brownlee v. State, 666 So. 2d 91 (Ala. Crim. App. 1995).

VI.

For the reasons stated above, we remand this case to the circuit court for it to afford Bryant the opportunity to present evidence at an evidentiary hearing to support the following claims in his petition: (1) that trial counsel at his first trial were ineffective for not properly investigating and retaining a blood-spatter expert and a DNA expert, as set out in Part II.B. of this opinion; (2) that trial counsel at his first trial were ineffective for not properly investigating and presenting evidence to support a motion to suppress the first statement he made to police, as set out in Part II.C. of this opinion; and (3) that trial counsel at his first trial and trial counsel at his second penalty-phase trial were ineffective for failing to adequately impeach Ricky Vickers's testimony and that trial counsel at his second penalty-phase trial were ineffective for failing to adequately challenge Vickers's unavailability, as set out in Part II.D. of this opinion.

Because Bryant is entitled to an evidentiary hearing on these claims, he may also be entitled to discovery relating to these claims. Therefore, on remand, the circuit court shall

reevaluate its denial of Bryant's discovery request as it relates to the above-listed claims,[15] and it may grant whatever discovery it deems necessary for a proper resolution of these claims. In this regard, we point out that postconviction discovery is not prohibited -- as the circuit court's notation on the case-action summary denying Bryant's discovery request appears to suggest -- but, rather, is governed by the good-cause standard set out by the Alabama Supreme Court in Ex parte Land, 775 So. 2d 847 (Ala. 2000), as follows:

> "We agree with the Court of Criminal Appeals that 'good cause' is the appropriate standard by which to judge postconviction discovery motions. In fact, other courts have adopted a similar 'good-cause' or 'good-reason' standard for the postconviction discovery process. See [State v.] Marshall, [148 N.J. 89, 690 A.2d 1 (1997)]; State v. Lewis, 656 So. 2d 1248 (Fla. 1994); People ex rel. Daley v. Fitzgerald, 123 Ill.2d 175, 121 Ill.Dec. 937, 526 N.E.2d 131 (1988). As noted by the Illinois Supreme Court, the good-cause standard guards against potential abuse of the postconviction discovery process. See Fitzgerald, supra, 123 Ill.2d at 183, 121 Ill.Dec. 937, 526 N.E.2d at 135. We also agree that New Jersey's Marshall case provides a good working framework for reviewing

[15]Because the circuit court must reconsider Bryant's discovery request on remand, we pretermit discussion of Bryant's claim on appeal that the circuit court erred in denying him discovery pending the circuit court's return to our remand.

> discovery motions and orders in capital cases. In addition, we are bound by our own rule that 'an evidentiary hearing must be held on a [petition for postconviction relief] which is meritorious on its face, i.e., one which contains matters and allegations (such as ineffective assistance of counsel) which, if true, entitle the petitioner to relief.' Ex parte Boatwright, 471 So. 2d 1257, 1258 (Ala. 1985).
>
> "We emphasize that this holding -- that postconviction discovery motions are to be judged by a good-cause standard -- does not automatically allow discovery under Rule 32, Ala. R. Crim. P., and that it does not expand the discovery procedures within Rule 32.4. Accord Lewis, supra, 656 So. 2d at 1250, wherein the Florida Supreme Court stated that the good-cause standard did not affect Florida's rules relating to postconviction procedure, which are similar to ours. By adopting this standard, we are only recognizing that a trial court, upon a petitioner's showing of good cause, may exercise its inherent authority to order discovery in a proceeding for postconviction relief...."

775 So. 2d at 852 (footnote omitted).

The circuit court shall also issue specific written findings of fact regarding each of the above-listed claims in accordance with Rule 32.9(d), Ala. R. Crim. P., and it may grant Bryant whatever relief it deems necessary. Due return shall be filed with this Court within 180 days of the date of this opinion and shall include the circuit court's written findings of fact, a transcript of the evidentiary hearing, and

any other evidence received or relied on by the court on remand.

Based on the foregoing, this cause is remanded to the circuit court for proceedings consistent with this opinion.

REMANDED WITH DIRECTIONS.

Welch, P.J., concurs. Windom, J., concurs in the result.