Rel: November 22, 2019

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-13-1552

Antonio Devoe Jones

v.

State of Alabama

Appeal from Houston Circuit Court
(CC-00-353.60)

On Remand from the Alabama Supreme Court

KELLUM, Judge.

The appellant, Antonio Devoe Jones, an inmate currently incarcerated on Alabama's death row, appeals the circuit court's summary dismissal of his petition for postconviction relief filed pursuant to Rule 32, Ala. R. Crim. P., in which

he attacked his capital-murder conviction and sentence of death.

Facts and Procedural History

In 2004, Jones was convicted of murdering Ruth Kirkland during the course of a burglary. See § 13A-5-40(a)(4), Ala. Code 1975. The jury, by a vote of 11 to 1, recommended that Jones be sentenced to death. The trial court sentenced Jones to death. This Court affirmed Jones's conviction and sentence on direct appeal. Jones v. State, 987 So. 2d 1156 (Ala. Crim. App. 2006). The Alabama Supreme Court denied certiorari review, and this Court issued the certificate of judgment on January 25, 2008. The United States Supreme Court denied certiorari review on October 6, 2008. Jones v. Alabama, 555 U.S. 833 (2008).

On direct appeal, this Court set out the facts of the crime:

> "The State's evidence tended to show that on the afternoon of December 31, 1999, 80-year-old Ruth Kirkland drove her 1990 white Cadillac automobile to the grocery store to purchase groceries. Mrs. Kirkland, who had lived alone since the death of her husband, was a petite woman, who had suffered a stroke, leaving her with a limp and a weak right arm. As a result of the stroke, Mrs. Kirkland used a walker or a cane to get around. It was generally

known in the community that Mrs. Kirkland kept money inside her house.

"According to testimony at trial, because of her condition, it took Mrs. Kirkland several trips to carry her groceries inside, and it became dark before she got all her groceries into her house. Because Mrs. Kirkland did not like to be outside after dark, she left the remaining groceries in her car for the night.

"Some time later, Antonio Jones went to Mrs. Kirkland's house, turned off the circuit breakers outside, and went inside. From the evidence, the police were unable to determine whether Jones broke into the house or whether Mrs. Kirkland opened the door to investigate the power failure, allowing Jones to enter unimpeded.

"Upon gaining entry to the house, Jones beat and kicked Mrs. Kirkland as she attempted to defend herself. Jones broke Mrs. Kirkland's wrists as she attempted to ward off his blows. In addition to using his hands and feet to assault Mrs. Kirkland, Jones also used one of Mrs. Kirkland's walking canes and a broken chair leg to savagely beat Mrs. Kirkland. Splatters of Mrs. Kirkland's blood were found in various locations and pieces of her broken cane were found in several different rooms.

"At some point, Jones dumped the contents of Mrs. Kirkland's purse on the floor. Mrs. Kirkland kept the keys to her car in her purse. He also searched the house for the money Mrs. Kirkland reportedly kept in her house, ransacking the house, leaving open several drawers and cabinets. Mrs. Kirkland's body was found near the armoire where she kept her money. Jones took Mrs. Kirkland's car keys -- and possibly other undetermined items -- and left Mrs. Kirkland's house driving her white Cadillac.

"That same evening, Linda Parrish, Mrs. Kirkland's daughter, became concerned when she was unable to contact her mother by telephone. Mrs. Parrish asked her son, Brent Parrish -- a Dothan police officer -- to go by Mrs. Kirkland's house and check on her. Officer Parrish arrived at his grandmother's house shortly before 8:00 p.m. He noticed that no lights were on inside the house and that Mrs. Kirkland's white Cadillac was missing. As he approached the house, Officer Parrish discovered that the back door was open. Officer Parrish notified the police and waited for help to arrive. When the other officers arrived, the police entered Mrs. Kirkland's house and discovered her body lying on the floor.

"Concluding that Mrs. Kirkland's assailant had taken her automobile, the police began searching for the white Cadillac. Around 9:00 p.m., an officer spotted a white Cadillac matching the description of Mrs. Kirkland's. The officer activated his emergency lights, signaling the driver to stop; however, the driver failed to stop. The officer requested assistance, and several other patrol cars responded. Eventually, the police were able to stop the car near a K-Mart discount department store on the north side of Dothan. Inside the car were Jones; his sister, Lakeisha Jones; Lakeisha's baby; and Lakeisha's boyfriend. Jones, whose clothes and shoes were bloodstained, was taken into custody. During a search of the car, police discovered a number of items, including Mrs. Kirkland's remaining groceries, two of Mrs. Kirkland's walking canes, and a torn and empty envelope from SouthTrust Bank apparently given to Mrs. Kirkland when she made a withdrawal. Neither Lakeisha nor her boyfriend knew anything about Mrs. Kirkland's murder. Lakeisha did, however, tell the police that Jones was acting strangely when he picked them up earlier that evening.

"Jones was transported to the Dothan Police Department. At some point, Jones voluntarily stated that he knew where to find bloody clothes related to Mrs. Kirkland's murder. Officer Jon Beeson then informed Jones of his constitutional rights in accordance with Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Jones declined to sign a waiver-of-rights form, but he did agree to accompany police officers to a bridge on Honeysuckle Road where, he claimed, the true killers of Mrs. Kirkland had disposed of their bloody clothing. Before taking Jones to the bridge, officers had him remove the clothes and shoes he was wearing when he was taken into custody. Jones agreed, and he changed clothes. The clothing he had been wearing was taken to the Alabama Department of Forensic Sciences for testing.

"Thereafter, the police took Jones to the bridge on Honeysuckle Road, where they unsuccessfully searched for the reported bloody clothing. The officers also searched for footprints in the area and found none. After daylight, the officers returned to the site but again found no evidence that would support Jones's claims.

"Back at the police station, Jones asked to speak to Officer Beeson again. Before talking with Jones, Beeson informed Jones of his Miranda rights a second time. At 2:55 a.m. on January 1, 2000, Jones signed a waiver-of-rights form, acknowledging that he understood his rights and that he had not been threatened or promised anything in exchange for his statement. Jones told Beeson that three other men had killed Mrs. Kirkland. Jones denied any involvement in Mrs. Kirkland's killing; he claimed that he was not present when Mrs. Kirkland was killed and that the blood on his clothes came from being around the three killers. Additionally, Jones claimed that the white Cadillac he was driving belonged to his grandfather.

> "Around 5:30 a.m., Jones asked to speak with Officer Beeson again, stating that he wanted to tell Beeson the 'whole story.' Sgt. Jim Stanley told Jones that Beeson was unavailable, and Jones indicated that he wished to tell Stanley 'the rest of the story.' Sgt. Stanley took Jones into his office, where they were joined by Officer Donovan Kilpatrick. Before allowing Jones to give his statement, Sgt. Stanley asked Jones if he remembered his Miranda rights. Jones indicated that he did. Jones proceeded to give the officers additional information regarding Mrs. Kirkland's murder. As Jones related his version of events, Sgt. Stanley made notes of what Jones told them. During Jones's second statement, he admitted being present at Mrs. Kirkland's house during the murder. Jones claimed, however, that the other three men had entered the house with the intent to commit a robbery. He claimed that when he entered Mrs. Kirkland's house, one of the three men was beating her with a walking cane. According to Jones, he took the cane away from Mrs. Kirkland's assailant and telephoned 911 for emergency assistance in an attempt to save Mrs. Kirkland. Jones also claimed that the other three men took Mrs. Kirkland's car. He claimed that after he telephoned for assistance and turned the circuit breakers back on, he became scared and fled the scene on foot. Only later, Jones claimed, did he meet up with the other three who at that time were driving Mrs. Kirkland's car. When the officers attempted to verify Jones's claims, they discovered that the three men Jones claimed had killed Mrs. Kirkland all had alibis. Likewise, no 911 emergency calls had been received from Mrs. Kirkland's home that night."

Jones, 987 So. 2d at 1158-60 (footnotes omitted).[1]

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

On January 23, 2009, Jones timely filed the instant Rule 32 petition.[2] He filed an amended petition in April 2013. In July 2013, the State filed its response and moved to dismiss the petition. On June 19, 2014, the circuit court issued a 72-page order summarily dismissing the amended petition, and Jones appealed. By order dated December 12, 2017, this Court dismissed the appeal on the ground that Jones's notice of appeal was untimely filed. On certiorari review, the Alabama Supreme Court reversed this Court's judgment and remanded the case for this Court to consider the appeal as timely filed. Ex parte Jones, [Ms. 1170546, April 26, 2019] ___ So. 3d ___ (Ala. 2019).

Standard of Review

Rule 32.7(d), Ala. R. Crim. P., authorizes a circuit court to summarily dismiss a Rule 32 petition

> "[i]f the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitled the petitioner to relief under this rule and that no purpose would be served by any further proceedings ...."

[2]The time for filing a Rule 32 petition in a case in which the death penalty has been imposed was changed by Act No. 2017-417, Ala. Acts 2017. However, that Act does not apply retroactively. See § 3, Act No. 2017-417, Ala. Acts 2017.

See also Hannon v. State, 861 So. 2d 426, 427 (Ala. Crim. App. 2003); Cogman v. State, 852 So. 2d 191, 193 (Ala. Crim. App. 2002); Tatum v. State, 607 So. 2d 383, 384 (Ala. Crim. App. 1992). "'"'[W]here 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.'"'" Shaw v. State, 148 So. 3d 745, 764-65 (Ala. Crim. App. 2013) (quoting Bryant v. State, 181 So. 3d 1087, 1102 (Ala. Crim. App. 2011), quoting other cases). On direct appeal, this Court reviewed the trial proceedings for plain error. See Rule 45A, Ala. R. App. P. However, the plain-error standard of review does not apply in a postconviction proceeding. See, e.g., Ferguson v. State, 13 So. 3d 418, 424 (Ala. Crim. App. 2008). Additionally, "[t]he procedural bars of Rule 32 apply with equal force to all cases, including those in which the death penalty has been imposed." Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995). With certain exceptions not applicable here, "this Court may affirm the judgment of the circuit court for any reason, even if not

for the reason stated by the circuit court." Acra v. State, 105 So. 3d 460, 464 (Ala. Crim. App. 2012).

The majority of the claims on Jones's petition were claims of ineffective assistance of counsel, and the circuit court summarily dismissed some of those claims on the ground that they were insufficiently pleaded. To prevail on a claim of ineffective assistance of counsel, the petitioner must meet the standard articulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). The petitioner must show: (1) that counsel's performance was deficient, and (2) that the petitioner was prejudiced by counsel's deficient performance. 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. As the United States Supreme Court explained:

> "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way."

Strickland, 466 U.S. at 689 (citations omitted). To meet the second prong of the test, the petitioner "must show 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. "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. "The likelihood of a different result must be substantial, not just conceivable." Harrington v. Ricter, 562 U.S. 86, 112 (2011).

"The petitioner shall have the burden of pleading ... the facts necessary to entitle the petitioner to relief." Rule 32.3, Ala. R. Crim. P.

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

Rule 32.6(b), Ala. R. Crim. P. "The 'notice pleading' requirements relative to civil cases do not apply to Rule 32 proceedings. 'Unlike the general requirements related to civil cases, the pleading requirements for postconviction

petitions are more stringent. ...'" Washington v. State, 95 So. 3d 26, 59 (Ala. Crim. App. 2012).

> "'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 a petitioner to relief. After facts are pleaded, which, if true, entitle the petitioner to relief, the petitioner is then entitled to an opportunity, as provided in Rule 32.9, Ala. R. Crim. P., to present evidence proving those alleged facts."

Boyd v. State, 913 So. 2d 1113, 1125 (Ala. Crim. App. 2003).

> "The burden of pleading under Rule 32.3 and Rule 32.6(b) is a heavy one. Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b). The full factual basis for the claim must be included in the petition itself. If, assuming every factual allegation in a Rule 32 petition to be true, a court cannot determine whether the petitioner is entitled to relief, the petitioner has not satisfied the burden of pleading under Rule 32.3 and Rule 32.6(b). See Bracknell v. State, 883 So. 2d 724 (Ala. Crim. App. 2003). To sufficiently plead an allegation of ineffective assistance of counsel, a Rule 32 petitioner not only must 'identify the [specific] acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment,' Strickland v. Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), but also must plead specific facts indicating that he or she was prejudiced by the acts or omissions, i.e., facts indicating 'that there is a reasonable probability

> that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' 466 U.S. at 694, 104 S.Ct. 2052. A bare allegation that prejudice occurred without specific facts indicating how the petitioner was prejudiced is not sufficient."

Hyde v. State, 950 So. 2d 344, 356 (Ala. Crim. App. 2006). "The sufficiency of pleadings in a Rule 32 petition is a question of law [and] '[t]he standard of review for pure questions of law in criminal cases is de novo.'" Ex parte Beckworth, 190 So. 3d 571, 573 (Ala. 2013) (quoting Ex parte Lamb, 113 So. 3d 686, 689 (Ala. 2011)).

Analysis

I.

Jones contends that the circuit court erred in summarily dismissing his claims that his trial counsel were ineffective during the guilt phase of his capital-murder trial. Jones was represented at trial, and on direct appeal, by Clark Parker and Thomas Brantley.

A.

Jones argues that the circuit court erred in dismissing his claim that his trial counsel were ineffective for relying on what he characterizes as a "legally invalid defense." (Jones's brief, p. 14.) Jones alleged in his amended petition

that counsel erroneously relied on the fact that no property had been taken from Kirkland's house to argue that there was no evidence of a burglary when evidence of a theft is not an element of burglary.

In dismissing this claim, the circuit court stated:

> "Jones alleges that his trial counsel were ineffective for arguing that the State did not prove burglary because nothing was taken from inside the victim's home, where the victim's car was stolen from her carport. ... This claim is not facially meritorious.
>
> "Jones cites no authority for his allegation that trial counsel is constitutionally deficient for pursing an argument that ultimately did not work. Trial counsel's decision to highlight that nothing within the victim's home was taken was entirely consistent with the defense's theory that Jones may have been at the murder scene, but did not murder the victim.
>
> "For these reasons, Jones would not show deficient performance or prejudice upon these facts. ... Accordingly, this claim is dismissed."

(C. 1244.)

The record from Jones's direct appeal indicates that counsel moved for a judgment of acquittal, in part, on the ground that the State had presented no evidence indicating that Jones had the intent to commit a theft in Kirkland's residence, as was charged in the indictment. During closing argument, counsel argued that there was no evidence that

anything had been taken from Kirkland's house or that Jones had even been in Kirkland's house because Jones's fingerprints were not found in the house. Nothing in the record suggests that Jones's counsel did not know the law regarding burglary, and the arguments made by counsel were consistent with Jones's statements to police that he did not participate in the events that resulted in the victim's murder. Therefore, summary dismissal of this claim was proper.

B.

Jones argues that the circuit court erred in dismissing his claim that he was deprived of the effective assistance of counsel because, he alleged, one of his attorneys, Clark Parker, had a drinking problem and had been arrested for driving under the influence of alcohol ("DUI") while he was representing Jones. He argues that Parker's drinking problem infected every stage of the proceedings against Jones and that his other attorney, Thomas Brantley, was aware of Parker's drinking problem but failed to notify the trial court. Although Jones makes a general argument that Parker was ineffective because of alcohol, he cites to no specific instances where Parker's alleged drinking affected his performance during Jones's trial. In essence, Jones argues

that Parker's performance was per se ineffective because he drank alcohol during Jones's trial.

In dismissing this claim, the circuit court stated:

> "The United States District Court for the Northern District of Illinois examined a similar issue in United States v. Lloyd, 983 F. Supp. 738, 742 (N.D. Ill. 1997). Lloyd claimed that one of his two trial attorney, F. Lee Bailey, was drunk during portions of his trial. The district court held that a claim alleging ineffective assistance due to a drunk attorney must allege how counsel's alleged alcohol impairment actually caused constitutionally deficient performance and prejudice. Id. at 743.
>
> "While Jones pleads in detail that Parker had an alcohol problem, Jones does not plead that an act or omission by Parker was caused by Parker's being drunk. Accordingly, Jones fails to plead sufficient facts to support a finding of deficient performance. Likewise, Jones does not plead with adequate specificity that he was prejudiced by Parker's allegedly impaired performance.
>
> "Furthermore, as the district court noted in Lloyd, 983 F. Supp. at 743, Lloyd had another attorney who he did not allege was impaired by alcohol during trial. Like Lloyd, Jones had a second attorney. Tom Brantley represented Jones and actually served as Jones's primary counsel. This fact weighed against a finding of a Strickland [v. Washington, 466 U.S. 668 (1984),] violation in Lloyd as it does here. Id. This claim is dismissed."

(C. 1205-06.)

In United States v. Lloyd, 983 F. Supp. 738 (N.D. Ill. 1997), the United States District Court considered whether defense counsel was ineffective because, Lloyd alleged,

counsel was drunk during parts of Lloyd's trial. The federal court stated:

> "[Lloyd] thus gives us no basis to infer that [counsel's] conduct at trial left some important stone unturned or some thematic question unanswered in the jurors' minds. In short, [Lloyd] has not demonstrated anything near the deprivation of 'fundamental fairness' which he must show before we will consider his underlying claims. ...
>
> "....
>
> "... [W]e note that [F. Lee] Bailey was not [Lloyd's] only attorney. In a case such as this one, where the ineffective assistance claim requires this Court to distinguish between the 'strategic mistakes' of effective counsel and the 'uninformed blunders' of ineffective counsel, [United States v.] Jackson, 930 F. Supp. [1228] at 1233 [N.D. Ill. 1996)], we believe that a petitioner with multiple attorneys must, as a practical matter, make a particularly strong showing that counsel's putative errors were of the latter type. Thus, even if [trial counsel's] trial prowess arguably fell below the level which Strickland [v. Washington, 466 U.S. 668 (1984)] requires, [second counsel's] ability to monitor and correct any of [trial counsel's] mistakes makes Mario's case a tougher one to make. Cf. Stoia v. United States, 109 F.3d 392, 398-99 (7th Cir. 1997) (discussing multiple attorneys and ineffective assistance in the conflict of interest context)."

Lloyd, 983 F. Supp. at 743. See also Commonwealth v. Burton, 491 Pa. 13, 21, 417 A.2d 611, 615 (1980) ("[O]ther than implying that his counsel's drinking resulted in counsel's failure to object to the questioning of defense witness Bowen

about his prior arrests and convictions, an allegation of ineffectiveness we have already disposed of, Burton does not assert any instance in which counsel's drinking resulted in ineffective assistance.).

"It is well-settled that alcoholism, mental illness, and other conditions are not enough to show ineffective assistance of counsel in the absence of a specific showing of deficient performance resulting from these conditions." Snow v. Pfister, 240 F. Supp. 3d 854, 876 (N.D. Ill. 2016).

> "We agree with the District Court that the general allegations of alcohol use do not require a departure from Strickland's [v. Washington, 466 U.S. 668 (1984)] two-prong standard -- a point conceded by [the appellant] in his new-trial memorandum. Alcohol or drug use by trial counsel can certainly be relevant to both parts of an ineffectiveness inquiry, especially if amplified or systemic, or on close questions of strategy and jury perception. But on these facts, alleged substance abuse is not, without more, one of the rare forms of dereliction amounting to the per se denial of a defendant's Sixth Amendment right to the effective assistance of counsel."

United States v. Washington, 869 F.3d 193, 204 (10th Cir. 2017). "[U]nder Strickland the fact that an attorney used drugs is not, in and of itself, relevant to an ineffective assistance claim. The critical inquiry is whether, for whatever reason, counsel's performance was deficient and

whether that deficiency prejudiced the defendant." Berry v. King, 765 F.2d 451, 454 (5th Cir. 1985).

> "[I]n order for an attorney's alcohol addiction to make his assistance constitutionally ineffective, there must be specific instances of deficient performance attributable to alcohol. See Bonin v. Calderon, 59 F.3d 815, 838 (9th Cir. 1995); Caballero v. Keane, 42 F.3d 738, 740 (2d 1994); Berry v. King, 765 F.2d 451, 454 (5th Cir. 1985); Young v. Zant, 727 F.2d 1489, 1492-93 (11th Cir. 1984). In this case, there is no evidence of specific instances of defective performance caused by [counsel's] alcohol abuse. Furthermore, it is significant that [the appellant] was not represented by [counsel] alone -- he had the benefit of two court-appointed lawyers assisting in his defense. And no attack is made on the professional capacity of [the second attorney]. See Lopez-Nieves v. United States, 917 F.2d 645, 647 (1st Cir. 1990) ('[T]he presence of a second attorney during the proceedings seriously undermines appellant's claim of ineffective assistance of counsel.')."

Frye v. Lee, 235 F.3d 897, 907 (4th Cir. 2000). See also Snow v. Pfister, 240 F. Supp. 3d 854, 876 (N.D. Ill. 2016), quoting United States v. Dunfee, 821 F. 3d 120, 128 (1st Cir. 2016) ("Where a 'defendant was represented by multiple attorneys, an ineffective assistance challenge is particularly difficult to mount.'").

It is not per se ineffective for a lawyer to have used alcohol or drugs during the representation of a client and, as noted above, Jones failed to plead in his amended petition

specific instances where the consumption of alcohol rendered Parker's performance deficient. Also, Jones was represented by a second attorney who Jones does not allege drank alcohol during the trial. Because Jones failed to plead any specific instances where Parker's actions or inactions were deficient as a result of his alleged drinking, Jones failed to sufficiently plead his claim. Therefore, summary dismissal of this claim was proper.

C.

Jones also argues that the circuit court erred in dismissing his claim that his trial counsel had a conflict of interest because the same district attorney prosecuting Jones had charged Parker with DUI and Brantley had represented Parker in the DUI proceedings.

In his amended petition, Jones alleged that Parker had been arrested for DUI in April 2004, after Jones had been convicted of capital murder and the jury had recommended a sentence of death, but before the trial court had sentenced him; that Brantley represented Parker in the DUI proceedings and Parker was convicted of DUI in November 2004; and that he was never informed of Parker's arrest and subsequent

conviction even though Brantley and Parker continued to represent him on appeal.

In dismissing this claim, the circuit court stated:

> "Jones alleges that his trial counsel, Clark Parker and Tom Brantley, were actually conflicted because Parker was charged with DUI by Doug Valeska, who prosecuted Jones for capital murder, and because Brantley represented Parker in the DUI proceedings. Assuming the facts pleaded were proved by a preponderance of the evidence at an evidentiary hearing, Jones would not establish that his trial counsel were conflicted. For the reasons stated below, this claim is not facially meritorious; therefore, it is dismissed.
>
> "A defendant claiming that his trial counsel had an actual conflict must show 'that his counsel actively represented conflicting interests,' or that his counsel 'made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other.' M.S. v. State, 822 So. 2d 449, 453 (Ala. Crim. App. 2000).
>
> "Jones alleges that Parker -- and Brantley, acting as Parker's lawyer -- had an 'incentive and duty' to protect Parker's interests. Of course, as Jones's lawyer, Brantley also had an 'incentive and duty' to protect Jones's interests. The prosecution of Parker for DUI by the same prosecutor who was prosecuting Jones does not itself give rise to an actual conflict. Essentially, Jones makes a bald allegation that his trial counsel could have made decisions against Jones's interests to 'curry favor' with Doug Valeska. However, Jones does not plead that there was an agreement between his trial counsel and Valeska for trial counsel to do anything in exchange for special treatment of Parker in his DUI case. Nor does Jones plead with adequate specificity that trial counsel actually did

> something that was against Jones's interest, or failed to do something that would have benefitted Jones, because of the alleged conflict.
>
> "The record shows that Jones's trial counsel filed appropriate motions on his behalf and adequately represented him at trial. For these reasons, this claim is not facially meritorious and therefore is dismissed."

(C. 1206-08.)

The record from Jones's direct appeal reflects that Jones was convicted of capital murder on March 12, 2004; that, on March 15, 2004, the jury recommended that he be sentenced to death; and that the sentencing hearing before the trial court was conducted on June 8, 2004. On April 11, 2004, Parker was arrested for DUI. Parker pleaded not guilty on April 23, 2004, and was convicted of DUI in the district court on November 23, 2004. Counsel's brief on direct appeal was filed with this Court in March 2005, months after Parker's conviction.

Jones relies on the case of United States v. DeFalco, 644 F.2d 132 (3d Cir. 1979), to support his claim that an actual conflict of interest existed in this case that automatically rendered counsel's performance deficient. In DeFalco, counsel was appointed to represent DeFalco on direct appeal. Unbeknownst to DeFalco, counsel had been "indicted three

times," had entered into plea negotiations, and had entered into a "guilty plea for himself in the same court and with the tangential involvement of the sentencing judge from which his client's appeal is prosecuted." 644 F.2d at 136. The DeFalco court held: "We are persuaded that, even without proof of an actual conflict of interest, legitimate decisions of counsel were rendered suspect because of the potential for conflicting loyalties to himself and his client." 644 F.2d at 137.

However, DeFalco was released before the United States Supreme Court released its decision in Cuyler v. Sullivan, 446 U.S. 335 (1980), and is readily distinguishable from the facts of this case. In Cuyler, the Supreme Court held that there must be an actual conflict of interest, not a potential conflict of interest, in order to render counsel's assistance ineffective. In applying the standard announced by the United States Supreme Court in Cuyler, the United States Court of Appeals for the Sixth Circuit explained:

> "The instant case involves a specific type of ineffectiveness claim, that of conflict of interest, which is also examined under a slightly different standard from that used in a traditional ineffectiveness claim. The Supreme Court set forth the standard for determining conflict of interest cases in Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), and summarized it again in Strickland as follows:

> "'In Cuyler ... [we] held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts ... it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above [actual or constructive denial of the assistance of counsel altogether]. Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'
>
> "Strickland, 466 U.S. at 692, 104 S.Ct. at 2067 (emphasis added) (quoting Cuyler, 446 U.S. at 345–50, 100 S.Ct. at 1716–19). This Circuit has interpreted the Cuyler test as directing courts 'to determine, on the facts of each case, whether there is an actual conflict of interest and whether that conflict has caused ineffective performance in violation of the provisions of the Sixth Amendment....' Smith v. Bordenkircher, 671 F.2d 986, 987 (6th Cir.), cert. denied, 459 U.S. 848, 103 S.Ct. 107, 74 L.Ed.2d 96 (1982)."

Thomas v. Foltz, 818 F.2d 476, 480 (6th Cir. 1987).

In a scenario similar to the one in this case, the United States Court of Appeals for the Seventh Circuit stated:

> "[The appellant] claims that he did not get a fair trial. ... The first is that his lawyer had a conflict of interest. He was under investigation for bribing police officers to reduce charges against his clients. The prosecutor's office -- the same office that prosecuted [the appellant] -- had given the lawyer immunity in exchange for cooperation and had promised, if the lawyer fulfilled his part of the bargain, to help him retain his license to practice law. A situation of this sort (the criminal defendant's lawyer himself under criminal investigation), which unfortunately is all too common, see, e.g., United States v. Balzano, 916 F.2d 1273, 1292–93 (7th Cir. 1990); United States v. Levine, 794 F.2d 1203 (7th Cir. 1986), can create a conflict of interest. It may induce the lawyer to pull his punches in defending his client lest the prosecutor's office be angered by an acquittal and retaliate against the lawyer. Such retaliation would be unethical; but still the defense lawyer may fear it, at least to the extent of tempering the zeal of his defense of his client somewhat. Yet presumably the fear would have to be shown before a conflict of interest could be thought to exist. But let us pass that point by and assume that the situation in this case as we have outlined it created a conflict of interest. The existence of a conflict does not automatically entitle the defendant to habeas corpus on the ground that he was deprived of his constitutional right to the effective assistance of counsel. Unless the conflict was brought to the trial judge's attention, the defendant must point to specific instances in which the lawyer would have done something different in his conduct of the trial had there been no conflict of interest. Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S.Ct. 1708, 1718, 64 L.Ed.2d 333 (1980); United States v. Cirrincione, 780 F.2d 620, 630–31 (7th Cir. 1985)."

Thompkins v. Cohen, 965 F.2d 330, 332 (7th Cir. 1992). See also United States v. Cirrincione, 780 F.2d 620, 629 (7th Cir. 1985) ("An actual conflict of interest that adversely affected the defendants' lawyers' performance must be evidenced by specific instances in the record.").

The Colorado Supreme Court has also stated:

> "[W]e conclude that no actual conflict of interest was created by the pendency of these charges. Prosecution for failure to obey a traffic signal and failure to present proof of insurance does not put counsel in fear of his or her own zealous advocacy or in a position 'inherently conducive to and productive of divided loyalties.' See People v. Castro, supra, 657 P.2d [932] at 945 [(Colo. 1983)]; cf. United States v. DeFalco, supra, 644 F.2d [132] at 136 [(3d Cir. 1979)] (federal mail fraud charges create 'inherent emotional and psychological barriers' to counsel's ability to compete 'vigorously with the government').
>
> "Nor does defendant show any adverse effect on counsel's representation. Defendant does not point to any instance where counsel's actions might have been hindered by concern for his own traffic violation charges. See Cuyler v. Sullivan, [446 U.S. 335 (1980)]; United States v. Baker, 256 F.3d 855 (9th Cir. 2001) (bare allegation of conflict based on attorney's cooperation and plea on unrelated charges insufficient basis on which to predicate actual conflict); United States v. Balzano, 916 F.2d 1273 (7th Cir. 1990) (no conflict where defendant did not show actual effect on trial); Sanchez v. State, 296 Ark. 295, 756 S.W.2d 452 (1988) (same); cf. United States v. McLain, [823 F.2d 1457 (11th Cir. 1987)] (actual conflict where defense counsel had personal interest in extending duration of defendant's trial)."

People v. Mata, 56 P.3d 1169, 1173 (Colo. 2002).

Here, Jones did not plead in his amended petition any specific instances where counsel's representation was affected by Parker's arrest and prosecution for DUI. In fact, Jones had been convicted and a sentencing recommendation had been made by the jury before Parker was arrested for DUI. Parker's case was pending in the district court, before a different judge, and not the same judge presiding over Jones's capital-murder case. Also, counsel filed the appellate brief in this Court months after Parker had been convicted of DUI; thus, counsel's actions on appeal could not have possibly been affected by his "pending" DUI charges.

Therefore, summary dismissal of this claim was proper.

D.

Jones also argues that the circuit court erred in dismissing his claim that his trial counsel were ineffective for not obtaining a blood-spatter expert to challenge the testimony given by State's witness Katherine McGeehan.

In his amended petition, Jones alleged that his counsel should have retained blood-spatter expert Gene N. Gietzen, who he said was available in 2004, to refute "McGeehan's testimony that 'high velocity' bloodstains can result from 'a pool of

blood being hit very hard' causing 'the blood to fly in the air and the higher the velocity the smaller the stain.'" (C. 510.) According to Jones, Gietzen would have testified that high-velocity bloodstains are "most frequently" seen with gunshot wounds; that blunt-force trauma -- the cause of Kirkland's death -- generally produces medium-velocity bloodstains; that he saw no high-velocity bloodstains in the photographs of the crime scene; and that there would likely be a significant amount of larger medium-velocity bloodstains on an assailant inflicting blunt-force trauma, not the "'pinpoint' bloodstain" found on Jones's clothing. (C. 511-12.)

Although Jones identified in his petition the name of the expert he believed counsel should have retained and specifically identified the testimony he believed the expert would have provided, he failed to allege sufficiently specific facts to overcome the presumption that counsel's not retaining a blood-spatter expert was sound trial strategy, and he made only bare allegations of prejudice, i.e., that McGeehan's testimony was of "extreme importance" to the State's case and that a blood-spatter expert was "essential to undermining the State's case" because "the only physical evidence in this case

suggesting that [he] was ever in direct contact with the victim was the State's DNA analysis of a 'pinpoint' bloodstain allegedly obtained from [his] clothing." (C. 512.)

As Jones conceded in his petition, however, it was the evidence indicating that the DNA of the bloodstains on Jones's clothing belonged to Kirkland, not McGeehan's testimony about blood-spatter, that linked Jones to the murder.[3] In fact, Jones's claim appears to be premised on the incorrect assumption that McGeehan testified that the "pinpoint" bloodstains on his clothing were, in fact, high-velocity bloodstains. She did not. After McGeehan testified that there were several small "pinpoint" bloodstains on Jones's clothing, the following occurred:

> "[Prosecutor]: Do you have an opinion, once again, if you can tell me, how you use the terminology pinpoint stains, how they could be transferred from one human being on clothing like that in your opinion if you have one? And the design that you saw you use pinpoint. What could cause that?
>
> "[McGeehan]: That can be caused by blood floating in the air at a high velocity or -- there's a couple of ways that it can be caused, but blood

[3]McGeehan tested various pieces of evidence to determine the presence of blood, but another forensic scientist, Phyllis Rollan, conducted the DNA testing. We note that Jones's counsel did request funds to hire a serologist or DNA expert.

being -- a pool of blood being hit very hard can cause blood to fly in the air and the higher the velocity the smaller the stain.

"[Prosecutor]: Is it consistent there's a large amount of blood, in other words, all over my clothes, on me particularly hypothetically because I'm showing you here on my pants and I bump up against those white pants hypothetically, would I get pinpoint touching like that?

"[McGeehan]: No. That type of staining would be considered transferred stains, and it would be -- depending on the amount of blood on the item you touched and how long that touch or that contact is made would depend on how much blood would transfer from the bloody item to the other item, and that would be more of a smear or a soaking stain. It would not be small pinpoint stains."

(Trial R. 638-39.) On cross-examination, the following occurred:

"[McGeehan]: In this case the majority of the stains were small pinpoint stains.

"[Jones's counsel]: And [the prosecutor] asked you earlier about how the method or the way that those stains got there that would have been flying through the air I believe you described it as.

"[McGeehan]: I described that as possible, yes.

"[Jones's counsel]: Do you -- and I believe you said also that the -- that it would be traveling at a high rate of speed? Do I recall that correctly?

"[McGeehan]: Small pinpoint stains can come from high velocity.

"[Jones's counsel]: Now, you don't have any way to know exactly how those stains got there, do you?

"[McGeehan]: No, I do not.

"[Jones's counsel]: And is it possible that these stains could have gotten on some of this clothing from a person stepping into a pool of blood and making a splash? Is that not possible? Just as if someone --

"[McGeehan]: I step -- it would not -- those stains would probably not be there was a step. Possibly a running or a stomp.

"[Jones's counsel]: Yes.

"[McGeehan]: But not a casual step.

"[Jones's counsel]: And I should have characterized that. A stomp or a forceful motion with a foot down, a stomp is a good way to describe it, can splatter that and send it airborne, is that correct?

"[McGeehan]: Yes.

"[Jones's counsel]: That's possible. And also it can be slung off of an object that the blood is on, could it not? Just like if you take a paint brush and sling a paint brush, is that possible?

"[McGeehan]: Yes. Small stains can come from another object moving at a high velocity being slung off in various methods, yes."

(Trial R. 688-89.)

As the above-quoted portion of the record reflects, McGeehan testified that there were a number of ways to create "pinpoint" bloodstains like those found on Jones's clothing and that blood floating in the air at a high velocity was one

way. However, she never testified that the "pinpoint" stains found on Jones's clothing were, in fact, high-velocity bloodstains. She also did not testify that there were high-velocity bloodstains found at the crime scene or that the infliction of blunt-force trauma would result in high-velocity bloodstains and not medium-velocity bloodstains on the assailant's clothing. Gietzen's testimony, as pleaded in Jones's amended petition, would not have refuted McGeehan's testimony. Moreover, McGeehan's testimony, both on direct examination and cross-examination, was consistent with Jones's statement to police that he was present at the time of the murder but did not participate in it.

> "The decision of how to deal with the presentation of an expert witness by the opposing side, including whether to present counter expert testimony, to rely upon cross-examination, to forgo cross-examination and/or to forgo development of certain expert opinion, is a matter of trial strategy which, if reasonable, cannot be the basis for a successful ineffective assistance of counsel claim."

Thomas v. State, 284 Ga. 647, 650, 670 S.E.2d 421, 425 (2008).

Under these circumstances, we cannot say that Jones pleaded sufficient facts to overcome the presumption that counsel's not retaining a blood-spatter expert was sound trial strategy or to establish that he was prejudiced by counsel's

performance. Therefore, summary dismissal of this claim was proper.

E.

Jones argues that the circuit court erred in dismissing his claim that his trial counsel were ineffective for not challenging the admissibility of DNA evidence.

In dismissing this claim, the circuit court stated:

> "Jones argues that trial counsel were deficient in failing to demand a ... hearing to challenge the admissibility of the DNA evidence, but a hearing is unnecessary when there are no legitimate challenges to the DNA evidence. The record shows that a proper predicate was laid for the introduction of DNA evidence. None of the arguments Jones raised would have resulted in the exclusion of DNA evidence in this case.
>
> "Jones also argues that the State did not meet admissibility requirements for DNA evidence because it did not introduce any evidence of the rate of error for its technique, but, as Jones admits in his amended petition, the Alabama Court of Criminal Appeals has held that 'the absence of testimony regarding the factor [error rate] will not, alone, render DNA evidence inadmissible.' Lewis v. State, 889 So. 2d 623, 672 (Ala. Crim. App. 2003).
>
> "Jones also argues that trial counsel should have challenged the chain of custody of the DNA evidence, but Jones's trial counsel would have been unsuccessful if they had challenged the chain of custody. As an initial matter, Jones does not contend that the alleged missing link in the chain -- Holli Spiers -- would not have been able to provide direct testimony had a challenge to the chain of custody been made.

"The State's reliance on circumstantial evidence of the chain of custody was adequate. See e.g., Smith v. State, 677 So. 2d 1240, 1245 (Ala. Crim. App. 1995) ('If the State, or any other proponent of demonstrative evidence, fails to identify a link ... the result is a 'missing' link, and the item is inadmissible. If, however, the State has shown each link, but has done so with circumstantial evidence, as opposed to the direct testimony of the 'link,' as to one or more criteria or as to one or more links, the result is a 'weak' link. When the link is 'weak,' a question of credibility and weight is presented, not one of admissibility.'). 'In the absence of any evidence to the contrary, the trial judge was entitled to assume that this official would not tamper with the sack and can or their contents. Where no evidence indicating otherwise is produced, the presumption of regularity supports the official acts of public officers, and courts presume that they have properly discharged their official duties.' Thomas v. State, 824 So. 2d 1, 45-46 (Ala. Crim. App. 1999) (overruled on other grounds by Ex parte Carter, 889 So. 2d 528 (Ala. 2004)). Under these precedents, DNA evidence was properly admitted in this case.

"Jones further argues that effective trial counsel would have challenged admissibility under the Confrontation Clause and the hearsay rules. Specifically, Jones argues that the Confrontation Clause was violated because [Hollie] Spiers -- the laboratory technician who cut a patch containing a blood sample from Jones's sweatpants that was subjected to DNA testing -- did not testify. However, neither the Confrontation Clause nor the hearsay rules are implicated where there is no testimonial evidence at issue. See Davis v. Washington, 547 U.S. 813, 824 (2006) (stating that Confrontation Clause jurisprudence is 'applied only in the testimonial context.'). Here, Spiers did not prepare a report. The State's DNA expert, Phyllis Rollan, testified at trial and was subject to cross-

> examination. Hence, an objection on these grounds would have been overruled.
>
> "....
>
> "For these reasons, Jones fails to plead a facially meritorious claim; accordingly, this claim is dismissed."

(C. 1225-29.)

We agree with the circuit court. The record from Jones's direct appeal reflects that Phyllis Rollan testified extensively about her qualifications and the DNA testing procedures employed by the Alabama Department of Forensic Sciences, as well as the controls used to ensure the accuracy of DNA tests. Her testimony was sufficient to satisfy the requirements for the admissibility of DNA evidence. See § 36-18-30, Ala. Code 1975. In addition, the lack of testimony from Hollie Spiers -- the laboratory technician who cut the samples from Jones's clothing -- did not result in a missing link in the chain of custody nor did it violate Jones's right to confrontation. "Counsel cannot be said to be ineffective for not filing a motion for which there is no legal basis." Boyd v. State, 746 So. 2d 364, 397 (Ala. Crim. App. 1999). Moreover, because the DNA evidence was properly admitted, we

cannot say that trial counsel were ineffective for not requesting a pretrial hearing on the matter.

Therefore, summary dismissal of this claim was proper.

F.

Jones also argues that the circuit court erred in dismissing his claim that his trial counsel were ineffective for not objecting to numerous instances of what he alleged was prosecutorial misconduct.

> "'[E]ffectiveness of counsel does not lend itself to measurement by picking through the transcript and counting the places where objections might be made. Effectiveness of counsel is not measured by whether counsel objected to every question and moved to strike every answer.' Brooks v. State, 456 So. 2d 1142, 1145 (Ala. Crim. App. 1984). '"[D]ecisions of when and how to raise objections are generally matters of trial strategy."' Daniels v. State, 296 Ga. App. 795, 800, 676 S.E.2d 13, 19 (2009) (quoting Holmes v. State, 271 Ga. App. 122, 124, 608 S.E.2d 726, 729 (2004))."

Washington v. State, 95 So. 3d 26, 66 (Ala. Crim. App. 2012). "'Isolated failures to object are typically not sufficient grounds for a finding of ineffective assistance.'" Id. (quoting Nadal v. State, 348 S.W.3d 304, 321 (Tex. App. 2011)). Moreover, this Court has stated:

> "'[I]nterruptions of arguments, either by opposing counsel or the presiding judge, are matters to be approached cautiously.' United States v. Young, 470 U.S. 1, 13, 105 S.Ct. 1038, 84 L.Ed.2d 1

> (1985). 'A decision not to object to a closing argument is a matter of trial strategy.' Drew v. Collins, 964 F.2d 411, 423 (5th Cir. 1992). To constitute error a prosecutor's argument must have 'so infected the trial with unfairness as to make the resulting [verdict] a denial of due process.' Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986)."

Benjamin v. State, 156 So. 3d 424, 454 (Ala. Crim. App. 2013).

1.

First, Jones contends that his trial counsel should have objected to what he says was the improper admission of victim-impact evidence. He asserts that this evidence was prejudicial and totally irrelevant to his guilt and resulted in reversible error.

Although some of the evidence cited by Jones in his amended petition could arguably be considered victim-impact evidence, its admission was, at most, harmless.

> "It is presumed that jurors do not leave their common sense at the courthouse door. It would elevate form over substance for us to hold, based on the record before us, that [Jones] did not receive a fair trial simply because the jurors were told what they probably had already suspected -- that [the victim] was not a 'human island,' but a unique individual whose murder had inevitably had a profound impact on [his] children, spouse, parents, friends, or dependents (paraphrasing a portion of Justice Souter's opinion concurring in the judgment in Payne v. Tennessee, 501 U.S. 808, 838, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991))."

Ex parte Rieber, 663 So. 2d 999, 1006 (Ala. 1995). "[W]hen, after considering the record as a whole, the reviewing court is convinced that the jury's verdict was based on the overwhelming evidence of guilt and was not based on any prejudice that might have been engendered by the improper victim-impact testimony, the admission of such testimony is harmless error." Ex parte Crymes, 630 So. 2d 125, 126 (Ala. 1993). "'Harmless error does not rise to the level of the prejudice required to satisfy the Strickland test.'" State v. Kerley, 260 So. 3d 891, 902 (Ala. Crim. App. 2017) (quoting Gaddy v. State, 952 So. 2d 1149, 1160 (Ala. Crim. App. 2006)).

Therefore, summary dismissal of this claim was proper.

2.

Jones also contends that his trial counsel should have objected to the admission of what he describes as "aggravating factors" and the prosecutor's comments on that evidence. (Jones's brief, p. 59.) Specifically, he argues that evidence was presented about, and the prosecutor frequently referred to, the severity of the beating Kirkland suffered before her death.

In dismissing this claim, the circuit court stated:

> "Jones ... alleges that his trial counsel were ineffective for not objecting to evidence of the brutality of the murder offered during the guilt phase. He argues that the evidence was not relevant in the guilt phase because it was relevant in the penalty phase to prove the Alabama Code [1975,] § 13A-5-49(8), aggravating circumstances that the crime was 'especially heinous, atrocious, or cruel.' This claim is not facially meritorious.
>
> "A prosecutor is allowed to make reasonable inferences from facts in evidence. ... The complained-of evidence was mere res gestae evidence. Accordingly, Jones would not be able to establish deficient performance and prejudice on these facts at an evidentiary hearing. Therefore, this claim is dismissed."

(C. 1243.) We agree.

"The pain and suffering of the victim is a circumstance surrounding the murder -- a circumstance that is relevant and admissible during the guilt phase of a capital trial." McCray v. State, 88 So. 3d 1, 38 (Ala. Crim. App. 2010). And the prosecutor's comments were proper comments on the evidence. "Whatever is in evidence is subject to comment by the prosecutor, and he may argue every legitimate inference therefrom." Lewis v. State, 24 So. 3d 480, 503 (Ala. Crim. App. 2006), aff'd, 24 So. 3d 540 (Ala. 2009). "Counsel cannot be ineffective for failing to raise an issue that has no merit." Bush v. State, 92 So. 3d 121, 140 (Ala. Crim. App. 2009).

Therefore, summary dismissal of this claim was proper.

3.

Jones contends that his trial counsel should have objected when, he says, the prosecutor improperly vouched for Jones's guilt during voir dire, opening statement, and closing argument.

In dismissing this claim, the circuit court stated:

> "Jones alleges that trial counsel should have objected to alleged improper vouching by the prosecutor. He takes certain remarks by the prosecutor out of context in an effort to show that the prosecutor vouched for Jones's guilt, but the record shows that the prosecutor did not actually vouch for Jones's guilt. Whether to object here was a matter of trial strategy. See Ray [v. State], 80 So. 3d [965] at 995 [(Ala. Crim. App. 2011)]. Counsel's decision not to object was not objectively unreasonable, and the facts pleaded would not establish prejudice.
>
> "As for the remaining allegations in this claim, the prosecutor's actions at most amounted to harmless error. Again, counsel was not objectively unreasonable for not objecting, and even if the facts pleaded here are true, Jones would not establish prejudice at an evidentiary hearing."

(C. 1223-24.) We agree.

We have reviewed the complained-of comments and conclude that they did not so infect the trial with such unfairness as to deny Jones due process. See Darden v. Wainwright, 477 U.S. 168 (1986). We agree with the circuit court that the comments

were, at most, harmless. In addition, the jurors were instructed that arguments of counsel are not evidence. As noted previously, "'[h]armless error does not rise to the level of the prejudice required to satisfy the Strickland test.'" State v. Kerley, 260 So. 3d 891, 902 (Ala. Crim. App. 2017) (quoting Gaddy v. State, 952 So. 2d 1149, 1160 (Ala. Crim. App. 2006)).

Therefore, summary dismissal of this claim was proper.

G.

Jones argues that the circuit court erred in dismissing his claim that his trial counsel were ineffective for not timely making an objection pursuant to Batson v. Kentucky, 476 U.S. 79 (1986), but, instead, waiting until after the jury had been sworn and the venire had been excused before making the objection.

However, the record from Jones's direct appeal reflects that trial counsel timely made a Batson objection after the jury was struck but before it was sworn. Although the trial court declined to hear the objection at that time and did not conduct a hearing until after the jury had been sworn and the venire dismissed, counsel's objection was nonetheless timely. Moreover, in dismissing this claim, the circuit court found

that Jones's Batson objection had been properly overruled and that, therefore, Jones was not prejudiced even if counsel's objection had been untimely. We agree.

The record from Jones's direct appeal reflects that there were 69 prospective jurors on the venire; that the State struck 25 prospective jurors, 6 of whom were black; and that 2 black jurors sat on the petit jury.[4] Jones made a Batson objection immediately after the jury was struck, and the trial court conducted a hearing after the jury had been sworn and the venire released. At the hearing, the prosecutor provided his reasons for striking the six black prospective jurors: Prospective Juror C.M. was struck because she failed to disclose during voir dire that she had been convicted of driving without a driver's license and that she had a brother who worked as a security guard at the Houston County jail; Prospective Juror B.L.M., was struck because he had been convicted of assault; Prospective Juror P.S. was struck because she stated during voir dire that she had been represented by defense counsel and "he had got her off" (Trial

[4]For purposes of this Batson analysis, alternate jurors are included. See Ashley v. State, 651 So. 2d 1096, 1099 (Ala. Crim. App. 1994).

R. 232); Prospective Juror S.L. was struck because she had been convicted of harassing communications; Prospective Juror C.P. was struck because he knew one of the defense attorneys and had a relative who had mental-health problems; and Prospective Juror C.W. was struck because he stated during voir dire that his house had been burglarized and that no one had been arrested for the crime, and he laughed loudly during this questioning and did not appear to take the proceedings seriously. With respect to C.W., one of the other prosecutors also stated that C.W. had laughed very loudly during the questioning about him being the victim of a crime, but Jones's counsel indicated that they did not witness any laughing. The trial court denied counsel's Batson objection.

All of the prosecutor's reasons for striking the black prospective jurors were race-neutral. See, e.g., Snyder v. Louisiana, 552 U.S. 472, 477 (2008) ("[R]ace-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention), making the trial court's first-hand observations of even greater importance."); Ex parte Brown, 686 So. 2d 409 (Ala. 1996) (holding that the fact that a prospective juror has a criminal history or has a relative who has a criminal history is a race-neutral reason

for a peremptory strike); Graham v. State, [Ms. CR-15-0201, July 12, 2019] ___ So. 3d ___, ___ (Ala. Crim. App. 2019) (holding that the fact that a prospective juror has been the victim of a crime or has a relative who has been the victim of a crime is a race-neutral reason for a peremptory strike); and Whatley v. State, 146 So. 3d 437, 456 (Ala. Crim. App. 2010) ("A juror's knowing defense counsel is a valid race-neutral reason for striking a juror."). In addition, the record from Jones's direct appeal does not indicate that the struck jurors shared only the characteristic of race. There was nothing in the type or manner of the prosecutor's statements or questions during voir dire indicating an intent to discriminate against black prospective jurors, and there was no lack of meaningful voir dire directed at black prospective jurors. Moreover, black and white prospective jurors were not treated differently. "It is well settled that '[a] trial court's ruling on a Batson motion depends on its credibility determinations.' ... In other words, this Court 'will give a trial court's ruling great deference. ...'" Wilson v. State, 142 So. 3d 732, 757 (Ala. Crim. App. 2010). Because the trial court properly denied Jones's Batson objection, even had counsel's objection been untimely Jones was not prejudiced.

Therefore, summary dismissal of this claim was proper.

H.

Jones argues that the circuit court erred in dismissing his claim that his trial counsel were ineffective for not challenging for cause two prospective jurors who, he claimed, were biased against him. Specifically, Jones argues that trial counsel should have challenged Prospective Juror S.W. on the ground that S.W. had a sister who had been murdered approximately 10 years before Jones's trial and stated during voir dire that this would affect his ability to be impartial. He also argues that trial counsel should have challenged for cause Prospective Juror H.P. on the ground that H.P. knew Officer Donovan Kilpatrick, a State's witness, and that he would be inclined to trust his testimony.

The record from Jones's direct appeal reflects the following exchange with S.W. during voir dire:

"[S.W.]: My sister was murdered.

"[Jones's counsel]: How long ago was that?

"[S.W.]: About nine or ten years ago.

"[Jones's counsel]: Do you think that fact would affect you as sitting in this case as a juror?

"[S.W.]: (Nodded.)"

(Trial R. 160.) However, the record does not indicate whether this "nod" was an affirmative or a negative response to counsel's question, and S.W. stated nothing else about this during voir dire. The record does show that prospective jurors were asked if anyone had any bias that would prevent them from being impartial in the case and that S.W. did not indicate that he had any such bias. "To justify a challenge for cause, there must be a proper statutory ground or '"some matter which imports absolute bias or favor, and leaves nothing to the discretion of the trial court."'" Ex parte Davis, 718 So. 2d 1166, 1171 (Ala. 1998) (quoting Clark v. State, 621 So. 2d 309, 321 (Ala. Crim. App. 1992), quoting in turn, Nettles v. State, 435 So. 2d 146, 149 (Ala. Crim. App.), aff'd, 435 So.2d 151 (Ala. 1983)). S.W.'s answers did not warrant his removal for cause.

H.P. stated during voir dire that he worked with and was friends with Off. Kilpatrick. The following then occurred:

> "[Jones's counsel]: You would place a lot of weight in what he said on the stand, wouldn't you?
>
> "[H.P.]: Probably so, yes.
>
> "[Jones's counsel]: Do you think you could sit on this case and be unbiased and -- especially when listening to Mr. Kilpatrick's testimony, the fact that you're his friend and work with him on a daily

basis, it would be hard for you to do that, wouldn't it? It would be hard for you to be objective?

"[H.P.]: Probably so, yes."

(Trial R. 183.) "It is only where the potential juror would '"unquestioningly credit the testimony of law enforcement officers over that of defense witnesses,"' that would render a prospective juror incompetent to serve." Duke v. State, 889 So. 2d 1, 23 (Ala. Crim. App. 2002), vacated on other grounds by Duke v. Alabama, 544 U.S. 901 (2005). H.P. did not indicate that he would unquestioningly credit Off. Kilpatrick's testimony over that of a witness for the defense or that he was biased. Rather, he stated only that he would "probably" place a lot of weight on Off. Kilpatrick's testimony and that it would "probably" be difficult for him to be objective. H.P.'s answers did not warrant his removal for cause.

"[C]ounsel could not be ineffective for failing to raise a baseless objection." Bearden v. State, 825 So. 2d 868, 872 (Ala. Crim. App. 2001). Because there was no basis to challenge for cause S.W. or H.P., summary dismissal of this claim was proper.

I.

Jones also argues that the circuit court erred in dismissing his claim that his trial counsel were ineffective for making what he claims were insensitive statements during voir dire. Specifically, he argues that counsel stated that they were afraid of Jones and that those "statements legitimized the insidious notion that it was permissible for the jurors to convict Jones based on their personal fears, without the requirement of due process." (Jones's brief, p. 75.)

In dismissing this claim, the circuit court stated:

> "Jones argues that his trial counsel were ineffective because they made the following comments during voir dire:
>
> > "'We all hate to pick up the paper or hear on the news, that someone in the community has been murdered, much less an elderly lady. I'm one of those people. I despise reading that. It makes me sick at my stomach and scares me. I'm wondering, you know, am I going to be next. I'm not far. Probably already am a senior citizen. ... We fear that we one day might be a victim or our children might be a victim. How many of you ... would convict [Jones] of capital murder ... simply out of fear that he may have committed this or ... simply out of fear that you suspect he may have but not convinced beyond a reasonable doubt? There's people that would do that. I might be one of them.'

"(R. 147-49).

> "This claim is meritless on its face. The record demonstrates that trial counsel's comments were designed to ferret out potential jurors who may vote to convict Jones based on fear and not the evidence in the case or the appropriate beyond-a-reasonable-doubt standard. Jones's allegation, if true, would not establish deficient performance or prejudice at an evidentiary hearing. Therefore, this claim is dismissed."

(C. 1218-19.) We agree.

> "'Generally, "[a]n attorney's actions during voir dire are considered to be matters of trial strategy," which "cannot be the basis" of an ineffective assistance claim "unless counsel's decision is ... so ill chosen that it permeates the entire trial with obvious unfairness."'
>
> "Neill v. Gibson, 263 F.3d 1184, 1193 (10th Cir. 2001) (quoting Nguyen v. Reynolds, 131 F.3d 1340, 1349 (10th Cir. 1997)). 'Counsel, like the trial court, is granted "particular deference" when conducting voir dire.' Keith v. Mitchell, 455 F.3d 662, 676 (6th Cir. 2006)."

Washington v. State, 95 So. 3d at 64.

Therefore, summary dismissal of this claim was proper.

J.

Jones argues that the circuit court erred in summarily dismissing his claim that his trial counsel were ineffective for "botching the pretrial publicity issue." (Jones's brief, p. 75.) Specifically, Jones argues that his trial counsel

were ineffective for not asking prospective jurors about their exposure to media coverage of the crime and that, therefore, counsel could not effectively conduct voir dire.

In dismissing this claim, the circuit court stated:

> "Jones does not specifically plead what effective trial counsel would have asked prospective jurors about their exposure to media coverage or what the jurors's response would have been. ... Furthermore, the media coverage Jones describes, if proved, would not establish that it was impossible for Jones to receive a 'fair and impartial' trial in Houston County.
>
> "For these reasons, the facts pleaded in Jones's amended Rule 32 petition would not establish deficient performance and prejudice at an evidentiary hearing. Accordingly, this claim is meritless on its face and is dismissed."

(R. 1215.) We agree with the circuit court. Jones failed to allege in his petition what questions he believed counsel should have asked prospective jurors, and, other than a bare allegation that "the majority of the jurors almost certainly had been exposed to publicity surrounding the case," he failed to identify in his petition a single prospective juror who had been exposed to media coverage of the crime. (C. 459.) He also made only a bare allegation that counsel's failure to adequately question prospective jurors "den[ied] him the ability to discover actual prejudice due to media saturation"

without alleging any specific facts indicating that, but for counsel's performance, there is a reasonable probability that the outcome of his trial would have been different.

Moreover, the record from Jones's direct appeal reflects that the trial court questioned prospective jurors about their exposure to media coverage:

> "THE COURT: Have you read, heard, or seen anything about the facts in this case that would bias your mind and prejudice your verdict and prevent you from giving a fair and impartial trial both to the State of Alabama and to [Jones], if you were selected as a juror to try this case?
>
> "(Hands raised.)
>
> "....
>
> "[Prospective Juror T.L.]: I have some relatives that actually live on the street that this lady lived on.
>
> "THE COURT: You have some relatives that live on Stadium Street. Do you know anything about the facts in this case or heard or read or seen anything?
>
> "[Prospective Juror T.L.]: I just heard there was a lady on the street that got killed.
>
> "THE COURT: That's all you know. And would that have any effect on the way you look at the case?
>
> "[Prospective Juror T.L.]: No, sir.
>
> "THE COURT: Would it prejudice you in any way either for the State or for [Jones]?

"[Prospective Juror T.L.]: No, sir.

"....

"[Prospective Juror C.S.]: I knew Ms. Kirkland personally and professionally.

"THE COURT: If you would, would you approach the bench, please, ma'am?

"(At which time the following proceedings were held at the bench outside of the hearing of the jury venire.)

"[Prospective Juror C.S.]: I worked at SouthTrust. I knew her from there. I've known her basically all my life.

"....

"THE COURT: I'm going to excuse [C.S.] as far as this case is concerned.

"....

"THE COURT: Did I see another hand?

"THE COURT: Your name?

"[Prospective Juror W.W.]: I have met Ms. Kirkland's daughter. She lives beside my daughter. And I also met another family member in Florida in January of this year.

"THE COURT: Would that bias your mind and prejudice your verdict the fact that you know the family and be impartial and --

"[Prospective Juror W.W.]: No.

"THE COURT: It would not?

"[Prospective Juror W.W.]: No."

(R. 46-50.) This was the extent of the prospective jurors who indicated that they had heard or had any knowledge concerning the facts of the case. The trial court also asked prospective jurors if any had a fixed opinion that would prevent them from being impartial and no one responded. The prospective jurors also completed lengthy juror questionnaires that included questions about their exposure to media coverage.

Therefore, summary dismissal of this claim was proper.

K.

Jones also argues that the circuit court erred in dismissing his claim that his trial counsel were ineffective for not arguing that his statements to police should have been suppressed on the ground that he was physically assaulted by police to secure the statements.

In dismissing this claim, the circuit court stated:

> "Jones alleges that the police coerced his statements 'by violently ramming his head into a door.' He claims his trial counsel should have argued for exclusion of his statements on this ground. This claim is not facially meritorious.
>
> "Jones fails to plead that his counsel knew or explain why they should have known of the alleged assault by police. See Alderman v. State, 647 So. 2d 28, 33 (Ala. Crim. App. 1994) (noting that a petitioner alleging a claim of ineffective assistance must plead that counsel had 'knowledge of facts giving rise to the claim asserted.'). Jones

argues that counsel should have interviewed him and reviewed the transcript of his statement in which he complains of a headache. However, an assault like the one described is not something that counsel would routinely ask a client about. There would have to be some reason to ask, and Jones offers no reason other than the transcript in which he complains of a headache. This Court cannot find, even if the facts pleaded are true, that trial counsel performed deficiently because they did not ask Jones why he had a headache during a police interview. Furthermore, Jones does not allege that he told his counsel that his statement to police was beaten out of him, something one would imagine a defendant would tell his counsel in a capital murder trial.

"Finally, Jones alleges that his sister, Lakeisha Jones, witnessed the alleged assault and could have told counsel about it if only they had asked her, but again Jones does not allege a reason why counsel should have asked Lakeisha Jones about any incident involving police brutality. Certainly, one would suspect that Lakeisha Jones would tell Jones's trial counsel about such an incident, if it actually happened and she knew about it.

"For the foregoing reasons, Jones's allegations that his trial counsel were constitutionally ineffective in moving to suppress his statements are not facially meritorious. Accordingly, these claims are summarily dismissed."

(C. 1211-12.) We agree.

The United States Supreme Court has held:

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant."

Strickland v. Washington, 466 U.S. 668, 691 (1984). See also Crum v. State, 611 So. 2d 495, 497 (Ala. Crim. App. 1992) ("Absent information from his client alerting him to a latent defect in the prior conviction that renders that conviction unavailable to enhance sentence, counsel is not ineffective for failing to challenge the use of a facially-valid prior conviction for enhancement purposes. The appellant's Rule 32 petition did not allege that he informed his attorney at the guilty plea proceedings that the prior convictions upon which the State relied to enhance his sentence occurred during his minority and were not preceded by advice regarding his right to apply for youthful offender treatment.").

Here, Jones failed to allege in his amended petition that his trial counsel were aware that he had been assaulted by police in order to secure his statements. "'Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b). The full factual basis must be included in the petition itself.'" Lee v. State, 44 So. 3d 1145, 1153 (Ala. Crim. App. 2009) (quoting Hyde v. State, 950 So. 2d 344, 356 (Ala. Crim. App. 2006)). Therefore, summary dismissal of this claim was proper.

L.

Jones argues that the circuit court erred in summarily dismissing his claim that his trial counsel were ineffective for not timely objecting to the admission of his second statement to police. Specifically, Jones argues that, "[a]t trial, when the officer who allegedly took Jones's unrecorded statement testified, counsel did not object until after the officer's testimony" and that, therefore, this Court reviewed the issue of the admissibility of that statement under the plain-error standard of review. (Jones's brief, p. 82.)

On direct appeal, this Court addressed the admissibility of Jones's second statement:

> "Initially, we note that no objection was raised regarding Officer Beeson's rebuttal testimony concerning Jones's second statement until the end of his testimony, at which time defense counsel requested that Beeson's testimony be struck. Because, however, Jones was sentenced to death, we will review the admissibility of the statement under the plain-error standard.
>
> "As previously stated, at no point while he was making the second statement did Jones admit any involvement in Mrs. Kirkland's killing. Indeed, Jones claimed that Mrs. Kirkland had been killed by three other men whom he had come into contact with later that evening. Accordingly, Jones's statement was not a compelled confession protected by the Fifth Amendment. 'A false statement made by an accused, in an offer to exculpate or divert suspicion from himself or to explain away apparently

> incriminating circumstances, is provable without regard to the rules governing the admissibility of confessions.' 2 Charles W. Gamble, McElroy's Alabama Evidence § 200.02(4)(c) (5th ed. 1996) (footnote omitted). Further, the State did not offer this statement as evidence of Jones's guilt, but, rather, to rebut his claim that he was with [Malik Ali] Hasan on the night Mrs. Kirkland was killed. Therefore, because the State did not offer Jones's statement for the purpose of establishing Jones's guilt or to show that Jones otherwise incriminated himself, the State was not obliged to establish that the statement was voluntarily given as a prerequisite for its admission into evidence. See, e.g., Ringstaff v. State, 451 So. 2d 375, 384 (Ala. Crim. App. 1984); McGehee v. State, 171 Ala. 19, 55 So. 159 (1911); Franklin v. State, 145 Ala. 669, 39 So. 979 (1906).
>
> "In any event, the trial court properly admitted Jones's statement because it was knowingly and voluntarily given. ...
>
> "....
>
> "... Because the State offered ample evidence indicating that Jones was informed of his Miranda rights, chose to waive those rights and voluntarily consented to be interviewed by Officer Beeson, and that Officer Beeson made neither threats nor implied promises of leniency, the trial court correctly determined that Jones's second statement was voluntary and admissible."

Jones, 987 So. 2d at 1164-65. We also addressed the admissibility of Jones's other statements and concluded:

> "Jones was properly advised of his Miranda rights, and none of his statements to law-enforcement officials was the product of either threats or implied promises of leniency. ... Based on the totality of the circumstances, the trial

> court correctly determined that Jones's statements were voluntarily made. ....
>
> "Moreover, in light of the fact that none of Jones's statements contained an outright confession to killing Mrs. Kirkland, together with the physical evidence connecting him to the offense -- Jones was found driving Mrs. Kirkland's car shortly after her body was discovered, wearing clothes stained with Mrs. Kirkland's blood -- any error in allowing testimony regarding Jones's statements was harmless beyond a reasonable doubt."

Jones v. State, 987 So. 2d at 1166.

Even had counsel timely objected to admission of the statement and even had this Court reviewed the admissibility of that statement under the preserved-error standard of review rather the plain-error standard of review, this Court's conclusion would have been the same. Therefore, Jones was not prejudiced by counsel's failure to object to his second statement until after it had been admitted and summary dismissal of this claim was proper.

II.

Jones argues that the circuit court erred in summarily dismissing his claims that his trial counsel were ineffective during the penalty phase of his capital-murder trial.

A.

Jones argues that the circuit court erred in summarily dismissing his claim that his trial counsel were ineffective for not adequately investigating and presenting additional mitigation evidence. Jones alleged in his amended petition that trial counsel failed to present mitigation evidence regarding his dysfunctional family life, the extreme poverty in which he was raised, the instability of his home life, his drug use, and his physical abuse by his mother and grandmother. Jones also alleged that counsel failed to hire a mitigation expert.

In dismissing this claim, the circuit court stated:

> "Jones alleges that his trial counsel were ineffective in investigating and presenting mitigation evidence at the penalty phase. Jones has presented mitigation evidence in his amended petition that was not presented by trial counsel at the penalty phase of the trial. Some of the evidence, he argues, could have been presented through three family witnesses and clinical psychologist Dr. Robert DeFrancisco, all of whom testified at the penalty phase. Other evidence, he alleges, could have been presented through additional family witnesses, one of his former medical doctors, and a mitigation expert. Assuming the facts pleaded as true, Jones would not show deficient performance or prejudice at an evidentiary hearing; therefore, this claim is not facially meritorious.
>
> "....

"In the sentencing order in this case, the trial court considered and found, in addition to Jones's age, the following nonstatutory mitigating circumstances:

"1. The defendant was reared in a single-parent home with no relationship with his father.

"2. The defendant was hyperactive as a child.

"3. The defendant's family was visited by DHR [Department of Human Resources] several times during his childhood.

"4. The defendant did not resist arrest.

"5. The defendant had learning disabilities as a child and was a special education student.

"6. The defendant was reared in lower end of socio-economic scale.

"7. The defendant suffered emotional and psychological problems.

"(C. 316-17.)

"The mitigation evidence presented during the penalty phase was the kind of evidence typically presented during the penalty phase of a capital murder trial. Jones's trial counsel selected mitigation evidence that 'develop[ed] an image of [Jones] as a human being who was generally a good public citizen, who had a background of poverty but who had worked hard as a child and as an adult to support his family and close relatives.' Collier [v. Turpin], 177 F.3d [1184] at 1202 [(11th Cir. 1999)].

"....

"As discussed above, the record shows that Jones's trial counsel presented a variety of

> mitigating evidence at the penalty phase. Jones argues that additional evidence -- such as evidence of 'beatings' Jones received and that he lived in houses with cockroaches and rats -- should have been presented. For purposes of its analysis here, this Court assumes that Jones was indeed subjected to corporal punishment and that he lived in houses with pest problems, along with all of the other mitigating evidence that was not presented at Jones's trial. However, this Court also considers the strong aggravating evidence in this case.
>
> "The trial court found the existence of three aggravating circumstances: (1) the capital offense was committed during a burglary; (2) the capital offense was especially heinous, atrocious, or cruel ('HAC') compared to other capital offenses; and (3) Jones was under a sentence of imprisonment when he committed the capital offense. With regard to the HAC aggravator, the trial court specifically noted in the sentencing order that 'Dr. [Alfredo] Paredes testified that an 80 year old disabled women was brutally beaten. He established that these injuries were painful and most preceded her death. This type of cruelty was unnecessary given the age and physical infirmities experienced by the victim.'
>
> "Given that trial counsel presented appropriate mitigating evidence and that there was serious aggravating evidence in this case, there is no reasonable probability that the outcome of Jones's trial would have been different had trial counsel presented the additional mitigating evidence Jones discusses in his amended Rule 32 petition.
>
> "For these reasons, Jones could not establish deficient performance and prejudice upon these facts at an evidentiary hearing. Accordingly, this claim is dismissed."

(C. 1245-54.) We agree.

"Although Petitioner's claim is that his trial counsel should have done something more, we first look at what the lawyer did in fact." Chandler v. United States, 218 F.3d 1305, 1320 (11th Cir. 2000). Several witnesses testified at the penalty phase of Jones's trial. Jill Whitsett,[5] Jones's mother, testified that Jones never had a relationship with his father; that there was no father at home for Jones; that she and the family were on welfare and food stamps; that the Department of Human Resources visited her house "from time to time" when Jones was growing up; that she had been accused of child abuse in Houston County; that she had a child born with syphilis who died; that Jones had been diagnosed as hyperactive when he was young; that Jones had been seen by a psychiatrist and a psychologist; that Jones was placed on the medications Prozac, Tenex, Ritalin, and Zoloft; that Jones's behavior improved with the medication; that Jones became calmer with the medication; that the school told her that Jones needed to be placed in a special class because he was "dumb" and that Jones was placed in special-education classes.

[5]Jones's mother's name is spelled "Whitsett" in the record in this appeal. However, in the record in Jones's direct appeal, her name was spelled "Witsett."

On cross-examination, Whitsett testified that "human resources" came to her house on four or five occasions, that Jones had gotten in trouble at school for fighting, and that she took Jones out of school when he was in the 11th grade. Whitsett further testified that the medication Jones took bothered him at night so she took him off the medications.

Edwina Culp, an adult-education instructor at Alfred Saliba Family Services Center, testified that she met Jones when he was studying to get his general-equivalency diploma in January 1998. She said that he stayed in that program until April 1999. Culp testified that, based on her observations, Jones was kind and meek; he was not aggressive or a troublemaker; he stayed to himself; and he cooperated with her. She further testified that Jones was 16 years old when she met him but that his education was at a sixth- to eighth-grade level. It was her understanding that Jones had an attention-deficit disorder.

Marilyn Walker, Jones's maternal aunt, testified that Jones and his mother and sister lived with her and her husband in Dothan for years. She said that Jones was always a good person when he was on his medication and was not violent, "[b]ut when he didn't take his medicine, he was just a totally

different person. You could tell he just get upset and angry for no reason." (Trial R. 1393.) Walker further testified that Jones was truant and lied a lot and that he had taken his grandmother's automobile and it was destroyed. Walker testified that Jones's mother provided a decent home for him. On cross-examination, Walker testified that, as a result of the death of one of Jones's siblings, the family got a $70,000 settlement that helped Jones's mother take care of Jones and his siblings. Walker had no problems with Jones, she said, because Jones respected her.

Lakeisha Jones, Jones's sister, testified that Jones was a good brother to her; that if she got in trouble she would go to Jones; that Jones was helpful; that Jones took medication to make him calm; that from "time to time" he would not take his medication; and that when he did not take his medication he was more hyperactive. She also testified that Jones's mother took him off his medication when Jones was about 15 or 16 years old.

Dr. Robert DeFrancisco, a clinical forensic psychologist, testified that he conducted a clinical evaluation of Jones. He testified that Jones's IQ was 81 and that Jones was a "gap child." After explaining the term "gap child," Dr.

DeFrancisco testified that he reviewed Jones's medical records and that Jones was hyperkinetic. He described the effect of Jones's medication on his ability to "learn and to behave." Dr. DeFrancisco then testified:

> "[I]n [Jones's] case, he has no father, he has a mother that's a drunk and a drug addict. He has no role models. And you add that into his school failure, he has no mental help at home, all he's around is drug abuse by his own admission and own history will tell you his history is awful. He basically raised himself. What do you expect from someone like this?"

(Trial R. 1437.) He further stated:

> "Under the right guidance and instruction, [Jones] can be a productive person. He is not stupid. He is not mentally retarded. And he is not crazy. He's totally misguided. And he has suffered from a horrible, horrible childhood. And I'm not justifying anything he's done. I'm explaining to you the fact that behavior does not occur in a vacuum. You just can't look at an act. You have to understand the individual. That is my job. I'm trying to give you some understanding of this person who didn't care about himself because we as society didn't care about him as well. We are failing miserably with people like Antonio Jones."

(Trial R. 1438.)

In closing argument at the penalty phase, Jones's counsel argued that there were several mitigating circumstances based on the evidence that had been presented at the penalty phase, but counsel's main argument was Jones's medical condition.

Counsel also argued for mercy and said that, based on Dr. DeFrancisco's testimony, Jones would function well in a structured environment like prison. The record from Jones's direct appeal also reflects that counsel requested and received funds for an investigator to, among other things, search for mitigating evidence such as "Jones's medical history, educational history, employment and training history, family and social history, his correctional history, and any religious or cultural influences." (Trial C. 201.)[6] Counsel asserted in their motion for funds that they "must direct an investigator to obtain records from all doctors, hospitals, schools, employers, and correctional facilities and interview people with knowledge of these aspects of Mr. Jones's background." (Trial C. 201.) Counsel also requested and received funds to secure "expert psychiatric and psychological assistance." (Trial C. 207.)

This is not a case where counsel conducted no investigation into mitigation or where no mitigation evidence was presented.

---

[6]This Court held in Hall v. State, 979 So. 2d 125 (Ala. Crim. App. 2007), that counsel is not ineffective for delegating to a subordinate the responsibility for investigating.

> "[T]rial counsel is afforded broad authority in determining what evidence will be offered in mitigation.' State v. Frazier (1991), 61 Ohio St. 3d 247, 255, 574 N.E.2d 483. We also reiterate that post-conviction proceedings were designed to redress denials or infringements of basic constitutional rights and were not intended as an avenue for simply retrying the case. ... Further, the failure to present evidence which is merely cumulative to that which was presented at trial is, generally speaking, not indicative of ineffective assistance of trial counsel. State v. Combs (1994), 100 Ohio App.3d 90, 105, 652 N.E.2d 205."

Jells v. Mitchell, 538 F.3d 478, 489 (6th Cir. 2008). "'[C]ounsel does not necessarily render ineffective assistance simply because he does not present all possible mitigating evidence.'" Boyd v. State, 913 So. 2d 1113, 1139 (Ala. Crim. App. 2003) (quoting Williams v. State, 783 So. 2d 108, 117 (Ala. Crim. App. 2000)).

> "[A] claim of ineffective assistance of counsel for failure to investigate and present mitigation evidence will not be sustained where the jury was aware of most aspects of the mitigation evidence that the defendant argues should have been presented. Troy v. State, 57 So. 3d 828, 835 (Fla. 2011). Although the evidence offered by [the petitioner] at the evidentiary hearing was not exactly the same as that presented during the penalty phase, in consideration of the testimony of Dr. Cunningham, the majority of the evidence presented at the evidentiary hearing was referenced at trial."

Frances v. State, 143 So. 3d 340, 356 (Fla. 2014).

> "'"[T]he failure to present additional mitigating evidence that is merely cumulative of that already presented does not rise to the level of a constitutional violation." Nields v. Bradshaw, 482 F.3d 442, 454 (6th Cir. 2007) (quoting Broom v. Mitchell, 441 F.3d 392, 410 (6th Cir. 2006)).' Eley v. Bagley, 604 F.3d 958, 968 (6th Cir. 2010). 'This Court has previously refused to allow the omission of cumulative testimony to amount to ineffective assistance of counsel.' United States v. Harris, 408 F.3d 186, 191 (5th Cir. 2005). 'Although as an afterthought this [defendant's father] provided a more detailed account with regard to the abuse, this Court has held that even if alternate witnesses could provide more detailed testimony, trial counsel is not ineffective for failing to present cumulative evidence.' Darling v. State, 966 So. 2d 366, 377 (Fla. 2007)."

Daniel v. State, 86 So. 3d 405, 429–30 (Ala. Crim. App. 2011).

> "'[I]n order to establish prejudice [under Strickland], the new evidence that a [postconviction] petitioner presents must differ in a substantial way -- in strength and subject matter -- from the evidence actually presented at sentencing.' Hill v. Mitchell, 400 F.3d 308, 319 (6th Cir. 2005), cert. denied, 546 U.S. 1039, 126 S.Ct. 744, 163 L.Ed.2d 582 (2005). In other cases, we have found prejudice because the new mitigating evidence is 'different from and much stronger than the evidence presented on direct appeal,' 'much more extensive, powerful, and corroborated,' and 'sufficiently different and weighty.' Goodwin v. Johnson, 632 F.3d 301, 328, 331 (6th Cir. 2011). We have also based our assessment on 'the volume and compelling nature of th[e new] evidence.' Morales v. Mitchell, 507 F.3d 916, 935 (6th Cir. 2007). If the testimony 'would have added nothing of value,' then its absence was not prejudicial. [Bobby v.] Van Hook, [558 U.S. 4, 12,] 130 S.Ct. [13,] 19 [(2009)]. In short, 'cumulative mitigation evidence' will not suffice. Landrum v. Mitchell, 625 F.3d 905, 930 (6th

> Cir. 2010), petition for cert. filed (Apr. 4, 2011) (10-9911)."

Foust v. Houk, 655 F.3d 524, 539 (6th Cir. 2011).

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

Hunt v. State, 940 So. 2d 1041, 1067-68 (Ala. Crim. App. 2005).

In Wiggins v. Smith, 539 U.S. 510 (2003), the United States Supreme Court stated:

> "In Strickland [v. Washington, 466 U.S. 668 (1984)], we made clear that, to establish prejudice, a '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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' Id., at 694, 104 S.Ct. 2052. In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence."

539 U.S. at 534. See also Stafford v. Saffle, 34 F.3d 1557, 1564 (10th Cir. 1994).

The great majority of mitigation evidence that Jones alleged in his amended petition should have been, but was not, presented by counsel was, in fact, presented at the penalty phase of Jones's trial. We, like the circuit court, are confident that the alleged omitted mitigation evidence would have had no impact on the verdict in this case. Therefore, summary dismissal of this claim was proper.

B.

Jones argues that the circuit court erred in summarily dismissing his claim that his trial counsel were ineffective for not objecting to what he characterizes as numerous instances of prosecutorial misconduct during the penalty phase of his trial.

> "An ineffectiveness of counsel claim does not lend itself to a search of the record to pick the instances in which an objection could have been made. Stringfellow v. State, 485 So. 2d 1238 (Ala. Cr. App. 1986). An attorney looking at a trial transcript can always find places where objections could have been made. Hindsight is not always 20/20, but hindsight is always ineffective in evaluating performance of trial counsel."

State v. Tarver, 629 So. 2d 14, 19 (Ala. Crim. App. 1993).

1.

Jones contends that his trial counsel should have objected when, he says, the prosecutor impermissibly commented

on his right to remain silent. Specifically, Jones challenges the following statement made by the prosecutor during closing argument: "Did you watch [Jones] during the trial when they testified, when his own mother was crying? He was cold as he could be." (Trial R. 622.)

In dismissing this claim, the circuit court stated:

> "[T]he prosecutor did not impermissibly comment on Jones's right to remain silent. The record reflects that the prosecutor was asking the jury to consider Jones's physical reaction to the testimony of another witness, which is permissible. See James v. State, 564 So. 2d 1002 (Ala. Crim. App. 1989) (holding that a defendant's conduct or demeanor during trial is a proper subject of comment; Haywood v. State, 501 So. 2d 515 (Ala. Crim. App. 1986) (same); Wherry v. State, 402 So. 2d 1130 (Ala. Crim. App. 1981) (same)."

(C. 1257.) We agree.

The prosecutor's comment was not a comment on Jones's right to remain silent. "The conduct of the accused or the accused's demeanor during the trial is a proper subject of comment." Wherry v. State, 402 So. 2d 1130, 1133 (Ala. Crim. App. 1981). "The prosecutor [is] entitled to make a comment on the demeanor of [the defendant] in the courtroom." Woodall v. Commonwealth, 63 S.W.3d 104, 125 (Ky. 2001). See also Thompson v. State, 153 So. 3d 84, 175 (Ala. Crim. App. 2012). "[C]ounsel could not be ineffective for failing to raise a

baseless objection." Bearden v. State, 825 So. 2d 868, 872 (Ala. Crim. App. 2001).

Therefore, summary dismissal of this claim was proper.

2.

Jones contends that his trial counsel should have objected when, he says, the prosecutor argued improper aggravating circumstances by stating that Kirkland's grandson was a police officer, that Jones had filed a federal lawsuit, and that Jones used "curse words."

In dismissing this claim, the circuit court stated:

> "Jones alleges that trial counsel should have objected to the prosecutor mentioning that the victim's grandson was a police officer, that Jones had filed a federal lawsuit, and that Jones used curse words. Jones argues that these comments constituted impermissible aggravating evidence. Yet, the record shows that the prosecutor did not rely on any of these comments in arguing aggravating circumstances to the jury. Again, the jury was properly instructed on aggravating and mitigating circumstances."

(C. 1258.) We agree. The prosecutor did not argue any improper aggravating circumstances, and the jury was properly instructed on the aggravating circumstances the State relied on in the penalty phase. In addition, some of the above comments constituted victim-impact evidence, and "we have repeatedly held that victim-impact evidence is admissible at

the penalty phase of a capital trial." Lee v. State, 44 So. 3d 1145, 1174 (Ala. Crim. App. 2009). "[C]ounsel could not be ineffective for failing to raise a baseless objection." Bearden v. State, 825 So. 2d 868, 872 (Ala. Crim. App. 2001).

Therefore, summary dismissal of this claim was proper.

3.

Jones also contends that trial counsel should have objected to the prosecutor questioning Dr. Alfredo Paredes, the pathologist who conducted the autopsy on Kirkland, about other capital murders.

At the penalty phase, the State submitted to the jury the aggravating circumstance that the murder was "especially heinous, atrocious, or cruel compared to other capital offenses." Section 13A-5-49(8), Ala. Code 1975 (emphasis added). The jury was properly instructed on the application of this aggravating circumstance. If any error did occur in the prosecutor's questioning of Dr. Paredes, we conclude that the error was harmless beyond a reasonable doubt. "'Harmless error does not rise to the level of the prejudice required to satisfy the Strickland test.'" State v. Kerley, 260 So. 3d 891, 902 (Ala. Crim. App. 2017) (quoting Gaddy v. State, 952 So. 2d 1149, 1160 (Ala. Crim. App. 2006)).

Therefore, summary dismissal of this claim was proper.

4.

Jones contends that his trial counsel should have objected when the prosecutor stated during closing argument that there was no evidence that Jones's family had a history of drug use. However, as the State correctly argues in its brief, this claim was not raised in Jones's amended petition; therefore, it is not properly before this Court and will not be considered.

> "'It is well settled that "[a]n appellant cannot raise an issue on appeal from the denial of a Rule 32 petition which was not raised in the Rule 32 petition." Arrington v. State, 716 So. 2d 237, 239 (Ala. Crim. App. 1997).' Mashburn v. State, 148 So. 3d 1094, 1106 (Ala. Crim. App. 2013). See also Ex parte Clemons, 55 So. 3d 348, 351 (Ala. 2007) ('We cannot, however, consider the issue whether the trial court erred in failing to consider Clemons's borderline intellectual capacity as a mitigating factor in the sentencing phase of his trial because the issue was not presented to the trial court in Clemons's Rule 32 petition.'); Dunaway v. State, [198 So. 3d 530] (Ala. Crim. App. 2009) ('This issue was not raised in Dunaway's consolidated amended Rule 32 petition. Therefore, it is not properly before this Court.'); Hooks v. State, 21 So. 3d 772, 795 (Ala. Crim. App. 2008) ('These claims were not raised in Hooks's third amended postconviction petition.')."

Stallworth v. State, 171 So. 3d 53, 74-75 (Ala. Crim. App. 2013).

5.

Jones contends that his trial counsel should have objected when, he says, the prosecutor misstated the law on mitigating evidence. Specifically, Jones argues that the prosecutor improperly characterized mitigating evidence as "excuses." (Jones's brief, p. 68.) During rebuttal closing argument, the prosecutor stated: "And [defense counsel] evidently he wants to stand up here and says because he didn't have a father, didn't have a father figure, he has low intelligence. These are excuses." (Trial R. 1497.)

> "This Court has long recognized that a prosecutor cannot improperly denigrate mitigation during a closing argument. See Brooks v. State, 762 So. 2d 879, 904 (Fla. 2000) (holding that characterizing mitigating circumstances as 'excuses' was an improper denigration of the case offered in mitigation). However, we do not reach the assertion in this claim that counsel was ineffective under Strickland because we find no error in the postconviction court's determination that Williamson failed to meet the prejudice prong of Strickland. The sentencing judge found three aggravating circumstances: (1) Williamson was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; (2) the capital felony was committed while Williamson was engaged or was an accomplice in the commission of or an attempt to commit burglary, robbery, and kidnapping; and (3) the capital felony was especially HAC. As detailed above, he found evidence supporting eleven nonstatutory mitigating factors and gave each factor some or little weight. In reviewing the comments in light of the record, we

> do not conclude that the brief mention of the word 'excuses' undermines confidence in the outcome."

Williamson v. State, 994 So. 2d 1000, 1014-15 (Fla. 2008).

Similarly, here, "even if counsel should have objected to the prosecutor's arguments, [we conclude that] the absence of objections did not affect the outcome of the trial." Stallworth v. State, 171 So. 3d 53, 67 (Ala. Crim. App. 2013). The jury was properly instructed on "their responsibility and the proper role mitigating evidence was to play in the discharge of that responsibility," State v. Feaster, 156 N.J. 1, 87, 716 A. 2d 395, 438 (1998), and "jurors are presumed to follow, not disregard, the trial court's instructions." Brooks v. State, 973 So. 2d 380, 409 (Ala. Crim. App. 2007).

Therefore, summary dismissal of this claim was proper.

6.

Jones also contends that the cumulative effect of counsel's failure to object to multiple incidents of alleged prosecutorial misconduct prejudiced him and warrants a new trial. When discussing the application of cumulative error to claims of ineffective assistance of counsel, this Court has stated:

> "Other states and federal courts are not in agreement as to whether the 'cumulative effect'

analysis applies to Strickland claims. As the Supreme Court of North Dakota noted in Garcia v. State, 678 N.W.2d 568, 578 (N.D. 2004):

> "'Garcia argues that even if trial counsel's individual acts or omissions are insufficient to establish he was prejudiced, the cumulative effect was substantial enough to meet Strickland's test. See Williams v. Washington, 59 F.3d 673, 682 (7th Cir. 1995) ("In making this showing, a petitioner may demonstrate that the cumulative effect of counsel's individual acts or omissions was substantial enough to meet Strickland's test"); but see Scott v. Jones, 915 F.2d 1188, 1191 (8th Cir. 1990) ("cumulative error does not call for habeas relief, as each habeas claim must stand or fall on its own").'"

"See also Holland v. State, 250 Ga. App. 24, 28, 550 S.E.2d 433, 437 (2001) ('Because the so-called cumulative error doctrine is inapplicable, each claim of inadequacy must be examined independently of other claims, using the two-prong standard of Strickland v. Washington.' (footnote omitted)); Carl v. State, 234 Ga. App. 61, 65, 506 S.E.2d 207, 212 (1998) ('Georgia does not recognize the cumulative error rule.'); Fisher v. Angelone, 163 F.3d 835, 852 (4th Cir. 1998) ('Not surprisingly, it has long been the practice of this Court to individually assess claims under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See, e.g., Hoots v. Allsbrook, 785 F.2d 1214, 1219 (4th Cir. 1986) (considering ineffective assistance claims individually rather than considering their cumulative impact.).').

"We can find no case where Alabama appellate courts have applied the cumulative-effect analysis to claims of ineffective assistance of counsel. However, the Alabama Supreme Court has held that the

> cumulative effect of prosecutorial misconduct necessitated a new trial in Ex parte Tomlin, 540 So. 2d 668, 672 (Ala. 1988) ('We need not decide whether either of the two errors, standing alone, would require a reversal; we hold that the cumulative effect of the errors probably adversely affected the substantial rights of the defendant and seriously affected the fairness and integrity of the judicial proceedings.'). Also, in Ex parte Bryant, [951 So. 2d 724] (Ala. 2002), the Supreme Court held that the cumulative effect of errors may require reversal.
>
> "If we were to evaluate the cumulative effect of the ineffective assistance of counsel claims, we would find that Brooks's substantial rights were not injuriously affected. See Bryant and Rule 45, Ala. R. App. P."

Brooks v. State, 929 So. 2d 491, 514 (Ala. Crim. App. 2005).

Similarly, here, if we were to evaluate the cumulative effect counsel's alleged errors, we would conclude that Jones's substantial rights were not violated. Therefore, summary dismissal of this claim was proper.

III.

Jones argues that his appellate counsel were ineffective for not raising certain issues on appeal. Specifically, Jones alleged in his amended petition that his appellate counsel should have raised the following issues on appeal: (1) that the State violated Batson v. Kentucky, 476 U.S. 79 (1986); (2) that the prosecutor engaged in prosecutorial misconduct; (3) that the death penalty is unconstitutional because Jones

was only 18 years old when he committed the murder; and (4) that the trial court improperly placed the burden of proof on him at the suppression hearing.

When considering claims of ineffective assistance of appellate counsel, this Court has stated:

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

> prevailed on appeal. Miller v. Keeney, 882 F.2d 1428, 1434 and n. 9 (9th Cir. 1989).'"

Moody v. State, 95 So. 3d 827, 836 (Ala. Crim. App. 2011) (quoting Thomas v. State, 766 So. 2d 860, 876 (Ala. Crim. 1998), overruled on other grounds, Ex parte Taylor, 10 So. 3d 1075 (Ala. 2005)).

> "If a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective. Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000)."

Frances v. State, 143 So. 3d 340, 357 (Fla. 2014).

In dismissing this claim, the circuit court stated:

> "The record does not establish that purposeful racial discrimination occurred during jury selection, so appellate counsel is not deficient for deciding not to raise Batson on direct appeal. However, Jones raised Batson in his petition for a writ of certiorari in the Alabama Supreme Court. In capital cases, the Alabama Supreme Court has granted certiorari on a Batson issue, even when the issue was not raised in the Court of Criminal Appeals. See e.g., Ex parte Sharp, [151 So. 3d 329] (Ala. 2009). Appellate counsel did not waive Jones's Batson argument by failing to raise it in the Court of Criminal Appeals.
>
> "....
>
> "Jones references other portions of his amended petition in which he argues that prosecutorial misconduct occurred. Specifically, Jones references

Section II.O, II.D.2, II.D.6, II.P., and III.D of his amended Rule 32 petition. In the sections of this order that correspond to those sections, this Court finds that there was no prosecutorial misconduct, or if there was, it was harmless. For these reasons, this Court finds that Jones could not prove deficient performance of trial or appellate counsel or prejudice on the facts pleaded, assuming they are true, at an evidentiary hearing. Accordingly, this claim is dismissed.

"....

"Jones makes that same argument [that appellate counsel was ineffective for not arguing that the death penalty was unconstitutional due to his age and mental capacity] with regard to his trial counsel. ... Because Jones was eighteen years old when he committed murder, he is eligible for the death penalty and is due no relief under Roper [v. Simmons, 543 U.S. 551 (2005)]. Accordingly, Jones could not show at an evidentiary hearing that his appellate counsel were deficient in deciding not to raise an argument based on Roper. Likewise, Jones would not show prejudice.

"....

"Jones alleges that his appellate counsel should have argued on appeal that the trial court erred in requiring him to establish at trial that his statements to police were voluntary. This claim is not facially meritorious.

"The record does not reflect that the trial court required Jones to establish that his statements were voluntary. The trial court instructed the defense to go forward with its motion to suppress, but the court did not indicate that it required Jones to prove that the statements were voluntary.

> "For these reasons, Jones would be unable to prove deficient performance or prejudice upon these facts at an evidentiary hearing. Accordingly, this claim is dismissed."

(R. 1265-68.) We agree with the circuit court.

The Batson claim and the claims of prosecutorial misconduct have been addressed previously in this opinion and found not to constitute error or, at the most, to constitute harmless error. Also, Jones was 18 years of age when he committed the murder. The United States Supreme Court in Roper v. Simmons, 543 U.S. 551 (2005), held that it was unconstitutional to execute a defendant for a crime that was committed when the defendant was under the age of 18. Thus, the death penalty is not unconstitutional as applied to Jones. Last, there is no indication that the trial court applied the incorrect standard when evaluating the admissibility of Jones's statements to police. In fact, at the beginning of the suppression hearing, Jones's counsel specifically stated: "Judge, I believe when we filed the motion, the burden shifted to the State." (Trial R. 252-325.) Regardless, on direct appeal, this Court held that the statements were properly admitted into evidence and that, even if error occurred, the admission of the statements was harmless. Appellate counsel

cannot be ineffective for not raising on appeal an issue that has no merit.

Therefore, summary dismissal of this claim was proper.

IV.

Jones argues that the State violated Brady v. Maryland, 373 U.S. 83 (1963), and Napue v. Illinois, 360 U.S. 264 (1959), when, he says, it suppressed evidence and knowingly used false evidence at trial.[7] Specifically, Jones alleged in his amended petition that the State suppressed evidence of a report regarding an interrogation that occurred before Jones was advised of his rights under Miranda v. Arizona, 384 U.S. 436 (1966), and that, during this interrogation, Jones was assaulted by police. Jones further alleged that the State knowingly used false testimony from Jones's mother, Jill Whitsett, that she did not use drugs or alcohol despite the

[7]Jones raised additional Brady violations in his amended petition; however, he does not pursue those claims on appeal. See Ferguson v. State, 13 So. 3d 418, 436 (Ala. Crim. App. 2008) ("[C]laims presented in a Rule 32 petition but not argued in brief are deemed abandoned.").

fact that Whitsett's husband had been prosecuted for the sale of a controlled substance.[8]

In dismissing these claims, the circuit court stated:

> "[Jones] alleges that the State elicited false testimony of a defense witness. Specifically, Jones alleges that the prosecutor would have known that the testimony of Jones's mother, Jill Whitsett, that she did not use drugs or abuse alcohol was untrue, because the State prosecuted Jill Whitsett's husband, Demetrius Whitsett, for sale of a controlled substance, and her husband was arrested at her house. Jones cites Napue [v. Illinois, 360 U.S. 264 (1959)], which is distinguishable because the prosecutor in Napue called a witness for the State who falsely testified that he had received no promise or consideration in return for his testimony, though in fact the prosecutor had promised witness consideration, and the prosecutor did nothing to correct false testimony of witness. Napue, 360 U.S. at 265.
>
> "The prosecutor was under no duty to provide information on Demetrius Whitsett's prosecution, especially considering Jill Whitsett was not the State's witness. It is unclear based upon Jones's pleading whether the prosecutor actually remembered Demetrius Whitsett's prosecution at the time of Jones's trial. But even if he did remember, simply because Demetrius Whitsett sold drugs does not mean that Jill Whitsett used drugs and alcohol. Jones does not allege that the prosecutor or Jill Whitsett were present when Demetrius Whitsett was arrested at this home, and there is no allegation that the prosecutor knew about Demetrius Whitsett's federal prosecution.

[8]We noted that Whitsett was called by Jones and not the State.

> "[Jones] alleges that the State did not provide 'any report' of a police interrogation that occurred the night Jones was arrested for capital murder. However, Jones does not allege that any report actually exists. The record shows that the State provided appropriate discovery regarding the interrogation of Jones, and the trial court heard argument on whether the interrogation violated Jones's constitutional rights. The trial court decided that Jones's rights were not violated."

(C. 1262-63.) We agree with the circuit court.

> "To prove a Brady violation, a defendant must show:(1) that the prosecution suppressed evidence, (2) that the evidence was of a character favorable to the defense, (3) that the evidence was material [or the defendant was prejudiced]."

Jefferson v. State, 645 So. 2d 313, 315 (Ala. Crim. App. 1994).

> "'There is no Brady violation where the information in question could have been obtained by the defense through its own efforts.' Johnson [v. State], 612 So. 2d [1288] at 1294 [(Ala. Crim. App. 1992)]; see also Jackson v. State, 674 So. 2d 1318 (Ala. Cr. App. 1993), aff'd in part and rev'd in part on other grounds, 674 So. 2d 1365 (Ala. 1995). '"Evidence is not 'suppressed' if the defendant either knew ... or should have known ... of the essential facts permitting him to take advantage of any exculpatory evidence." United States v. LeRoy, 687 F.2d 610, 618 (2d Cir. 1982)[, cert. denied, 459 U.S. 1174, 103 S.Ct. 823, 74 L.Ed.2d 1019 (1983)].' Carr v. State, 505 So. 2d 1294, 1297 (Ala. Cr. App. 1987) (noting, 'The statement the appellant contends was suppressed in this case was his own, and no reason was set forth to explain why he should not have been aware of it.'). Where there is no suppression of

> evidence, there is no Brady violation. Carr, 505 So. 2d at 1297."

Freeman v. State, 722 So. 2d 806, 810-11 (Ala. Crim. App. 1998). No Brady violation occurs when the facts alleged to have been suppressed were within the knowledge of the defendant. Clearly, information that Jones was interrogated and assaulted before he was advised of his Miranda rights was information within Jones's knowledge.

> "'[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment....' Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).
>
> "[T]he knowing use of material false evidence by the state in a criminal prosecution does violate due process. Giglio v. United States, 405 U.S. 150, 153, 92 S.Ct. 763, 766, 31 L.Ed.2d 104, 108 (1972); Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217, 1221 (1959); Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 341-42, 79 L.Ed. 791, 794 (1935); Skipper v. Wainwright, 598 F.2d 425, 427 (5th Cir.) (per curiam), cert. denied, 444 U.S. 974, 100 S.Ct. 469, 62 L.Ed.2d 389 (1979). This rule applies equally when the state, although not soliciting perjured testimony, allows it to go uncorrected after learning of its falsity. Giglio, 405 U.S. at 153, 92 S.Ct. at 766, 31 L.Ed.2d at 108; Napu[e], 360 U.S. at 269, 79 S.Ct. at 1177, 3 L.Ed.2d at 1221. In addition, "[i]t is of no consequence that the falsehood [bears] upon the witness' credibility rather than directly upon [the] defendant's guilt." Napue, 360 U.S. at 269, 79 S.Ct. at 1177, 3 L.Ed.2d at 1221 (quoting People v. Savvides, 1 N.Y.2d 554, 557, 136 N.E.2d 853, 854,

> 154 N.Y.S.2d 885, 887 (1956)); see Giglio, 405 U.S. at 154, 92 S.Ct. at 766, 31 L.Ed.2d at 108."

Williams v. Griswald, 743 F.2d 1533, 1541 (11th Cir. 1984).

> "To prove a Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), violation [or a Napue v. Illinois, 360 U.S. 264 (1959), violation], the petitioner must show that: (1) the State used the testimony; (2) the testimony was false; (3) the State knew the testimony was false; and (4) the testimony was material to the guilt or innocence of the accused. Williams v. Griswald, 743 F.2d [1533] at 1542 [(11th Cir. 1984)]. '[T]he defendant must show that the statement in question was "indisputably false," rather than merely misleading.' Byrd v. Collins, 209 F.3d 486, 517 (6th Cir. 2000) (quoting United States v. Lochmondy, 890 F.2d 817, 823 (6th Cir. 1989)). 'The burden is on the defendants to show that the testimony was actually perjured, and mere inconsistencies in testimony by government witnesses do not establish knowing use of false testimony.' Lochmondy, 890 F.2d at 822. '[I]t is not enough that the testimony is challenged by another witness or is inconsistent with prior statements, and not every contradiction in fact or argument is material.' United States v. Payne, 940 F.2d 286, 291 (8th Cir. 1991) (citing United States v. Bigeleisen, 625 F.2d 203, 208 (8th Cir. 1980)). '[T]he fact that a witness contradicts himself or herself or changes his or her story does not establish perjury.' Malcum v. Burt, 276 F. Supp. 2d 664, 684 (E.D. Mich. 2003) (citing Monroe v. Smith, 197 F. Supp.2d 753, 762 (E.D. Mich. 2001))."

Perkins v. State, 144 So. 3d 457, 469–70 (Ala. Crim. App. 2012).

Here, Whitsett's testimony that she did not use drugs or alcohol was elicited by Jones's counsel, not the State, during the penalty phase of the trial. Although Jones alleged in his amended petition that the State knew the testimony was false because Whitsett's husband had been arrested for the unlawful distribution of a controlled substance, as the circuit court pointed out, "simply because Demetrius Whitsett sold drugs does not mean that Jill Whitsett used drugs and alcohol." (C. 1263.) Nor does it indicate that the State knew that Whitsett's testimony was false.

Therefore, summary dismissal of these claims was proper.

V.

Finally, Jones argues that the circuit court erred in adopting the State's proposed order as its own. He relies on Ex parte Ingram, 51 So. 3d 1119 (Ala. 2010), and Ex parte Scott, 262 So. 3d 1266 (Ala. 2011), to support his argument.

> "'Alabama courts have consistently held that even when a trial court adopts verbatim a party's proposed order, the findings of fact and conclusions of law are those of the trial court and they may be reversed only if they are clearly erroneous.' McGahee v. State, 885 So. 2d 191, 229–30 (Ala. Crim. App. 2003). '[T]he general rule is that, where a trial court does in fact adopt the proposed order as its own, deference is owed to that order in the same measure as any other order of the trial court.' Ex

> parte Ingram, 51 So.3d 1119, 1122 (Ala. 2010). Only 'when the record before this Court clearly establishes that the order signed by the trial court denying postconviction relief is not the product of the trial court's independent judgment' will the circuit court's adoption of the State's proposed order be held erroneous. Ex parte Jenkins, 105 So.3d 1250, 1260 (Ala. 2012)."

Riley v. State, 270 So. 3d 291, 297-98 (Ala. Crim. App. 2018).

In Ex parte Ingram, the Alabama Supreme Court found reversible error in the circuit court's adoption of the State's proposed order where the circuit court made patently erroneous statements that it had personal knowledge of the case and had "'presided over Ingram's capital murder trial and personally observed the performance of both lawyers throughout Ingram's trial and sentencing,'" 51 So. 3d at 1123 (citation and emphasis omitted), when, in fact, it had not. In Ex parte Scott, the Alabama Supreme Court found reversible error in the circuit court's adoption of the State's answer to the petition, which, "by its very nature, is adversarial and sets forth one party's position in the litigation." 262 So. 3d at 1274.

However, the circuit court's order here is not infected with the errors that warranted reversal in Ex parte Ingram and Ex parte Scott. To the contrary, there is nothing in the

order that suggests that it was not the product of the circuit court's own independent judgment. Therefore, we find no error in the circuit court's adoption of the State's proposed order.

VI.

Based on the foregoing, the judgment of the circuit court summarily dismissing Jones's Rule 32 petition is affirmed.

AFFIRMED.

Windom, P.J., and McCool and Minor, JJ., concur. Cole, J., recuses himself.