Rel: April 12, 2019

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2018-2019

CR-16-0741

Justin White

v.

State of Alabama

Appeal from Jefferson Circuit Court
(CC-09-1813.60)

KELLUM, Judge.

Justin White, currently an inmate on death row at Holman Correctional Facility, appeals the Jefferson Circuit Court's summary dismissal of his petition for postconviction relief

filed pursuant to Rule 32, Ala. R. Crim. P., attacking his capital-murder convictions and sentence of death.

In 2009, White was convicted of murdering Jasmine Parker during the course of a rape and a burglary. The jury recommended, by a vote of 9 to 3, that White be sentenced to life imprisonment without the possibility of parole. The trial court sentenced White to death. On direct appeal, this Court affirmed White's convictions and remanded the case to the trial court for it to correct its sentencing order. On return to remand, we affirmed White's death sentence. See White v. State, 179 So. 3d 170 (Ala. Crim. App. 2013). The United States Supreme Court denied certiorari review. See White v. Alabama, 577 U.S. ___, 136 S.Ct. 365 (2015). This Court issued a certificate of judgment on April 17, 2015. See Rule 41, Ala. R. App. P.

On April 12, 2016, White, acting pro se, timely filed Rule 32 petition.[1] White requested in forma pauperis status. That motion was granted, and two attorneys were appointed to

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

assist White in the postconviction proceedings. Appointed counsel filed a 206-page amended petition in January 2017. The State filed an answer to the petition and moved that it be dismissed. The circuit court dismissed White's petition. This appeal followed.

On direct appeal, this Court set out the following facts surrounding White's convictions:

> "On the morning of July 11, 2006, Parker went to work with her mother, Vanessa Parker, at Sharp Cleaners in Vestavia. Parker was not employed at the cleaners; however, she helped Vanessa on occasion. Around 3:00 p.m., Sylvia Williams, Vanessa's coworker, drove Parker home. After Parker got home, she called Vanessa and asked if she could go to a Captain D's restaurant with Greg Jelks. Vanessa gave Parker permission to go.
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> "Vanessa left work around 6:00 p.m. and went to a funeral home because a friend had passed away. After leaving the funeral home, Vanessa drove to her apartment. She arrived at the apartment between 7:00 p.m. and 7:30 p.m. As she entered the apartment, she called out to Parker but received no response. At that point, Vanessa noticed that the apartment was in disarray. The cushions on the couch were misplaced, the telephone had been knocked from its base, and a coffee table had been knocked over.
>
> "Vanessa then began to walk through the apartment and found Parker's body in a small hall area. Parker was nude from the waist down and her shirt was pulled up, exposing her breasts. Parker's blue jeans had been tied in a knot around her neck and used to strangle her to death. Upon finding Parker's body, Vanessa telephoned emergency 911.

"In response to Vanessa's call to 911, law-enforcement officers were dispatched to the apartment. Steve Owens, an officer with the forensic unit of the Birmingham police department, was called to the scene to collect evidence and diagram the scene. While at the scene, Owens took a number of photographs and collected, among other things: 1) a plastic fingernail that had been found next to Parker's body; 2) a cigar tip that had been found on a table; and 3) a cigarette butt. Parker's cellular telephone was never found.

"Dr. Gregory G. Davis, with the Jefferson County Coroner's Office, performed an autopsy on Parker. According to Dr. Davis, when he began the examination, Parker's blue jeans were tied around her neck so tightly he could not get his finger between the blue jeans and her neck. Dr. Davis explained that Parker had abrasions on her neck from the blue jeans. She also had a nonlethal, five-inch cut on her neck. Dr. Davis testified that Parker had petechiae--ruptured blood vessels due to pressure--under her eyelids. According to Dr. Davis, 'petechiae [are] something that you ... expect to see in someone who has been strangled.' (R. 313.) Dr. Davis concluded Parker had died as a result of asphyxia due to strangulation.

"During the autopsy, Dr. Davis swabbed Parker's mouth, vagina, and anus to look for signs of sexual assault. He also swabbed a stain on her leg. Initially, Dr. Davis did not detect any semen on the swabs. However, after examining the swabs a second time, Dr. Davis detected semen on the swab from Parker's vagina and on the swab from her leg.

"The investigation into Parker's murder languished until Detective Christopher Anderson, the lead detective, realized in August 2008 that none of the evidence collected from the crime scene or from Parker's body had been sent to the Alabama Department of Forensic Sciences (hereinafter 'DFS')

> for testing. The evidence collected from the crime scene and from Parker's body was then sent to DFS. Nathan Rhea, a forensic scientist at DFS, tested numerous items related to Parker's murder. According to Rhea, he obtained a DNA profile for saliva located on the cigar tip collected from the apartment and from the semen collected from Parker's leg and vagina. Rhea then entered those profiles into a State database and determined that the profiles matched White's profile."

White, 179 So. 3d at 181-82 (footnote omitted).

Standard of Review

White is appealing the circuit court's summary dismissal of his Rule 32, Ala. R. Crim. P., petition. "The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief." Rule 32.3, Ala. R. Crim. P.

Rule 32.6(b), Ala. R. Crim. P., addresses the pleading requirements in regard to postconviction petitions and provides:

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

When addressing the scope of Rule 32.6(b), Ala. R. Crim. P., this Court has stated:

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

Hyde v. State, 950 So. 2d 344, 356 (Ala. Crim. App. 2006).

> "'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)

(emphasis in original).

> "'"Where a simple reading of the petition for post-conviction relief shows that, assuming every allegation of the petition to be true, it is obviously without merit or is precluded, the circuit court [may] summarily dismiss that petition."' Tatum v. State, 607 So. 2d 383, 384 (Ala. Crim. App. 1992), quoting Bishop v. State, 608 So. 2d 345, 347-48 (Ala. 1992), quoting in turn Bishop v. State,

> 592 So. 2d 664, 667 (Ala. Crim. App. 1991)(Bowen, J., dissenting); see also Rule 32.7(d), Ala. R. Crim. P."

Boyd v. State, 913 So. 2d at 1126. "An evidentiary hearing on a [Rule 32] petition is required only if the petition is 'meritorious on its face.' Ex parte Boatwright, 471 So. 2d 1257 (Ala. 1985)." Moore v. State, 502 So. 2d 819, 820 (Ala. 1986).

"The sufficiency of pleadings in a Rule 32 petition is a question of law. 'The standard of review for pure questions of law in criminal cases is de novo. Ex parte Key, 890 So. 2d 1056, 1059 (Ala. 2003).' Ex parte Lamb, 113 So. 3d 686 (Ala. 2011)." Ex parte Beckworth, 190 So. 3d 571, 573 (Ala. 2013).

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

Ford v. State, 831 So. 2d 641, 644 (Ala. Crim. App. 2001).

Furthermore, even though this Court applied a plain-error standard of review for White's direct appeal, the plain-error

standard does not apply to this appeal. See Ex parte Debone, 805 So. 2d 763, 766 (Ala. 2001).

> "'[A] judge who presided over the trial or other proceeding and observed the conduct of the attorneys at the trial or other proceeding need not hold a hearing on the effectiveness of those attorneys based upon conduct that he observed.' Ex parte Hill, 591 So. 2d 462, 463 (Ala. 1991).
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> > "'"'In some cases, recollection of the events at issue by the judge who presided at the original conviction may enable him summarily to dismiss a motion for postconviction relief.' Little v. State, 426 So. 2d 527, 529 (Ala. Cr. App. 1983). 'If the circuit judge has personal knowledge of the actual facts underlying the allegations in the petition, he may deny the petition without further proceedings so long as he states the reasons for the denial in a written order.' Seats v. State, 556 So. 2d 1094, 1095 (Ala. Cr. App. 1989)."'

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

Bryant v. State, 181 So. 3d 1087, 1102-03 (Ala. Crim. App. 2011).

Lastly, with limited exceptions not applicable here, "[t]here exists a long-standing and well-reasoned principle that we may affirm the denial of a Rule 32 petition if the denial is correct for any reason." McNabb v. State, 991 So. 2d 313, 333 (Ala. Crim. App. 2007). 2003). See also Bryant v. State, 181 So. 3d 1087, 1100 (Ala. Crim. App. 2011).

With these principles in mind, we review the issues White raises in his brief to this Court.

I.

White first argues that the circuit court erred in adopting the State's proposed order summarily dismissing his postconviction petition because, he says, the order was written entirely by the State and "reflected a lack of independent findings and conclusions of law." (White's brief, p. 12.) White relies on Ex parte Ingram, 51 So. 3d 1119 (Ala. 2010), and Ex parte Scott, [Ms. 1091275, March 18, 2011] ___ So. 3d ___ (Ala. 2011), to support this argument.

The record establishes that, after the circuit court issued its order dismissing the petition, White filed a motion

to reconsider. In that motion, White argued that the order should be set aside because, he said, it did not reflect the "court's independent findings and conclusions of law." (C. 598.)

In discussing the scope of the Supreme Court's holding in Ex parte Ingram, this Court has stated:

> "[T]he Alabama Supreme Court has admonished that 'appellate courts must be careful to evaluate a claim that a prepared order drafted by the prevailing party and adopted by the trial court verbatim does not reflect the independent and impartial findings and conclusions of the trial court.' Ex parte Ingram, 51 So. 3d 1119, 1124 (Ala. 2010).
>
> "In Ingram, the Supreme Court held that the circuit court's adoption of the State's proposed order denying postconviction relief was erroneous because, it said, the order stated that it was based in part on the personal knowledge and observations of the trial judge when the judge who actually signed the order denying the postconviction petition was not the same judge who had presided over Ingram's capital-murder trial. '[T]he patently erroneous nature of the statements regarding the trial judge's "personal knowledge" and observations of Ingram's capital-murder trial undermines any confidence that the trial court's findings of fact and conclusions of law are the product of the trial judge's independent judgment....' Ingram, 51 So. 3d at 1125."

Ray v. State, 80 So. 3d 965, 971-72 (Ala. Crim. App. 2011).

A year later, the Supreme Court reconsidered the Ingram holding in Ex parte Scott. In Scott, the Supreme Court reversed the circuit court's judgment, which adopted the State's answer. The Supreme Court stated:

> "Here, we do not even have the benefit of an order proposed or 'prepared' by a party; rather the order is a judicial incorporation of a party's pleading as the 'independent and impartial findings and conclusions of the trial court.' [Ex parte Ingram, 51 So. 3d] at 1124 [(Ala. 2010)]. The first and most fundamental requirement of the reviewing court is to determine 'that the order and the findings and conclusions in such order are in fact those of the trial court.' Id. at 1124. The trial court's verbatim adoption of the State's answer to Scott's Rule 32 petition as its order, by its nature, violates this Court's holding in Ex parte Ingram."

Ex parte Scott, ___ So. 3d at ___.

In 2012, the Supreme Court again addressed this issue in Ex parte Jenkins, 105 So. 3d 1250 (Ala. 2012), and clarified its earlier decisions. In affirming the circuit court's judgment adopting the State's proposed order, the Alabama Supreme Court stated:

> "The circumstances of this case differ from the circumstances presented in Ex parte Ingram and Ex parte Scott. In both of those cases it was clear from evidence before this Court that the orders signed by the trial court were not the product of the trial court's independent judgment. In Ingram, that fact was clear from the statements contained in the order regarding the trial judge's 'personal

> knowledge' and observations of Ingram's capital-murder trial when the trial judge signing the proposed Rule 32 order did not preside over Ingram's capital-murder trial. In Ex parte Scott, that fact was clear from the materials before this Court, which contained the State's responsive pleading adopted by the trial court as its order. In this case, however, there is nothing definitive in the record or on the face of the order that indicates that the order is not the product of the trial court's independent judgment.
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> "....
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> "This Court's decision today should not be read as entitling a petitioner to relief in only those factual scenarios similar to those presented in Ex parte Ingram and Ex parte Scott. A Rule 32 petitioner would be entitled to relief in any factual scenario 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. See Ex parte Ingram."

Ex parte Jenkins, 105 So. 3d at 1260.

"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).

In this case, the proposed order adopted by the circuit court did not suffer from the defects that were present in Ex

parte Ingram and Ex parte Scott. The circuit judge who signed the order was the same judge who had presided over White's trial, and the order did not reference events outside his personal knowledge. Nor did the circuit court adopt the State's answer as its final order. White acknowledges that the circuit court added its own "language regarding conclusions." (White's brief, p. 12.) There is no indication that the order was not the "product of the [circuit] court's independent judgment." Ex parte Jenkins, 105 So. 3d at 1260. For the reasons set out in this opinion, we hold that the circuit court's findings are not clearly erroneous. Accordingly, we find no error in the circuit court's adoption of the State's proposed order as its final order summarily dismissing White's postconviction petition. White is due no relief on this claim.[2]

II.

White next argues that the circuit court erred in denying his request for funds for expert assistance to pursue his

[2]In brief, White argues that the court's order was defective because, he says, it contained errors regarding the sufficiency of his pleadings in his amended petition. We will address those claims as they relate to each specific issue raised on appeal.

postconviction proceedings. White asserts that he was entitled to state funds to "investigate, develop, and prepare factual bases for his claims related to federal constitutional violations." (White's brief, at p. 15.) He relies on the United States Supreme Court cases of Ake v. Oklahoma, 470 U.S. 68 (1985), and McWilliams v. Dunn, 582 U.S. ___, 137 S.Ct. 1790 (2017).

The United States Supreme Court in Ake v. Oklahoma, 470 U.S. 68 (1985), first recognized that an indigent defendant is entitled to expert assistance when his/her mental state at the time of the offense is "seriously in question." 470 U.S. at 70. The court revisited and reaffirmed that holding in McWilliams v. Dunn. The Supreme Court in McWilliams v. Dunn stated:

> "[N]o one denies that the conditions that trigger application of Ake [v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985)] are present. McWilliams is and was an 'indigent defendant,' 470 U.S., at 70, 105 S.Ct. 1087. See supra, at 1794. His 'mental condition' was 'relevant to ... the punishment he might suffer,' 470 U.S., at 80, 105 S.Ct. 1087. See supra, at 1794–1795. And, that 'mental condition,' i.e., his 'sanity at the time of the offense,' was 'seriously in question.' 470 U.S., at 70, 105 S.Ct. 1087. See supra, at 1794–1795. Consequently, the Constitution, as interpreted in Ake, required the State to provide McWilliams with 'access to a competent psychiatrist who will conduct

> an appropriate examination and assist in evaluation, preparation, and presentation of the defense,' 470 U.S., at 83, 105 S.Ct. 1087."

582 U.S. at ___, 137 S.Ct. at 1798.

Here, the record shows that on November 14, 2016, White filed an ex parte motion for funds for an expert to assist "in the development and presentation of evidence in support of his Rule 32 petition." (C. 177.) The State objected to White's motion. White then filed a renewed motion for funds for expert and investigative services. (C. 430.) In this motion, White requested $17,100 for a neuropharmacologist; $6,250 for a DNA expert; $12,000 for a mitigation expert; $5,200 for an investigator; undisclosed funds for a forensic psychologist; and undisclosed funds for a clinical neuropsychologist. White noted that the required fees for the last two experts would be forthcoming. (C. 430-52.) The State again filed an objection to White's motion. (C. 517.) At a hearing at which this motion was discussed, the court noted that it was denying the motion because it would not allow a "fishing expedition to retry or relitigate" issues. (R. 13.)[3]

[3]The Alabama Supreme Court has specifically held that discovery in a postconviction proceeding does not provide a petitioner the right to conduct a "fishing expedition." See

"'[T]he law is clear that Rule 32 petitioners are not entitled to funds to hire experts to assist in postconviction litigation, ex parte or otherwise .... Boyd v. State, 913 So. 2d 1113 (Ala. Crim. App. 2003).'" Bush v. State, 92 So. 3d 121, 167 (Ala. Crim. App. 2009). See also Van Pelt v. State, 202 So. 3d 707, 719 (Ala. Crim. App. 2015); McGahee v. State, 885 So. 2d 191, 229 (Ala. Crim. App. 2003).

> "This Court held that the fundamental fairness mandated by the Due Process Clause does not require the trial court to approve funds for experts at a postconviction proceeding. Hubbard v. State, 584 So. 2d 895, 900 (Ala. Crim. App. 1991). Moreover, this Court has specifically held that Ake [v. Oklahoma, 470 U.S. 68 (1985),] is not applicable in postconviction proceedings. Ford v. State, 630 So. 2d 111, 112 (Ala. Crim. App. 1991), aff'd, 630 So. 2d 113 (Ala. 1993). See also Williams v. State, 783 So. 2d 108 (Ala. Crim. App. 2000), aff'd, 662 So. 2d 929 (Ala. 1992)(table).
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> "McGahee's reliance on Ex parte Moody, 684 So. 2d 114 (Ala. 1996), is misplaced. In Moody, the Alabama Supreme Court held that 'an indigent criminal defendant is entitled to an ex parte hearing on whether expert assistance is necessary, based on the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.' 684 So. 2d at 120. As discussed above, for purposes of this proceeding, McGahee is not 'an indigent criminal defendant.' Instead, he is a convicted capital murderer who, in Rule 32 proceedings, is a civil

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Ex parte Land, 775 So. 2d 847, 852 (2000), overruled on procedural grounds, State v. Martin, 69 So. 3d 94 (Ala. 2011).

> petitioner with the burden of proving that he is entitled to relief on the grounds alleged in the petition he filed. Moody does not support McGahee's argument here. McGahee is not entitled to any relief on this claim of error. The trial court did not err when it denied an ex parte hearing on McGahee's request for funds."

McGahee v. State, 885 So. 2d at 229. See also People v. Richardson, 189 Ill. 2d 401, 422, 245 Dec. 109, 122, 727 N.E.2d 362, 375 (2000) ("Since a post-conviction petitioner does not have a constitutional right to appointed counsel ... there is no constitutional obligation to provide post-conviction counsel with investigative resources. ... Where no constitutional right is implicated, the decision to appoint an expert, or to authorize funds to hire an expert, rests within the sound discretion of the circuit court.").

This Court has held that the provisions of Ake v. Oklahoma, do not apply to postconviction petitions or collateral petitions. The circuit court committed no error in denying both of White's motions for funds for experts to assist in the postconviction proceedings. White is due no relief on this claim.

III.

White next argues that the circuit court erred in summarily dismissing his claims that his trial counsel's performance at the penalty phase of his capital-murder trial was ineffective. He lists several grounds in support of this contention.

To prevail on a claim of ineffective assistance of counsel, the petitioner must satisfy the two-pronged test articulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). The petitioner must show: (1) that counsel's performance was deficient, and (2) that he was prejudiced by the deficient performance. The Supreme Court in Strickland recognized that this test presents a mixed question of law and fact. 466 U.S. at 698.

> "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, 950 So. 2d at 356.

> Moreover,
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> "'[t]he claim of ineffective assistance of counsel is a general allegation that often consists of numerous specific subcategories. Each subcategory is an independent claim that must be sufficiently pleaded.' Coral v. State, 900 So. 2d 1274, 1284 (Ala. Crim. App. 2004), overruled on other grounds, Ex parte Jenkins, 972 So. 2d 159 (Ala. 2005)."

Jackson v. State, 133 So. 3d 420, 451 (Ala. Crim. App. 2009).

More importantly, the jury recommended, by a vote of 9 to 3, that White be sentenced to life imprisonment without the possibility of parole. In considering the prejudice prong of the Strickland test when a jury has not recommended the death penalty, we have stated:

> "'"Appellant's contention that his trial counsel rendered ineffective assistance of counsel during the penalty phase of the trial is repudiated by the fact that the jury recommended life in this case. Lewis v. State, 398 So. 2d 432 (Fla. 1981); Douglas v. State, 373 So. 2d 895 (Fla. 1979)."'
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> "Hooks [v. State], 21 So. 3d [772] at 791 [(Ala. Crim. App. 2008)] (quoting Buford v. State, 492 So.2d 355, 359 (Fla. 1986)). See also Coleman v. State, 64 So. 3d 1210, 1224 (Fla. 2011) ('This Court

> has repeatedly held that a defendant cannot demonstrate prejudice for counsel's failure to present mitigation to the jury, as opposed to the judge, when the jury recommended a life sentence.' (emphasis omitted))."

Spencer v. State, 201 So. 3d 573, 613 (Ala. Crim. App. 2015).

"'Although petitioner's claim is that his trial counsel should have done something more, we first look at what the lawyer did in fact.'" Ray v. State, 80 So. 3d 965, 979 (Ala. Crim. App. 2011), quoting Chandler v. United States, 218 F.3d 1305, 1320 (11th Cir. 2000).[4]

The record of White's penalty phase shows that Dr. Allen E. Shealy, a psychologist, testified that he interviewed White, that he reviewed White's numerous medical records, that he reviewed White's mental-health treatment records, that he reviewed White's school records, and that he conducted psychological testing on White. He testified that, after reviewing White's school records, he found that White had been diagnosed with a mental disorder at the age of four, that White had been in psychiatric hospitals on several occasions,

[4]This Court may take judicial notice of the records of White's trial. See Hamm v. State, 439 So. 2d 829, 831 (Ala. Crim. App. 1983). The record of White's trial shows that on trial counsel's attorney-fee declaration he billed the State for 207 hours for work on White's case. (Trial R. 328)

and that White had been diagnosed with impulse-control disorders or with attention deficit hyperactivity disorder ("ADHD") at the age of four. It was Dr. Shealy's opinion that White suffers difficulty controlling his impulses and that he has an "explosive disorder." (Trial R. 645.)

Andrew White, White's adopted father, testified at the penalty phase that he and his wife adopted White when he was about eight months old. (Trial R. 662.)[5] He testified concerning the difficulty that he and his wife had in raising White.

Stella White, White's adopted mother, testified that White was very active as a child and was diagnosed with ADHD when he was four years old and was given the medication Ritalin for that condition. She testified that between the ages of four through his high-school years he "virtually always" was under the care of psychiatrists or psychologists and that he saw at least six different psychiatrists and/or psychologists. (Trial R. 679.) At one time, she said, when White was in middle school White was "having a little bit of

[5]The presentence report states that White was adopted when he was six months old.

difficulty" so she took him to Children's Hospital's Emergency room. (Trial R. 680.) Stella further testified:

> "After the psychiatrist talked to him, he said I can't let him go.
>
> "He said, anytime I asked him about thoughts of suicide and if they say yes to those questions I have to admit him.
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> "....
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> "He stayed in the mental hospital for ten days and when we went to check on him, the doctor said that the insurance company was not going to let them keep him. They only allow the first ten days.
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> "....
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> "So we had no choice but to take him home. And go back to the outpatient, you know, the outpatient treatment. And do the medication and he was on lots of medications from the hospital.
>
> "So we just kept doing that. Things didn't get any better. He really needed to stay in the hospital. It just didn't get any better."

(Trial R. 681-83.) Stella White further testified that White had problems with the fact that he was biracial and adopted.

A.

First, White argues that the circuit court erred in summarily dismissing his claim that his trial counsel was

ineffective for failing to present evidence of his mental illness at the penalty phase of his capital-murder trial.[6]

In White's amended petition, he pleaded the following, in part:

> "Defense counsel failed to adequately investigate the available evidence regarding [White's] struggles with substance dependence. Counsel failed to adequately investigate the manner in which Mr. White's substance dependence impacted his mental illness. Specifically, Mr. White's counsel failed to interview the available family members who had information concerning Mr. White's mental health history. Counsel did not interview Mr. White's biological family, including his mother, Beth Lorraine Crook, his two sisters, Bethany Crook and Caitlyn Crook, and his younger brother. Mr. White's counsel also failed to interview his three adopted siblings, Andrea White, Tiffani Hambrick, and Toosdhi White, each of whom lives in the state of Alabama. Counsel failed to interview Mr. White's extended family on both sides of his adopted family who reside in the state of Alabama. On his maternal side, counsel could have interviewed Horace Felder, Gale Felder Gilky, Valencia Felder, Jackie Felder, Albert Felder, Billie Felder, and Carolyn Felder. On Mr. White's paternal side, counsel could have interviewed Albert White, John White, James White, and Dorothy Jean Trammel. Each of these people were available and willing to talk at the time of trial and would have provided extensive information, and

[6]This argument in White's brief is very similar to White's pleadings in his amended postconviction petition. For that reason, the State argues that this section of White's brief fails to comply with the filing requirements of Rule 28 (a)(10), Ala. R. App. P.

> persuasive testimony, regarding Mr. White's history of mental illness.
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> "Mr. White's counsel failed to interview and present testimony from any of Mr. White's foster family, teachers, football coaches, or peers. Counsel could have interviewed a number of individuals, including the mother of his child, Brittany Taylor; his original foster parents, Ben and Patty Gordon; the Gordon's son Caleb; educators Kathy Long and Brian Cain; his former coaches; and former supervisors Kila Carlyle and Glenn Liemback. These witnesses were available and willing to talk at the time of trial and would have provided extensive and persuasive testimony about Mr. White's mental health issues."

(C. 275-76.)

The circuit court made the following findings on this claim:

> "While White has set forth many allegations supporting this claim in the first amended Rule 32 petition, the allegations are insufficiently pleaded. For instance, White contends that counsel failed to present evidence concerning his family's history of mental illness. However, White failed to specifically plead what the family history of mental illness is or how he was prejudiced by counsel's failure to present this evidence. White also asserts that his attorneys were ineffective because they failed to investigate his struggles with substance dependence and how his substance dependence affected his mental illness. White, however, fails to specifically plead what substance dependence he suffers from, what witnesses could testify to his substance dependence, or how specifically his substance dependence affected his mental illness. Finally, White asserts that his attorneys failed to interview and present testimony

> from his foster families, teachers, football coaches and peers concerning his mental illness. However, White fails to identify the names of these witnesses, what these unidentified witnesses would say about his mental condition, or how he was prejudiced because of counsel's failure to call these unidentified witnesses during the penalty phase of his trial. 'Conclusory allegations not supported by specifics do not warrant relief.' Thomas v. State, 766 So. 2d 860, 889 (Ala. Crim. App. 1998). This allegation fails to comply with the specificity and full factual pleading requirements of Rule 32.3 and 32.6(b), [Ala. R. Crim. P.,]; therefore, this claim is summarily dismissed from the first amended Rule 32 petition."

(C. 42-43.)

On appeal, White argues that the circuit court erred in dismissing this claim because, he says, he fully complied with the pleading requirements of Rule 32.3, Ala. R. Crim. P. Specifically, he argues that he provided the names of five doctors who had previously treated White's mental condition and attached an affidavit from one of White's former psychologists. The State asserts that the mere attachment of an affidavit does not comply with the full-fact pleading requirements of Rule 32.3, Ala. R. Crim. P.

"[A] Rule 32 petitioner is not required to include attachments to his or her petition in order to satisfy the pleading requirements in Rule 32.3 and Rule 32.6(b)[;

however,] when a petitioner does so, those attachments are considered part of the pleadings." Conner v. State, 955 So. 2d 473, 476 (Ala. Crim. App. 2006). In this case, however, there is no reference in the pleadings on this claim to the affidavit and the affidavit does not state what claim it was attached to support. (C. 274-84.) The five doctors White states he named in his postconviction petition were not identified in this section of White's petition but were merely named in the introductory section of the petition. (C. 197.) Also, White did not plead in his postconviction petition what these doctors could have testified to in regard to mitigation.

"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) (quoting Daniel v. State, 86 So. 3d 405, 410-11 (Ala. Crim. App. 2011)).

> "Rule 32.6(b), Ala. R. Crim. P., requires that full facts be pleaded in the petition if the petition is to survive summary dismissal. See Daniel [v. State, 86 So. 3d 405 (Ala. Crim. App. 2011)]. Thus, to satisfy the requirements for pleading as they relate to postconviction petitions, Washington was required

> to plead full facts to support each individual claim."

Washington v. State, 95 So. 3d 26, 59 (Ala. Crim. App. 2012) (emphasis added). "[T]he claim of ineffective assistance of counsel is a general allegation that often consists of numerous specific subcategories. Each subcategory is an independent claim that must be sufficiently pleaded." Coral v. State, 900 So. 2d 1274, 1284 (Ala. Crim. App. 2004), overruled on other grounds, Ex parte Jenkins, 972 So. 2d 159 (Ala. 2005).

Although White listed many individuals he said could have provided mitigation testimony, he failed to plead what each of those individuals could have presented. White also failed to specifically identify all of witnesses by name and instead identified them by their title, i.e., former coaches, teachers, or peers. "Specificity in pleading requires that the petitioner state both the name and the evidence that was in the witness's possession that counsel should have discovered, but for counsel's ineffectiveness." Daniel v. State, 86 So. 3d 405, 422 (Ala. Crim. App. 2011). "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." Hyde v. State, 950 So. 2d at 356.

Moreover, as set out above, one affidavit was attached to the postconviction petition; that affidavit was executed by Dr. Samuel Saxon, a clinical psychologist. Dr. Saxon stated that he had treated White when he was young and that White had been diagnosed with ADHD and impulse-control issues. (C. 404.) However, the evidence in this affidavit was presented at White's sentencing hearing.

White's trial counsel presented evidence of his mental illness at his sentencing hearing through the testimony of Dr. Shealy and White's adopted mother. In fact, the mitigation evidence was so persuasive that the jury recommended a sentence of life imprisonment without the possibility of parole. Stella White testified, in depth, concerning their struggles in raising White because of his mental problems and said that White had been diagnosed with ADHD when he was four years old. Dr. Shealy testified that White had ADHD and impulse-control problems.

Dr. Saxon's testimony was cumulative of testimony that White's trial counsel did present at the sentencing hearing.

> "Any testimony the additional witnesses would have provided would have been cumulative to that provided by the witnesses at resentencing. As discussed above, trial counsel are not ineffective for failing to present cumulative evidence. See Marquard v. State, 850 So. 2d 417, 429-30 (Fla. 2002) ('[C]ounsel is not required to present cumulative evidence.'). Moreover, the cumulative mitigation testimony would not have outweighed the State's evidence in aggravation. See, e.g., Bell v. State, 965 So. 2d 48 (Fla. 2007) (finding that the defendant did not demonstrate the prejudice prong because the unpresented penalty phase testimony could not have countered the quantity and quality of the aggravating evidence); see also Gaskin v. State, 737 So. 2d 509, 516 n. 14 (Fla. 1999) ('Prejudice, in the context of penalty phase errors, is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or the deficiencies substantially impair confidence in the outcome of the proceedings.'). The additional testimony would only have added to the mitigation already found."

Rhodes v. State, 986 So. 2d 501, 512-13 (Fla. 2008).

This claim was correctly summarily dismissed because it failed to comply with the full-fact pleading requirements of Rule 32.3, Ala. R. Crim. P. Also, this claim was subject to summary dismissal under Rule 32.7(d), Ala. R. Crim. P., because it failed to state an issue of fact or law that would entitle White to relief. White is due no relief on this claim.

B.

White next argues that the circuit court erred in summarily dismissing his claim that his trial counsel failed to adequately investigate and present a basis for a sentence of life imprisonment without the possibility of parole because, he says, counsel did not investigate any of White's records. In White's amended petition, White pleaded:

> "Counsel's duty to investigate includes looking into [White's] medical history, educational history, employment and training history, family and social history, prior correctional experience, and religious and cultural influences. See ABA Guidelines 10.7 Commentary. An adequate investigation requires defense counsel to interview all available witnesses, and gather school records, social service and welfare records, juvenile dependency or family court records, medical records, military records, employment records, criminal and correctional records, family, birth, marriage and death records, alcohol and drug abuse assessment or treatment records, and INS [Immigration and Naturalization Service] records. Only by acquiring information from these sources can counsel perform the sort of multi-generational investigation extending as far as possible vertically and horizontally necessary to adequately defend a capital case. In this case, counsel failed to conduct the type of investigation necessary to effectively defend Mr. White during the penalty phase of his capital trial."

(C. 271-72.)

When summarily dismissing this claim, the circuit court made the following findings:

> "White ... does not identify what witnesses counsel should have interviewed, what a background investigation would have revealed, and what information could be found in the records counsel failed to obtain. In addition, White does not set forth how this information would have changed the outcome of the penalty phase of his trial. 'Claims of failure to investigate must show with specificity what information would have been obtained with investigation, and whether, assuming the evidence is admissible, its admission would have produced a different result.' Van Pelt [v. State, 202 So. 3d 707 (Ala. Crim. App. 2015)] (quoting, Thomas v. State, 766 So. 2d 860, 892 (Ala. Crim. App. 1998)). Because this claim is insufficiently pleaded, it is summarily dismissed from the first amended Rule 32 petition."

(C. 41-42.)

"'A defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial.' United States v. Green, 882 F.2d 999, 1003 (5th Cir. 1989)." Nelson v. Hargett, 989 F.2d 847, 850 (5th Cir. 1993). As the circuit court stated, White failed to plead what any further investigation would have revealed. "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." Hyde v. State, 950 So. 2d at 356.

Moreover, the record of White's trial shows that trial counsel requested and was granted funds for an investigator to investigate the circumstances surrounding the case, and a mitigation expert to assist in gathering mitigation for the penalty phase. (Trial C. 53, 56.) The record further shows that trial counsel requested funds so he could secure White's "medical records, school records, criminal background records, and military records." (Trial C. 133.) That motion was also granted. (Trial C. 136.) Dr. Shealy, a psychologist, testified at the penalty phase that he had reviewed White's medical, mental-health, and school records.

Accordingly, this claim was correctly summarily dismissed pursuant to Rule 32.3, Ala. R. Crim. P., and Rule 32.7(d), Ala. R. Crim. P. White is due no relief on this claim.

C.

White next argues that the circuit court erred in summarily dismissing his claim that his trial counsel was ineffective for failing to investigate and present evidence concerning his family history.

In his amended petition, White pleaded:

> "Trial counsel failed to adequately interview Mr. White, his biological mother Beth Crook, his foster parents, his adopted parents, his extended adopted family, his biological siblings, his adopted siblings, and relevant experts in order to obtain information critical to understanding the circumstances and impact of his adoption. Trial counsel failed to obtain available records regarding Mr. White's birth records and records regarding his time in foster care and his adoption. There were records available that counsel could have obtained to provide important details regarding Mr. White's birth, time in foster care, and adoption.
>
> "....
>
> "Mr. White spent the beginning of his life in foster care. He was taken in by his foster parents Ben Gordon and Patty Gordon at four months old. He lived with his foster parents until he was adopted at eight months old by Andrew and Stella White. Defense counsel failed to adequately investigate and present evidence from Ben Gordon and Patty Gordon regarding Mr. White's time in foster care. Defense counsel failed to adequately interview and present evidence from Caleb Gordon regarding Mr. White's relationship with the Gordon family. ..."

(C. 285-86.)

When dismissing this claim, the circuit court made the following findings:

> "This claim is insufficiently pleaded because White does not specifically allege what further records counsel should have obtained concerning his adoption, what details these records would show, what impact White's adoption had on his development, and what evidence counsel should have presented

> concerning White's positive relationships with his adoptive family."

(C. 44.)

This claim was insufficiently pleaded. Clearly, White failed to plead full facts in support of this claim -- he failed to plead what such an investigation would have uncovered or what counsel failed specifically to present once counsel conducted what White considered to be an "appropriate investigation." "Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b)." Hyde, 950 So. 2d at 356.

Moreover, the trial record shows that White was adopted when he was about eight months old and was in foster care only until that time. We fail to see how White could establish any prejudice for trial counsel's failure to present evidence of his foster care, which occurred before White was eight months old. Also, White's adoptive mother, Stella White, testified at the sentencing hearing that White had "issues" with being adopted:

> "[W]hen he was about 7 or 8, you know, he got the telephone, and you know he was learning -- he found out his birth name. So he went down the telephone book and he'll dial numbers with that last name.

> "That he would ask people, if a lady answered, he would say, are you my mother? And once people would say no, he would hang up and go to the next number.
>
> "I remember one person, a lady actually talked to him, a very long time. She was very sweet. And she just talked to him. Just like he was her own.
>
> "He just -- he just wanted to know where she was. When we got him, we didn't know anything about his birth father. There were no records on him. And the birth mother said in a letter to him, you know, she alluded to the fact that she was not a willing participant in his conception.
>
> "And so he -- but he always wondered, why didn't she keep me. Because he knew he was biracial. But he would always see biracial children with their parents. So he didn't understand why his mother wouldn't keep him. And he just -- he was always worried about it."

(Trial R. 683-84.)

This claim was correctly summarily dismissed because White failed to comply with the full-fact pleading requirements of Rule 32.3, Ala. R. Crim. P. White is due no relief on this claim.

D.

White next argues that his trial counsel was ineffective for failing to present evidence at his sentencing hearing that he was a loving father. The record shows that White fathered a child when he was 17 years of age.

In White's amended petition, he pleaded:

> "Counsel failed to investigate or present evidence of Mr. White's positive relationship with his daughter, Jessica Michelle Taylor, Mr. White's daughter, was born in December 2004, when Mr. White was 17 years old. Mr. White saw Jessica nearly every day from the time she was born until he was arrested. Mr. White did not live with his daughter, but he provided her with emotional and financial support. He continued to stay in touch with his daughter in the time leading up to his trial. Despite his young age, Mr. White was a loving father who cared for his daughter.
>
> "Trial counsel failed to contact a number of witnesses regarding Mr. White's relationship with his daughter. Counsel could have spoken with Brittany Michelle Taylor, Jessica's mother; counsel could have spoken with Mr. White's family members; and counsel could have spoken with Mr. White. All these witnesses were available to discuss Mr. White's loving relationship with his daughter at trial, a well-recognized category of mitigation."

(C. 288-89.)

When summarily dismissing this claim, the circuit court made the following findings:

> "White fails to allege in his petition how he was prejudiced by counsel's failure to present evidence that he was a loving father. See Van Pelt [v. State, 202 So. 3d 707 (Ala. Crim. App. 2015),] (where the Court of Criminal Appeals found that a similar claim was insufficiently pleaded because the petitioner failed to explain how further investigation would have changed the result of the trial). In addition, the jury recommended that White be sentenced to life without parole. White's failure to plead how he was prejudiced is more

> egregious where the jury recommended a life without parole sentence for him. For these reasons, this claim is summarily dismissed from the first amended Rule 32 petition."

(C. 44.) This claim was insufficiently pleaded because White failed to plead how he was prejudiced by counsel's failure to present evidence that he was a loving father. "[White] failed to plead prejudice; therefore summary dismissal was proper." Washington v. State, 95 So. 3d 26, 68 (Ala. Crim. App. 2012).

Furthermore, this claim was due to be dismissed on its merits because White could not establish any prejudice. Here, the jury recommended a sentence of life imprisonment without the possibility of parole. The presentence report, which the sentencing court but not the jury was privy to, gave background information concerning White's family history and the fact that he was a father.

Accordingly, this claim was correctly summarily dismissed because it failed to comply with the full-fact pleading requirements of Rule 32.3, Ala. R. Crim. P. White is due no relief on this claim.

E.

White next argues that his trial counsel was ineffective at the penalty phase for failing to investigate and to present evidence concerning White's "positive employment history."

In his amended petition, White pleaded:

> "Counsel failed to investigate or present evidence that Mr. White, while young, continued to maintain steady employment throughout his life. Mr. White was employed at a series of jobs including: Bruno's Supermarket, Journeys, Winn Dixie, Publix, and AutoZone. Mr. White maintained consistent employment in part to support his daughter and was recognized as a good employee by his supervisors. Trial counsel failed to contact Mr. White's family to uncover information about Mr. White's positive employment history. Trial counsel could have contacted Mr. White's former supervisors, including Kila Carlyle and Glenn Liemback, to uncover information about Mr. White's positive employment history. All of these witnesses were available and willing to discuss Mr. White's positive employment history at trial."

(C. 289-90.)

The circuit court stated: "This claim is insufficiently pleaded because White does not specifically plead how he was prejudiced by counsel's failure to present evidence concerning his positive employment history." (C. 45.) "A bare allegation that prejudice occurred without specific facts

indicating how the petitioner was prejudiced is not sufficient." Hyde v. State, 950 So. 2d at 356.

Moreover, as stated above, the jury recommended a sentence of life imprisonment without parole. The presentence report that the judge considered before the judicial sentencing hearing contained White's work history and showed that White worked since he was 18 years of age. The report showed that White worked at a Publix grocery store and an AutoZone store. Moreover, the trial record shows that counsel subpoenaed White's employment records from AutoZone. (Trial C. 113-14.) Clearly, trial counsel did consider White's work history.

> "'[C]ounsel's method of presenting mitigation ... [is] clearly trial strategy.' Hertz v. State, 941 So. 2d 1031, 1044 (Fla. 2006). See also People v. Ratliff, 41 Cal. 3d 675, 697, 224 Cal. Rptr. 705, 715 P.2d 665, 678 (1986) ('[T]he manner of presenting evidence [is] one of trial tactics properly vested in counsel.'). '[T]he presentation of mitigating evidence is a matter of trial strategy.' State v. Keith, 79 Ohio St. 3d 514, 530, 684 N.E.2d 47, 63 (1997)."

Clark v. State, 196 So. 3d 285, 316 (Ala. Crim. App. 2015).

This claim was correctly summarily dismissed because White failed to plead what the "positive work history" consisted of and how he was prejudiced by counsel's failure to

present such evidence. See Rule 32.3, Ala. R. Crim. P. White is due no relief on this claim.

F.

White next argues that his trial counsel was ineffective in the penalty phase for failing to object to the circuit court's instructions on the jury's weighing the aggravating circumstances and the mitigating circumstances.

The circuit court stated that this claim was due to be "summarily dismissed because it failed to state a valid claim for relief or present a material issue of fact or law under Rule 32.7(d) of the Alabama Rules of Criminal Procedure." (C. 62.)

Indeed, this Court addressed this specific issue on direct appeal and stated:

> "White's contention that the circuit court failed to inform the jury how to vote after weighing the aggravating and the mitigating circumstances, i.e., to vote for death if the aggravation outweighs the mitigation or for life without the possibility of parole if the mitigation outweighs the aggravation, is refuted by the record. At trial, the circuit court instructed the jury as follows:
>
> > "'So ladies and gentlemen, if, after a full and fair consideration of all the evidence in this case, you are convinced beyond a reasonable doubt, that at least one aggravating circumstance does exist.

> And you are convinced that that aggravating circumstance outweighs any mitigating circumstance that has been offered. Then the form of your verdict would be:
>
> > "'We the jury, find the Defendant to be punished by death."
> >
> > "'....
> >
> > "'If, on the other hand, you find that the mitigating circumstances outweigh the aggravating circumstances, your verdict would be:
> >
> > > "'"We, the jury, find that the Defendant be punished of life imprisonment without parole."'
>
> "(R. 730.)
>
> "Because the circuit court instructed the jury on how to vote after it weighed the aggravating circumstances and the mitigating circumstances, White's argument to the contrary is without merit. Albarran [v. State], 96 So. 3d [131] at 160 [(Ala. Crim. App. 2011)] ('This assertion is refuted by the record and is without merit.'). Accordingly, this issue does not entitle White to any relief."

White, 179 So. 3d at 220.

"[B]ecause the underlying claims have no merit, the fact that [the petitioner's] lawyer did not raise those claims cannot have resulted in any prejudice to [the petitioner]." Magwood v. State, 689 So. 2d 959, 974 (Ala. Crim. App. 1996). See also Commonwealth v. Walker, 613 Pa. 601, 614, 36 A.3d 1,

9 (2011) ("Since all of appellant's underlying claims of trial counsel's ineffectiveness fail, his claims of appellate counsel's ineffective are necessarily defeated as well. ..."); Jackson v. State, 133 So. 3d 420, 453 (Ala. Crim. App. 2009). Many other states have applied this same standard. See Walker v. State, 863 So. 2d 1, 11 (Miss. 2003) ("Because we have held that the underlying claims are without merit, Walker cannot show the requisite deficient performance and resulting prejudice necessary to establish the various claims of ineffective assistance of counsel."); People v. Pitsonbarger, 205 Ill. 2d 444, 466, 275 Ill. Dec. 838, 854, 793 N.E.2d 609, 625 (2002) ("Claims of ineffective assistance of counsel at trial and on direct appeal are evaluated under the standard set forth in Strickland, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.E.2d at 693, which requires the defendant to demonstrate both deficient performance by counsel and resulting prejudice. Accordingly, if the underlying claim has no merit, no prejudice resulted, and petitioner's claims of ineffective assistance of counsel at trial and on direct appeal must fail.").

This claim was correctly summarily dismissed because no material issue of fact or law exists that would entitle White to relief. See Rule 32.7(d), Ala. R. Crim. P.

G.

White next argues that his trial counsel was ineffective for failing to present new evidence at the judicial sentencing hearing after the jury had recommended, by a vote of 9 to 3, that White be sentenced to life imprisonment without the possibility of parole.

White pleaded the following:

> "After White received a jury verdict recommending life without parole, the only way he would receive a death sentence was the possibility of this Court overriding the jury's verdict. During this Court's sentencing hearing, trial counsel was deficient for presenting no additional evidence. In overriding the jury's verdict, this Court failed to find extensive mitigating evidence present in Mr. White's background. Notably, the trial court's sentencing order made no findings regarding: the extent of Mr. White's mental health history; the impact of Mr. White's adoption; Mr. White's positive community relationship; his loving relationship with his daughter; his positive work history; or his positive institutional record."

(C. 294.)

The circuit court made the following findings:

> "White asserts that his attorneys were ineffective because they failed to present evidence during the

> judge sentencing hearing. This claim is insufficiently pleaded because White does not identify what additional evidence counsel should have presented or how he was prejudiced by counsel's failure to present additional evidence during the judge sentencing hearing. ... This claim is therefore summarily dismissed from the first amended Rule 32 petition because it does not satisfy the specificity and full factual pleading requirements of Rule 32.3 and 32.6(b) of the Alabama Rules of Criminal Procedure."

(C. 46.) Clearly, this claim was correctly summarily dismissed because White failed to plead what additional evidence should have been presented at the sentencing hearing before the judge. White failed to comply with the full-fact pleading requirements of Rule 32.3, Ala. R. Crim. P.

Moreover, this claim was correctly summarily dismissed because it failed to state a claim that would entitle White to any relief. See Rule 32.7(d), Ala. R. Crim. P. We have held that

> "'[a]ppellant's contention that his trial counsel rendered ineffective assistance of counsel during the penalty phase of the trial is repudiated by the fact that the jury recommended life in this case. Lewis v. State, 398 So. 2d 432 (Fla. 1981); Douglas v. State, 373 So. 2d 895 (Fla. 1979). Further, we refuse to find counsel ineffective by relying on the jury recommendation and failing to present further mitigating evidence to the judge. Lewis.'"

Hooks v. State, 21 So. 3d 772, 791 (Ala. Crim. App. 2008), quoting Buford v. State, 492 So. 2d 355, 359 (Fla. 1986).

This claim was correctly summarily dismissed based on defects in the pleadings and because it was without merit. White is due no relief on this claim.

H.

White next argues that his trial counsel was ineffective for failing to challenge the psychologist's diagnosis that he suffered from an antisocial personality disorder.

The circuit court made the following findings:

> "This claim is also summarily dismissed because it fails to present a valid claim for relief or present a material issue of fact or law under Rule 32.7(d) of the Alabama Rules of Criminal Procedure. This claim is based on pure speculation without any record evidence to support the allegation that this Court considered improper evidence when it overrode the jury's life without parole sentence recommendation."

(C. 50.)

White's trial counsel was entitled to rely on Dr. Shealy's opinion of White's mental condition, and counsel was not obliged to shop around for another diagnosis that postconviction counsel now says was more favorable to White.

> "'[T]rial counsel had no reason to retain another psychologist to dispute the

> first expert's findings. "A postconviction petition does not show ineffective assistance merely because it presents a new expert opinion that is different from the theory used at trial." State v. Combs, 100 Ohio App. 3d 90, 103, 652 N.E.2d 205, 213 (1994). See also State v. Frogge, 359 N.C. 228, 244-45, 607 S.E.2d 627, 637 (2005). "Counsel is not ineffective for failing to shop around for additional experts." Smulls v. State, 71 S.W.3d 138, 156 (Mo. 2002). "Counsel is not required to 'continue looking for experts just because the one he has consulted gave an unfavorable opinion.' Sidebottom v. Delo, 46 F.3d 744, 753 (8th Cir. 1995)." Walls v. Bowersox, 151 F.3d 827, 835 (8th Cir. 1998).'
>
> "Waldrop v. State, 987 So. 2d 1186, 1193 (Ala. Crim. App. 2007). '[D]efense counsel is entitled to rely on the evaluations conducted by qualified mental health experts, even if, in retrospect, those evaluations may not have been as complete as others may desire.' Darling v. State, 966 So. 2d 366, 377 (Fla. 2007)."

McMillan v. State, 258 So. 3d 1154, 1177 (Ala. Crim. App. 2017).

This claim was correctly summarily dismissed because it failed to state a material issue of fact or law that would entitle White to relief. See Rule 32.7(d), Ala. R. Crim. P. White is due no relief on this claim.

I.

White argues that the cumulative effect of his lawyer's errors in the penalty phase entitled him to relief.

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

Taylor v. State, 157 So. 3d 131, 140 (Ala. Crim. App. 2010). Accordingly, White is due no relief on this claim.

IV.

White next argues that his trial counsel was ineffective at the guilt phase of his capital-murder trial for failing to argue effectively against the admission of evidence that White had raped and murdered Sierra Black. He further argues that his trial counsel was ineffective for failing to properly object to the court's limiting instructions on the use of the Rule 404(b), Ala. R. Crim. P., evidence because, he says, the instructions were overly broad.

The record of White's trial shows that the State gave pretrial notice of its intent to present Rule 404(b), Ala. R. Evid., evidence that White had been convicted of raping and murdering Sierra Black.[7] (Trial C. 45.) White objected. The trial court allowed detailed evidence of White's conviction to be presented at his trial for murdering Parker. Black was murdered in October 2006; Parker was murdered in July 2006.

[7]White was convicted of murdering Black in 2008 and appealed to this Court. We affirmed his conviction and sentence by unpublished memorandum. See White v. State, (No. CR-07-1172, January 29, 2010) 75 So. 3d 1225 (Ala. Crim. App. 2010) (table).

The circuit court made the following findings on this claim:

> "White raised the substantive claim on direct appeal and the Court of Criminal Appeals found that the claim was without merit. White [v. State], 179 So. 3d [170] at 184-187 [(Ala. Crim. App. 2013)]. The Court of Criminal Appeals found that the evidence established that White's two crimes were 'peculiarly distinctive' and the evidence from the Black rape/murder was admissible under Rule 404(b) to prove White's identity as the person who murdered Jasmine Parker. ...
>
> "White cannot prevail on his ineffective assistance of counsel claim where the Alabama Court of Criminal Appeals found the substantive claim without merit."

(C. 51-52.)

On direct appeal, this Court thoroughly addressed this issue:

> "At trial, White's theory was that he was not the individual who murdered [Jasmine] Parker. Accordingly, White's identity as the individual who murdered Parker was at issue. 'Considering there was no eyewitness to [Parker's] murder, it was necessary for the State to present other evidence proving the identity of the killer.' Petric v. State, 157 So. 3d 176, 192 (Ala. Crim. App. 2013). Further, the circumstances of the Black rape/murder and Parker rape/murder were sufficiently similar to admit evidence of the Black rape/murder under the identity exception contained in Rule 404(b). White murdered both Parker and Black by strangling them to death with a soft ligature, a method of strangulation that is extremely rare. In fact, he strangled both women with their clothing. In both

> rapes, White did not wear a condom and left his semen on his victims. The State established that both victims were young, black women with similar body types. The State presented evidence indicating that items belonging to both women were kept by the murderer. Further, the State established that White murdered Black slightly under four months after Parker was murdered. Because the evidence established that White's two crimes were peculiarly distinctive, the circuit 'court did not exceed its discretion in finding that the evidence of [White's] bad acts against [Black] was admissible under Rule 404(b) as proof of [his] identity [as Parker's] killer.' Petric, 157 So. 3d at 193.
>
> "Further, this Court has thoroughly reviewed the record and holds that the probative value of the evidence establishing that White raped and murdered Black was not substantially outweighed by unfair prejudice. See Averette v. State, 469 So. 2d 1371, 1373–74 (Ala. Crim. App. 1985) (holding that 'not only must it be determined that the other offenses are material and relevant to an issue other than the character of the accused and fall within an exception to the exclusionary rule, but the probative value must not be substantially outweighed by undue prejudice'); Rule 403, Ala. R. Evid. (providing that, '[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence')."

White, 179 So. 3d at 186-87.

Additionally, when addressing White's argument concerning the trial court's limiting instructions, the circuit court stated:

> "White's claim ... that his attorneys were ineffective because they failed to object to this Court's impermissibly broad instruction about how the jury should consider Rule 404(b) evidence is summarily dismissed because it fails to state a valid claim for relief or present a material issue of fact or law under Rule 32.7(d) of the Alabama Rules of Criminal Procedure.
>
> "White raised the substantive claim on direct appeal and the Court of Criminal Appeals found that the claim was without merit."

(C. 52-53.) On direct appeal, this Court stated the following concerning the jury instructions:

> "In its final instructions, the circuit court informed the jury that evidence of collateral bad acts is not admissible to prove bad character; however, it may be admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. After informing the jury of the possible purposes for which evidence of collateral crimes may be admitted, it then restricted the jury's consideration of White's collateral crimes to determining his identity only. Accordingly, unlike in [Ex parte] Billups, [86 So. 3d 1079 (Ala. 2010),] the circuit court did 'limit the jury's consideration of ... evidence [of White's collateral crime] to only th[e] purpose[ ] for which [it] was ... offered by the State,' i.e., to establish White's identity. Ex parte Billups, 86 So. 3d at 1086. Consequently, no error, much less plain error, resulted from the circuit court's jury instruction."

White, 179 So. 3d at 189.

This Court held that the judge's limiting instructions were not overly broad. Thus, the underlying claim supporting

the claim of ineffective assistance of counsel was without merit and White could establish no prejudice under Strickland. White was due no relief on this claim.

V.

White next argues that his trial counsel's performance was deficient for failing to object to the introduction of what he claims was victim-impact evidence at the guilt phase of his trial. Specifically, he argues that the 911 emergency call made by Vanessa Parker, the victim's mother, should not have been admitted into evidence because, he says, it was highly emotional, prejudicial, and not probative.

The circuit court found that this issue was procedurally barred because it had been raised and addressed by this Court on White's direct appeal. Rule 32.2(a)(4), Ala. R. Crim. P.

> "Here, the recording of the call Vanessa Parker made to emergency 911 after finding her daughter's lifeless body was relevant to the discovery of Parker's body, the timing of the murder, and how the police became involved in investigating the murder. Accordingly, the recording did not constitute victim-impact evidence."

White, 179 So. 3d at 206. On appeal, this Court held that the 911 emergency call did not constitute victim-impact evidence. "Because the substantive claim underlying the claim of

ineffective assistance of counsel has no merit, counsel could not be ineffective for failing to raise this issue." Lee v. State, 44 So. 3d 1145, 1173 (Ala. Crim. App. 2009). "This Court will not consider an ineffective assistance of counsel claim when the underlying issue was considered on direct appeal and found to be without merit." Moffett v. State, 156 So. 3d 835, 866 (Miss. 2014).

This claim was correctly summarily dismissed because it failed to state a material issue of fact or law that would entitle White to relief. See Rule 32.7(d), Ala. R. Crim. P. White is due no relief on this claim.

VI.

White next argues that his trial counsel was ineffective for failing to adequately challenge the admission into evidence of White's confession to police regarding the rape and murder of Sierra Black.

The circuit court found that this claim was due to be summarily dismissed because there was no material issue of law or fact that would entitle White to relief because the issue had been addressed on direct appeal and found to be without

merit. See Rules 32.2(a)(4), and Rule 32.7(d), Ala. R. Crim. P.

This Court, relying on our decision in White's appeal from his conviction for the rape and murder of Sierra Black, found that White's statement "'was knowingly, voluntarily, and intelligently given after proper Miranda[8] warnings and was admissible into evidence.'" White, 179 So. 3d at 192 (quoting this Court's unpublished memorandum in White v. State (No. CR-07-1172, January 29, 2010), 75 So. 3d 1225 (Ala. Crim. App. 2010) (table)).

Therefore, we agree with the circuit court that the substantive claim supporting this claim of ineffective of counsel had no merit; therefore, summary dismissal was proper. See Rule 32.7(d), Ala. R. Crim. P. White is not entitled to relief on this claim.

VII.

White next argues that his trial attorneys were ineffective at the guilt phase of his capital-murder trial for failing to conduct an adequate investigation into Parker's

[8]Miranda v. Arizona, 384 U.S. 436 (1966).

murder and to present evidence of the inadequacy of the police investigation.

A.

First, White argues that his trial counsel failed to show that the police investigation into Parker's murder was incomplete.

The circuit court made the following findings:

> "White alleges that the police did not test the majority of the physical evidence, did not follow-up on relevant leads, and did not interview a number of witnesses. However, White does not set forth specific facts to support this claim. White does not identify what physical evidence was not tested, what relevant leads were not followed up on, and does not identify the witnesses who were not interviewed. Because White failed to specifically plead how counsel's performance was deficient, this claim is summarily dismissed pursuant to Ala. R. Crim. P. 32.7(d).
>
> "....
>
> "White contends ... that his attorneys were ineffective because they failed to investigate who the victim was in contact with on the day of the murder. This claim is summarily dismissed because it does not satisfy the specificity and full factual pleading requirements of Rule 32.3 and 32.6(b) of the Alabama Rules of Criminal Procedure. While it appears that White asserts that his attorneys should have talked to Greg Jelks and Naman Jones, White fails to plead what his attorneys would have learned from talking to these people and fails to plead how this information would have changed the outcome of his trial. ...

"White's allegation ... that his attorneys were ineffective because they failed to investigate potential witnesses to the murder that the police did not interview is insufficiently pleaded and is therefore summarily dismissed. While White names some of those potential witnesses, he does not identify what counsel would have learned from these witnesses or how this information would have changed the outcome of his trial. ...

"White contends ... that his attorneys were ineffective because they failed to investigate several possible suspects identified by the police. This claim is summarily dismissed because it does not satisfy the specificity and full factual pleading requirements of Rule 32.3 and 32.6(b) of the Alabama Rules of Criminal Procedure. While White identifies the suspects the police failed to investigate, he does not set forth what information these people would have provided to counsel concerning the offense or how this information would have changed the outcome of his trial. White merely makes conclusory allegations which are not supported by facts. ...

"White's claim that his attorneys were ineffective because they failed to investigate physical evidence from the crime scene ... is summarily dismissed because it does not satisfy the specificity and full factual pleading requirements of Rules 32.3 and 32.6(b) of the Alabama Rules of Criminal Procedure. White does identify some of the physical evidence counsel failed to have analyzed; however, he does not set forth what counsel would have learned from further testing of this physical evidence or how this information would have changed the outcome of his trial. ...

"White contends ... that his attorneys were ineffective because they failed to put on an affirmative case during the guilt phase of his trial. This claim is summarily dismissed because it

> does not satisfy the specificity and full factual pleading requirements of Rules 32.3 and 32.6(b) of the Alabama Rules of Criminal Procedure. While White alleges that counsel should have presented an alibi defense, he does not identify who would have established his alibi or that the outcome of his trial would have been different had he presented such evidence."

(C. 37-40.)

The circuit court correctly found that White failed to plead what a "proper" investigation would have uncovered or what evidence was not presented. Indeed, White pleaded that his trial counsel failed to investigate the fact that not all the physical evidence collected at the murder scene had been tested, but White failed to plead in his petition what evidence was not tested. White pleaded that counsel failed to investigate who the victim was in contact with on the day of her murder but failed to plead what information those witnesses would have provided. White pleaded that his trial counsel failed to investigate the suspects who were originally identified but failed to plead what an investigation would have uncovered. Clearly, White failed to plead full facts in support of this claim -- he failed to plead what such an investigation would have uncovered or what counsel failed to specifically present once he conducted what White considered

to be an "appropriate investigation." "Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b)." Hyde, 950 So. 2d at 356.

Moreover, the trial record shows that Det. Christopher Anderson, a homicide investigator with the City of Birmingham, testified that he was assigned to investigate the case. He explained on direct examination that the delay in the case occurred because not all of the evidence collected from the crime scene had been sent to the Department of Forensic Sciences for testing. Det. Anderson stated that there were several suspects. White's counsel on cross-examination thoroughly cross-examined Det. Anderson concerning the adequacy of the police investigation. Also, on cross-examination Det. Anderson stated that he had spoken to Naman Jones, who was Parker's ex-boyfriend, and that he had obtained a search warrant to search Jones's blue Cadillac. He had also spoken with Greg Jelks because he had been informed that Parker was dating Jelks at the time of her murder. Det. Anderson testified that he eliminated Jelks as a suspect because Jelks had been in the hospital that day. Also, Det.

Anderson said that police had no evidence to support charging Jones with any crime. It is clear from reading the record on direct appeal that trial counsel did challenge the police investigation into Parker's murder and did present evidence that two others had been investigated before the investigation ultimately focused on White.

Thus, not only was this claim insufficiently pleaded, it also failed to state an issue of fact or law that would entitle White to relief and was thus due to be summarily dismissed. See Rules 32.3 and 32.7(d), Ala. R. Crim. P. White is due no relief on this claim.

B.

White next argues that his trial counsel was ineffective for failing to introduce "nonhearsay evidence" concerning "witness observations" on the day Parker was murdered.

In White's amended petition, he merely pleaded the following:

> "Defense counsel failed to adequately cross-examine police investigators based on the limited, non-hearsay purpose that counsel identified at trial. Counsel failed to elicit whether police determined the identity of 'Wheezy,' identified in Mr. [Willy] Tate's statement. Counsel failed to elicit whether police determined the identity of

> 'Gankman,' identified in Mr. Tate's statement.[9] Counsel failed to elicit whether police corroborated allegations of Ms. Parker's involvement with narcotics. Counsel failed to elicit whether police obtained DNA evidence from Mr. [Naman] Jones.[10] Counsel failed to elicit whether police obtained DNA evidence from Mr. [Greg] Jelks.[11] Counsel failed to elicit whether police matched known suspects to the unidentified DNA from the scene of the offense. Trial counsel's failure here was 'unreasonable' under 'prevailing professional norms,' and, thus, was constitutionally deficient under the first prong of Strickland [v. Washington, 466 U.S. 668 (1984)]. ... Had counsel adequately investigated and presented a defense for Mr. White at trial, there is a reasonable probability that he would not have been found guilty of capital murder."

(C. 219-20.)

The circuit court made the following findings:

> "This claim is summarily dismissed because it does not satisfy the specificity and full factual pleading requirements of Rules 32.2 and 32.6(b) of

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[9]Mr. Tate's statement is identified in another section of White's postconviction petition. In another portion of the petition, White states that police were "informed by Willy Tate that an individual with the alias 'Wheezy' had expressed an intent to kill Ms. Parker concerning a dispute over narcotics." (C. 213.)

[10]In another section of White's petition, he pleaded that Jones was first identified as a suspect and a search warrant was issued to search his vehicle. (C. 214.)

[11]In another section of White's petition, he pleaded that Jelks was a potential suspect but was eliminated as a suspect because he was in the hospital at the time of the rape/murder. (C. 213-14.)

> the Alabama Rules of Criminal Procedure. White fails to allege in this claim how evidence concerning another suspect would have affected the outcome of the trial."

(C. 41.) We agree with the circuit court. By itself, this claim is confusing. Review of the entire petition is necessary to fully understand the claim. As we previously stated: "[T]he claim of ineffective assistance of counsel is a general allegation that often consists of numerous specific subcategories. Each subcategory is an independent claim that must be sufficiently pleaded." Coral v. State, 900 So. 2d 1274, 1284 (Ala. Crim. App. 2004), overruled on other grounds, Ex parte Jenkins, 972 So. 2d 159 (Ala. 2005).

Moreover, the trial record shows that Det. Anderson testified that he interviewed two individuals -- Naman Jones and Greg Jelks -- as possible suspects and eliminated both as suspects. Det. Anderson was also questioned as to whether any DNA evidence tied Jones to the murder and he replied "No." (Trial R. 386.)

For these reasons, summary dismissal of the claim was proper. White is due no relief on this claim.

C.

White next argues that counsel was ineffective for failing to adequately challenge the DNA evidence admitted at the guilt phase of his trial. A cigar was collected from the scene, and the saliva on the cigar matched White's DNA profile.[12] Also, semen collected from Parker's body matched White's DNA profile.

The circuit court made the following findings:

> "This claim is summarily dismissed because the allegations supporting the claim are not sufficiently pleaded. For example, White alleges that there was no evidence presented describing the DNA testing and no evidence presented describing the methodology relied on to determine the DNA match but White does not specifically allege how the State's testing of the DNA was unreliable or what testimony should have been presented by the State to prove these matters. ...
>
> "This claim concerning the chain of custody of the DNA evidence is also summarily dismissed from the first amended Rule 32 petition as a matter of law because it fails to state a valid claim for relief or present a material issue of fact or law under Rule 32.7(d) of the Alabama Rules of Criminal Procedure. White raised the substantive claim on

[12]There was also testimony at trial that the cigar had not been in the apartment when Vanessa Parker went to work and that White had been in Parker's apartment between 3:00 p.m. and 7:30 p.m., immediately before Vanessa Parker discovered her daughter's body.

> direct appeal and the Court of Criminal Appeals found that the claim was without merit."

(C. 48.)

We agree with the circuit court's findings. White pleaded that his trial counsel should have challenged the methodology used in conducting the DNA tests but failed to plead what defects occurred in the testing or what should have been done. Also, on direct appeal, this Court specifically found that the State presented a proper chain of custody for the evidence that contained White's DNA. "[B]ecause the underlying claims have no merit, the fact that [the petitioner's] lawyer did not raise those claims cannot have resulted in any prejudice to [the petitioner]." Magwood v. State, 689 So. 2d 959, 974 (Ala. Crim. App. 1996). White is due no relief on this claim.

D.

White next argues that his trial counsel was ineffective for failing to object to the prosecutor's argument in the guilt phase that he says was not based on evidence that had been presented at trial. Specifically, he argued that his counsel failed to object when the prosecutor improperly argued that "any semen on the victim's leg would have been washed off

and that the rape occurred on the same day because the victim would have taken a shower in the morning."

The circuit court found that the claim was raised and addressed on direct appeal and found not to rise to the level of plain error. The court then stated:

> "It is true that a finding of no plain error on direct appeal does not preclude White from arguing that he was prejudiced by counsel's failure to object. Ex parte Taylor, 10 So. 3d 1075-1078 (Ala. 2005) ('Although it may be the rare case in which the application of the plain-error test and the prejudice prong of the Strickland test will result in different outcomes, a determination on direct appeal that there had been no plain error does not automatically foreclose a determination of the existence of the prejudice required under Strickland to sustain a claim of ineffective assistance of counsel.'). White however, has not pleaded any facts whatsoever in his first amended Rule 32 petition that would show that this is a 'rare case.' For this reason, this claim is summarily dismissed from the first amended Rule 32 petition as a matter of law. Ala. R. Crim. P. 32.7(d)."

(C. 57.)

As the circuit court correctly stated, the Alabama Supreme Court in Ex parte Taylor, 10 So. 3d 1075 (Ala. 2005), noted that there may be times when a finding of no plain error on direct appeal will nevertheless satisfy the prejudice prong of the Strickland test. The Taylor court relied on the

Missouri case of Deck v. State, 68 S.W.3d 418 (Mo. 2002), to support this conclusion.

> "Of course, as Strickland [v. Washington] recognized, 466 U.S. at 694, 697, 104 S.Ct. 2052 [(1984)], this theoretical difference in the two standards of review will seldom cause a court to grant post-conviction relief after it has denied relief on direct appeal, for, in most cases, an error that is not outcome-determinative on direct appeal will also fail to meet the Strickland test. Nonetheless, Strickland cautions that the distinction in the standards of review is important because there are a small number of cases in which the application of the two tests will produce different results. Id. at 697, 104 S.Ct. 2052."

Deck v. State, 68 S.W.3d at 428. Other courts have discussed the distinction in prejudice under a plain-error analysis versus the prejudice necessary under Strickland v. Washington.

> "A criminal defendant is constitutionally entitled to effective assistance from his counsel. Strickland, 466 U.S. at 687, 104 S.Ct. 2052. To succeed on a claim of ineffective assistance of counsel, a defendant must show (1) that his counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. Ardolino [v. People], 69 P.3d [73] at 76 [(Colo. 2003)]. To satisfy the prejudice component of the Strickland test, the 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.' Id. (citing Strickland, 466 U.S. at 694, 104 S.Ct. 2052). A reasonable probability means a 'probability sufficient to undermine confidence in the outcome.' Id. (citing Strickland, 466 U.S. at 694, 104 S.Ct. 2052). The word 'probability' does not require a defendant to

show that the deficient performance more likely than not altered the outcome of the case. Strickland, 466 U.S. at 693, 104 S.Ct. 2052.

"Plain error addresses error that is both 'obvious and substantial.' [People v.] Miller, 113 P.3d [743] at 750 [(Colo. 2005)]. We have recognized plain error as those errors that 'so undermined the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction.' Wilson [v. People], 743 P.2d [415] at 420 [(Colo. 1987)] (citing United States v. Young, 470 U.S. 1, 16, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985)); see also Miller, 113 P.3d at 750. The plain error standard is 'calculated to temper the contemporaneous-objection requirement in the interests of permitting an appellate court to correct particularly egregious errors.' Wilson, 743 P.2d at 420. These errors must therefore 'seriously affect the fairness, integrity or public reputation of judicial proceedings.' Young, 470 U.S. at 15, 105 S.Ct. 1038 (quoting United States v. Atkinson, 297 U.S. 157, 160, 56 S.Ct. 391, 80 L.Ed. 555 (1936)); see also Domingo-Gomez v. People, 125 P.3d 1043, 1053 (Colo. 2005) ('A reviewing appellate court must inquire into whether the errors seriously affected the fairness or integrity of the trial.').

"Plain error casts serious doubt on the judgment of conviction. Deficient performance of counsel, on the other hand, undermines confidence in the judgment of conviction. The words 'undermine confidence' reveal that the error in a claim of ineffective assistance of counsel must impair the reliability of the judgment of conviction to a lesser degree than a plain error in order to warrant reversal of the conviction. These two standards are therefore not the same.

"The two claims serve different purposes and each requires an independent, fact-specific analysis. The direct appeal addresses whether the

> prejudice resulted from the trial court's acts or omissions, while the ineffective assistance claim examines whether prejudice resulted from counsel's acts or omissions. Moreover, a direct appeal and an ineffective assistance of counsel claim ask the court to assess substantially different errors in the context of different due process rights. The direct appeal analysis examines whether an error deprived the defendant of his constitutional right to trial, while an ineffective assistance analysis looks at whether an error deprived the defendant of his constitutional right to effective assistance of counsel. Because the two claims serve different purposes and each requires an independent, fact-specific analysis, the respective analyses should remain separate.
>
> "A prior determination, therefore, that an error was not so prejudicial as to cast serious doubt upon the reliability of the judgment of conviction, and therefore was not plain error, does not control a later determination of whether the error undermined confidence in the judgment of conviction under Strickland."

Hagos v. People, 288 P.3d 1116, 120-21 (Colo. 2012). See also Burton v. State, 180 P. 3d 964, 969 (Alaska Ct. App. 2008) ("[E]ven when a party's claim of plain error is based on the assertion that their attorney incompetently allowed something to happen at trial, or that the attorney incompetently failed to request something different, the question on appeal is normally not whether the attorney acted incompetently. Instead, the question is whether, based on what the trial judge knew, the judge's failure to recognize the problem and

take corrective action sua sponte was unreasonable or incompetent."); Commonwealth v. Reaves, 592 Pa. 134, 152, 923 A.2d 1119, 1130 (Pa. 2007) ("This Court has long recognized the distinction between Strickland prejudice and the harmless error standard applicable in the direct review context, and this distinction can be outcome-determinative.").

The Alabama Supreme Court in Ex parte Taylor further held that situations where no plain error rises to the level of error under Strickland will be "rare." White challenged his trial counsel's failure to object to an argument made by the prosecutor. However, the jury was instructed that arguments of counsel were not evidence, and on direct appeal this Court noted that the argument could have reasonably been inferred from the evidence presented at trial. This is not one of those rare cases where the unchallenged argument of the prosecutor rises to the level of prejudice necessary to satisfy Strickland. We agree with the circuit court's detailed findings on this claim. White is due no relief.

E.

White next argues that his trial counsel was ineffective for failing to object when the prosecutor, in the guilt phase, argued that White failed to show any remorse.

The circuit court made the following findings:

> "White cannot prevail on his ineffective assistance of counsel claim where the Alabama Court of Criminal Appeals found the substantive claim without merit. See Spencer [v. State], 201 So. 3d [573] at 616 [(Ala. Crim. App. 2015)] (quoting, Lee v. State, 44 So. 3d 1145, 1173 (Ala. Crim. App. 2009) ('Because the substantive claim underlying the claim of ineffective assistance has no merit, counsel could not be ineffective for failing to raise that issue')). This claim is summarily dismissed because there is no material issue of fact or law that entitles White to relief.
>
> "As set forth above, the Court of Criminal Appeals also found that even if the prosecutor's comment was improper, there was no plain error. Id. It is true that he was prejudiced by counsel's failure to object. Ex parte Taylor, 10 So. 3d 1075, 1078 (Ala. 2005) ('Although it may be the rare case in which the application of the plain-error test and the prejudice prong of the Strickland test will result in different outcomes, a determination on direct appeal that there has been no plain error does not automatically foreclose a determination of the existence of the prejudice required under Strickland to sustain a claim of ineffective assistance of counsel.'). White, however, has not pleaded any facts whatsoever in his first amended Rule 32 petition that would show that this is a 'rare case.' For this reason, this claim is summarily dismissed from the first amended Rule 32

> petition as a matter of law. Ala. R. Crim. P. 32.7(d)."

(C. 59-60.)

Again, this is not one of those rare cases when a finding of no plain error rises to the level of prejudice under Strickland. Accordingly, because the substantive claim underlying the claim of ineffective assistance is without merit, White could establish no prejudice under Strickland. White is due no relief on this claim.

F.

White next argues that his trial counsel was ineffective for failing to object to the prosecutor's discriminatory use of its peremptory strikes to remove women from the venire in violation of Batson v. Kentucky, 476 U.S. 79 (1986), and J.E.B. v. Alabama, 511 U.S. 127 (1994).

The circuit court made the following findings:

> "White raised the substantive claim on direct appeal and the Court of Criminal Appeals found that the claim was without merit. White[v. State,] 179 So. 3d [170] at 193-202 [(Ala. Crim. App. 2013)]. In denying relief, the Court of Criminal Appeals found that there was no plain error in the prosecution's use of its peremptory strikes against women. Id. The Court of Criminal Appeals found as follows concerning this claim: 'In sum, the State's number of peremptory strikes against women does not raise an inference of discrimination. In fact,

> neither the circuit court nor defense counsel believed that a J.E.B. [v. Alabama, 511 U.S. 127 (1994),] violation had occurred. And nothing in the record -- from the type and manner of questions asked to the State's use of its strikes -- indicates that the State treated women disparately.' Id. at 202. It is true that a finding of no plain error on direct appeal does not preclude White from arguing that he was prejudiced by counsel's failure to object. Ex parte Taylor, 10 So. 3d 1075, 1078 (Ala. 2005) ('Although it may be the rare case in which the application of the plain-error test and the prejudice prong of the Strickland test will result in different outcomes, a determination on direct appeal that there has been no plain error does not automatically foreclose a determination of the existence of the prejudice required under Strickland to sustain a claim of ineffective assistance of counsel.'). White however, has not pleaded any facts whatsoever in his first amended Rule 32 petition that would show that this is a 'rare case.' For this reason, this claim is summarily dismissed from the first amended Rule 32 petition as a matter of law. Ala. R. Crim. P. 32.7(d)."

(C. 61-62.)

On direct appeal, we stated the following concerning White's Batson claim:

> "Here, the State used 12 of its 14 peremptory strikes to remove female veniremembers. Thereafter, White's jury consisted of 5 women and 7 men. Also, a female and a male served as alternate jurors. At the conclusion of voir dire, defense counsel did not indicate and the circuit court did not believe that a J.E.B. [v. Alabama, 511 U.S. 127 (1994),] violation had occurred. The circuit court asked both sides whether they had anything to say, and defense counsel responded: 'The defense is satisfied, Your Honor.' (R. 208.)

"Now, on appeal, White argues for the first time that the State's use of 12 of its 14 peremptory strikes, including the last 9 in a row, to remove women establishes a prima facie case that the State used its strikes to discriminate against women. This Court disagrees. The use of 12 of 14 peremptory strikes against women does not raise an inference that the State purposefully discriminated against women. See Ex parte Land, 678 So. 2d 224, 246 (Ala. 1996) (holding that the State's use of 11 of its 14 peremptory strikes against whites did not raise a inference that the State purposefully discriminated against whites); Ex parte Trawick, 698 So. 2d [162,] 167 [(Ala. 1997)] (holding that the State's 'use[] [of] 11 of its 14 peremptory strikes to remove women from Trawick's jury, resulting in a petit jury that was composed of 7 men and 5 women' did not raise an inference that the State discriminated against women). Nor does the State's use of its last 9 peremptory strikes against women establish that there was a pattern to the State's use of its strikes. McCray v. State, 88 So. 3d 1, 19 (Ala. Crim. App. 2010) (holding that the State's use of its last 7 strikes against women did not establish a pattern). Further, the number of strikes the State used against women is tempered by the fact that 5 jurors and 1 alternate were women. See McCray v. State, 88 So. 3d 1, 24 (Ala. Crim. App. 2010) ('"'Of course, the fact that [women] are ultimately seated on the jury does not necessarily bar a finding of discrimination under Batson [v. Kentucky, 476 U.S. 79 (1986)] [or J.E.B.,] see [United States v.] Battle, 836 F.2d [1084,] 1086 [(8th Cir. 1987)], but the fact may be taken into account in a review of all the circumstances as one that suggests that the government did not seek to rid the jury of persons who shared the [same gender].' United States v. Young-Bey, 893 F.2d 178, 180 (8th Cir. 1990)"' (quoting Mitchell v. State, 579 So. 2d 45 (Ala. Crim. App. 1991), quoted with approval in Ex parte Thomas, 659 So. 2d 3, 7 (Ala. 1994)) (emphasis omitted)). Accordingly, the State did not use

> 'peremptory challenges to dismiss all or most [female] jurors.' Ex parte Branch, 526 So. 2d at 623.
>
> "Further, there is nothing in the record to indicate that the prosecutor had a history of discriminating against women. The type and manner of questions asked during voir dire were general and not directed toward women. In fact, the State asked questions of the entire venire, then asked follow-up questions of both men and women when appropriate. Additionally, the State did not single out women for individualized voir dire; rather, all potential jurors (men and women) who had given answers that raised concerns where questioned individually."

White, 179 So. 3d at 200.

Based on this Court's holding in White, this claim would not have constituted error even had counsel made an objection in the circuit court. Again, this is not one of those rare cases where a finding of no plain error rises to the level of prejudice under Strickland. White was due no relief on this claim.

G.

White argues that the cumulative effect of the errors at the guilt phase entitled him to relief.

"Even if a cumulative-effect analysis were required by Alabama law, that factor would not eliminate Taylor's obligation to plead each claim of ineffective assistance of

counsel in compliance with the directives of Rule 32." Taylor, 157 So. 3d at 140. White is due no relief on this claim.

VIII.

White next argues that his sentence of death violates the United States Supreme Court's holding in Hurst v. Florida, 577 U.S. ___, 136 S.Ct. 616 (2016). Specifically, he argues that his death sentence is illegal because it was imposed by a now unconstitutional judicial override, because the Hurst decision requires that all the facts required to impose a death sentence be found by a jury to exist beyond a reasonable doubt, because a factual determination must be made that the aggravating circumstances outweigh the mitigating circumstances, and because Alabama's capital-sentence statute violates the Sixth and Fourteenth Amendments to the United States Constitution.

The circuit court made the following detailed findings on this claim:

> "White contends ... that his death sentence violates the Sixth and Fourteenth Amendments under Hurst v. Florida, 135 S.Ct. 616 (2016). This claim is summarily dismissed ... for the reasons set forth below.

"First, the Supreme Court's decision in Hurst did not announce a new rule of law and is not retroactive to cases, such as White's, that are beyond direct appeal. The Court's decision in Hurst was based solely on its previous decision in Ring v. Arizona, 536 U.S. 584 (2002). The Court held in Schriro v. Summerlin, 542 U.S. 348 (2004), that its opinion in Ring did not apply retroactively to cases that were already final when the decision was announced. As the Alabama Court of Criminal Appeals recently found, 'it follows that Hurst does not apply retroactively on collateral review. Rather, Hurst applies only to cases not yet final when that opinion was released, such as Johnson [v. State, 256 So. 3d 684 (Ala. Crim. App. 2014)], a case that was still on direct appeal (specifically pending certiorari review in the United States Supreme Court when Hurst was released.).' Reeves v. State, [226 So. 3d 711] (Ala. Crim. App. 2016). White's case became final in 2015, a year before the opinion in Hurst was released. Hurst cannot be retroactively applied to White's case because his case is on collateral review.

"....

"'Like [the defendant in Ex parte] Waldrop, [859 So. 2d 1181 (Ala. 2002),] White was convicted of capital offenses that have corresponding aggravating circumstances, i.e., murder during the course of a rape and murder during the course of a burglary. See §§ 13A-5-40(a)(3), 13A-5-40(a)(4), 13A-5-49(4), Ala. Code 1975. Accordingly, the jury's verdict finding White guilty of the two counts of capital murder established that the jury unanimously found that aggravating circumstances existed. Because the jury's guilt-phase verdict established that the jury found a fact necessary to expose White to a sentence of

> death, White's Sixth Amendment right to a jury was not violated.
>
> "'To the extent White argues that the Supreme Court's holding in Ring was violated because the jury did not unanimously find that the aggravating circumstances outweighed the mitigating circumstances, this argument is likewise without merit. ...
>
> "'....

"White, 179 So. 3d at 220-223.

"Moreover, in Ex parte Bohannon, [222 So. 3d 525] (Ala. 2016), the Alabama Supreme Court considered whether Bohannon's death sentence should be vacated in light of Hurst. Id. at [527]. After considering Apprendi v. New Jersey, 530 U.S. 466 (2000), Ring v. Arizona, 536 U.S. 584 (2002), and Ex parte Waldrop, 859 So. 2d 1181 (Ala. 2002), the court held that Alabama's capital sentencing scheme is constitutional. Id. at [533]. In reaching that result, the court reasoned as follows:

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

> sentencing scheme does not violate the Sixth Amendment.'

"Id. [at 532.] The Supreme Court found that Bohannon's death sentence was consistent with Apprendi, Ring, and Hurst and did not violate the Sixth Amendment to the United States Constitution because the jury, by finding him guilty of capital murder at the guilt phase of his trial, unanimously found the existence of the aggravating circumstance that Bohannon intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct. Id. at [533]. The Court concluded its analysis of Bohannon's Hurst argument by stating the following:

> "'Nothing in Apprendi, Ring, or Hurst suggests that, once the jury finds the existence of the aggravating circumstance that establishes the range of punishment to include death, the jury cannot make a recommendation for the judge to consider in determining the appropriate sentence or that the judge cannot evaluate the jury's sentencing recommendation to determine the appropriate sentence within the statutory range. Therefore, the making of a sentencing recommendation by the jury and the judge's use of the jury's recommendation to determine the appropriate sentence does not conflict with Hurst.'

"Id. at [534]. Notably, the United States Supreme Court denied Bohannon's cert. petition on January 23, 2017.

"The Court of Criminal Appeals has already found that there was no Ring violation in White's case. White, 179 So. 3d at 220-222. Because there was no Ring violation, there is also no Hurst violation. White is not entitled to relief on his Hurst claim; therefore, this claim is summarily dismissed. ..."

(C. 67-71.)

The circuit court's findings are consistent with the holdings of this Court and the Alabama Supreme Court. This Court in Reeves v. State, 226 So. 3d 711 (Ala. Crim. App. 2016), held:

> "The United States Supreme Court's opinion in Hurst was based solely on its previous opinion in Ring, an opinion the United States Supreme Court held did not apply retroactively on collateral review to cases that were already final when the decision was announced. See Schriro v. Summerlin, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004). Because Ring does not apply retroactively on collateral review, it follows that Hurst also does not apply retroactively on collateral review. Rather, Hurst applies only to cases not yet final when that opinion was released, such as Johnson [v. Alabama, 578 U.S. ___, 136 S.Ct. 1837 (2016)], a case that was still on direct appeal (specifically, pending certiorari review in the United States Supreme Court) when Hurst was released. Reeves's case, however, was final in 2001, 15 years before the opinion in Hurst was released. Therefore, Hurst is not applicable here."

226 So. 3d at 757. Other courts have held that the United States Supreme Court's decision in Hurst does not apply retroactively to cases on collateral review. See State v. Lotter, 301 Neb. 125, 145, 917 N.W.2d 850, 864 (2018) ("Hurst has no retroactive application to cases on collateral review. Because Hurst is tethered to Ring, we see no reason why Hurst

would apply retroactively on collateral review when Ring does not."); State v. Jackson, (No. 2017-T-0041, June 4, 2018) (Ohio Ct. App. 2018) (not published) ("[T]he United States Supreme Court did not expressly hold that Hurst v. Florida was to be applied retroactively to cases on collateral review. Additionally, the holding in Hurst was an application of Ring, ... And the United States Supreme Court has expressly held that Ring does not apply retroactively to cases on collateral review. ..."). Compare Asay v. State, 210 So. 3d 1, 21 (Fla. 2016) ("Hurst should not be applied retroactively to Asay's case, in which the death sentence became final before the issuance of Ring. We limit our holding to this context because the balance of factors may change significantly for cases decided after the United States Supreme Court decided Ring.").

For these reasons, White is due no relief on his claims that his sentence violates Hurst.

IX.

The circuit court correctly found that the following claims were procedurally barred in White's Rule 32, Ala. R. Crim. P., petition. The court stated:

"[White's claim] that evolving standards of decency no longer tolerate Alabama's capital sentencing scheme because Alabama is the only State that allows a judge to override a jury's sentencing recommendation is procedurally defaulted because it could have been, but was not, raised at trial and because it was raised on direct appeal. Ala. R. Crim. P. 32.2(a)(3) and (4); White, 179 So. 3d at 239.

"[White's claim] that White is categorically excluded from the death penalty because society's evolving standards of decency reject its use on people with long-term severe mental illness is procedurally defaulted because it could have been, but was not, raised at trail and on direct appeal. Ala. R. Crim. 32.2(a)(3) and (5).

"[White's claim] that White is categorically excluded from the death penalty because the scientific community now recognizes that teenagers' brains have not matured and developed is procedurally defaulted because it could have been, but was not, raised at trial and on direct appeal. Ala. R. Crim. P. 32.2(a)(3) and (5).

"[White's claim] that White is categorically excluded from the death penalty because killing him violates his due process right to human dignity is procedurally defaulted because it could have been, but was not, raised at trial and on direct appeal. Ala. R. Crim. P. 32.2(a)(3) and (5).

"[White's claim] that the imposition of death violates the Eighth Amendment's cruel and unusual punishment clause and the Fourteenth Amendment's due process clause generally is procedurally defaulted because it could have been, but was not, raised at trial and on direct appeal. Ala. R. Crim. P. 32.2(a)(3) and (5)."

(C. 71-72.) The circuit court also found that the following two issues were procedurally barred: (1) The trial court failed to find that White's mental illness was a mitigating circumstance and that other mental-health evidence constituted mitigating circumstances; and (2) The trial court failed to consider White's youth and cognitive development as mitigating circumstances.

All the above issues could have been raised at trial or on direct appeal and are procedurally barred in this postconviction proceeding. See Rule 32.2(a)(3) and (a)(5), Ala. R. Crim. P. "Alabama has never recognized any exceptions to the procedural default grounds contained in Rule 32, Ala. R. Crim. P." See Hooks v. State, 822 So. 2d 476, 481 (Ala. Crim. App. 2000). White is due no relief on these claims.

X.

Finally, White argues that this appeal should be remanded to the circuit court for that court to consider his second postconviction petition that he says he filed in October 2017.[13] In that petition, which is not part of the record on

[13]The circuit court dismissed White's first postconviction petition, the subject of this appeal, in March 2017.

appeal, White states that he argued that his death sentence is unconstitutional given that the Alabama Legislature has repealed the judicial-override statute.[14] The State argues that this Court should not remand this case because the statute repealing judicial override does not apply retroactively to White's sentence.

It is true that the lower court has no jurisdiction to consider the second postconviction petition until the appeal of White's first postconviction petition is final or until this Court issues the certificate of judgment on this appeal. See Rule 41, Ala. R. App. P. "The general rule is that jurisdiction of one case cannot be in two courts at the same time." Ex parte Hargett, 772 So. 2d 481, 483 (Ala. Crim. App. 1999).

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[14]The record shows that, after the circuit court had issued its order dismissing White's petition, White moved that the court withdraw that order and allow him to amend his petition to add the claim that his death sentence is unconstitutional in light of the recent legislation that placed the ultimate sentence for a capital defendant in the hands of the jury and not the judge. (C. 614.) That motion was not granted. Rule 32.7(b), Ala. R. Crim. P., states: "Amendments to pleadings may be permitted at any stage of the proceedings prior to the entry of judgment." "[A]mendments are permitted only 'prior to the entry of judgment.'" Allen v. State, 825 So. 2d 264, 268 (Ala. Crim. App. 2001).

Moreover, in Barnes v. State, 621 So. 2d 329 (Ala. Crim. App. 1992), this Court considered the procedural effect of a petitioner filing a second postconviction petition when the appeal of a first postconviction petition was pending in this Court.

> "[W]e can only conclude that because Rule 32.6(a) allows a petition to 'be filed at any time after entry of judgment and sentence (subject to the provisions of Rule 32.2(c)),' Barnes's second petition should have been accepted by the circuit court, but ... any action on the petition should have been suspended until a certificate of judgment was issued on the appeal of the prior petition."

Barnes v. State, 621 So. 2d 329, 334 (Ala. Crim. App. 1992) (emphasis added).

In Barnes, this Court also held that where a direct appeal is pending when a petitioner files a postconviction petition, this Court has the discretion to stay the direct appeal while the lower court adjudicates the postconviction petition. Barnes, 621 So. 2d at 333.[15] However, this Court in Barnes did not recognize that same procedure when a postconviction petition is filed while another postconviction petition is pending in this Court on appeal. Barnes, 621 So.

[15]This Court has rarely stayed a direct appeal to allow a lower court to adjudicate a postconviction petition.

2d at 334. In fact, we stated: "[A]ny action on the petition should have been suspended until a certificate of judgment was issued on the appeal of the prior petition." 621 So. 2d at 334 (emphasis added).

Moreover, "sections 13A-5-45, 13A-5-46, and 13A-5-47, Ala. Code 1975, were amended effective April 11, 2017, by Act No. 2017-131, Ala. Acts 2017, to place the final sentencing decision in the hands of the jury." DeBlase v. State, [Ms. CR-14-0482, November 16, 2018] ___ So. 3d ___, ___ (Ala. Crim. App. 2018). Section 13A-5-47.1, Ala. Code 1975, specifically provides that: "Sections 13A-5-45, 13A-5-46, and 13A-5-47 shall apply to any defendant who is charged with capital murder after April 11, 2017, and shall not apply retroactively to any defendant who has previously been convicted of capital murder and sentenced to death prior to April 11, 2017." (Emphasis added.) White was sentenced to death in 2009. See DeBlase v. State, supra ("That Act, however, does not apply retroactively to [the appellant]. See § 2, Act No. 2017-131, Ala. Acts 2017, § 13A-5-47.1, Ala. Code 1975.").

> "'In Alabama, retrospective application of a statute is generally not favored, absent an express statutory provision or clear legislative intent that the enactment apply retroactively as well as

> prospectively.' Jones v. Casey, 445 So. 2d 873, 875 (Ala. 1983). Generally, '"statutes are to be considered prospective, unless the language is such as to show that they were intended to be retrospective."' Baker v. Baxley, 348 So.2d 468, 71 (Ala. 1977), quoting Mobile Housing Bd. v. Cross, 285 Ala. 94, 229 So. 2d 485, 487 (1969)."

White v. State, 992 So. 2d 783, 785 (Ala. Crim. App. 2007). The Alabama Legislature specifically provided that the change in law was not to be applied retroactively to any defendant who was sentenced to death before April 11, 2017. See § 13A-5-47.1, Ala. Code 1975. We decline to remand this case to the lower court given that the issue White states he raised in his second postconviction petition has no retroactive application to White's sentence.

For the foregoing reasons, we affirm the circuit court's summary dismissal of White's petition for postconviction relief attacking his capital-murder convictions and sentence of death.

AFFIRMED.

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