Rel: July 10, 2020

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-16-1219

Jimmy Lee Brooks, Jr.

v.

State of Alabama

Appeal from Talladega Circuit Court
(CC-03-693.60; CC-03-694.60;
CC-03-695.60; and CC-03-696.60)

COLE, Judge.

Jimmy Lee Brooks, Jr., an inmate on Alabama's death row, appeals the Talladega Circuit Court's summary dismissal in part and denial in part of his Rule 32, Ala. R. Crim. P., petition for postconviction relief.

Facts and Procedural History

In the evening and into the early morning hours of February 17 and 18, 2002, Jimmy Lee Brooks and Michael David Carruth posed as narcotics officers, entered Forest F. Bowyer's home, and abducted both Forest and Forest's 12-year-old son, William "Brett" Bowyer.[1] Carruth and Brooks then took Forest and Brett to a remote location. While there, they took turns slitting Forest's throat with a knife. Brooks then shot Brett in the head three times. Brett fell into a shallow grave. Brooks and Carruth then threw Forest on top of Brett. Brooks and Carruth "'laughed and joked as they threw dirt on the dead child and his father.'" Brooks v. State, 973 So. 2d 380, 387 (Ala. Crim. App. 2007). "After Brooks and Carruth left the scene, [Forest] dug himself out of the grave and flagged down a passing motorist for assistance. [Forest] later identified both Brooks and Carruth as the perpetrators of the crimes."[2] Brooks, 973 So. 2d at 387.

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[1]For his role in Brett's murder, Carruth was also convicted of capital murder and sentenced to death. See Carruth v. State, 165 So. 3d 627, 633-34 (Ala. Crim. App. 2014).

[2]This Court thoroughly detailed the facts of this case in its opinion on direct appeal. Although we are guided by those

Brooks was convicted of four counts of capital murder for killing Brett.[3] Brooks was also convicted of attempted murder and first-degree robbery with respect to Forest and of first-degree burglary. After finding him guilty of capital murder, the jury unanimously recommended that Brooks receive the death penalty for his capital-murder convictions. The trial court followed that recommendation. Brooks, 973 So. 2d at 386. The trial court sentenced Brooks to life in prison for his other convictions. Brooks, 973 So. 2d at 386. Brooks appealed.

On March 2, 2007, this Court affirmed Brooks's convictions for capital murder committed during a kidnapping, capital murder committed during a first-degree burglary, and capital murder of a child less than 14 years old and affirmed his death sentence. Brooks, 973 So. 2d at 423. This Court also affirmed Brooks's convictions and sentences for attempted

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facts in this case, there is no need to reiterate them here.

[3]The four counts of capital murder were as follows: one count for killing Brett during the commission of a first-degree kidnapping, see § 13A-5-40(a)(1), Ala. Code 1975; one count for killing Brett during the commission of a first-degree robbery, see § 13A-5-40(a)(2), Ala. Code 1975; one count for killing Brett during the commission of a first-degree burglary, see § 13A-5-40(a)(4), Ala. Code 1975; and one count because Brett was less than 14 years old, see § 13A-5-40(a)(15), Ala. Code 1975.

murder and first-degree robbery. Brooks, 973 So. 2d at 423. However, this Court reversed Brooks's conviction for capital murder committed during a robbery and his conviction for first-degree burglary. Brooks, 973 So. 2d at 423. The Alabama Supreme Court denied Brooks's petition for a writ of certiorari on May 18, 2007, and, on that same date, this Court issued a certificate of judgment, making Brooks's direct appeal final.[4]

On May 16, 2008, Brooks timely filed a Rule 32 petition. (C. 15-111.) In his petition, Brooks raised the following claims:

> I. His arrest was illegal and, therefore, "use of any evidence procured, including statements and clothing, should have been suppressed as fruits of that illegality." (C. 23-35.)
>
> > I.A. Under Alabama law, the Russell County officers were not authorized to arrest Brooks in Lee County. (C. 23-28.)
> >
> > I.B. Because his arrest was illegal, his subsequent confession should have been suppressed. (C. 28-34.)
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> > I.C. The Miranda v. Arizona, 384 U.S. 436 (1966), warnings read to Brooks before his

[4]The Supreme Court of the United States denied Brooks's petition for a writ of certiorari on December 10, 2007. See Brooks v. Alabama, 552 U.S. 1077 (2007).

confession did not cure the illegality of his arrest or the "illegality of using his statements at trial." (C. 34-35.)

II. His trial counsel were ineffective. (C. 36-90.)

II.A. His trial counsel were ineffective during the guilt phase of his trial:

II.A.1. For "failing to challenge the legality of [his] arrest and, accordingly, the use of any evidence procured, including statements, which should have been suppressed as fruits of that illegality." (C. 36-37.)

II.A.2. For "failing to move to dismiss the indictment as to the capital murder committed during the commission of a burglary charge as that charge failed to specify the crime for which [he] was charged." (C. 37-39.)

II.A.3. For "failing to properly object to cumulative and prejudicial video submitted as evidence at trial." (C. 39-40.)

II.A.4. For "failing to adequately argue the motion to suppress [his] statement." (C. 40-45.)

II.A.5. For "failing to perform a factual investigation and to conduct independent tests on evidence used at trial." (C. 45-48.)

II.A.6. For one of his counsel--Charles Floyd III--admitting that he had been ineffective in a motion to withdraw. (C. 48-55.)

II.B. His counsel were ineffective during the penalty phase of his trial:

II.B.1. For failing "to investigate mitigation evidence adequately and present it to the jury and the sentencing court at both the jury and court sentencing hearings" (C. 56-72):

II.B.1.a. By failing "to undertake a reasonable and adequate mitigation investigation." (C. 61-64.)

II.B.1.b. By failing "to discover or present a fraction of the mitigation evidence available through minimal diligence." (C. 64-72.)

II.B.2. For failing "to hire an expert to present any information regarding [his] mental health and/or drug issues." (C. 72-80.)

II.B.3. For failing to "discuss evidence demonstrating the existence of mitigating factors" during penalty-phase closing arguments. (C. 80-83.)

II.B.4. For failing "to present any additional mitigation evidence or argument to counter errors made by the sentencing judge" during the judicial-sentencing hearing. (C. 84-86.)

II.C. "The cumulative effect of trial counsel error violated [his] rights to due process, a fair trial, the effective assistance of counsel, and an individualized sentencing under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the Alabama Constitution, and Alabama Law." (C. 87-90.)

III. His appellate counsel was ineffective. (C. 90-91.)

III.A. His appellate counsel failed "to support the claims he did raise and [failed] to raise all meritorious claims." (C. 90-91.)

III.B. The cumulative effect of his appellate counsel's errors violated his rights to "due process, a fair trial, the effective assistance of counsel, and an individualized sentencing" under the United States Constitution, the Alabama Constitution, and Alabama law. (C. 91.)

IV. The trial court erred because it did not consider Brooks's age as a mitigating factor. (C. 91-96.)

V. The trial court erred when it did not grant Brooks's counsel's motion to withdraw. (C. 96-104.)

VI. Alabama's capital-sentencing scheme is unconstitutional. (C. 104-05.)

> VII. The jury's death recommendation is "invalid because the verdict form does not specify what aggravating and mitigating circumstances, if any, were considered and found by the jury." (C. 105-06.)
>
> VIII. Alabama's methods of execution constitute cruel and unusual punishment. (C. 106-07.)

The State moved to dismiss Brooks's petition on July 2, 2008. (C. 128-49.)

Brooks then filed his first amended Rule 32 petition. (C. 220-348.) In his first amended petition, Brooks reiterated the claims raised in his original petition and added the following subclaims to his allegation that his trial counsel were ineffective:

> II.A.7.[5] His trial counsel were ineffective during the guilt phase of his trial for "preventing him from testifying on his own behalf in support of his suppression motion." (C. 253-58.)
>
> II.A.8. His trial counsel were ineffective during the guilt phase of his trial for "failing to retain experts." (C. 260-63.)

[5]When he added these subclaims, Brooks reordered and renumbered some of the claims from his original petition. For example, newly added claim II.A.7., as listed above, appears in Brooks's amended petition as claim II.A.5., and what was listed as claim II.A.5. in his original petition was renumbered as claim II.A.6. in his amended petition. For clarity, this Court refers to Brooks's claims as it has numbered them here--not as Brooks numbered and renumbered them in his amended petitions.

> II.B.5. His trial counsel were ineffective during the penalty phase of his trial "for failing to object to [the] trial court's improper instruction [to] the jury about the heinous, atrocious, or cruel aggravating circumstance." (C. 311-13.)

Brooks also added the following substantive claims to his petition:

> IX. The trial court improperly instructed the jury about the heinous, atrocious, or cruel aggravating circumstance. (C. 334-35.)
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> X. The State withheld favorable evidence from the defense. (C. 336-37.)
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> XI. The State introduced "irrelevant evidence the sole purpose of which was to inflame the jury's passions during the guilt/innocence phase of trial and to prejudice [Brooks.]" (C. 337-40.)

On May 7, 2009, the State moved to dismiss Brooks's first amended petition (C. 361-91), and, on July 10, 2009, the circuit court held a hearing on the State's motion (C. 437; R. 4-68).

On March 24, 2010, the circuit court issued an order summarily dismissing many of Brooks's claims. Specifically, the circuit court summarily dismissed claims II.A.5., II.A.7., II.A.8., and III as insufficiently pleaded (C. 437); it summarily dismissed claims II.B.5. and II.C., finding that those claims failed to state a material issue of fact or law

(C. 438); and it summarily dismissed claims I, IV, V, VI, VII, VIII, IX, X, and XI as precluded under Rule 32.2(a), Ala. R. Crim. P. (C. 438-39).

On August 4, 2010, Brooks filed his second amended Rule 32 petition. (Supp. C. 25-220.) In his second amended petition, Brooks added facts to his claim that his trial counsel were ineffective for failing to challenge both the legality of his arrest and for failing to challenge the use of evidence that stemmed from his illegal arrest. (Supp. C. 47-60.) Brooks also added facts to his claim that his trial counsel were ineffective for failing to hire expert witnesses during the guilt phase of his trial--specifically, Brooks said that his trial counsel should have hired a "gun/ballistics expert, a knife wound expert, and a fingerprint expert," as well as mental-health experts. (Supp. C. 79-83.) Brooks also added the following subclaims to his ineffective-assistance-of-trial-counsel claim:

> II.A.9. His trial counsel were ineffective during the guilt phase of his trial for failing to object to improper victim-impact evidence. (Supp. C. 91-95.)
>
> II.A.10. His trial counsel were ineffective during the guilt phase of his trial for failing to object to improper victim-impact arguments made by the

State during its closing arguments. (Supp. C. 95-99.)

II.B.6. His trial counsel were ineffective during the penalty phase of his trial for failing to argue that Alabama's capital-sentencing scheme is unconstitutional. (Supp. C. 149-50.)

II.B.7. His trial counsel were ineffective during the penalty phase of his trial for failing to object to the jury's unanimous death recommendation because the verdict form did not specify what aggravating and mitigating circumstances, if any, were considered and found by the jury. (Supp. C. 150-51.)

II.B.8. His trial counsel were ineffective during the penalty phase of his trial for failing to raise an objection that Alabama's methods of execution are cruel and unusual. (Supp. C. 151-52.)

Finally, Brooks added the following subclaims to his claim that his appellate counsel was ineffective:

III.A.1. His appellate counsel failed to challenge Brooks's arrest on appeal. (Supp. C. 159-72.)

III.A.2. His appellate counsel failed to raise a claim about the trial court's refusal to consider Brooks's age at the time of the offense--22--as a mitigating factor in sentencing. (Supp. C. 172-78.)

III.A.3. His appellate counsel failed to argue the improper-victim-argument issue on appeal. (Supp. C. 178-80.)

III.A.4. His appellate counsel failed to raise the improper-victim-impact-evidence claim on appeal. (Supp. C. 180-84.)

III.A.5. His appellate counsel failed to raise on appeal the trial court's ruling that Brooks's

> testimony at the suppression hearing could not be limited solely to the issue of the voluntariness of his statement. (Supp. C. 184-87.)
>
> III.A.6. His appellate counsel failed to argue on appeal that Alabama's capital-sentencing scheme is unconstitutional. (Supp. C. 187-89.)
>
> III.A.7. His appellate counsel failed to argue on appeal that the jury's death recommendation was invalid because the verdict form did not specify what aggravating and mitigating circumstances were considered and found by the jury. (Supp. C. 189-90.)

On September 2, 2010, the State moved to dismiss Brooks's second amended petition (C. 454-517), and, on July 11, 2014, the circuit court held a hearing on the State's motion. (R. 132-218.) At that hearing, the circuit court explained that the claims it had already dismissed in its March 2010 order were going to "remain dismissed" and it was "not going to go back and address those issues." (R. 141.) The parties then addressed the claims Brooks raised in his second amended Rule 32 petition.

After hearing arguments as to Brooks's added claims, the circuit court summarily dismissed claims II.A.9., II.A.10., II.B.6., II.B.7., and II.B.8. (See R. 181-82, 199, 200, 202.) The circuit court, however, found that Brooks was entitled to an evidentiary hearing on his claim that his trial counsel

were ineffective during the penalty phase of his trial. (See R. 187, 197, 205.)

On March 15, 2016, Brooks filed his third amended Rule 32 petition. (C. 1053-59.) In his third amended petition, Brooks added the following claim:

> XII. Hurst v. Florida, 136 S. Ct. 616 (2016), rendered unconstitutional Alabama's capital-sentencing scheme. (C. 1054-59.)

The State moved to dismiss Brooks's third amended Rule 32 petition, alleging that "Hurst has no effect on Brooks'[s] case." (C. 1060-72.)

On September 3, 2015, February 22 and 23, 2016, August 23, 2016, and April 13, 2016, the circuit court held an evidentiary hearing. At that hearing, Brooks testified in his own behalf. (R. 221-88.) Brooks also presented testimony from his three trial counsel, Jeff Compton Sr. (R. 383-424), Joel Collins (R. 424), and Charles Eddie Floyd III (R. 514-69); and he presented testimony from Carl Edward Brooks (R. 288-342), Jason Beverly (R. 343-68), Kimberly Manning (R. 570-651), Lorrie Velez (R. 651-87), Susan Watts (R. 713-16), Dr. Marti Loring (R. 720-98.), and Dr. Bhushan Agharkar (R. 801-30). The State called one witness--Dr. Glen King. (R. 839-98.)

On February 15, 2017, the circuit court issued an order denying Brooks's remaining claims and setting out its reasons for doing so. (C. 1228-30.) Then, on April 3, 2017, Brooks filed a notice of appeal. (C. 1232-34.) Because that notice of appeal was untimely, however, this Court dismissed Brooks's appeal and promptly issued a certificate of judgment. (No. CR-16-0666) (C. 1250-51.)

Thereafter, on August 2, 2017, Brooks filed a Rule 32.1(f), Ala. R. Crim. P., petition requesting an out-of-time appeal. (C. 1253-59.) The next day, the State filed a response to Brooks's petition, noting that it did not object to Brooks's request. (C. 1271.) On August 18, 2017, the circuit court granted Brooks an out-of-time appeal. (C. 1274-75.) This appeal follows.

Standard of Review

As explained above, Brooks's petition was partly summarily dismissed under Rule 32.7(d), Ala. R. Crim. P., and partly denied under Rule 32.9(a), Ala. R. Crim. P. Our standard of review is well settled:

> "Rule 32.7(d), Ala. R. Crim. P., authorizes a circuit court to summarily dispose of a petitioner's Rule 32 petition without accepting evidence,

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

"See also Hannon v. State, 861 So. 2d 426, 427 (Ala. Crim. App. 2003); Cogman v. State, 852 So. 2d 191, 193 (Ala. Crim. App. 2002); Tatum v. State, 607 So. 2d 383, 384 (Ala. Crim. App. 1992). Summary disposition is appropriate if the record directly refutes a petitioner's claim or if the claim is obviously without merit. See, e.g., Shaw v. State, 148 So. 3d 745, 764–65 (Ala. Crim. App. 2013). Moreover, 'a judge who presided over the trial or other proceeding and observed the conduct of the attorneys at the trial or other proceeding need not hold a hearing on the effectiveness of those attorneys based upon conduct that he observed.' Ex parte Hill, 591 So. 2d 462, 463 (Ala. 1991).

"'Once a petitioner has met his burden ... 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). Rule 32.9(a), Ala. R. Crim. P., provides:

> "'Unless the court dismisses the petition, the petitioner shall be entitled to an evidentiary hearing to determine disputed issues of material fact, with the right to subpoena material witnesses on his behalf. The court in its discretion may take evidence by affidavits, written interrogatories, or depositions, in lieu of an evidentiary hearing, in which event the presence of the petitioner is not required,

> or the court may take some evidence by such means and other evidence in an evidentiary hearing.'

"In Wilkerson v. State, 70 So. 3d 442 (Ala. Crim. App. 2011), this Court explained:

> "'"The burden of proof in a Rule 32 proceeding rests solely with the petitioner, not the State." Davis v. State, 9 So. 3d 514, 519 (Ala. Crim. App. 2006), rev'd on other grounds, 9 So. 3d 537 (Ala. 2007). "[I]n a Rule 32, Ala. R. Crim. P., proceeding, the burden of proof is upon the petitioner seeking post-conviction relief to establish his grounds for relief by a preponderance of the evidence." Wilson v. State, 644 So. 2d 1326, 1328 (Ala. Crim. App. 1994). Rule 32.3, Ala. R. Crim. P., specifically provides that "[t]he petitioner shall have the burden of ... proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief."'

"70 So. 3d at 451.

"'[W]here there are disputed facts in a postconviction proceeding and the circuit court resolves those disputed facts, "[t]he standard of review on appeal ... is whether the trial judge abused his discretion when he denied the petition."' Boyd v. State, 913 So. 2d 1113, 1122 (Ala. Crim. App. 2003) (quoting Elliott v. State, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992)). However, 'when the facts are undisputed and an appellate court is presented with pure questions of law, that court's review in a Rule 32 proceeding is de novo.' Ex parte White, 792 So. 2d 1097, 1098 (Ala. 2001). 'The sufficiency of pleadings in a Rule 32 petition is a question of law.' Ex parte Beckworth, 190 So. 3d 571, 573 (Ala. 2013).

> "With limited exceptions not applicable here, the general rule is that this Court may affirm a circuit court's judgment if it is correct for any reason. See Bryant v. State, 181 So. 3d 1087, 1100 (Ala. Crim. App. 2011); Moody v. State, 95 So. 3d 827, 833 (Ala. Crim. App. 2011), and McNabb v. State, 991 So. 2d 313, 333 (Ala. Crim. App. 2007), and the cases cited therein. Moreover, '[o]n direct appeal we reviewed the record for plain error; however, the plain-error standard of review does not apply to a Rule 32 proceeding attacking a death sentence.' Ferguson v. State, 13 So. 3d 418, 424 (Ala. Crim. App. 2008). See also Mashburn v. State, 148 So. 3d 1094, 1104 (Ala. Crim. App. 2013)."

Woodward v. State, 276 So. 3d 713, 728-29 (Ala. Crim. App. 2018). Additionally, we note that "'"the procedural bars of Rule 32 apply with equal force to all cases, including those in which the death penalty has been imposed."'" Mashburn v. State, 148 So. 3d 1094, 1104 (Ala. Crim. App. 2013) (quoting Nicks v. State, 783 So. 2d 895, 901 (Ala. Crim. App. 1999), quoting in turn, State v. Tarver, 629 So. 2d 14, 19 (Ala. Crim. App. 1993)). With these principles in mind, we address Brooks's claims on appeal.

Discussion

I.

Brooks first argues that the circuit court erred when it denied his claims that his trial counsel were ineffective during the penalty phase of his trial because, he says, his

counsel (1) failed "to investigate and present mitigation evidence during the penalty phase and in the sentencing phase before the judge" (Brooks's brief, p. 12); (2) failed to "retain mental health experts to present evidence regarding Brooks'[s] mental health and drug use during the penalty phase and in the sentencing phase before the judge" (Brooks's brief, p. 28); and (3) failed "to discuss evidence demonstrating the existence of mitigating factors" during the penalty-phase closing argument (Brooks's brief, p. 35).

> "'To prevail on a claim of ineffective assistance of counsel, the petitioner must show (1) that counsel's performance was deficient and (2) that the petitioner was prejudiced by the deficient performance. See Strickland v. Washington, 466 U.S. 668 (1984).
>
> > "'"Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight,

> to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way."

"'Strickland, 466 U.S. at 689.

> "'"[T]he purpose of ineffectiveness review is not to grade counsel's performance. See Strickland [v. Washington], [466 U.S. 668,] 104 S. Ct. [2052] at 2065 [(1984)]; see also White v. Singletary, 972 F.2d 1218, 1221 (11th Cir. 1992) ('We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.'). We recognize that '[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in

> another.' Strickland, 104 S. Ct. at 2067. Different lawyers have different gifts; this fact, as well as differing circumstances from case to case, means the range of what might be a reasonable approach at trial must be broad. To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.' Burger v. Kemp, 483 U.S. 776, 107 S. Ct. 3114, 3126, 97 L. Ed. 2d 638 (1987)."

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

> "'An appellant is not entitled to "perfect representation." Denton v. State, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). "[I]n considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.'" Burger v. Kemp, 483 U.S. 776, 794 (1987).'

"Yeomans v. State, [195] So. 3d [1018], [1026] (Ala. Crim. App. 2013). ...

"We also recognize that when reviewing claims of ineffective assistance of counsel 'the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.'

> Strickland v. Washington, 466 U.S. 668, 698, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)."

Marshall v. State, 182 So. 3d 573, 582-83 (Ala. Crim. App. 2014).

Before addressing Brooks's claims on appeal, we also note that the judge who presided over Brooks's capital-murder trial and imposed Brooks's death sentence did not preside over Brooks's Rule 32 evidentiary hearing.[6] Thus, this Court does not accord "considerable weight" to the circuit court's judgment as to whether Brooks was prejudiced by his counsels' performance as to the claims heard during the evidentiary hearing. Cf. Ex parte Gissendanner, 288 So. 3d 1011, 1028-29 (Ala. 2019) (holding that, when the same judge presides over both the trial and Rule 32 proceedings, this Court must give that judge's finding as to prejudice "considerable weight").

Finally, we note that Brooks was represented throughout the trial-court proceedings by Joel Collins, who at the time of his appointment to Brooks's case had been practicing law

[6]The judge who presided over Brooks's capital-murder trial and imposed his death sentence summarily dismissed all but Brooks's claims of ineffective assistance of counsel during the penalty phase. That judge, however, retired before Brooks's evidentiary hearing. (R. 225-26.)

for over 25 years. (R. 440.) Brooks was also initially represented by Jeffrey Michael Compton, but when Compton was allowed to withdraw as Brooks's trial counsel, the trial court appointed Charles E. Floyd III to replace him. At the time the trial court appointed Floyd to represent Brooks, Floyd had been practicing law for over 10 years. (R. 516.) When, as is the case here, this Court examines the performance of "'experienced trial counsel, the presumption that [their] conduct was reasonable is even stronger.'" Ray v. State, 80 So. 3d 965, 977 n.2 (Ala. Crim. App. 2011) (quoting Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000)).

I.A.

Brooks first argues that the circuit court erred when it denied his claim that his trial counsel were ineffective for "failing to investigate and present mitigation evidence during the penalty phase and in the sentencing phase before the judge." (Brooks's brief, p. 12.) Brooks argues that, at the hearing on his petition, he "presented significant evidence of his trial counsel's failure to investigate significant mitigation evidence and failure to present such evidence

during the penalty phase and the sentencing phase." (Brooks's brief, p. 12.) We disagree.

> "In Ray v. State, 80 So. 3d 965 (Ala. Crim. App. 2011), this Court explained:
>
> > "'"'[F]ailure to investigate possible mitigating factors and failure to present mitigating evidence at sentencing can constitute ineffective assistance of counsel under the Sixth Amendment.' Coleman [v. Mitchell], 244 F.3d [533] at 545 [(6th Cir. 2001)]; see also Rompilla v. Beard, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005); Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). Our circuit's precedent has distinguished between counsel's complete failure to conduct a mitigation investigation, where we are likely to find deficient performance, and counsel's failure to conduct an adequate investigation, where the presumption of reasonable performance is more difficult to overcome."
> >
> > "....
> >
> > "'"... A defense attorney is not required to investigate all leads...." Bolender v. Singletary, 16 F.3d 1547, 1557 (11th Cir. 1994). "A lawyer can almost always do something more in every case. But the Constitution requires a good deal less than maximum performance." Atkins v.

> Singletary, 965 F.2d 952, 960 (11th Cir. 1992). "The attorney's decision not to investigate must not be evaluated with the benefit of hindsight, but accorded a strong presumption of reasonableness." Mitchell v. Kemp, 762 F.2d 886, 889 (11th Cir. 1985).'

"Ray, 80 So. 3d at 983-84 (emphasis omitted). Additionally,

> "'"'"[C]ounsel is not required to present all mitigation evidence, even if the additional mitigation evidence would not have been incompatible with counsel's strategy. Counsel must be permitted to weed out some arguments to stress others and advocate effectively." Haliburton v. Sec'y for the Dep't of Corr., 342 F.3d 1233, 1243-44 (11th Cir. 2003) (quotation marks and citations omitted); see Herring v. Sec'y, Dep't of Corr., 397 F.3d 1338, 1348-50 (11th Cir. 2005) (rejecting ineffective assistance claim where defendant's mother was only mitigation witness and counsel did not introduce evidence from hospital records in counsel's possession showing defendant's brain damage and mental retardation or call psychologist who evaluated defendant pre-trial as having dull normal intelligence); Hubbard v. Haley, 317 F.3d 1245, 1254 n.16, 1260 (11th Cir. 2003) (stating this Court has "consistently held that there is 'no absolute duty ... to introduce mitigating or character

> evidence'" and rejecting claim that counsel were ineffective in failing to present hospital records showing defendant was in "borderline mentally retarded range") (brackets omitted) (quoting Chandler [v. United States], 218 F.3d [1305] at 1319 [(11th Cir. 2000)]).'
>
> "'"Wood v. Allen, 542 F.3d 1281, 1306 (11th Cir. 2008). 'The decision of what mitigating evidence to present during the penalty phase of a capital case is generally a matter of trial strategy.' Hill v. Mitchell, 400 F.3d 308, 331 (6th Cir. 2005)."'
>
> "McWhorter v. State, 142 So. 3d 1195, 1246-47 (Ala. Crim. App. 2011)(quoting Dunaway v. State, 198 So. 3d 530, 547 (Ala. Crim. App. 2009))."

George v. State, [Ms. CR-15-0257, January 11, 2019] ___ So. 3d ___, ___ (Ala. Crim. App. 2019).

Brooks's allegation that his trial counsel were ineffective for failing to investigate "significant mitigation evidence" is not supported by the testimony presented at the evidentiary hearing on his Rule 32 petition. Indeed, the testimony at the evidentiary hearing showed that Brooks's counsel conducted a reasonable investigation into possible mitigation evidence, that his counsel knew that there was a wealth of mitigation evidence to present to the jury, and that

his counsel had developed a reasonable strategy to present that evidence to the jury.

Specifically, at the evidentiary hearing, Compton testified that, after he was appointed to represent Brooks, he took it upon himself "to get as much information from [Brooks] as [he] could." (R. 387.) Compton explained that he met with Brooks around 30 to 40 times, and that, during those meetings, they "talked about ... what had gone on in [Brooks's] younger life" and "it became clear ... that [Brooks] had some issues in his childhood that needed to be addressed." (R. 392.) Compton also testified that he spoke with Brooks's mother, one of his sisters, his father, and his father's girlfriend, and that he and Collins had a lengthy meeting with Brooks's family. Compton also said that he spoke with people in Texas who knew Brooks from when Brooks's family lived there. Although Compton was allowed to withdraw as an attorney of record before Brooks's trial, Compton said that he conveyed all the information that he learned about Brooks to Collins and that Collins never refused the information Compton gave him.

Brooks testified that, at the initial meeting with his counsel, Collins told Brooks that Collins would be discussing "background histories, drug histories, and [Brooks's] background, anything pertaining to the case, itself, with [Compton,] and that [Collins] would obtain the information from [Compton]." (R. 223.) Brooks said that he saw Compton "many, many times. ... Roughly estimating ... at least, 30, 40, times ... during that time [Compton] was appointed on [Brooks's] case." (R. 232.) Brooks said that most of the visits with Compton were two to three hours long and that, during those visits, they

> "discussed [his] background, as in [his] childhood, which, you know, that took some time getting through all of that. [They] discussed [his] family's background, [his] father and [his] mother. [They] discussed, you know, issues pertaining to the case, itself. Discussed, you know, about did [he] have any mental health problems, you know, and just mainly--and sometimes they'd come in an talk with [him], how was [he] doing, and gave [him] a little update about how the case was going."

(R. 233.) Brooks said that he gave Compton the names of 15 to 20 people who knew about his life and his background. Brooks also said that Compton explained the penalty phase of trial to him and discussed mitigation with him. Brooks testified that he told Compton about his personal and family history of drug

use and his history of physical and sexual abuse. Brooks said that he could not think of anything that he did not tell Compton during their meetings.

Collins testified that he met with Compton a few times and, although he could not remember what they talked about, he said that their discussions had to do with Compton's investigation into Brooks's background. Collins also said that he and Compton met with Brooks's family four or five times, and that, during those meetings, they talked

> "[a]bout [Brooks's] childhood, how he reacted with his father and how his father reacted with him, how the other, the mother and the daughters, faired in the family dynamic, were able to determine that there was sexual abuse performed by [Brooks's] father on, at least, one of the daughters. I believe--I don't that there was any evidence or testimony, but I believe that it might have been some against [Brooks]. How [Brooks] was brought up. He had a very, very, rough life. When he was brought up, he was beaten quite often. The whole family was afraid of his daddy."

(R. 450.) Collins explained that Brooks's family provided him "with information about [Brooks's] childhood and about his life with his father and his family and about some of the family history that went on and the dynamics between the family members" and that he "planned to have them come to court and testify about all of that." (R. 470-71.) Collins

said that he believed that "the best and most effective way" to present this evidence of Brooks's life was through the testimony of Brooks's family members (who had firsthand experience of what Brooks went through), and that he had planned on using those witnesses to present to the jury what they had learned about Brooks's background.

Floyd testified about the mitigation strategy for Brooks's trial, explaining that he and Collins wanted to present "[t]he fact that [Brooks] had been abused as a child; the fact that [Brooks] had been, possibly, sexually, physically, mentally, abused; the fact that [Brooks] had started drug use at a very early age; [Brooks's] lifestyle; [and] everything that [Brooks] was brought up with that could cause mental issues." (R. 553.)

In short, although Brooks argues on appeal that his "trial counsel undertook no 'investigatory efforts'" and "did not conduct mitigation investigation, and thus they were per se deficient" (Brooks's brief, p. 17), Brooks's trial counsel clearly conducted an investigation into possible mitigation evidence. Furthermore, Brooks's counsels' mitigation investigation was objectively reasonable. Brooks's counsel

conducted several extensive interviews with Brooks to discuss his background, met with Brooks's family to discuss Brooks's background, and planned on having Brooks's family members testify during the penalty phase about Brooks's background. Although Brooks claims that his counsel could have done more, "'[t]he test for ineffectiveness is not whether counsel could have done more; perfection is not required.'" Ray v. State, 80 So. 3d 965, 981 (Ala. Crim. App. 2011) (quoting Waters v. Thomas, 46 F.3d 1506, 1518 (11th Cir. 1995)). What his counsel did was reasonable. Thus, the circuit court did not err when it found that Brooks failed to meet his burden of proof as to this claim. (C. 1228-29.)

As for Brooks's argument that the circuit court erred when it denied his claim that his trial counsel were ineffective for failing to present mitigation evidence to the jury during the penalty phase and the judicial-sentencing phase of his trial, that claim is without merit.

In his second amended petition, Brooks alleged that his counsel failed to present "compelling" mitigation evidence that Brooks was subject to physical, sexual, emotional, and mental abuse and that he was "exposed to and began using drugs

at a young age." (Supp. C. 114-22.) Brooks further alleged that there were people who would testify about Brooks's upbringing, including his sister, Kim Manning. (Supp. C. 116-17.)

As explained above, Brooks's counsel testified that they planned to present to the jury as mitigation evidence "[t]he fact that [Brooks] had been abused as a child; the fact that [Brooks] had been, possibly, sexually, physically, mentally, abused; the fact that [Brooks] had started drug use at a very early age; [Brooks's] lifestyle; [and] everything that [Brooks] was brought up with that could cause mental issues." (R. 553.) His counsel also testified that they planned to present this mitigation evidence to the jury by having Brooks's family members come to court and testify, but only Brooks's sister (Kim Manning) was present at his trial. (R. 470-71.)

The record in Brooks's direct appeal shows that, before the penalty phase began, the following exchange occurred:

> "The Court: And the defendant, I think is going to offer what?
>
> "[Collins]: Your Honor, Mr. Floyd will be reading the report of Dr. Herawi [sic]. We've agreed and stipulated that be admitted without any proof.

"The Court: Okay.

"[Collins]: We will not be presenting anything, other than that.

"The Court: All right.

"[Collins]: We do need to put on the record that [Brooks's] sister, Kim Manning, is here.

"The Court: All right.

"[Collins]: She is in court and I will identify her when we get going.

"The Court: Okay.

"[Collins]: And will indicate to the jury that he has instructed us not to call her as a witness.

"The Court: All right.

"[Collins]: And that he has instructed us that he will not be taking the stand.

"The Court: Okay.

"[Collins]: And we've explained to him that he has a right to do that and it's up to him as to how we proceed. And we wanted to confirm that on the record; is that a correct statement of what we decided, [Brooks]?

"[Brooks]: That's correct.

"....

"[Floyd]: Judge, could we also have him confirm for the record, that he does not want any other witness, such as Kim Manning called?

> "[Collins]: I just stated all that, but you don't want your sister called, do you?
>
> "[Brooks]: That's correct."

(Record in CR-03-1113, R. 1629-31 (emphasis added).)

At the evidentiary hearing on Brooks's Rule 32 petition, his counsel recalled that Brooks told them that he did not want his sister to testify. Collins explained that Brooks "didn't want to have any information about his background brought out, about how bad it was or anything else. He said he did not want to have that done, and that would have been the need to have an investigator, but he did not want that. He didn't want his family to have to go through it. And he probably didn't want it to be in the record if its gets down the road on an appeal where it is now." (R. 471.)

Collins said that, although Brooks did not expressly tell them not to call his mother to testify, she did not appear at trial. Even so, Collins explained that Brooks said he "didn't want to have anything said or done about his father or his father involved in any way" and "[h]e said he didn't want to have any evidence about the sexual abuse and the way his father treated his family from anyone anywhere ... . He said,

specifically, I do not want any of that information out." (R. 473-74.)

Collins said that, instead of calling witnesses to set out Brooks's background, they read into the record excerpts from Dr. King's competency evaluation that discussed Brooks's background. (R. 484.) Collins agreed that having Brooks's family testify would have been the "most important" mitigation evidence (R. 487), but Brooks

> "limited [them] by not wanting his family to testify about what happened in his household or what his daddy had done to him or anybody in his family. That was what he limited me in doing. Now, I could have probably gone up against his wishes, and that's why I put it on the record that he did not want to have his sister to testify. He did not want to have that testimony presented, and the Court heard my proffer of evidence of that he did not want that. So, by not allowing me to go into that, I guess I should have overridden what my client decided for me to do to try to save his life. But he chose not to do that, so that's part of my theory, not a theme, but a theory, of trying to get the jury to understand what went on in his life, but he didn't want that."

(R. 489.) Collins said that he was expecting the family to testify in Brooks's behalf "and that would have been the best and most effective, but [Brooks] chose not to let them testify, and they chose not to be there." (R. 491.)

Floyd testified similarly, explaining that the strategy behind their mitigation presentation was to show that Brooks "had been abused as a child; the fact that he had been, possibly, sexually, physically, mentally, abuse[d]; the fact that he had started drug use at a very early age; his lifestyle; everything that he was brought up with that could cause mental issues." (R. 553.) Floyd explained that, "[t]o the best of [his] knowledge, [Brooks] did not want any of the testimony of the stuff that [he] presented to you mentioned in open court, whether it be his sister or any other witness." (R. 558.) According to Floyd, "Brooks had told [him] many times during that trial that he did not want life, he wanted off, or death." (R. 557.)

Given Brooks's instruction to his counsel, which hampered their ability to present mitigation evidence in the way they had planned to do it, his counsel presented mitigation evidence to the jury and the court by reading excerpts from Dr. King's report detailing Brooks's upbringing and background. After reading excerpts of Dr. King's report to the jury, Brooks's counsel explained in their closing argument what they believed was mitigating in Brooks's case, including:

(1) that Brooks was not the mastermind behind the crime (Record in CR-03-1113, R. 1662); (2) that Brooks cooperated with law enforcement (Record in CR-03-1113, R. 1662); (3) that Brooks cared for his girlfriend (Record in CR-03-1113, R. 1663); (4) that Brooks came from a "broken home," in which his "stepmom ... was a prostitute," his father "is in prison and was crazy," and he "used drugs" and was "dependant on drugs" (Record in CR-03-1113, R. 1664); (5) that he has "no significant criminal history" (Record in CR-03-1113, R. 1664); and (6) that he showed remorse (Record in CR-03-1113, R. 1664). Additionally, Brooks's counsel argued that a sentence of life imprisonment without the possibility of parole was far worse than the death penalty for Brooks. (Record in CR-03-1113, R. 1665.)

Although Brooks alleged in his petition that his counsel were ineffective in the way they presented mitigation evidence to the jury, Brooks instructed his counsel not to present mitigation evidence through the testimony of his family members and instructed them not to present certain aspects of his upbringing. Brooks's counsel complied and, instead, presented evidence of Brooks's background through Dr. King's

report. Brooks cannot both dictate how his counsel presents mitigation evidence and later argue that his counsel were ineffective for following his instructions. This Court has never sanctioned such a tactic, and "[w]e refuse to find an attorney's performance ineffective for following his client's wishes." Adkins v. State, 930 So. 2d 524, 540 (Ala. Crim. App. 2001). Thus, the circuit court did not err in finding that "Brooks'[s] decision to prohibit the presentation of potentially mitigating evidence through his family cannot be used to create a claim of ineffective assistance of counsel on appeal." (C. 1229.)

In sum, based on the testimony presented during Brooks's evidentiary hearing, Brooks failed to prove that his counsels' investigation into mitigation evidence was inadequate; failed to prove that his counsels' decision to present that mitigation evidence through testimony from Brooks's mother and sister was unreasonable; and failed to prove that, after Brooks refused to allow his counsel to present that mitigation evidence by calling his sister to testify, that his counsels' decision to present that mitigation evidence through Dr. King's report was unreasonable. Thus, the circuit court did

not err when it found that Brooks failed to prove that his counsels' performance was deficient in investigating and presenting mitigation evidence.

I.B.

Next, Brooks argues that the circuit court erred when it denied his claim that his trial counsel were ineffective for "failing to retain mental health experts to present evidence regarding [his] mental health and drug use during the penalty phase and in the sentencing phase before the judge." (Brooks's brief, p. 28.) "During his Rule 32 hearing, Brooks presented two mental health experts, Dr. Bhushan Agharkar, a neuropsychiatrist, and Dr. Marti Loring, a licensed clinical social worker. Both experts discussed Brooks'[s] post-traumatic stress disorder, Dr. Agharkar also discussed frontal lobe damage and panic disorder findings in regard to Brooks, and Dr. Loring also discussed what should have been presented for a full mitigation presentation in regard to Brooks." (Brooks's brief, pp. 28-29.)

In denying Brooks's claim and concluding that Brooks failed to satisfy his burden of proof at the evidentiary hearing, the circuit court found:

"On pages 99 through 111 of the Second Amended Rule 32 Petition Brooks claims that Trial Counsel were ineffective due to failing to hire experts to present testimony regarding Brooks'[s] drug use, family history, and mental health. At the evidentiary hearing, Brooks presented the testimony of Dr. Bhushan Agharkar, who evaluated Brooks. Dr. Agharkar contended that Brooks suffers from post-traumatic stress disorder, as well as panic disorder, and potential frontal lobe damage. These diagnoses are contrary to the testimony of Dr. Glen King, who evaluated Brooks in 2002 and again in 2014. Dr. King testified that Brooks does not have PTSD. More specifically, Dr. King testified that in 2002, at the time of the offense, Brooks exhibited no signs of PTSD, and that Brooks showed no evidence for the presence of any serious mental illness or defect.

"The fact that the Court appointed evaluator, Dr. King, found no signs of mental disease or defect in Brooks at the time of his evaluation in 2002 renders Trial Counsel's decision not to hire further experts regarding Brooks'[s] mental health as a reasonable course of action, and thus not a violation of Brooks'[s] rights.

"At the evidentiary hearing, Brooks presented the testimony of Dr. Mar[t]i Loring, a social worker and sociologist to discuss Brooks'[s] exposure to abuse, neglect, drugs, and trauma. Dr. Loring's testimony revolved around family history that defense counsel intended to present through Brooks'[s] family at the sentencing phase. Trial Counsel had witnesses (Brooks'[s] sister and mother) who could have presented testimony as to the traumas Brooks was exposed to, but Brooks directed that those witnesses not be called to testify. A party cannot claim ineffective assistance of counsel by claiming evidence was not presented when he directed counsel not to present said evidence."

(C. 1229.) The record on direct appeal and the evidence presented at the Rule 32 hearing support the circuit court's conclusion.

Indeed, the record on direct appeal shows that, before Brooks's preliminary hearing, Collins moved the court to have Brooks undergo a psychological evaluation and that the court granted Brooks's request. (Record in CR-03-1113, R. 39-40.) On April 1, 2002, however, Collins moved to withdraw his request for Brooks's psychological evaluation; the court denied Collins's motion to withdraw the requested evaluation. (Record in CR-03-1113, R. 39-40.)

On May 4, 2002, Dr. Glen King, a licensed clinical and forensic psychologist, conducted Brooks's psychological evaluation. In his "forensic evaluation report," Dr. King noted that Brooks was "well groomed and well nourished"; that Brooks reported "no history of serious illnesses, injuries, nor diseases"; that Brooks "has never had a seizure disorder and he does not report headaches" and has "never been hospitalized." (C. 1726.) Brooks told Dr. King that he drinks alcohol, that he started smoking marijuana at nine years old, that he occasionally uses cocaine, and that he has previously

used "LSD, crystal meth, and some narcotics." (C. 1726-27.) Brooks also told Dr. King that he "has never seen a mental health professional for treatment either as an inpatient or outpatient." (C. 1727.) Dr. King then set out his findings about Brooks's mental health as follows:

> "[Brooks] is a 22 year old single white male who presents for the examination with motor activity level normal. He demonstrated good eye contact and showed no unusual mannerisms, gestures, nor facial expressions. His thought productivity was normal and the structure of his thoughts as evidenced by his answers to questions was both logical and relevant. His speech productivity was normal with normal flow and he had expressive tone. He was coherent and comprehensible throughout the evaluation.
>
> "Mr. Brooks demonstrated normal quality of affect with normal range or affective response and appropriate control of both his feelings and behaviors.
>
> "Mr. Brooks had good cognitive skills. He was able to immediately recall a color, object, and number and could do so with 100% accuracy after 10 minutes. He demonstrated good remote memory as well. He was oriented as to person, place, and time. He reports his birth date and social security number accurately without referral to written information and indicates that he was being evaluated at the Russell County Jail. He knew it was Saturday. He reported it to be April 5th when in fact it was May 5th, but this is not particularly unusual. He gave the correct year. He showed no distractability. He was able to engage in some abstract reasoning and he gave an abstract interpretation to a proverb. He knew the names accurately of both the current and immediate past presidents of the United States. He

> reports no evidence for hallucinations, delusions, depersonalization nor derealization. He reports no suicidal or homicidal ideation or intent."

(C. 1727-28.) Dr. King gave Brooks an Axis I diagnosis of "Cannabis Dependence, continuous" and "Polysubstance Dependence, continuous." (C. 1728.)

Dr. King also explained that he administered to Brooks the Competency to Stand Trial Assessment and found that Brooks "is quite capable of assisting his attorneys in his own defense and has a reasonably good understanding of legal processes so that he may proceed with the disposition of the charges against him." (C. 1729.) As for Brooks's mental state at the time of the offense, Dr. King found:

> "[Brooks] has a fairly lengthy history of dependence on cannabis and abuse or dependence on a number of other illicit substances. However, he reports no history whatsoever for serious mental illness or mental defect and he does not claim any. There was no evidence to indicate that at the time of the alleged offense he was suffering from any serious mental illness or mental defect that would render him incapable of understanding the nature and quality of his actions or the consequences of his behaviors. Indeed, the perpetrators of the crime engaged in lengthy planning and execution of a crime for pecuniary gain."

(C. 1729.)

In his amended petition and on appeal, Brooks alleges that his trial counsel were ineffective for "failing to retain mental health experts to present evidence regarding Brooks'[s] mental health and drug use during the penalty phase and in the sentencing phase before the judge." (Brooks's brief, p. 28.) We disagree.

As explained above, Brooks's trial counsel moved to have Brooks evaluated by a mental-health professional and, as a result of that evaluation, received information from Dr. King that Brooks was not suffering from any serious mental illness and had no history of ever having suffered from a serious mental illness. Moreover, Brooks never gave his trial counsel any reason to seek the opinion of another mental-health expert. As Floyd explained at the evidentiary hearing, Brooks never gave any indication that he had any mental-health issues. Therefore, Brooks's "'[t]rial counsel had no reason to retain another psychologist to dispute [Dr. King's] findings,'" Ray v. State, 80 So. 3d 965, 989–90 (Ala. Crim. App. 2011) (quoting Waldrop v. State, 987 So. 2d 1186, 1193 (Ala. Crim. App. 2007)), were "entitled to rely on [Dr. King's] opinion of [Brooks's] mental condition, and ... [were]

not obliged to shop around for another diagnosis that postconviction counsel now says was more favorable to [Brooks]." White v. State, [Ms. CR-16-0741, April 12, 2019] ___ So. 3d ___, ___ (Ala. Crim. App. 2019). The fact that Brooks has now found, "'years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial.'" Ward v. Hall, 592 F.3d 1144, 1173 (11th Cir. 2010) (quoting Davis v. Singletary, 119 F.3d 1471, 1475 (11th Cir. 1997)).

Additionally, although Collins testified at the evidentiary hearing that he "should have" hired a mental-health expert (R. 477), that concession does not establish that counsel were ineffective in failing to hire a mental-health expert before Brooks's trial. Indeed, most counsel, when given the time to reflect about their actions (or inactions) in a case, question their choices or realize, in hindsight, that they could have done something more. But "'[h]indsight does not elevate unsuccessful trial tactics into ineffective assistance of counsel.'" Davis v. State, 44 So. 3d 1118, 1132 (Ala. Crim. App. 2009) (quoting People v. Eisemann,

248 A.D.2d 484, 484, 670 N.Y.S.2d 39, 40-41 (1998)). And, when this Court evaluates counsels' effectiveness, we are required to make "every effort ... to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Boyd v. State, 913 So. 2d 1113, 1127-28 (Ala. Crim. App. 2003) (internal citations and quotations omitted; emphasis added). From counsels' perspective before Brooks's trial, the decision not to hire a mental-health expert was certainly a reasonable one.

Brooks also argues that Collins's decision to file a motion requesting funds to hire a mental-health expert after Collins had received Dr. King's report shows that counsel "suspected" that Brooks had a mental-health issue. Collins testified at the evidentiary hearing, however, that the motion he filed seeking funds to hire a mental-health expert "basically came out of a manual." (R. 499.) Collins also testified that he did not recall Brooks ever complaining of having flashbacks, nightmares, or "any sort of mental distress while he was at the Russell County Jail." (R. 501.) As explained above, Floyd testified similarly. In short, Brooks

failed to prove that his counsels' performance was, in any way, deficient when they failed to hire a mental-health expert. Thus, the circuit court properly dismissed this claim.

Moreover, Brooks failed to prove that he was prejudiced by his counsels' alleged deficiency. As the circuit court found in its order, Brooks presented testimony at the evidentiary hearing from Dr. Agharkar, who testified that Brooks suffers from "post-traumatic stress disorder, as well as panic disorder, and potential frontal lobe damage." (C. 1229.) But, as the circuit court also found, those conclusions were contradicted by Dr. King. Dr. King testified that Brooks did not suffer from post-traumatic stress disorder, that he showed no signs of frontal lobe dysfunction, and that he had a full-scale IQ score of 100.

"The United States Supreme Court in Wiggins[v. Smith, 539 U.S. 510 (2003),] held that in addressing the prejudice prong of the Strickland analysis a reviewing court must reweigh the aggravating circumstances against the omitted mitigating circumstances to determine if the petitioner has been prejudiced." Ray v. State, 80 So. 3d 965, 985 (Ala. Crim. App. 2011).

Here, given the sharp conflict between the expert witnesses, the fact that the State proved (and the trial court found) the existence of four statutory aggravating circumstances during the penalty phase of Brooks's trial,[7] and that the jury unanimously recommended that Brooks receive the death penalty, there is no reasonable probability that Dr. Agharkar's testimony would have resulted in a different recommendation from the jury or a different sentence in this case. See, e.g., Ray, 80 So. 3d at 985 (holding that Ray failed to show prejudice under Strickland when his counsel failed to present certain mitigation evidence in light of the disputed expert testimony, the "overwhelming evidence of three aggravating circumstances," and the "brutal nature of the facts surrounding Tiffany Harville's murder"). Thus, Brooks failed to show that he was prejudiced by his counsels' failure to hire a mental-health expert.

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[7]The trial court found the following aggravating circumstances to exist: (1) that the murder was committed during the course of a robbery, see § 13A-5-49(4), Ala. Code 1975; (2) that the murder was committed during the course of a burglary, see § 13A-5-49(4), Ala. Code 1975; (3) that the murder was committed during the course of a kidnapping, see § 13A-5-49(4), Ala. Code 1975; and (4) that the murder was especially heinous, atrocious, or cruel compared to other capital offenses, see § 13A-5-49(8), Ala. Code 1975.

Brooks also failed to show that his counsel were ineffective for failing to hire Dr. Agharkar and Dr. Loring for another reason: At the evidentiary hearing, Dr. Agharkar admitted that he had not finished his fellowship in forensic psychiatry and had not received his board certification in that field until after Brooks's trial, and Dr. Loring testified that it is "against the law" in Alabama for her to diagnose someone with a mental-health disorder.

It is well settled that, to properly plead a claim that counsel were ineffective for failing to hire an expert witness, the petitioner must, among other things, identify by name the expert witness his counsel should have hired, set out the testimony that the named expert would have given, and plead that the named expert was both willing and available to testify at trial. In Yeomans v. State, 195 So. 3d 1018, 1043 (Ala. Crim. App. 2013), this Court held that Yeomans's claim of ineffective assistance of counsel was insufficiently pleaded because, "although the petition alleges that trial counsel should have sought the assistance of an expert to testify, for example, that 'one's initial IQ score ... is regarded as most accurate,' the petition did not identify, by

name, any expert who could have presented that specific testimony--or even testified at all--at Yeomans's trial." If a petitioner properly pleads such a claim, the petitioner is then entitled to prove that claim at an evidentiary hearing. See, e.g., McAnally v. State, [Ms. CR-18-0656, Sept. 20, 2019] ___ So. 3d ___, ___ (Ala. Crim. App. 2019) (recognizing that a Rule 32 petitioner is entitled to an evidentiary hearing only when the claim is meritorious on its face, which requires that the claim (1) is sufficiently pleaded, (2) is not subject to the grounds of preclusion, and (3) includes factual allegations that, if true, entitle the petitioner to relief). In other words, to obtain relief on a claim that counsel were ineffective for failing to hire an expert witness, the petitioner must first plead the name of that expert, the substance of that expert's testimony, and that the expert is willing and available to testify at the petitioner's trial; then the petitioner must prove each of those allegations at an evidentiary hearing.

Here, although he proved that Dr. Agharkar and Dr. Loring were willing to testify at his trial in 2004, Brooks failed to prove that Dr. Agharkar and Dr. Loring were available to

testify as mental-health experts at his trial. Again, Brooks presented both Dr. Agharkar and Dr. Loring as the expert witnesses his counsel should have hired to testify in the penalty phase of his trial as to certain aspects of his mental health. In doing so, both Dr. Agharkar and Dr. Loring conceded that there were issues concerning their ability to testify as expert witnesses at the time of Brooks's trial in early 2004. Specifically, Dr. Agharkar testified that, although he was licenced to practice medicine in 2002, he did not finish his fellowship in forensic psychiatry (the field in which Brooks sought his expertise) until the "[m]iddle of 2005"--over one year after Brooks's trial--and did not become a board-certified forensic psychiatrist until 2007. (R. 823-24.) Similarly, although Brooks argues on appeal that Dr. Loring "discussed Brooks'[s] post-traumatic stress disorder," Dr. Loring admitted that she could not make such a diagnosis in Alabama as it would be "against the law." (R. 765.) Thus, Dr. Agharkar could not have testified at Brooks trial as a board certified forensic psychiatrist, and Dr. Loring could not have testified as to any specific mental-health diagnosis for Brooks.

Given that Dr. Agharkar was in the middle of his forensic psychiatry fellowship and was not yet board-certified in that field at the time of Brooks's trial, and given that Dr. Loring cannot legally diagnose anyone in Alabama with a mental-health disorder, we fail to see how Brooks's counsel were ineffective for failing to hire Dr. Agharkar and Dr. Loring as expert witnesses in their respective fields.

As for Brooks's additional claim that his counsel were ineffective for failing to hire Dr. Loring as a mitigation expert, that claim is likewise without merit. As we have explained:

> "'[H]iring a mitigation specialist in a capital case is not a requirement of effective assistance of counsel.' Phillips v. Bradshaw, 607 F.3d at 207–08.
>
> > "'[The petitioner] claims "inadequate preparation and presentation of mitigation evidence," because counsel should have hired a "mitigation specialist" to gather mitigating evidence. However, he cites no authority that this is a requirement of effective assistance, and we hold that it is not.'
>
> "State v. McGuire, 80 Ohio St. 3d 390, 399, 686 N.E. 2d 1112, 1120 (1997). See also Jonathan P. Tomes, Damned If You Do, Damned If You Don't: The Use of Mitigation Experts in Death Penalty Litigation, 24 Am. J. Crim. L. 359 (1997) ('Whether a court casts its grounds for failing to find a constitutional violation of the right to counsel for failure to

> hire or use a mitigation expert in terms of the defendant's failure to meet either or both of the Strickland prongs, as a reasonable tactical decision, or as a procedural matter, the result is the same--affirmance of the death penalty in all but the very few cases in which counsel's performance is so deficient that the defendant can satisfy the high hurdle of Strickland and its progeny.')."

Daniel v. State, 86 So. 3d 405, 437 (Ala. Crim. App. 2011).

Even so, Brooks failed to show that his counsel were ineffective for failing to hire Dr. Loring as a mitigation expert. As the circuit court found in its order denying Brooks's claim, Dr. Loring testified at the evidentiary hearing about Brooks's "exposure to abuse, neglect, drugs, and trauma." (C. 1229.) But, as explained above, Brooks's trial counsel were well aware of Brooks's upbringing and intended to present that evidence during the penalty phase of Brooks's trial through Brooks's mother and his sister. Counsel is not ineffective for failing to hire a mitigation expert to discover information of which they were already aware. As Brooks put it at the evidentiary hearing, he could not think of anything that he did not tell Compton about his background during their meetings. (R. 270.)

In sum, the circuit court did not err when it denied this claim.

I.C.

Finally, Brooks argues that the circuit court erred when it denied his claim that his counsel were ineffective "in closing arguments during the penalty phase for failing to discuss evidence demonstrating the existence of mitigating factors." (Brooks's brief, p. 35.)

In his second amended petition, Brooks alleged that his trial counsel were ineffective in making a penalty-phase closing argument because the "information, which was offered in argument as mitigation, is a far cry from the complete picture of [his] background and situation and does not approach the level of constitutionally adequate performance." Furthermore, he claimed that his counsels' "performance prevented the jury and the trial court from hearing and considering an abundance of mitigating evidence." (Supp. C. 137.)

On appeal, however, Brooks argues that his trial counsel were ineffective in presenting a penalty-phase closing argument because, he says, the argument "included complete misstatements with absolutely no basis in fact and some of it was contradictory and damaging to Brooks." (Brooks's brief, p.

36.) In other words, Brooks raises a claim of ineffective assistance of counsel on appeal that differs from the claim he alleged in his petition. Because the specific claim of ineffective assistance of counsel Brooks raises on appeal "was not presented to the circuit court in [Brooks's] Rule 32 petition," it is not properly before this Court for appellate review. Boyd v. State, 913 So. 2d 1113, 1143 (Ala. Crim. App. 2003). Thus, we do not address it.

To the extent that Brooks argues on appeal that the circuit court erred when it denied the claim that he raised in his Rule 32 petition, Brooks did not satisfy his burden of proof as to that claim.

We have explained that

> "the presumption that counsel performed effectively '"is like the 'presumption of innocence' in a criminal trial,"' and the petitioner bears the burden of disproving that presumption. Hunt v. State, 940 So. 2d 1041, 1059 (Ala. Crim. App. 2005) (quoting Chandler v. United States, 218 F.3d 1305, 1314 n.15 (11th Cir. 2000) (en banc)). 'Never does the government acquire the burden to show competence, even when some evidence to the contrary might be offered by the petitioner.' Id. '"'An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption [of effective representation]. Therefore, "where the record is incomplete or unclear about [counsel]'s actions, [a court] will presume that he did what he should have done, and that he exercised reasonable

professional judgment."'"' Hunt, 940 So. 2d at 1070–71 (quoting Grayson v. Thompson, 257 F.3d 1194, 1218 (11th Cir. 2001), quoting in turn Chandler, 218 F.3d at 1314 n.15, quoting in turn Williams v. Head, 185 F.3d 1223, 1228 (11th Cir. 1999)). Thus, to overcome the strong presumption of effectiveness, a Rule 32 petitioner must, at his evidentiary hearing, question trial counsel regarding his or her actions and reasoning. See, e.g., Broadnax v. State, 130 So. 3d 1232, 1255–56 (Ala. Crim. App. 2013) (recognizing that '[i]t is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions, or inactions, of counsel that occurred outside the record[, and holding that] circuit court correctly found that Broadnax, by failing to question his attorneys about this specific claim, failed to overcome the presumption that counsel acted reasonably'); Whitson v. State, 109 So. 3d 665, 676 (Ala. Crim. App. 2012) (holding that a petitioner failed to meet his burden of overcoming the presumption that counsel were effective because the petitioner failed to question appellate counsel regarding their reasoning); Brooks v. State, 929 So. 2d 491, 497 (Ala. Crim. App. 2005) (holding that a petitioner failed to meet his burden of overcoming the presumption that counsel were effective because the petitioner failed to question trial counsel regarding their reasoning); McGahee v. State, 885 So. 2d 191, 221–22 (Ala. Crim. App. 2003) ('[C]ounsel at the Rule 32 hearing did not ask trial counsel any questions about his reasons for not calling the additional witnesses to testify. Because he has failed to present any evidence about counsel's decisions, we view trial counsel's actions as strategic decisions, which are virtually unassailable.'); Williams v. Head, 185 F.3d at 1228; Adams v. Wainwright, 709 F.2d 1443, 1445–46 (11th Cir. 1983) ('[The petitioner] did not call trial counsel to testify ... [; therefore,] there is no basis in this record for finding that counsel did

> not sufficiently investigate [the petitioner's] background.')."

Stallworth v. State, 171 So. 3d 53, 92-93 (Ala. Crim. App. 2013) (emphasis added). "'Closing argument is an area where trial strategy is most evident,'" Clark v. State, 196 So. 3d 285, 315 (Ala. Crim. App. 2015) (quoting Flemming v. State, 949 S.W.2d 876, 881 (Tex. Ct. App. 1997), and "'[m]atters of trial tactics and trial strategy are rarely interfered with or second-guessed on appeal.'" Clark, 196 So. 3d at 316 (quoting Arthur v. State, 711 So. 2d 1031, 1089 (Ala. Crim. App. 1996), aff'd, 711 So. 2d 1097 (Ala. 1997)).

Because closing argument is a matter where trial strategy is most evident during a trial, a claim that counsel was ineffective in presenting closing argument must be supported by evidence showing why counsel acted the way he or she did. "'Without some explanation as to why counsel acted as he did, we presume that his actions were the product of an overall strategic plan.'" Washington v. State, 95 So. 3d 26, 54 (Ala. Crim. App. 2012) (quoting Tong v. State, 25 S.W.3d 707, 714 (Tex. Crim. App. 2000)).

During the evidentiary hearing on Brooks's petition, Brooks did not ask any of his trial counsel any questions

about the penalty-phase closing argument or the strategy his counsel had in presenting the argument in the way that they did. Thus, the circuit court correctly found that "Brooks failed to prove by a preponderance of the evidence that Trial Counsel's performance regarding the closing argument during the penalty phase was deficient." (C. 1230.) Accordingly, Brooks is not entitled to any relief on this claim.

II.

Brooks next argues that the circuit court erred when it summarily dismissed some of his claims of ineffective assistance of trial counsel and all of his claims of ineffective assistance of appellate counsel because, he says, they were sufficiently pleaded and facially meritorious. (Brooks's brief, pp. 42-75.)

This Court has repeatedly explained the pleading requirements set out in Rule 32.3 and Rule 32.6(b), Ala. R. Crim. P.; has thoroughly detailed how to properly plead claims of ineffective assistance of counsel in a Rule 32 petition; and has held that a circuit court may summarily dismiss claims that do not satisfy the pleading requirements.

> "'[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).

"In Boyd v. State, 913 So. 2d 1113 (Ala. Crim. App. 2003), this Court explained the pleading requirements and the propriety of summary disposition as follows:

> "'Rule 32.3, Ala. R. Crim. P., provides, in pertinent part, that "[t]he petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief." See, e.g., Fortenberry v. State, 659 So. 2d 194, 197 (Ala. Crim. App. 1994). Pursuant to Rule 32.6(b), Ala. R. Crim. P.:
>
> > "'"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."

"'See, e.g., Wilson v. State, 650 So. 2d 587, 590 (Ala. Crim. App. 1994).

"'As this court has previously noted:

> "'"'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). A petition is "meritorious on its face" only if it contains a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the facts relied upon (as opposed to a general statement concerning the nature and effect of those facts) sufficient to show that the petitioner is entitled to relief if those facts are true. Ex parte Boatwright, supra; Ex parte Clisby, 501 So. 2d 483 (Ala. 1986).'
>
> "'"Moore v. State, 502 So. 2d 819, 820 (Ala. 986)."

"'Bracknell v. State, 883 So. 2d 724, 727-28 (Ala. Crim. App. 2003).

> "'"Rule 32.6(b) requires that the petition itself disclose the facts relied upon in seeking relief." Boyd v. State, 746 So. 2d 364, 406 (Ala. Crim. App. 1999). In other words, it is not the pleading of a conclusion "which, if true, entitle[s] the petitioner to relief." Lancaster v. State, 638 So. 2d 1370, 1373 (Ala. Crim. App. 1993). It is the allegation of facts in pleading which, if true, entitles a petitioner to relief. After facts are pleaded, which, if true, entitle the petitioner to relief, the petitioner is then entitled to an opportunity, as provided in Rule 32.9, Ala. R. Crim. P., to present evidence proving those alleged facts.
>
> "'Thus, a Rule 32 petitioner is not automatically entitled to an evidentiary hearing on any and all claims raised in the petition. To the contrary, Rule 32.7(d), Ala. R. Crim. P., provides for the summary disposition of a Rule 32 petition
>
> > "'"[i]f the court determines that the petition is not sufficiently specific [in violation of Rule 32.6(b)], or is precluded [under Rule 32.2, Ala. R. Crim. P.], or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by further proceedings...."
>
> "'"'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.'

"913 So. 2d at 1125-26 (footnote omitted).

"In Hyde v. State, 950 So. 2d 344 (Ala. Crim. App. 2006), this Court explained further:

> "'The burden of pleading under Rule 32.3 and Rule 32.6(b) is a heavy one.... 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.'

"950 So. 2d at 356."

Mashburn v. State, 148 So. 3d 1094, 1105-07 (Ala. Crim. App. 2013). Even if a claim of ineffective assistance of counsel is

sufficiently pleaded, however, counsel is not ineffective for failing to raise a meritless claim. Carruth v. State, 165 So. 3d 627, 645 (Ala. Crim. App. 2014).

In his brief on appeal, Brooks argues that the circuit court erred when it summarily dismissed some of his guilt-phase claims of ineffective assistance of counsel and when it summarily dismissed all of his claims that his appellate counsel was ineffective.[8]

II.A.

Before addressing the ineffective-assistance-of-trial-counsel claims that were summarily dismissed, we note that, because "'[t]he claim of ineffective assistance of counsel is a general allegation that often consists of numerous specific subcategories,'" and because "'[e]ach subcategory is an independent claim that must be sufficiently pleaded,'"

[8]Brooks does not challenge the circuit court's summary dismissal of his claim that his counsel were ineffective for "failing to move to dismiss the indictment as to the capital murder committed during the commission of a burglary charge" (Claim II.A.2.) and his claim that his counsel were ineffective for failing to object "to cumulative and prejudicial video submitted as evidence at trial" (Claim II.A.3.). Thus, Brooks has abandoned those claims, and we will not address them on appeal. See Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995) ("We will not review issues not listed and argued in brief.").

Washington v. State, 95 So. 3d 26, 58 (Ala. Crim. App. 2012) (quoting 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)), we address each claim of ineffective assistance of counsel independently.

II.A.1.

Brooks first argues that the circuit court erred when it summarily dismissed his claim that his trial counsel were ineffective "for failing to challenge the legality of his arrest and failing to move to suppress evidence based on [his] illegal arrest." (Brooks's brief, p. 43.)

In his first and second amended Rule 32 petitions, Brooks alleged that his trial counsel were ineffective for "failing to challenge the legality of [his] arrest and, accordingly, the use of any evidence procured, including statements, which should have been suppressed as fruits of that illegality." (C. 241; Supp. C. 47.) Brooks's claims about his arrest[9] were all

[9]In his petition, Brooks parsed this claim into three subclaims: (1) that his arrest was illegal because officers arrested him outside their jurisdiction (Supp. C. 47-52); (2) that, because the arrest was illegal, "his subsequent confessions are fruits of the illegality and should be suppressed" (Supp. C. 52-58); and (3) that "[w]hether officials Mirandized [him] prior to his statements does not

premised on his allegations that, "[o]n February 18, 2002, Investigator Bill Babcock of the Russell County Sheriff's Department obtained three arrest warrants in the District Court of Russell County against [Brooks] for violating §§ 13A-008-041, and 13A-004-002[, Ala. Code 1975]"; that there were "[n]o supporting affidavits ... attached to the complaints alleging the source of the information or the basis for probable cause to arrest" Brooks; that two Russell County officers--Harold Smith and Susie Burkes--then went into Lee County and arrested Brooks; and that, "prior to the arrest, the warrants were not endorsed by a judge or magistrate in Lee County" as is required by § 15-10-10, Ala. Code 1975. (Supp. C. 47-52.) Thus, Brooks claimed, "the arrest warrants could not support [his] arrest." (Supp. C. 51.)

But Brooks contradicted those allegations in his second amended petition by explaining that he was actually arrested

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cure the illegality of the arrest or the illegality of using his statements at trial" (Supp. C. 58-60). In other words, Brooks's claims all turn on whether his arrest was lawful. If it was, all of Brooks's allegations in claim II.A.1. fail. Because, as explained below, we conclude that Brooks's arrest was lawful and that the circuit court properly summarily dismissed Brooks's claim to the contrary, we also conclude that the circuit court properly dismissed the claims that arise from the allegation that Brooks's arrest was unlawful.

"prior to the warrants being obtained." (Supp. C. 47 (emphasis added).) Brooks further highlighted that contradiction by claiming that "the fact that the Russell County officers made a warrantless arrest in a public place does not cure the illegality of the arrest by officers acting outside of their jurisdiction." (Supp. C. 51-52 (emphasis added).) Brooks then concluded that, under Alabama law, "an officer may only arrest outside of his jurisdiction when the offense is committed in his presence" (Supp. C. 52 (citing § 15-10-3, Ala. Code 1975)), and, because Brooks was arrested for offenses "not committed in the presence of any Russell County law enforcement official," his warrantless arrest was improper.

On appeal, Brooks maintains that he was arrested without a warrant and reiterates his warrantless-arrest argument, claiming that the Russell County officers' arrest of Brooks in Lee County "amounted to improper procedure." (Brooks's brief, p. 45.) To support this argument, Brooks cites Ex parte Borden, 769 So. 2d 950, 959 (Ala. 2000), which holds that "a law enforcement officer may not obtain an arrest warrant in one county and execute it in another county without also obtaining, before executing the warrant, its endorsement by a

judge or magistrate of the county where the arrest is to take place"--a procedure that is required by § 15-10-10, Ala. Code 1975. In other words, Borden applies in those situations in which a law-enforcement officer attempts to execute an arrest warrant in one county that was issued in a different county without first getting that warrant signed by a judge in the county he is attempting to execute it in. That is not the case here.

As it is shown in the record on direct appeal, Brooks was arrested in Lee County by Russell County officers before arrest warrants were issued by the Russell County District Court. (See Record in CR-03-1113, R. 339 ("I don't think we had the warrant prior to [Brooks] being arrested. I think we arrested him without the warrant at that time based on probable cause.").) In other words, the Russell County officers made an extrajurisdictional warrantless arrest of Brooks in Lee County. This Court addressed this precise scenario in Hill v. State, 665 So. 2d 1024 (Ala. Crim. App. 1995), explaining as follows:

> "An officer's authority to make a warrantless arrest is set out in § 15-10-1, Code of Ala. 1975:

> "'An arrest may be made, under a warrant or without a warrant, by any sheriff or other officer acting as sheriff or his deputy, or by any constable, acting within their respective counties, or by any marshal, deputy marshal or policeman of any incorporated city or town within the limits of the county.'

"... Whether a deputy can make a warrantless arrest outside the deputy's jurisdiction ... appears to be an issue of first impression in Alabama. This case presents a fact situation that has not yet been addressed by our court, and a search of the relevant caselaw fails to reveal authority on point on this issue.

"The prevailing view regarding a situation like the one presented here is that if the circumstances were such that a private citizen would have had the authority to make a citizen's arrest under the same circumstances, then the extrajurisdictional warrantless arrest is legal. See generally Russell G. Donaldson, Annotation, Validity, In State Criminal Trial, of Arrest Without Warrant by Identified Peace Officer Outside of Jurisdiction, When Not in Fresh Pursuit, 34 A.L.R.4th 328 (1984), and cases cited therein.

"Florida subscribes to the prevailing view. In State v. Phoenix, 428 So. 2d 262 (Fla. App. 4 Dist. 1982), Florida's District Court of Appeal discussed the rationale supporting that state's common law precedent granting police officers the power to make certain extrajurisdictional warrantless arrests:

> "'In addition to any official power to arrest, police officers also have a common law right as citizens to make so-called citizen's arrests. State v. Shipman, [370 So. 2d 1195 (Fla. 4th DCA 1979), cert. denied, 381 So. 2d 769 (Fla. 1980)]. We do

> not mean to imply that police officers acting outside their jurisdictions are treated as private persons for purposes of the exclusionary rule. Rather, we mean that the Legislature, by vesting police officers with official powers, did not intend to divest the officers of their common law right as citizens to make arrests.'

"Id. at 265. We find this reasoning persuasive. We are further persuaded to favor this view, because the authority of a private citizen to make an arrest is much more limited in scope than the authority of a peace officer to do so. Compare § 15-10-7, Code of Ala. 1975 ('Arrests by private persons'), with § 15-10-1, Code of Ala. 1975 ('Officers authorized to make arrests'), and § 15-10-2, Code of Ala. 1975 ('Arrest without warrant--When and for what allowed').

> "....
>
> "'[The "color of law"] doctrine does not prevent officers from making an otherwise valid citizen's arrest just because they happen to be in uniform or otherwise clothed with the indicia of their position when making the arrest. When officers outside their jurisdiction have sufficient grounds to make a valid citizen's arrest, the law should not require them to discard the indicia of their position before chasing and arresting a fleeing felon. Any suggestion that officers could not make a valid citizen's arrest merely because they happened to be in uniform or happened to be in a police car at the time they inadvertently witnessed a felony outside their jurisdiction would be ridiculous.'

"428 So. 2d at 266."

665 So. 2d at 1027 (emphasis added). Thus, in this case, if the Russell County officers acted within the limited scope of authority given to private citizens to arrest someone when they arrested Brooks in Lee County, Brooks's claim is meritless and his ineffective-assistance-of-counsel claim premised on that argument was properly summarily dismissed.

Section 15-10-7, Ala. Code 1975, controls the circumstances under which a private citizen may arrest a person and provides, in part:

> "(a) A private person may arrest another for any public offense:
>
> "(1) Committed in his presence;
>
> "(2) Where a felony has been committed, though not in his presence, by the person arrested; or
>
> "(3) Where a felony has been committed and he has reasonable cause to believe that the person arrested committed it.
>
> "(b) An arrest for felony may be made by a private person on any day and at any time.
>
> "(c) A private person must, at the time of the arrest, inform the person to be arrested of the cause thereof, except when such person is in the actual commission of an offense, or arrested on pursuit."

(Emphasis added.) The phrase "reasonable cause" as it is used in § 15-10-7 is synonymous with the phrase "probable cause." Chambers v. State, 38 So. 3d 105, 113 (Ala. Crim. App. 2009).

> "'"'Probable cause exists where "the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.'"' State v. Johnson, 682 So. 2d [385] at 388 [(Ala. 1996)], quoting Young v. State, 372 So. 2d 409, 410 (Ala. Crim. App. 1979), quoting, in turn, Draper v. United States, 358 U.S. 307, 313, 79 S. Ct. 329, 333, 3 L. Ed. 2d 327 (1959). Put another way, 'probable cause is knowledge of circumstances that would lead a reasonable person of ordinary caution, acting impartially, to believe that the person arrested is guilty.' Sockwell [v. State], 675 So. 2d [4,] 13 [(Ala. Crim. App. 1993)]. '"An officer need not have enough evidence or information to support a conviction [in order to have probable cause for arrest].... 'Only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.'"' State v. Johnson, 682 So. 2d at 387–88, quoting Stone v. State, 501 So. 2d 562, 565 (Ala. Crim. App. 1986), overruled on other grounds, Ex parte Boyd, 542 So. 2d 1276 (Ala.), cert. denied, 493 U.S. 883, 110 S. Ct. 219, 107 L. Ed. 2d 172 (1989).
>
> > "'"'"In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act...." Brinegar v. United States, 338 U.S. 160, 175, 69 S. Ct. 1302, 1310, 93 L. Ed. 1879, 1891 (1949).

> "'The substance of all the definitions of probable cause is a reasonable ground for belief of guilt.'" Id. "Probable cause to arrest is measured against an objective standard and, if the standard is met, it is unnecessary that the officer subjectively believe that he has a basis for the arrest." Cox v. State, 489 So. 2d 612 (Ala. Cr. App. 1985).'
>
> "'"Dixon v. State, 588 So. 2d 903, 906 (Ala. 1991). ... 'In making the determination as to whether probable cause exists for a warrantless arrest, we must examine the totality of the circumstances surrounding the arrest.' Sockwell, 675 So. 2d at 13, quoting Daniels[v. State], 534 So. 2d [628] at 651 [(Ala. Crim. App. 1985)]."'"

Chambers, 38 So. 3d at 113–14 (quoting Washington v. State, 922 So. 2d 145, 159-69 (Ala. Crim. App. 2005), quoting in turn, Reeves v. State, 807 So. 2d 18, 35–36 (Ala. Crim. App. 2000)).

Here, when the Russell County officers arrested Brooks in Lee County, they had probable cause to believe that Brooks had murdered Brett and that he had attempted to murder Forest. At a pretrial hearing on Brooks's motion to suppress his statement to law enforcement, Dep. Harold Smith of the Russell County Sheriff's Office testified that he and Inv. Susie Burkes went into Lee County and arrested Brooks and, at the time of the arrest, Dep. Smith told Brooks that he was being

arrested "in reference to a homicide investigation." (Record in CR-03-1113, R. 269.) After he arrested Brooks and read Brooks his Miranda rights, Dep. Smith told Brooks that "Carruth had already given a statement, and [that they] knew about [Brooks's] involvement in the murder of [Forest] and [Brett]." (Record in CR-03-1113, R. 278.) Additionally, Lt. Heath Taylor of the Russell County Sheriff's Office testified that, before Brooks was arrested, law-enforcement officers learned from Forest that Brooks was one of the men who had robbed him and assaulted him and Brett. (Record in CR-03-1113, R. 315.)

Because the Russell County officers knew that Forest had identified Brooks as one of the men who was involved in the crime, the Russell County officers had probable cause to believe that Brooks had committed multiple felony offenses when they arrested him in Lee County. In short, the Russell County officers were well within their authority as private citizens to lawfully arrest Brooks in Lee County. See § 15-10-7, Ala. Code 1975.

Thus, the substantive claim underlying Brooks's ineffective-assistance-of-counsel claim is meritless, and

counsel is not ineffective for failing to raise a meritless argument. See Carruth, 165 So. 3d at 645 (holding that counsel "were not ineffective for failing to raise a baseless objection"). Accordingly, the circuit court did not err when it summarily dismissed Brooks's claim.

II.A.2.

Second, Brooks argues that the circuit court erred when it summarily dismissed his claim that his trial counsel were ineffective for failing to "properly present and argue the motion to suppress" the statement Brooks gave to law enforcement. (Brooks's brief, p. 46.)

To address Brooks's claim on appeal, we must first provide some background information about the motion to suppress Brooks filed in the trial court. In his direct appeal, Brooks argued that the trial court erred when it denied his motion to suppress because, he said, the statements he made to law enforcement were involuntary. See Brooks, 973 So. 2d at 387-90. In rejecting Brooks's argument, this Court summarized the evidence presented at Brooks's suppression hearing and at his trial as follows:

> "At approximately 8:30 a.m. the morning after the murder, Harold Smith, a deputy with the Russell

County Sheriff's Department, and Susie Burkes, an investigator with the Russell County Sheriff's Department, went to a residence in Lee County, owned by the mother of Brooks's girlfriend, where they believed Brooks was staying. During surveillance of the residence, Deputy Smith saw a man matching Brooks's description standing behind the residence 'stirring ... a fire pit.' (R. 271.) A while later, the man and two women left the residence in an automobile, and Deputy Smith and Inv. Burkes executed a traffic stop of the vehicle. The traffic stop occurred at approximately 10:00 a.m. After obtaining the driver's license of the driver of the vehicle and determining that the driver was, in fact, Brooks, Deputy Smith arrested Brooks. Brooks asked Deputy Smith why he was being arrested and Deputy Smith said that it was 'in reference to a homicide investigation.' (R. 269.) At that point, Brooks told Deputy Smith that he 'wanted to take the Fifth.' (R. 269.) When Deputy Smith asked Brooks what he meant, Brooks refused to answer. Deputy Smith then advised Brooks of his Miranda rights and Brooks acknowledged that he understood his rights by nodding his head. Deputy Smith placed Brooks in the back of his patrol car and transported him back to the residence.

"Because the residence was located in Lee County and the officers were with the Russell County Sheriff's Department, it took several hours to contact Lee County law-enforcement officials and obtain a search warrant for the residence. During that time, Brooks remained handcuffed in the backseat of Deputy Smith's patrol car. Brooks was not questioned during that time, but he was advised of the situation--that he would remain at that location until a search warrant could be obtained and the residence searched. Brooks made no requests during that time, but he was offered a sandwich, a drink, and the use of a restroom; he accepted the drink, but declined the other offers. At approximately 4:00 p.m. that afternoon, after the

search was complete, Deputy Smith transported Brooks to Brooks's residence in Lee County, where a search was also being conducted. During the transport, Brooks asked Deputy Smith several questions and then confessed. Deputy Smith testified that he did not use any force or coercion or offer any reward or inducement for Brooks to confess. Deputy Smith testified at the suppression hearing regarding his conversation with Brooks as follows:

> "'[Deputy Smith]: Mr. Brooks asked me, when I got into the patrol vehicle, what was going to happen next. I advised him that we were going to his other residence. Mr. Brooks asked me what we had found at the residence. I advised him that we had found marijuana at both residences. Mr. Brooks asked me what we were going to--what was going to happen, and I advised Mr. Brooks that whoever was in possession of the marijuana would be charged.
>
> "'[Prosecutor]: What happened next?
>
> "'[Deputy Smith]: Mr. Brooks asked me what he could do to keep his girlfriend and [her mother] out of trouble. I told him that he could start by telling the truth.
>
> "'[Prosecutor]: What happened then?
>
> "'[Deputy Smith]: Mr. Brooks then asked me what we knew. I advised Mr. Brooks that Mr. Carruth had already given a statement, and we knew about his involvement in the murder of Butch Bowyer and his son.
>
> "'[Prosecutor]: What happened next?

> "'[Deputy Smith]: Mr. Brooks asked me several times, did [Carruth] really give a statement, and I told him yes.
>
> "'[Prosecutor]: What happened then?
>
> "'[Deputy Smith]: Brooks asked--stated, I'll tell you the truth, will my girlfriend and [her mother]--I'll tell you the truth if my girlfriend and [her mother] will not go to jail.
>
> "'[Prosecutor]: What did you say?
>
> "'[Deputy Smith]: I told him that we would talk to the district attorney and ask them not to charge them for the marijuana.
>
> "'[Prosecutor]: What happened then?
>
> "'[Deputy Smith]: Brooks asked--Brooks stated that [Carruth] and I killed him. Once he said, [Carruth] and I killed him, at that point, I reconfirmed that he understood his Miranda rights.
>
> "'....
>
> "'[Prosecutor]: So when he told you, we killed him and, [Carruth] and I killed him, you asked him again if he underst[oo]d his Miranda rights. What happened then?
>
> "'[Deputy Smith]: He said, yes, I did --yes, I do understand my rights.'

"(R. 278-79.)

"When Deputy Smith and Brooks arrived at Brooks's residence, Brooks told Deputy Smith that if he was allowed to use the restroom, he would show Deputy Smith where he had hidden the money he had

taken from Forest Bowyer. Deputy Smith and Heath Taylor, a lieutenant with the Russell County Sheriff's Department who was present at the residence, then escorted Brooks into his residence and to the restroom. After using the restroom, Brooks asked Lt. Taylor if he 'promised to ask the district attorney in Lee County not to charge his girlfriend and [her mother] for the marijuana' (R. 282), and Lt. Taylor agreed to ask the district attorney in Lee County for help, but he informed Brooks that 'it was not up to me as to who got charged and who didn't.' (R. 322.) Brooks then indicated that he wanted to talk about the murder. Lt. Taylor advised Brooks of his Miranda rights; Brooks orally indicated that he understood his rights; and Brooks then again confessed to the murder. Testimony indicated that no one used force or coercion or offered Brooks any reward for making a statement, and specifically that no one told Brooks that he could avoid the death penalty if he confessed.

"Following his confession at his residence, Brooks was transported to the Russell County Sheriff's Department, where he was interviewed at approximately 6:40 p.m.; the interview was videotaped. Lt. Taylor testified that he advised Brooks of his Miranda rights; that Brooks indicated that he understood his rights; and that Brooks signed a waiver-of-rights form. Before the recording began, Lt. Taylor said, he told Brooks that he would inform the district attorney and the court that Brooks had been cooperative, and when Brooks asked him 'what he was facing,' he told Brooks that 'in a capital case, he was either facing life without parole or the death penalty.' (R. 1005.) Lt. Taylor said that no one coerced or threatened Brooks to make a statement, nor did anyone promise Brooks anything to induce him to make a statement. The videotape begins with Lt. Taylor introducing to Brooks the law-enforcement officers present, from both Russell County and Lee County. The videotape

> then shows Brooks signing the waiver-of-rights form and asking for help from Lee County. Lt. Taylor told Brooks that both he and Lee County law-enforcement officials would 'go to bat' for him with the district attorneys in Lee and Russell Counties, but that as law-enforcement officials they did not have the 'final say' regarding what would happen to him; the 'final say' rested with the district attorneys. Brooks then again confessed to the murder of Brett Bowyer. At the conclusion of the interview, Brooks indicated that he did not want to be sentenced to death, and Lt. Taylor then informed him that the court system would determine what debt he had to pay for his crimes. Brooks then again asked what he was facing and was informed that the district attorney would be told that he was cooperative and truthful, but that the 'ultimate decision' regarding how to proceed against him was up to the district attorney."

Brooks, 973 So. 2d at 388-90 (footnotes omitted). At the close of the State's presentation of evidence at the suppression hearing, Brooks's counsel argued as follows:

> "[B]ased on this, Your Honor, we would contend that the defendant was kept improvidently for--to right before six o'clock. That's almost nine hours that the defendant was kept at different residences where there was an opportunity for him to go somewhere else, and we're asking the Court to indicate that that is improper and that anything taken from him with the understanding that he be allowed to use the restroom.
>
> "Also, we want the Court to view the video tape of Mr. Carruth. We want the Court to see the video tape of the interrogation by Lieutenant Taylor and the other officer that was involved in that to show what kind of coercion and promises and offers were made in that particular case prior to Mr.

> Carruth--since Mr. Carruth never said anything or never admitted anything, that they talked to him for at least 45 minutes to an hour trying to get him to say something. We contend that what they did there was similar to what they did to Mr. Brooks, where he had no access to a phone, attorney, or to any type of conveniences."

(Record in CR-03-1113, R. 351-52.) Brooks's counsel explained that it was important for the trial court to view Carruth's interrogation because "you have the tactics of the Sheriff's Department in doing whatever they can to elicit testimony from the defendants. They've lied to them. You can see that in the Carruth tape, that they lied to them." (Record in CR-03-1113, R. 352.) Brooks's counsel continued: "And the promises that they made to Mr. Carruth, that is definitely an inducement to get him to speak and for Mr. Brooks to make a statement. I want the Court to see exactly what he's done." (Record in CR-03-1113, R. 353.) Brooks's counsel then told the trial court that he would "like to put Mr. Brooks on the stand <u>for the limited purpose of testifying as to whether or not he was advised of his rights prior to making any statements</u>." (Record in CR-03-1113, R. 353 (emphasis added).) Thereafter, the following exchange occurred:

> "The Court: If Mr. Brooks takes the stand, he takes the stand. He's going to be subject to cross-examination, period.
>
> "Mr. Collins: But that would not be able to be used at a later trial or be cross-examined at that trial unless he takes the stand there. None of this would be admissible at a trial of the defendant unless he takes the stand there. That's the conditions that we would ask that he be allowed to take the stand. I believe Mr. Carruth was allowed to take the stand on his motion to recuse, Your Honor, and he took that with a blanket of protection of the Court.
>
> "The Court: That was for the recusal motion.
>
> "Mr. Collins: Yes, sir.
>
> "The Court: But without agreement by the State, I'm not going to otherwise limit the State's ability to cross-examination.
>
> "[Prosecutor]: I can't tell you whether your client's going to say something on the stand that might be, might or might not be admissible in our case-in-chief absent him taking the stand. I don't know what he's going to say.
>
> "The Court: Your motion is denied."

(Record in CR-03-1113, R. 353-54 (emphasis added).) The trial court then took a lunch recess. When everyone returned, Brooks's counsel announced that Brooks had decided not to testify at the suppression hearing. (Record in CR-03-1113, R. 355.) Thereafter, the trial court denied Brooks's motion to

suppress. With this background in mind, we now turn to Brooks's arguments on appeal.

On appeal, Brooks argues that the circuit court erred when it summarily dismissed his claim that his trial counsel were ineffective in the way they argued the motion to suppress because, he says, they (1) "failed to make any argument regarding the illegality of his arrest"; (2) failed to explain "the true extent of the coercive environment in which [his] statement was obtained" (namely, that, after Brooks "wanted to 'take the Fifth,' [he] remained in the back of a patrol car with his hand handcuffed behind him for almost nine hours" and "was not offered food or drink at all during that time, nor was he allowed to go to the restroom"); (3) "failed to do any investigation which would have assisted them in presenting the motion to suppress" (namely, speaking with "news crews filming in the area" and speaking with people who lived nearby);[10] and (4) "failed to properly argue that he be allowed to testify

[10]Brooks did not raise this allegation in his Rule 32 petition. Thus, it is not properly before this Court for appellate review, and we do not address it. See, e.g., Arrington v. State, 716 So. 2d 237, 239 (Ala. Crim. App. 1997) (holding that "[a]n appellant cannot raise an issue on appeal from the denial of a Rule 32 petition which was not raised in the Rule 32 petition").

limited only to the issues regarding suppression." (Brooks's brief, pp. 46-47.) We disagree.

First, the circuit court properly dismissed Brooks's claim that his counsel were ineffective at the suppression hearing when they did not argue that his arrest was illegal because the argument underlying Brooks's claim is without merit. As explained in Part II.A.1. of this opinion, Brooks's arrest was not illegal. Brooks's counsel cannot be ineffective for failing to raise a meritless claim at the suppression hearing. See Washington v. State, 95 So. 3d 26, 71 (Ala. Crim. App. 2012) ("Counsel is not ineffective for failing to raise a baseless claim."). Moreover, as the State correctly points out, Brooks's counsel did, in fact, question Dep. Harold Smith about his authority to arrest someone outside Russell County. (See Record in CR-03-1113, R. 286.) Thus, the circuit court properly dismissed this claim.

Second, the circuit court properly dismissed Brooks's claim that his trial counsel were ineffective at his suppression hearing when they failed to "describe completely [the] events surrounding Mr. Brooks'[s] statements in arguing the Motion to Suppress" because his counsel did precisely what

Brooks claims they did not do. In his brief on appeal, Brooks argues that his counsel failed to argue to the trial court that, after he "wanted to 'take the Fifth,' [he] remained in the back of a patrol car with his hands handcuffed behind him for almost nine hours" and "was not offered food or drink at all during that time, nor was he allowed to go to the restroom." (Brooks's brief, pp. 46-47.) At the suppression hearing, however, Brooks's counsel questioned Dep. Smith about these very issues. Specifically, Brook's counsel questioned Dep. Smith as follows:

> "[Collins]: You said several hours, would it be as much as seven to nine hours that the defendant was kept in the back of the car?
>
> "[Dep. Smith]: I don't have the times here which would resolve it because it's on the radio log. I don't have the radio log here in front of me. To the best of my recollection, it wasn't--wouldn't be nine hours, but it was several hours. And I would say, my rough guess would be, about four, maybe a little more. I know that we had to have time to go to--he stayed there while there was a search warrant obtained in Opelika. I remember that the judge was on the golf course and that we had to go meet the judge on the golf course to get the search warrant signed, and Investigator Babcock had performed that task, and they had to have--the Lee County Sheriff's Office was there assisting us. We had to have time to type up the search warrant for the residence and the search warrant was brought back, and the search was conducted. So it very well might have been

several hours. It very well could have been seven hours. Without looking at that log, I don't recall.

"[Collins]: And during that time, he was kept in the back of the car with his hands handcuffed behind him?

"[Dep. Smith]: You know, I remember he was handcuffed, and I remember, initially, that I handcuffed him behind his back, and I don't recall the handcuffs. I do recall that when we got out at 67 Lee Road 293 that his handcuffs were in front of him at that point. So at some point the handcuffs were moved to the front, and I don't recall when it happened.

"[Collins]: Now, y'all were out there during lunchtime. Did y'all get you some food to eat?

"[Dep. Smith]: I would have been at the--with Investigator Babcock at that time. We went to meet with a Lee County Deputy to type up a search warrant. We met him at Lee Road 430 which would have --it's the ambulance station, the fire station right there at 280 and 430. We worked on the search warrant and we went to speak with the judge on the golf course to get the search warrant signed.

"[Collins]: Well, who stayed with the defendant in your car at that particular time?

"[Dep. Smith]: There were several people at the scene: Lieutenant Taylor, Investigator Burkes. There were several people. I didn't ride in my vehicle at that point.

"[Collins]: When did you get something to eat that day?

"[Dep. Smith]: You know, I don't even recall eating. At some point, it seems like they had

brought some sandwiches or something, but I don't recall, personally, eating myself.

"[Collins]: Is there a green Jeep Cherokee vehicle that's part of the automobiles that are operated by somebody in the Russell County Sheriff's Department?

"[Dep. Smith]: Yes, there is.

"[Collins]: Who is that?

"[Dep. Smith]: That would have been Investigator Franklin. The vehicles changed hands. I believe that Investigator Franklin was in it at that time.

"[Collins]: And if the defendant were to testify and state that deputies and investigators were eating on the hood of the jeep car or jeep vehicle right next to his, and laughing and talking, and he had not been provided anything to eat or anything to drink, would you be able to say if that occurred or didn't occur?

"[Dep. Smith]: I believe that at some point there was--someone did get sandwiches. Whether Mr. Brooks got a sandwich or not, I do not know. Whether we were laughing and joking, I do not know.

"[Collins]: Is it standard procedure for you to keep a defendant in a car without food or drink for several hours rather than taking them to the Russell County Sheriff's Department or the jail?

"[Dep. Smith]: No, I guess--we were conducting an investigation. Mr. Brooks was in my vehicle, and I hadn't went to the jail yet--went back to the sheriff's office. So at that point--Mr. Brooks basically wasn't brought back until I drove him back because he was in my vehicle.

"[Collins]: So he wasn't free to go?

"[Dep. Smith]: No, he was not."

(Record in CR-03-1113, R. 292-96 (emphasis added).) Later, Brooks's counsel highlighted the fact that Brooks had not had anything to eat or drink and had not been allowed to use the bathroom as follows:

> "[Collins]: Now, when you get to the residence, this was the statement made by him after being in a car for several hours with nothing to eat or drink that you were aware of; is that correct?
>
> "[Dep. Smith]: Yes, sir. I'm not aware if he had anything to drink. I believe he did, but I cannot testify today that he absolutely did.
>
> "[Collins]: But you're pretty well sure that he had not been allowed to go to the bathroom prior to going to the other residence?
>
> "[Dep. Smith]: You know, I don't know if he'd been to the bathroom. I know there was a period that I was not there. I know that on the way to the other house he asked me to take him to the bathroom, and I did. But I don't know what happened while I wasn't there, Mr. Collins.
>
> "[Collins]: While you were on your way over there, did he not indicate to you the distress that he was in?
>
> "[Dep. Smith]: I don't recall distress. I do recall that he asked to go to the bathroom.
>
> "[Collins]: Didn't he say that he would tell y'all anything y'all needed to know if you'd just let him go to the bathroom?

> "[Dep. Smith]: No, what he said--no, what he said was that--when we arrived at the residence, Mr. Brooks told me that if I would let him use the bathroom, he would show me where the money they had stolen was hid. And I asked him where was the money hid? And he said, it's in the bathroom.
>
> "[Collins]: Now, you had not said that earlier. Is there anything else that you have omitted?
>
> "[Dep. Smith]: Well, I'm reading directly from my report, Mr. Collins. If I didn't say it earlier, I missed it, but I'm reading directly from my report."

(Record in CR-03-1113, R. 304-05 (emphasis added).)

In short, Brooks's claim that his counsel failed to present to the trial court the facts that he did not have food or drink, that he had not been allowed to use the bathroom, and that he had been placed in handcuffs in the back of a patrol vehicle for up to nine hours is refuted by the record on direct appeal. "Counsel cannot be ineffective for not presenting evidence that counsel did, in fact, present." Clark v. State, 196 So. 3d 285, 318 (Ala. Crim. App. 2015).

Moreover, as discussed above, this Court thoroughly reviewed the trial court's denial of Brooks's motion to suppress his statement on direct appeal, holding that, "[g]iven the totality of the circumstances, we conclude that no illegal inducements were used to obtain Brooks's

confessions and that Brooks's will was not overborne by promises of leniency." Brooks, 973 So. 2d at 392. Even if counsel had presented the evidence that Brooks says they did not present, his "statement would have still been admissible." Hooks v. State, 21 So. 3d 772, 785 (Ala. Crim. App. 2008). Again, "'[a]n attorney's failure to raise a meritless argument ... cannot form the basis of a successful ineffective assistance of counsel claim because the result of the proceeding would not have been different had the attorney raised the issue.'" Hooks, 21 So. 3d at 785 (quoting United States v. Kimler, 167 F.3d 889, 893 (5th Cir. 1999)). Thus, the circuit court did not err when it summarily dismissed this claim.

Finally, the circuit court properly dismissed Brooks's claim that his trial counsel were ineffective at his suppression hearing when they "failed to present the legal bases for allowing Mr. Brooks'[s] testimony for the limited purpose of refuting the voluntariness of his statements."

As explained above, Brooks's counsel told the trial court that he would "like to put Mr. Brooks on the stand for the limited purpose of testifying as to whether or not he was

advised of his rights prior to making any statements." (Record in CR-03-1113, R. 353 (emphasis added).) After the trial court told Brooks's counsel that Brooks would be subject to cross-examination, Brooks's counsel argued that Brooks's testimony would "not be able to be used at a later trial or be cross-examined at that trial unless he takes the stand there. None of this would be admissible at a trial of the defendant unless he takes the stand there." (Record in CR-03-1113, R. 353.) Without responding to Brooks's counsels' argument that Brooks's suppression-hearing testimony could not be used at trial, the trial court told Brooks's counsel that it would not limit the State's ability to cross-examine Brooks. (Record in CR-03-1113, R. 354.)

The trial court correctly overruled Brooks's counsels' request to have Brooks testify only as to "whether or not he was advised of his rights prior to making any statements." (Record in CR-03-1113, R. 353 (emphasis added).) As this Court has held: "It is well established in Alabama that cross-examination is not limited to matters brought out on direct examination, but extends to all matters within the issues of the case." Trawick v. State, 431 So. 2d 574, 576

(Ala. Crim. App. 1983) (citing Hughes v. State, 385 So. 2d 1010 (Ala. Crim. App. 1980), Braswell v. State, 371 So. 2d 992 (Ala. Crim. App. 1979), and § 12-21-137, Ala. Code 1975).

Here, Brooks's counsel moved to suppress the statements Brooks gave to law enforcement, implicating himself in Brett's murder. (Record in CR-03-1113, C. 345-48.) In the motion, Brooks's counsel alleged that Brooks "was seized on less than probable cause"; that "his statement was obtained after an illegal seizure"; that he "did not voluntarily answer questions or voluntarily make a statement, but was instead coerced into responding to police interrogation"; that the "police made material misrepresentations to [him]"; that he "was not adequately advised of his rights under Miranda v. Arizona, 384 U.S. 436 (1966)"; and that he "did not knowingly and intelligently waive his rights." (Record in CR-03-1113, C. 346-47.) Thus, if Brooks had taken the stand during his suppression hearing, then the State would have been permitted to cross-examine him as to all the matters at issue in that hearing, including the timing of the Miranda warnings and his understanding of those warnings, the circumstances surrounding

his seizure, and the circumstances surrounding his questioning.

Because there was no legal basis for the trial court to limit Brooks's suppression-hearing testimony to only the timing of the Miranda warnings, Brooks's counsel were not ineffective in failing to "present the legal bases for allowing Mr. Brooks'[s] testimony for the limited purpose of refuting the voluntariness of his statements." Thus, the circuit court properly dismissed this claim.

II.A.3.

Third, Brooks argues that the circuit court erred when it summarily dismissed his claim that his trial counsel were ineffective "in preventing him from testifying on his own behalf at his pretrial suppression hearing." (Brooks's brief, p. 48.) The circuit court properly summarily dismissed this claim because it was insufficiently pleaded and was clearly refuted by the record on direct appeal.

In his second amended petition, Brooks alleged that his trial counsel were ineffective "for preventing [him] from testifying on his own behalf in support of his suppression motion." (Supp. C. 71.) According to Brooks, he "was set to

testify at the suppression hearing," but, "after the court improperly informed trial counsel that it would allow the State to expand its cross-examination of [him] beyond the scope of the issue of his statement, counsel prevented [him] from testifying." (Supp. C. 72.) Brooks alleged that "[h]e was the only person who could possibly testify to all the coercive and intimidating actions of the arresting officers" (Supp. C. 74.) Brooks further alleged that his "recollections of that day were central ... to the issue of coercion and duress" and that there "were several issues on which [he] would have testified differently than the police." (Supp. C. 75-76, n.7.) Specifically, Brooks alleged that he would have testified that he was not allowed to go to the bathroom and that "he was not offered food or drink at all" while he was detained (Supp. C. 65); and that it was Deputy Smith, not him, who reinitiated the "conversation regarding the crime" (Supp. C. 69).[11]

[11]These three allegations are the only facts Brooks alleges were different from the officers' testimony. Brooks also incorporated by reference the allegations from his claim that his trial counsel were ineffective in arguing his motion to suppress. In his motion-to-suppress claim, Brooks largely reiterated the facts presented during the hearing on the motion to suppress.

On appeal, Brooks argues that the circuit court erred in dismissing this claim because, he says, his counsel prevented him from exercising his "right to testify on his own behalf" at a suppression hearing. (Brooks's brief, p. 51 (citing Faretta v. California, 422 U.S. 806, 819 n.15 (1975).) The State, on the other hand, argues in part that the circuit court properly dismissed this claim because a defendant's right to testify at trial has never been expressly extended "to pretrial suppression hearings." (State's brief, p. 68 (citing Lewis v. United States, 491 F. App'x 84, 86 n.1 (11th Cir. 2012) (not selected for publication in the Federal Reporter) (noting that, although the United States Supreme Court "has said that the right to testify 'reaches beyond the criminal trial,'" the United States Court of Appeals for the Eleventh Circuit has not "expressly held that the right to testify applies to pretrial suppression hearings").) But we do not need to resolve this dispute because Brooks did not sufficiently plead how he was prejudiced by his counsels' alleged deficiency.

As noted above, Brooks alleged that he was prevented from testifying at the suppression hearing and that, if he had been

allowed to testify, he would have contradicted the testimony of law enforcement in three ways: (1) he was not allowed to use the bathroom while he was being detained; (2) he was not offered food or drink while he was being detained; and (3) it was law enforcement, not him, who reinitiated contact to speak about the crime. Brooks claimed that, because his counsel prevented him from testifying, the trial court was not able to weigh this testimony against the testimony of law enforcement. (Supp. C. 75.) Critically, Brooks did not plead any facts demonstrating how the result of his suppression hearing would have been any different had he testified and the trial court had weighed the evidence.

In other words, Brooks pleaded only allegations that, if true, would have done nothing more than create a conflict in the evidence for the trial court to resolve. Brooks did not plead any facts demonstrating the probability that the trial court would have resolved that conflict in his favor if it had the opportunity to hear his testimony and weigh it against the testimony of law enforcement. This is especially true given the fact that the judge who presided over Brooks's trial and who would have resolved the conflict in the evidence at the

suppression hearing is the same judge who summarily dismissed this claim. Cf. Reeves v. State, 974 So. 2d 314, 325-36 (Ala. Crim. App. 2007) (finding that, under the circumstances, trial counsel's refusal to allow Reeves to testify at his trial was prejudicial to Reeves and was not harmless error). Thus, the circuit court did not err when it summarily dismissed this claim as insufficiently pleaded.

Even so, Brooks's claim is refuted by the record on direct appeal. As set out above, at the close of the State's evidence at the suppression hearing, Brooks's counsel told the trial court that he "would also like to put Mr. Brooks on the stand for the limited purpose of testifying as to whether or not he was advised of his rights prior to making any statement." (Record in CR-03-1113, R. 353.) After the trial court told Brooks's counsel that it would not limit the State's cross-examination of Brooks, Brooks's counsel asked the trial court if he could "confer with [Brooks] during lunch and see if he's going to take the stand on that." (Record in CR-03-1113, R. 354.) The trial court then recessed for lunch, allowing Brooks and his counsel to talk. When the parties returned from lunch recess, the following exchange occurred:

> "The Court: When we broke for lunch we were still on the motion to suppress the statement, and the defendant had indicated, through counsel, that is, whether or not to tell us if--whether or not he was going to testify after lunch, so I guess that's where we are now.
>
> "[Collins]: Yes, sir. I have discussed the matter with our client in the presence of co-counsel, and he does not want to present or take the stand at this time regarding the motion to suppress."

(Record in CR-03-1113, R. 355.)

In sum, the record on direct appeal shows that Brooks was given the opportunity to testify at the suppression hearing but that, after a discussion with his counsel, his counsel informed the court, in Brooks's presence, that Brooks chose not to testify. Because the record on direct appeal clearly refutes Brooks's allegation that his counsel prevented him from testifying at the suppression hearing, and the circuit-court judge who summarily dismissed this argument presided over the suppression hearing and witnessed the defendant's decision not to testify, the circuit court did not err when it summarily dismissed this claim. See Yeomans v. State, 195 So. 3d 1018, 1031 (Ala. Crim. App. 2013) ("Thus, the record on direct appeal refutes this claim, and the circuit court did

not err in summarily disposing of it. Rule 32.7(d), Ala. R. Crim. P.").

II.A.4.

Fourth, Brooks argues that the circuit court erred when it summarily dismissed his claim that his trial counsel were ineffective for "failing to perform a factual investigation and conduct testing on evidence used at his capital trial." (Brooks's brief, p. 51.) Specifically, Brooks asserts that his trial counsel failed to have a knife, which the State alleged was used to cut Forest's throat, independently tested. He asserts that this knife "was located almost a month after Brooks'[s] arrest, and was not located by law enforcement but rather by Brooks'[s] former girlfriend, Sarah Reynolds." (Brooks's brief, pp. 51-52.) According to Brooks, his trial counsel were constitutionally ineffective for failing to "seek their own expert to test the knife for fingerprints" and for failing "to have blood on the knife, allegedly a match to [Forest], independently tested." (Brooks's brief, p. 52.)[12]

[12]In his second amended petition, Brooks also alleged that his counsel were ineffective for failing to investigate (1) whether the flashing headlights that were described by Forest as being at the scene were "a potential witness or perhaps involved in the crime"; (2) how a potential witness named

As to his counsels' actions concerning the knife, Brooks alleged:

> "Contrary to the foregoing standards, trial counsel failed to conduct any factual investigation and failed to request independent testing of physical and forensic evidence. For example, one of the charges against Mr. Brooks was an attempted murder charge as to [Forest]. The State presented a knife which they alleged to be the weapon used on [Forest]. This knife was located almost a month after Mr. Brooks'[s] arrest, and was not located by law enforcement but rather by Mr. Brooks'[s] former girlfriend, Sarah Reynolds. (R. 1046). Ms. Reynolds allegedly found the knife wrapped in a towel on the floor of the camper behind her mother's home. (Id.) However, on the day of Mr. Brooks'[s] arrest, law enforcement searched the camper and found no towel or knife. Ms. Reynolds'[s] stepfather brought the knife to law enforcement the day after Ms. Reynolds allegedly located it. (R. 1079). Despite the fact that it was allegedly the weapon used in the attempted murder of [Forest], the State failed to test the knife for fingerprints. (R. 1277). Trial counsel questioned witnesses that found the knife

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Mildred Smith learned of the crime "so quickly"; and (3) why "evidence from the crime scene was actually gathered by inmates from the local jail." (Supp. C. 78.) Although Brooks's brief on appeal mentions, in passing, that his counsel were ineffective for failing to test "evidence used at his capital trial," Brooks only makes a specific argument on appeal about his counsels' failure to test the knife. Because Brooks makes no specific arguments on appeal about the specific items of evidence he mentioned in his Rule 32 petition, Brooks has abandoned the claims that he does not specifically raise on appeal, and we will not consider them. See Boyd v. State, 913 So. 2d 1113, 1145 (Ala. Crim. App. 2003) ("Claims presented in a Rule 32 petition but not pursued on appeal are deemed to be abandoned.").

> and the law enforcement officer who received the knife; however, counsel failed to seek an expert to test the knife for fingerprints. Further, counsel failed to have blood on the knife, allegedly a match to [Forest], independently tested. Counsel failed to subject the blood to testing, despite the fact that no testimony or statements from the individuals who found the knife and brought it to law enforcement officials indicated that there was blood on the knife."

(Supp. C. 77-78.)

Brooks's claim fails to satisfy the pleading requirements of Rule 32.3 and Rule 32.6(b), Ala. R. Crim. P. Among other things, Brooks failed to identify who his counsel should have hired to test the knife for fingerprints and blood and what that testing would have revealed. Moreover, Brooks failed to allege any facts showing that the evidence produced from testing the knife would have been helpful to him and failed to allege how it would have altered the outcome of his trial. See, e.g., Van Pelt v. State, 202 So. 3d 707, 737 (Ala. Crim. App. 2015) ("'"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."' Nelson v. Hargett, 989 F.2d 847, 850 (5th Cir. 1993) (quoting United States v. Green, 882 F.2d 999, 1003 (5th Cir. 1989)).

'[C]laims 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.' Thomas v. State, 766 So. 2d 860, 892 (Ala. Crim. App. 1998) (citing Nelson, supra), aff'd, 766 So. 2d 860 (Ala. 2000), overruled on other grounds by Ex parte Taylor, 10 So. 3d 1075 (Ala. 2005).").

Thus, the circuit court did not err when it summarily dismissed this claim.

II.A.5.

Fifth, Brooks argues that the circuit court erred when it summarily dismissed his claim that his trial counsel were ineffective "for failing to retain experts during the guilt/innocence phase of his capital trial"--namely, "gun, knife, and fingerprint experts," as well as "a mental health expert." (Brooks's brief, p. 53.)

In his second amended petition, Brooks alleged that his counsel were ineffective for failing to hire "forensic experts" and "mental health experts." (Supp. C. 79-83.) According to Brooks, his counsel should have hired a

"gun/ballistics expert [who] could have performed independent testing on the weapon at issue in the case and determined if it was the murder weapon," "a knife wound expert [who] could have testified regarding whether the knife submitted at trial was the weapon used to assault [Forest]," a "fingerprint expert [who] could have performed independent testing to determine if there were any fingerprints on either the gun or knife submitted at trial," and "mental health experts" "who could have testified about [Brooks's alleged brain damage, mental-health issues, and substance-abuse problems] and their impact on [his] thoughts and behavior." (Supp. C. 79-80.)

> "When addressing a similar claim that counsel was ineffective for failing to secure the presence of an expert, this Court in Daniel v. State, 86 So. 3d 405 (Ala. Crim. App.2011), stated:
>
> > "'Daniel failed to identify, by name, any forensic or DNA expert who could have testified at Daniel's trial or the content of the expert's expected testimony. Accordingly, Daniel failed to comply with the full-fact pleading requirements of Rule 32.6, Ala. R. Crim. P. See McNabb v. State, 991 So. 2d 313 (Ala. Crim. App. 2007) (claim that counsel was ineffective for failing to retain an expert not sufficiently pleaded because expert was not identified); Woods v. State, 957 So. 2d 492 (Ala. Crim. App. 2004), rev'd on other grounds, 957 So. 2d 533 (Ala. 2006) (claim of ineffective assistance of counsel not

> sufficiently pleaded because Woods failed to identify an expert by name).'
>
> "86 So. 3d at 425–26. As we stated previously, to sufficiently plead a claim that counsel was ineffective in failing to secure the services of an expert, the petitioner must identify the expert by name and plead his/her expected testimony."

Woods v. State, 221 So. 3d 1125, 1138-39 (Ala. Crim. App. 2016).

Here, Brooks did not identify, by name, any expert witness his trial counsel should have hired to examine the "gun/ballistics," the knife, or to examine fingerprints. Thus, Brooks failed to satisfy the full-fact-pleading requirements of Rule 32.6, Ala. R. Crim. P. See Jackson v. State, 133 So. 3d 420, 452 (Ala. Crim. App. 2009).

Additionally, Brooks did not specifically identify any mental-health expert his counsel could have hired to testify in the guilt phase of his trial. Although Brooks's claim incorporated by reference his assertion of ineffective assistance of counsel for failing to hire a mental-health expert for the penalty phase of his trial, Brooks's penalty-phase claim did not specifically identify, by name, any mental-health expert that his trial counsel should have hired.

Thus, we agree with the circuit court's finding that Brooks's claim was insufficiently pleaded.

Regardless, the argument underlying Brooks's claim that his counsel were ineffective for failing to hire a mental-health expert for the guilt phase of his trial is meritless. Indeed, in his second amended petition, Brooks alleged that his counsel were ineffective for failing to hire a mental-health expert who could have testified during the guilt phase of Brooks's trial, which, he said, would have "challenged the State's arguments regarding [his] level of responsibility for the crime"--i.e., "diminished [his] culpability and/or negated his intent." (Supp. C. 81.) Importantly, Brooks did not allege that a mental-health expert would have testified as to any mental-health issues that would amount to legal insanity under Alabama law. In other words, Brooks merely alleged that his counsel were ineffective for failing to hire an expert to present a diminished-capacity defense. As this Court held in Jones v. State, 946 So. 2d 903, 927 (Ala. Crim. App. 2006), Alabama does not recognize a diminished-capacity defense. Trial counsel is not ineffective for failing to hire a mental-health expert to present a defense that does not exist in the

State of Alabama. See Cartwright v. State, [Ms. CR-16-1166, February 7, 2020] ___ So. 3d ___, ___ (Ala. Crim. App. 2020) ("Although Cartwright argues that he wanted to present 'mental disability' evidence to rebut his guilt, not his intent, it is abundantly clear that he was, in fact, attempting to offer impermissible evidence of 'diminished capacity.'").

Accordingly, the circuit court properly dismissed this claim.

II.A.6.

Sixth, Brooks argues that the circuit court erred when it summarily dismissed his claim that his trial counsel, Charles E. Floyd III, was ineffective "due to a conflict based on admissions made in ... Floyd's Motion to Withdraw." (Brooks's brief, p. 55.)

Soon after Floyd's appointment to Brooks's case, Floyd filed a motion to withdraw as Brooks's counsel. (Record in CR-03-1113, C. 446-48.) At a hearing on Floyd's motion, Floyd explained the reasons that, he believed, allowed him to withdraw from Brooks's case--namely, that his representation of Floyd would create a hardship on his extended family and his minor children because of community pressure. In response,

the trial court denied Floyd's motion and invited him to file a petition for a writ of mandamus. (Record in CR-03-1113, R. 235.) Then the following exchange occurred:

> "The Court: ... If you had had personal dealings, but that is not the issue here of some built-in conflict yourself. What you're telling me is, basically, community pressure, and that is what I am seeing here. And I just don't know if that in and of itself--and like [the prosecutor] said, there will be built-in review, and there is built-in review in capital cases--
>
> "....
>
> "--if there is a conviction. But let me ask you this question, and in all candor, if you, for whatever reason, by my order or by the Supreme Court's order, remain on this case, do you feel you can represent [Brooks] and perform the service to the best of your ability?
>
> "Mr. Floyd: Judge, I have always represented every client of mine to the best of my ability, and I will continue to represent anybody to the best of my ability.
>
> "The Court: That is the reason I appointed you to the case. I'm going to deny the motion, but if you wish to file for a writ of mandamus, feel free."

(Record in CR-03-1113, R. 236.) Brooks then asked to be heard and told the trial court that he did not want Floyd to represent him, that Floyd "has prejudice," that Floyd already thinks that he is guilty, and that he did not think that Floyd "will do the best he can for me." (Record in CR-03-1113, R.

237.) After the court denied his motion to withdraw, Floyd filed a petition for a writ of mandamus in this Court, requesting that this Court direct the trial court to grant his motion. (Record in CR-03-1113, C. 615-26.) This Court denied Floyd's petition. (No. CR-02-1550) (Record in CR-03-1113, C. 560.)

In his second amended petition, Brooks alleged that the trial court "erred in failing to grant [Floyd's] motion" to withdraw because, he said, the motion "raised an issue of actual conflict." (Supp. C. 89.) Brooks also alleged that Floyd was ineffective because he had an actual conflict of interest. (Supp. C. 83-90.) According to Brooks, Floyd's motion

> "made clear that the Motion was not motivated simply by a desire to avoid trying the case. He stated clearly that he believed there was a conflict of interest because of outside pressures unique to his situation, that he felt his relationship with Mr. Brooks was adversely effected because he felt personal distaste regarding Mr. Brooks and the alleged offense, and that his business was likely to be harmed due to acceptance of this representation. Thus, his Motion detailed more than one reason outlined in the Alabama Rules of Professional Conduct that should have required his withdraw."

(Supp. C. 88.) Brooks concluded that Floyd's motion "set out an actual conflict between himself and Mr. Brooks, and thus

prejudice to Mr. Brooks is presumed." (Supp. C. 89.) Alternatively, Brooks alleged that, if there is not "an actual conflict of interest, it was evident that a complete breakdown in the attorney-client relationship had occurred within little more than a week from Mr. Floyd's appointment to the case." (Supp. C. 89.) We address each allegation in turn.

To start, Brooks's claim that the trial court erred in failing to grant Floyd's motion to withdraw because Floyd had an actual conflict of interest was properly dismissed because that claim is nonjurisdictional and is precluded under Rule 32.2(a)(2) and (5), Ala. R. Crim. P., because it was raised at trial (see Record in CR-03-1113, C. 446, 537) and because it could have been, but was not, raised on appeal. See, e.g., Lancaster v. State, 362 So. 2d 271, 272 (Ala. Crim. App. 1978) (holding that a guilty plea waives all nonjurisdictional defects, including "conflict of interest of a defendant's court appointed counsel"). Thus, the circuit court properly dismissed this claim.

Next, Brooks's allegation that Floyd was ineffective because he had an actual conflict of interest and that prejudice to him is presumed is without merit.

This Court has explained that

> "[c]onflict of interest cases commonly appear in the context of 'joint representations,' where an attorney is representing two clients charged with the same offense. Holloway v. Arkansas, 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978); State v. Serpas, 485 So. 2d 999, 1001 (La. App. 1986). However, conflicts of interest are not limited to that scenario and have been found in the following situations: where the attorney was called upon to cross-examination a witness he had previously represented, Commonwealth v. Goldman, 395 Mass. 495, 480 N. Ed. 2d 1023 (1985), cert. denied, 474 U.S. 906, 106 S. Ct. 236, 88 L. Ed. 2d 237 (1985), Serpas, supra; where the city prosecutor acted as defense counsel and city police officers were involved in the case, People v. Washington, 101 Ill. 2d 104, 77 Ill. Dec. 770, 461 N. Ed. 2d 393 (1984), cert. denied, 469 U.S. 1022, 105 S. Ct. 442, 83 L. Ed. 2d 367 (1985); where the attorney faced the same charges for which his client was tried, Government of Virgin Islands v. Zepp, 748 F.2d 125 (3d Cir. 1984); and where the judge appointed his son to represent the defendant in a guilty plea before him, State v. Browning, 475 So. 2d 90 (La. App. 1985), writ granted, 478 So. 2d 1229 (La. 1985), aff'd in part, rev'd in part, 483 So. 2d 1008 (La. 1986). See also Annot., Circumstances Giving Rise to Prejudicial Conflict of Interests Between Criminal Defendant and Defense Counsel-Federal Cases, 53 A.L.R. Fed. 140 (1981); Annot., Propriety and Prejudicial Effect of Counsel's Representing Defendant in Criminal Case Notwithstanding Counsel's Representation or Former Representation of Prosecution Witness, 27 A.L.R.3d 1431 (1969); Annot., What Constitutes Representation of Conflicting Interests Subjecting Attorney to Disciplinary Action, 17 A.L.R. 3d 835 (1968); Annot., Constitutionality and Construction of Statute Prohibiting a Prosecuting Attorney From

Engaging in the Private Practice of Law, 6 A.L.R. 3d 562 (1966)."

Browning v. State, 607 So. 2d 339, 340 (Ala. Crim. App. 1992).

"'Addressing a lawyer's conflict of interest as it relates to the Sixth Amendment right to effective counsel, this Court has explained:

> "'"'[I]n order to establish a violation of the Sixth Amendment, ... [a defendant] must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.' Cuyler v. Sullivan, 446 U.S. [335] at 348, 100 S. Ct. [1708] at 1718 [(1980)]. Accord Williams v. State, 574 So. 2d 876, 878 (Ala. Cr. App. 1990). To prove that an actual conflict adversely affected his counsel's performance, a defendant must make a factual showing 'that his counsel actively represented conflicting interests,' Cuyler v. Sullivan, 446 U.S. at 350, 100 S. Ct. at 1719, '"and must demonstrate that the attorney 'made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other.'"' Barham v. United States, 724 F.2d 1529, 1532 (11th Cir.) (quoting United States v. Mers, 701 F.2d 1321, 1328 (11th Cir. 1983)), cert. denied, 467 U.S. 1230, 104 S. Ct. 2687, 81 L. Ed. 2d 882 (1984). Once a defendant makes a sufficient

> showing of an actual conflict that adversely affected counsel's performance, prejudice under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)--i.e., 'that, but for counsel's unprofessional errors, the result of the proceeding would have been different'--is presumed. Strickland, 466 U.S. at 694, 692, 104 S. Ct. at 2068, 2067. See United States v. Winkle, 722 F.2d 605, 610 (10th Cir. 1983); Williams v. State, 574 So.2d at 878."'"

"'Jones v. State, 937 So. 2d 96, 99-100 (Ala. Crim. App. 2005) (quoting Wynn v. State, 804 So. 2d 1122, 1132 (Ala. Crim. App. 2000)). Additionally,

> "'"'[a]n actual conflict of interest occurs when a defense attorney places himself in a situation "inherently conducive to divided loyalties." Castillo [v. Estelle], 504 F.2d [1243] at 1245 [(5th Cir. 1974)]. If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if

> it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.'
>
> "'"Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir. 1979)."'
>
> "Ervin v. State, 184 So. 3d 1073, 1080–81 (Ala. Crim. App. 2015). See also Smith v. State, 745 So. 2d 922, 938 (Ala. Crim. App. 1999)."

Acklin v. State, 266 So. 3d 89, 106-07 (Ala. Crim. App. 2017).

Here, Brooks alleged that Floyd wanted to withdraw from Brooks's case because of "outside pressure" and "personal distaste." Neither reason establishes an actual conflict of interest. Indeed, the American Bar Association's Criminal Justice Standards for the Defense Function, Standard 4-2.1(c), encourages counsel to be "willing and ready to undertake the defense of a suspect or an accused regardless of public hostility or personal distaste for the offense or the client." (Emphasis added.) Similarly, the Alabama Rules of Professional Conduct mandate that lawyers "shall not seek to avoid appointment by a tribunal to represent a person except for good cause" and recognize that by accepting such appointments lawyers will be "accepting a fair share of unpopular matters

or ... unpopular clients." See Rule 6.2, Ala. R. Prof. Cond., and Comment to Rule 6.2, Ala. R. Prof. Cond.

Although Rule 6.2, Ala. R. Prof. Cond., explains that "good cause" to decline an appointment may exist if the "client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client," the record on direct appeal refutes the fact that any such cause exists here. As Floyd expressly told the trial court, the "outside pressure" he felt in representing Brooks would not impair his ability to represent Brooks in this case. (See Record in CR-03-1113, R. 236 ("Judge, I have always represented every client of mine to the best of my ability, and I will continue to represent anybody to the best of my ability.").) Contrary to Brooks's allegation, Floyd had no actual conflict of interest. Accordingly, the circuit court properly summarily dismissed this claim.

Finally, Brooks's alternative allegation that Floyd was ineffective because, if there is not "an actual conflict of interest, it was evident that a complete breakdown in the attorney-client relationship had occurred within little more

than a week from Mr. Floyd's appointment to the case" is also without merit. (Supp. C. 89.) To show this "complete breakdown," Brooks alleged that Floyd "felt a personal distaste regarding [him] and the alleged offense," that there was a "breakdown in communication" because Floyd "did not return phone calls or reply to correspondence," and that Floyd "remained relatively uninvolved in the entire proceeding, other than showing up for court hearings and, during trial, he read Dr. King's report into the record." (Supp. C. 89.)

Floyd's "personal distaste" for Brooks and Brooks's crime, even if it actually existed, does not show that Floyd was ineffective. As set out above, Rule 6.2, Ala. R. Prof. Cond., contemplates the possibility of a lawyer-client relationship in which the lawyer has a "personal distaste" for his client and his client's actions, and encourages counsel to still accept representation of that client. In short, Floyd's purported personal distaste for Brooks and Brooks's crime does not establish ineffective assistance of counsel.

Additionally, Brooks's claim that Floyd "did not return phone calls or reply to correspondence" from Brooks does not show that Floyd was ineffective for several reasons. To start,

Brooks did not sufficiently plead any facts showing how the result of his trial would have been any different had Floyd returned his telephone calls or responded to his letters. See Peterson v. Timme, 509 F. App'x 830, 832 (10th Cir. 2013) ("Peterson does not explain how his trial counsel's ... failure to return his phone calls ... prejudiced him such that there is a 'reasonable probability' that the 'result of the proceeding would have been different.'" (not selected for publication in the Federal Reporter)). Brooks also failed to plead any facts demonstrating what he would have told Floyd had Floyd returned his telephone calls. Furthermore, to the extent that Brooks alleged that Floyd's failure to return telephone calls and respond to letters shows that Floyd failed to develop a rapport with him, we have "'reject[ed] the claim that the Sixth Amendment guarantees a "meaningful relationship" between an accused and his counsel.'" Washington v. State, 95 So. 3d 26, 61–62 (Ala. Crim. App. 2012) (quoting Morris v. Slappy, 461 U.S. 1, 13-14 (1983)).

Finally, Brooks's claim that Floyd was "relatively uninvolved in the entire proceeding, other than showing up for court hearings and, during trial, [reading] Dr. King's report

into the record," is clearly refuted by the record. Indeed, the record shows that Floyd spent a total of 270.25 hours on Brooks's case, including both out-of-court preparation for Brooks's trial and in-court participation in Brooks's trial. (C. 2590-94.) Contrary to Brooks's allegation, Floyd did more than "show up" and read Dr. King's report into the record. Thus, the circuit court properly dismissed this claim.

Accordingly, Brooks is not entitled to any relief on this claim.

II.A.7.

Brooks also argues that the circuit court erred when it summarily dismissed his claim that his trial counsel were ineffective "for failing to object to the admission of improper victim impact evidence during the guilt phase of the trial." (Brooks's brief, p. 58.) We disagree.

In his second amended petition, Brooks alleged that his trial counsel were ineffective because they failed to "adequately" object to "victim-impact" evidence that was introduced during Forest's trial testimony--namely, a picture of Brett in a karate uniform; a picture of Forest and Brett; a picture of and questions about a motocross track Forest had

built for Brett; and the State's discussion about Brett's "sporting interests," "including gymnastics and motor cross." (Supp. C. 91.) This evidence, however, was not victim-impact evidence.

This Court has explained that, to be victim-impact evidence, the evidence must "'"typically 'describe the effect of the crime on the victim and his family.'"'" Russell v. State, 272 So. 3d 1134, 1162 (Ala. Crim. App. 2017) (quoting Townes v. State, 253 So. 3d 447, 474 (Ala. Crim. App. 2015) (opinion on return to remand), quoting in turn Turner v. State, 924 So. 2d 737, 770 (Ala. Crim. App. 2002), quoting in turn Payne v. Tennessee, 501 U.S. 808, 821 (1991)) (emphasis added). If it does not describe the effect of the crime on the victim or the victim's family, then it is not victim-impact evidence.

In Russell, this Court found that testimony about Officer Justin David Sollohub's organ donation was not victim-impact testimony because it "did not describe the effect of the crime on Officer Sollohub or his family." 272 So. 3d at 1162. This Court also held that Officer Sollohub's mother's testimony that Officer Sollohub "was just so full of life," that he was

her "baby," that he wanted to be a police officer "from the time he was in second grade," and that she had to sit with him as he was taken off life support was not victim-impact evidence because it "did not describe the effect Officer Sollohub's death had upon her." Russell, 272 So. 3d at 1165. Similarly, this Court held that Tyler Gilley's testimony that Officer Sollohub was her "work boyfriend" was not "victim-impact evidence because it did not describe the effect that Officer Sollohub's death had on Tyler." Russell, 272 So. 3d at 1166. Additionally, this Court held that a close-up photograph of Officer Sollohub was not victim-impact evidence because "'"'"it is generally agreed that the photograph of the victim of the homicide, taken before the alleged murder, is admissible for the purpose of identification."'"'" Russell, 272 So. 3d at 1165 (quoting other cases).

Here, none of the complained-of evidence described the effect that Brett's death had on Brett or his family. During Brooks's trial, the State called Forest to testify. During Forest's testimony, the following exchange occurred:

> "[Prosecutor]: Let me show you a photograph marked as State's Exhibit 139. Is that your son, Brett?

"[Forest]: Yes, sir.

"[Prosecutor]: Was Brett a--was he an athletic little boy?

"[Forest]: Yes, sir.

"[Prosecutor]: What kind of dress is that? What is that?

"[Forest]: He's a black belt in karate.

"[Prosecutor]: Did he take karate classes?

"[Forest]: Yes, sir.

"[Prosecutor]: Did he also--did he ride a motor bike?

"[Forest]: Yes, sir. He rode motor cross. And then he was in gymnastics.

"[Prosecutor]: Did he sometimes ride a motor bike outside your house?

"Mr. Collins: Objection.

"The Court: Overruled.

"[Prosecutor]: I want to show you a photograph marked State's Exhibit 186. Do you recognize the area depicted in that photograph?

"[Forest]: Yes, sir, that's the track I had for him around my house.

"[Prosecutor]: Was that out on a lawn?

"[Forest]: Inside my yard, yes, sir. That's the track. I had him a figure eight around the house, around the side of the house. That's the end of my

house, end of my lot. It's 500 feet across the front.

"[Prosecutor]: Does that fairly and accurately depict how that would appear back in February?

"[Forest]: Back then it would, yes.

"[Prosecutor]: We move to introduce State's Exhibit 186.

"Mr. Collins: Objection. Previously mentioned, Your Honor.

"[Prosecutor]: Judge, there's a great deal of testimony that--

"Mr. Collins: Your Honor, do you mind if we handle this outside the presence of the jury?

"The Court: All right. We can take this up outside the presence of the jury. Ladies and gentlemen, we need to take this up outside the presence of the jury. Take about a ten minute break or so.

"(Jury not present.)

"Mr. Collins: Your Honor, this picture, which has already been surreptitiously published to the jury, as well as the subsequent picture that shows where the grass had grown over that area, is merely for the purpose of inflaming the jury, has no probative value whatsoever, and we'll ask that it not be allowed.

"[Prosecutor]: Judge, first of all, the second photograph, which shows the regrown area, we agree. And we do not offer it and make no proffer of it, and we've already announced that to the Court.

"When Dr. Herawi was on cross-examination for Mr. Collins, Mr. Collins went to great lengths to ask her about bruises on the lower extremities of this child, suggesting, I suppose, to the jury or hoping to imply to them that these were injuries that the child received prior to the time that he was shot to death on this evening. A reasonable explanation from those injuries is that he received them either while he was taking training in karate or that he got them while he was riding that dirt bike, something that would be entirely expected for a 12-year-old child, riding a dirt bike.

"The Court: All right. Y'all can--

"Mr. Collins: Your Honor, if I might--

"The Court: Overruled. We will be in recess for five minutes.

"(Recess.)

"(Jury present.)

"....

"[Prosecutor]: Now, [Forest], before we recessed I had shown you a photograph marked as State's Exhibit 186, and you said that you recognized it. I moved for it to be introduced. Is this, in fact, the photograph of an area of your yard where Brett used to ride his little bike?

"[Forest]: Yes, sir. His four-wheeler and his bike.

"....

"[Prosecutor]: Has Brett lived with you since he was born?

"[Forest]: Yes, sir. All except for maybe a little over a year.

"[Prosecutor]: Let me show you 148. Do you recognize that exhibit?

"[Forest]: Yes, sir. That's my son and I.

"[Prosecutor]: That's you and Brett?

"[Forest]: Yes, sir."

(Record in CR-03-1113, R. 1416-21.)

Like the testimony in Russell, Forest's testimony about the motocross track he built for Brett and about Brett's interests in karate and gymnastics "did not describe the effect [Brett]'s death had upon [him]." Russell, 272 So. 3d at 1165. Thus, it was not victim-impact evidence, and, consequently, Brooks's trial counsel were not ineffective for failing to object to the admission of that evidence as victim-impact evidence.

As for Brooks's claim that his counsel were ineffective for failing to object to the picture of Brett in a karate uniform and a picture of Forest and Brett together, as explained above, "it is generally agreed that the photograph of the victim of the homicide, taken before the alleged murder, is admissible for the purpose of identification."

Russell, 272 So. 3d at 1165 (citations and quotations omitted). Thus, Brooks's counsel were not ineffective for failing to object to the admission of those photographs as victim-impact evidence.

Accordingly, the circuit court did not err when it summarily dismissed this claim.

II.A.8.

Brooks further asserts that the circuit court erred when it summarily dismissed his claim that his trial counsel were ineffective "for failing to object to improper closing arguments by the State." (Brooks's brief, pp. 61-62.)

In his second amended petition, Brooks quoted a portion of the State's rebuttal closing argument, alleging that his trial counsel were ineffective for failing to object to it because "the prosecutor expressed anger at Mr. Brooks'[s] defense, and argued that Mr. Brooks should be sentenced to death to achieve justice for the victims, specifically referencing prejudicial facts not in evidence--his co-defendant's capital murder conviction and punishment." (Supp. C. 95.) Brooks also alleged that it "was improper for the prosecutor to express a personal opinion about the evidence

during argument in a criminal trial." (Supp. C. 97.) According to Brooks, "there is a reasonable probability that an objection would have resulted in a different outcome." (Supp. C. 96.)

In Brooks's direct appeal, however, this Court rejected the substantive argument underlying this claim of ineffective assistance of counsel. Specifically, on direct appeal, Brooks's appellate counsel challenged the propriety of the State's rebuttal closing argument. See Brooks, 973 So. 2d at 394-99. This Court, reviewing Brooks's claim for plain error, held:

> "Although typically a prosecutor commenting on the outcome of a codefendant's case would be improper, in light of the circumstances of this case, we conclude that the prosecutor's reference to Carruth's death sentence did not so infect the trial with unfairness as to make the resulting convictions a denial of due process. The comment was a legitimate reference to evidence presented by the defense at trial as part of the defense strategy, and was a proper reply-in-kind to defense counsel's repeated arguments throughout the guilt phase asking the jury to sentence Brooks to life imprisonment without the possibility of parole.
>
> "Brooks next argues that the prosecutor 'inferred in its argument to the jury that the only justice the jury could do in this case was to convict Brooks of the capital and other offenses and sentence him to death.' (Brooks's brief at p. 25.) We disagree. When viewed in context, the prosecutor

> was merely making an appeal for justice. 'There is no impropriety in a prosecutor's appeal to the jury for justice and to properly perform its duty.' Price v. State, 725 So. 2d 1003, 1033 (Ala. Crim. App. 1997), aff'd, 725 So. 2d 1063 (Ala. 1998).
>
> "Finally, Brooks argues that the prosecutor improperly expressed his own personal feelings about the case when he referred to how 'angry' he was. However, as the State correctly points out, when viewed in context, it is clear that the prosecutor was not expressing his personal feelings about the case, but rather, was expressing his displeasure with defense counsel's attempt to impeach Forest Bowyer. The record reflects that during cross-examination of Bowyer, defense counsel elicited testimony that Bowyer had a previous drug conviction, suggested that Bowyer and his employees had sold drugs from Bowyer's used car business, and attempted to imply that the crime may have involved drugs. It is not improper for a prosecutor to remark on defense tactics. See, e.g., Minor v. State, 914 So. 2d 372 (Ala. Crim. App. 2004), and the cases cited therein."

Brooks, 973 So. 2d at 398-99. After examining the State's rebuttal closing argument, this Court concluded that there was "no error, much less plain error, in the prosecutor's rebuttal closing argument during the guilt phase of the trial." Brooks, 973 So. 2d at 399 (emphasis added).

Because this Court held that there was no error in the State's rebuttal closing argument, Brooks's claim that his trial counsel were ineffective for failing to object to the State's rebuttal closing argument is without merit. Thus, the

circuit court did not err when it summarily dismissed this claim.

II.B.

Brooks next argues that the circuit court erred when it summarily dismissed his claim that his trial counsel were ineffective during the penalty phase of his trial when they failed "to object to the trial court's improper jury instruction regarding the heinous, atrocious, [or] cruel aggravating circumstance" (Brooks's brief, p. 63), and because they failed "to challenge aspects of Alabama's capital sentencing scheme" (Brooks's brief, p. 66). We address each argument in turn.

II.B.1.

In his petition, Brooks alleged that the trial court's instruction on the especially heinous, atrocious, or cruel aggravating circumstance was improper because that instruction included the phrase "set the crime apart from the norm of capital offenses," which, he said, rendered the instruction "unconstitutionally vague" because there was "no instruction about how to determine what a 'normal' capital offense entails," and that, although his counsel did object to the

trial court giving that instruction, his counsel should have objected to the "actual language of the instruction." (Supp. C. 139-40.)

Although Brooks takes issue with the trial court's use of the phrase "set the crime apart from the norm of capital offenses" and claims that his counsel were ineffective in failing to object to that language, Brooks's codefendant (Carruth) made the same argument in his Rule 32 petition and this Court rejected it, holding:

> "Carruth argued that the 'set the crime apart from the norm of capital offenses' language rendered [the heinous, atrocious, or cruel instruction] unconstitutionally vague because, he said, the jury was given no instruction as to what a normal capital offense entailed. According to Carruth, trial counsel were ineffective for failing to raise an objection to this instruction.
>
> "However, this Court has held that such language is not unconstitutional. In Broadnax v. State, 825 So. 2d 134, 210 (Ala. Crim. App. 2000), this Court approved of jury instructions that were nearly identical to the instructions in the present case. The jury instructions in Broadnax contained the 'set the crime apart from the norm of capital offenses' language that Carruth claimed was improper. Because the trial court's instructions were not improper, counsel was not ineffective for failing to raise a meritless objection."

Carruth v. State, 165 So. 3d 627, 645 (Ala. Crim. App. 2014). Like Carruth's counsel, Brooks's counsel were not ineffective

for failing to object to the "set the crime apart from the norm of capital offenses" language in the trial court's instruction.

Moreover, in Brooks's direct appeal, this Court examined the trial court's especially heinous, atrocious, or cruel instruction and found that there was "no error, much less plain error, in the trial court's instructing the jury on ... the aggravating circumstance that the murder of [Brett] was especially heinous, atrocious, or cruel." Brooks, 973 So. 2d at 420.

In sum, the substantive claim underlying Brooks's claim of ineffective assistance of counsel is meritless. Thus, the circuit court did not err when it summarily dismissed this claim.

II.B.2.

In his petition, Brooks also raised the following three claims concerning his trial counsels' effectiveness in failing to object to "aspects of Alabama's capital sentencing scheme": (1) that his trial counsel were ineffective for failing to object to the jury's unanimous death recommendation because the verdict form did not specify what aggravating and

mitigating circumstances, if any, were considered and found by the jury (Supp. C. 150-51); (2) that his trial counsel were ineffective for failing to raise an objection that Alabama's methods of execution are cruel and unusual (Supp. C. 151-52); and (3) that his trial counsel were ineffective for failing to argue that Alabama's capital sentencing-scheme is unconstitutional (Supp. C. 149-50). The substantive claims underlying Brooks's claim of ineffective assistance of trial counsel, however, are meritless. See, e.g., Jackson v. State, 169 So. 3d 1, 99-100 (Ala. Crim. App. 2010) (holding that a jury is not required to complete a special verdict form to indicate which aggravating circumstances it found to exist); Ex parte Belisle, 11 So. 3d 323, 339 (Ala. 2008) (holding that Alabama's lethal-injection method of execution does not violate the Eighth Amendment to the United States Constitution); and Ex parte Waldrop, 859 So. 2d 1181, 1187-88 (Ala. 2002) (holding that Alabama's capital-sentencing scheme is not unconstitutional). Brooks's trial counsel were not ineffective for failing to raise these meritless objections to Alabama's capital-sentencing scheme. See Jackson v. State, 133 So. 3d 420, 453 (Ala. Crim. App. 2009) ("'[B]ecause the

underlying claims have no merit, the fact that Magwood's lawyer did not raise those claims cannot have resulted in any prejudice to Magwood.' Magwood v. State, 689 So. 2d 959, 974 (Ala. Crim. App. 1996).").

In this section of his brief on appeal, Brooks also argues that the circuit court erred when it summarily dismissed his claim "that under Hurst v. Florida, 136 S. Ct. 616, 619 (2016), Brooks'[s] death sentence is unconstitutional." (Brooks's brief, p. 66.) Both this Court and the Alabama Supreme Court have consistently held that Hurst did not render unconstitutional Alabama's capital-sentencing scheme. See Ex parte Bohannon, 222 So. 3d 525, 533 (Ala. 2016) (holding that Alabama's capital-sentencing scheme is consistent with Apprendi v. New Jersey, 530 U.S. 466 (2000), Ring v. Arizona, 536 U.S. 584 (2002), and Hurst), and State v. Billups, 223 So. 3d 954, 970 (Ala. Crim. App. 2016) ("Because in Alabama it is the jury, not the trial court, that makes the critical finding necessary for imposition of the death penalty, Alabama's capital-sentencing scheme is constitutional under Apprendi, Ring, and Hurst."). Therefore, Brooks's Hurst claim is without merit, and the circuit court did not err when it summarily dismissed this claim.

II.C.

Next, Brooks argues that the circuit court erred because, he says, his trial counsel's "cumulative error" entitles him to postconviction relief, and that in summarily dismissing his cumulative-error claim "the circuit court unreasonably refused to consider the totality of attorney error in this case." (Brooks's brief, p. 67-69.)

Recently, this Court addressed the precise issue Brooks raises here:

> "'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, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (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] [262] So. 3d [1239, 1253] (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.... 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)."

White v. State, [Ms. CR-16-0741, April 12, 2019] ___ So. 3d ___, ___ (Ala. Crim. App. 2019). Here, even "[i]f we were to evaluate the cumulative effect of the instances of alleged ineffective assistance of counsel, we would find that [Brooks's] substantial rights had not been injuriously affected, because we have found no error in the instances argued in the petition." McNabb v. State, 991 So. 2d 313, 332 (Ala. Crim. App. 2007). Thus, Brooks is not entitled to any relief on this claim.

II.D.

Finally, Brooks argues that the circuit court erred when it summarily dismissed his claims of ineffective assistance of appellate counsel. (Brooks's brief, pp. 70-75.) First, we will address Brooks's argument that the circuit court erred when it summarily dismissed his claims that his appellate counsel were

ineffective for failing to challenge his "illegal arrest" on appeal; for failing to "challenge the trial court's erroneous ruling that [his] intended suppression hearing testimony could not be limited to the voluntariness of his statement"; for failing to challenge the State's presentation of victim-impact testimony during the guilt phase of his trial; for failing to challenge the constitutionality of Alabama's capital-sentencing scheme; and for failing to "challenge the jury's death recommendation, which does not identify any aggravating and mitigating circumstances considered or found by the jury." Those claims were properly summarily dismissed because, as explained in Parts II.A.1., II.A.2., II.A.7., and II.B.2. of this opinion, the arguments underlying Brooks's allegations of ineffective assistance of appellate counsel are meritless. Appellate counsel, like trial counsel, is not ineffective for failing to raise meritless claims. Southall v. State, 835 So. 2d 1073, 1076 (Ala. Crim. App. 2001). Thus, the circuit court did not err when it summarily dismissed these claims.

Brooks next argues that the circuit court erred when it summarily dismissed his claim of ineffective assistance of appellate counsel for failing to challenge on appeal the

prosecutor's allegedly improper rebuttal closing argument. (Supp. C. 178 (citing Record in CR-03-1113, R. 1579-82).) Brooks's claim was properly summarily dismissed because Brooks's appellate counsel did, in fact, raise that argument on direct appeal and this Court rejected it. See Brooks, 973 So. 2d at 394-99 (finding "no error, much less plain error, in the prosecutor's rebuttal closing argument during the guilt phase of the trial").

Finally, Brooks argues that the circuit court erred when it summarily dismissed his claim that his appellate counsel was ineffective for failing to argue on appeal that the trial court refused to consider his age--22 years old at the time of the offense--as a mitigating factor. The circuit court properly dismissed this claim because the argument underlying the claim is meritless and is refuted by the record on direct appeal. Indeed, the trial court's sentencing order shows that it did, in fact, consider Brooks's age as a mitigating circumstance, but because Brooks "was past the age of majority at the time of the commission of this offense," the court concluded that the mitigating circumstance did not exist. (Record in CR-03-1113, C. 93.) "[A]lthough a trial court is

required to consider all evidence proffered as mitigation, a trial court is not required to find that a mitigating circumstance exists simply because evidence is proffered to the trial court in support of that circumstance." Phillips v. State, 287 So. 3d 1063, 1168 (Ala. Crim. App. 2016) (opinion on return to remand) (emphasis added). Because the claim underlying Brooks's allegation of ineffective assistance of counsel is meritless and is refuted by the record, the circuit court did not err when it summarily dismissed this claim.

Brooks also argues that the circuit court erred when it summarily dismissed his claim that "the cumulative effect of appellate counsel's errors deprived Brooks of effective assistance." (Brooks's brief, p. 71.) Brooks's claim is without merit. Although Alabama has not expressly recognized a cumulative-effect analysis for claims of ineffective assistance of counsel, as previously noted, "'even if a cumulative-effect analysis were required by Alabama law, that factor would not eliminate [the petitioner's] obligation to plead each claim of ineffective assistance of counsel in compliance with the directives of Rule 32.'" White, ___ So. 3d at ___, (quoting Taylor v. State, 157 So.3d 131, 140 (Ala.

Crim. App. 2010)). Here, even "[i]f we were to evaluate the cumulative effect of the instances of alleged ineffective assistance of counsel, we would find that [Brooks's] substantial rights had not been injuriously affected, because we have found no error in the instances argued in the petition." McNabb v. State, 991 So. 2d 313, 332 (Ala. Crim. App. 2007). Thus, Brooks is not entitled to any relief on this claim.

III.

Brooks argues that the circuit court erred when it summarily dismissed some of the claims he raised in his Rule 32 petition "based on procedural default." (Brooks's brief, pp. 75-79.) Brooks divides his argument into three categories: (1) claims that the circuit court summarily dismissed because "they could have been, but [were] not raised at trial or on direct appeal" (Brooks's brief, p. 76); (2) claims that the circuit court summarily dismissed because "they were raised at trial or on direct appeal" (Brooks's brief, p. 76); and (3) his Brady claim (Brooks's brief, pp. 77-79).

Before addressing Brooks's claims, we note that

> "a circuit court may, in some circumstances, summarily dismiss a postconviction petition based on

the merits of the claims raised therein. Rule 32.7(d), Ala. R. Crim. P., provides:

> "'If the [circuit] court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings, the court may either dismiss the petition or grant leave to file an amended petition. Leave to amend shall be freely granted. Otherwise, the court shall direct that the proceedings continue and set a date for hearing.'
>
> "'"Where a simple reading of the petition for post-conviction relief shows that, assuming every allegation of the petition to be true, it is obviously without merit or is precluded, the circuit court [may] summarily dismiss that petition."' Bishop v. State, 608 So. 2d 345, 347-48 (Ala. 1992) (emphasis added) (quoting Bishop v. State, 592 So. 2d 664, 667 (Ala. Crim. App. 1991) (Bowen, J., dissenting)). See also Hodges v. State, 147 So. 3d 916, 946 (Ala. Crim. App. 2007) (a postconviction claim is 'due to be summarily dismissed [when] it is meritless on its face')."

Bryant v. State, 181 So. 3d 1087, 1102 (Ala. Crim. App. 2011). With this in mind, we address Brooks's claims.

III.A.

First, Brooks argues that the circuit court erred when it summarily dismissed the following claims because they could have been, but were not, raised at trial or on direct appeal:

his claim that his arrest was illegal (claim I); his claim that the trial court failed to consider his age at the time of the offense--22 years old--as a mitigating factor (claim IV); his claim that Alabama's capital-sentencing scheme is unconstitutional (claim VI); his claim that the jury's death recommendation was invalid (claim VII); and his claim that the State introduced prejudicial and irrelevant evidence during trial (claim XI). Brooks's argument concerning the circuit court's summary dismissal of those claims, however, does not satisfy Rule 28(a)(10), Ala. R. App. P., which requires that an argument contain "the contentions of the appellant/petitioner with respect to the issues presented, and the reasons therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on." (Emphasis added.)

The totality of Brooks's argument on appeal relating to those claims is as follows:

> "The Circuit Court dismissed multiple claims from Brooks'[s] Rule 32 petition on the bases that they were procedurally defaulted due to the Court's finding that the claims could have been or were raised at trial or on direct appeal. (R32 C. 438-39). The Court found Brooks was procedurally barred from raising the following claims as it found they could have been, but [were] not raised at trial

> or on direct appeal: Claim I regarding Brooks' illegal arrest, Claim IV regarding the trial court's refusal to consider Brooks' age as a mitigating factor, Claim [XI] regarding prejudicial and irrelevant evidence introduced during the trial, Claim [VI] regarding the unconstitutionality of Alabama's capital sentencing scheme, and Claim [VII] regarding the unconstitutionality of the jury's recommendation of a death sentence."

(Brooks's brief, pp. 75-76.)

Brooks cites no authority to support his contention that the circuit court erred when it summarily dismissed those claims. "'"It is not the function of this Court to do a party's legal research or to make and address legal arguments for a party based on undelineated general propositions not supported by sufficient authority or argument."'" Ex parte Borden, 60 So. 3d 940, 943 (Ala. 2007) (quoting Butler v. Town of Argo, 871 So. 2d 1, 20 (Ala. 2003), quoting in turn Dykes v. Lane Trucking, Inc., 652 So. 2d 248, 251 (Ala. 1994)). Consequently, Brooks's argument does not satisfy Rule 28(a)(10), Ala. R. App. P., and his argument that the circuit court erred when it summarily dismissed these claims is deemed waived.

Regardless, Brooks's argument is without merit. The claims he contends were improperly dismissed by the circuit

court are nonjurisdictional and are subject to the grounds of preclusion set out in Rule 32.2, Ala. R. Crim. P. See, e.g., Mitchell v. State, 825 So. 2d 864, 866 (Ala. Crim. App. 2001) (holding that an illegal-arrest claim is nonjurisdictional and subject the grounds of preclusion set out in Rule 32.2); Marshall v. State, 182 So. 3d 573, 622 (Ala. Crim. App. 2014) (holding that claim challenging the constitutionality of Alabama's capital-sentencing scheme was nonjurisdictional and subject to the grounds of preclusion set out in Rule 32.2); and Fortner v. State, 825 So. 2d 876, 880 (Ala. Crim. App. 2001) (holding that claims challenging the admission of evidence are waivable and are, therefore, nonjurisdictional). Thus, the circuit court properly dismissed these claims because they could have been, but were not, raised at trial or on direct appeal. See Rule 32.2(a)(3) and (5), Ala. R. Crim. P.

Moreover, as noted above, Brooks's illegal-arrest claim and his claim that Alabama's capital-sentencing scheme is unconstitutional are meritless. Thus, those claims were properly summarily dismissed. Additionally, Brooks's claim that the trial court failed to consider his age as a

mitigating circumstance is, as explained above, refuted by the record on direct appeal.

Thus, the circuit court properly dismissed these claims.

III.B.

Brooks next argues that the circuit court erred when it summarily dismissed his claim that the trial court should have granted Floyd's motion to withdraw as counsel (claim V); his claim that Alabama's methods of execution constitute cruel and unusual punishment (claim VIII); and his claim that the trial court's jury instruction on the aggravating circumstance of especially heinous, atrocious, or cruel was incorrect (claim IX).

As discussed in Part II.A.6. of this opinion, Brooks's argument that the circuit court erred when it summarily dismissed his claim that the trial court should have granted his counsel's motion to withdraw was properly dismissed because this claim is nonjurisdictional and precluded under Rule 32.2(a)(2) and (5), Ala. R. Crim. P., because it was raised at trial (see Record in CR-03-1113, C. 446, 537), and it could have been raised on appeal. See, e.g., Lancaster v. State, 362 So. 2d 271, 272 (Ala. Crim. App. 1978) (holding

that a guilty plea waives all nonjurisdictional defects, including "conflict of interest of a defendant's court appointed counsel").

Additionally, Brooks's method-of-execution claim and his jury-instruction claim were properly summarily dismissed under Rule 32.2(a)(4), Ala. R. Crim. P., because they were raised and addressed on appeal. See Brooks, 973 So. 2d at 420-21 (finding no error in the court's instructions on the especially heinous, atrocious, or cruel aggravating circumstance, and finding no error as to Brooks's claim that Alabama's method of execution constitutes cruel and unusual punishment).

Thus, Brooks is not entitled to any relief on this claim.[13]

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[13]Brooks also argues, in passing, that the circuit court erred when it summarily dismissed the claims addressed in Part III.A. and III.B. of this opinion because, he says, he also "asserted and substantiated his claims that ineffective assistance of counsel prevented him from adequately litigating and preserving these issues at trial and on appeal." (Brooks's brief, pp. 76-77.) In Brooks's view, "[i]n order to evaluate the merits of these particular claims, and to provide [him] with the opportunity to prove these claims, the circuit court should have evaluated the merits of the underlying claim related to the ineffective assistance of counsel at all stages of trial and appeal." (Brooks's brief, p. 77.) In other words, Brooks argues that, because he alleged both a substantive

III.C.

Finally, Brooks argues that the circuit court erred when it summarily dismissed his Brady v. Maryland, 373 U.S. 83 (1963), claim, alleging that "the State withheld favorable impeachment evidence from the defense as related to deals offered to two State witnesses, finding that it could have and should have been raised at trial or on direct appeal" (claim X). (Brooks's brief, pp. 77-78.)

In his petition, Brooks alleged that the State violated Brady when it withheld "exculpatory and impeachment information" from him. (Supp. C. 210-11.) In making this allegation, Brooks quoted and cited general propositions of law concerning Brady material, and he alleged the following:

> "Upon information and belief, the State in this case withheld exculpatory and impeachment information favorable to the defense in violation of Mr. Brooks'[s] rights under the Fifth, Sixth, Eighth, And Fourteenth Amendments of the United

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claim and a claim of ineffective assistance of counsel related to that substantive claim, the circuit court could not summarily dismiss the substantive claim pursuant to Rule 32.2, Ala. R. Crim. P. Brooks cites no authority, and this Court is aware of none, that holds that a substantive claim raised in a Rule 32 petition is not subject to the grounds of preclusion set out in Rule 32.2 if that claim is also tied to a separate claim of ineffective assistance of counsel. Thus, Brooks is not entitled to any relief on this claim.

> States Constitution, the Alabama Constitution, and Alabama State law. Upon information and belief, the State declined to prosecute drug charges against Ms. Sarah Reynolds and Ms. Terry Godwin in exchange for their testimony at trial. Based on the fact that Ms. Reynolds is also the person who claims to have found, more than one month after the crime took place, the knife used to assault Mr. Bowyer, this withholding of evidence is even more critical. Due to the State's withholding of evidence, defense counsel did not have the ability to fairly challenge the state's evidence at both the guilt and penalty phase of trial. The State's violations of Mr. Brooks'[s] right to due process necessitates a reversal of his convictions and death sentence."

(Supp. C. 210-11.) Brooks's Brady claim does not satisfy Rule 32.3 and Rule 32.6(b), Ala. R. Crim. P.

To sufficiently plead a Brady claim brought under Rule 32.1(a), Ala. R. Crim. P., the Rule 32 petition itself must set out a full factual basis, which, "if true, entitle[s] a petitioner to relief. After facts are pleaded, which, if true, entitle the petitioner to relief, the petitioner is then entitled to an opportunity, as provided in Rule 32.9, Ala. R. Crim. P., to present evidence proving those alleged facts." Boyd v. State, 913 So. 2d 1113, 1125 (Ala. Crim. App. 2003). So, under Rules 32.1(a), 32.3 and 32.6(b), Ala. R. Crim. P., Brooks had to plead sufficient facts to show that a Brady violation had occurred.

To establish a Brady violation, and thus sufficiently plead a Brady claim in a Rule 32 petition,

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

Bryant v. State, 181 So. 3d 1087, 1122 (Ala. Crim. App. 2011) (quoting Freeman v. State, 722 So. 2d 806, 810 (Ala. Crim. App. 1998)). Additionally, the Supreme Court of the United States has held that "[a] Brady violation involves 'the discovery, after trial, of information favorable to the accused that had been known to the prosecution but unknown to the defense.'" Bryant, 181 So. 2d at 1123 (quoting United States v. Bagley, 473 U.S. 667, 678 (1985)) (emphasis added in Bryant)).

Here, Brooks's claim failed to set out a full factual basis of a Brady violation in at least two ways. First, Brooks did not allege that the State actually withheld or suppressed any evidence. Rather, the information Brooks cites as a basis for his Brady claim--that the State declined to prosecute two witnesses in exchange for their trial testimony--was qualified by the phrase "upon information and belief." In other words, Brooks alleged that he believed that the State had withheld or suppressed certain evidence--not that it did in fact do so. See generally Government Street Lumber Co. v. AmSouth Bank, N.A., 553 So. 2d 68, 77-78 (Ala. 1989) ("Speculation and subjective beliefs are not the equivalent of personal knowledge and do not satisfy the requirement of Rule 56(e), A. R. Civ. P. ... Moreover, matters based upon information and belief are essentially hearsay and thus are insufficient to support a motion for summary judgment." (citations omitted)). In short, alleging "upon information and belief" that something happened is nothing more than a speculative assertion, and "[s]peculation is not sufficient to satisfy a Rule 32 petitioner's burden of pleading." Mashburn v. State, 148 So. 3d 1094, 1125 (Ala. Crim. App. 2013).

Second, Brooks failed to plead any facts to show that he discovered the alleged deal between the State and two of its witnesses after his trial, and he failed to plead that the alleged deal was unknown to the defense before and/or during Brooks's trial. See, e.g., Beckworth v. State, 190 So. 3d 576, 578 (Ala. Crim. App. 2015) (opinion on application for rehearing) (Joiner, J., concurring specially) (explaining that Beckworth's Brady claim was insufficiently pleaded because his petition "did not allege that the statement allegedly withheld was not known to the defense until after Beckworth's trial"). Although, pursuant to the holding in Ex parte Beckworth, 190 So. 3d 571 (Ala. 2013), Brooks was not required to plead sufficient facts to establish a newly discovered evidence claim or plead sufficient facts to overcome the grounds of preclusion set out in Rule 32.2(a)(3) and (5), Brooks still had to plead sufficient facts to show that a Brady violation occurred, which includes an allegation of when the petitioner learned of the withheld or suppressed evidence. He failed to do so.

Thus, the circuit court properly dismissed Brooks's Brady claim under Rule 32.7(d), Ala. R. Crim. P.

Conclusion

Based on these reasons, the judgment of the circuit court is affirmed.

AFFIRMED.

Windom, P.J., and McCool and Minor, JJ., concur. Kellum, J., concurs in the result.