REL: March 13, 2020

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-18-0098

Earnest Lee Walker

v.

State of Alabama

Appeal from Mobile Circuit Court
(CC-08-2835.61; CC-08-2836.61;
CC-08-2837.61; and CC-08-2838.61)

MINOR, Judge.

Earnest Lee Walker appeals the Mobile Circuit Court's summary dismissal of his Rule 32, Ala. R. Crim. P., petition for postconviction relief. Walker's appeal presents these issues: (1) whether Walker was constructively denied the assistance of counsel; (2) whether Walker's trial counsel was

ineffective for allegedly failing to properly investigate his case and prepare for trial; (3) whether Walker's trial counsel was ineffective for allegedly providing Walker erroneous advice about sentencing and Walker's eligibility for parole; (4) whether Walker's sentences are illegal because they were enhanced by allegedly invalid convictions; (5) whether Walker's appellate counsel was ineffective for allegedly failing to ensure that the record in his direct appeal was complete; (6) whether Walker's trial counsel was ineffective for allegedly preventing Walker from testifying in his own defense at trial; (7) whether Walker's right to the counsel of his choice was violated; (8) whether the circuit court erred in not addressing pro se issues that Walker allegedly raised in the first three Rule 32 petitions but that his counsel did not raise in Walker's fourth amended petition; and (9) whether the circuit court erred in adopting the proposed order the State submitted. For the reasons discussed below, we hold that the summary dismissal of Walker's petition was appropriate.

Facts and Procedural History

Walker was convicted, following a jury trial, on March 4, 2009, of first-degree burglary, see § 13A-7-5(a)(2), Ala. Code

1975; first-degree sexual abuse, see § 13A-6-66(a)(1), Ala. Code 1975; attempted first-degree sodomy, see § 13A-4-2 and § 13A-6-63, Ala. Code 1975; and obstructing justice, see § 13A-8-194, Ala. Code 1975. The circuit court applied the Habitual Felony Offender Act ("the HFOA"), see § 13A-5-9, Ala. Code 1975, in sentencing Walker, who had at least five prior felony convictions. The circuit court sentenced Walker to life imprisonment without the possibility of parole on the first-degree burglary conviction and to life imprisonment on each of the remaining convictions. The circuit court ordered that the sentences were to run consecutively.

This Court affirmed Walker's convictions and sentences by an unpublished memorandum. See Walker v. State (No. CR-08-1521), 75 So. 3d 1228 (Ala. Crim. App. 2010) (table).[1] The Alabama Supreme Court denied Walker's petition for a writ of certiorari. Ex parte Walker, 83 So. 3d 593 (Ala. 2010). This Court issued the certificate of judgment, making Walker's judgments of conviction final, on May 7, 2010.

[1]See Nettles v. State, 731 So. 2d 626, 629 (Ala. Crim. App. 1998) ("[T]his Court may take judicial notice of its own records." (citing Hull v. State, 607 So. 2d 369, 371 n.1 (Ala. Crim. App. 1992))).

This Court's memorandum affirming Walker's convictions and sentences stated:

> "In August 2007, P.R., the victim, lived on Spruce Street in Mobile, with three children, and she worked at a local hospital. Walker, who lived on the victim's street, worked for the victim as her yardman. P.R. did not know Walker's name because she referred to him as her 'yardman' and she always paid him in cash. According to P.R., at the time of her assault, Walker was the only yardman that she had.
>
> "On Saturday, August 25, 2007, P.R. arrived home around midnight and noticed that her front door was ajar. However, because she saw no damage, she assumed that a relative might have left the door open. Nothing in the house seemed to be out of place or missing. P.R. fell asleep on the couch in the front room of her house.
>
> "She later awoke to take a call, but went back to sleep. Thereafter, she was awakened by a man, who had his penis out of his pants, standing over her asking her if she 'wanted this.' (R. 150, 178.) The man attempted to force P.R. to put his penis in her mouth. P.R. resisted and struggled while scratching him. P.R. pleaded for him not to hurt her and she offered him money. He began strangling P.R., and she eventually fell to the floor and attempted to play dead. He then began touching P.R.'s vagina area and inserted an object into it. Thereafter, he wiped her hands and nails with some kind of cloth. P.R. later identified her 'yardman' as the man who did all of this to her.
>
> "After the man left, P.R. called 911, and paramedics soon arrived to treat her injuries. After P.R. was treated and released from a local hospital, she returned to her home and discovered that a DVD player, DVDs, and PlayStation games were

missing, as well as a John Cena wrestler T-shirt. With regard to the victim's injuries, her fingernails were broken off beyond the quick, she was bleeding from her vagina, she had bruises around her neck, and her eyes were bright red from strangulation. She had a vaginal laceration that had to be sutured by a physician at the hospital.

"On Sunday, August 26, 2007, City of Mobile Police Department Officer Tilford Saunders responded to two calls for assistance regarding domestic matters from a residence on Spruce Street. Rosa Moore called the police regarding disputes between her and her boyfriend, Walker. Walker, however, did not give Officer Saunders his correct name either time, but instead gave him the name of Clint Walker. Officer Saunders did not observe any marks or scratches on Walker.

"Subsequently, sometime after 4:00 a.m. on Sunday, Officer Saunders received a call to a rape in progress on Spruce Street at P.R.'s house. Upon his arrival, Officer Saunders observed blood leading from the front door all the way back through the house to the laundry room. He saw P.R. in a white gown and he could see that blood was dripping from her vaginal area and that her panties had been torn. Officer Saunders noticed that Walker and his son were standing on the street outside. He also noticed that Walker had changed his clothes from those that he was previously wearing when the officer responded earlier to the domestic calls. Both Walker and his son were detained by Officer Saunders. After P.R. informed Officer Saunders that neither man was the man who attacked her, they were released.

"At the hospital, Officer Saunders informed P.R. that he had brought her yardman down to the scene of the crime and that she had indicated that he was not the man who had assaulted her. P.R. told Officer Saunders that the man that she saw after the attack

was not wearing the same clothes which had confused her. The description that P.R. gave Officer Saunders was of a skinny black male who was medium height, clean-shaven head, wearing a black T-shirt and some jeans. Officer Saunders asked P.R. several times if she knew who had done this, and she responded that she thought it was her yardman because he sounded like her yardman.

"Officer Saunders went off duty at 8:00 a.m. on the morning of the crime and arrived back at work at around 7:00 p.m. that evening. When he came back to work, Officer Saunders located Walker near the scene of the crime. Walker once again gave the officer a false name, Clint Walker. Officer Saunders performed a Terry [v. Ohio, 392 U.S. 1 (1968),] pat-down search of Walker because the Spruce Street area was known for burglaries and he had stopped Walker earlier in August for carrying a large plastic bag full of teddy bears. Officer Saunders observed that Walker was carrying a large plastic bag, a clear bag that you could see through, that contained a DVD player, DVDs, and PlayStation games that were spilling out of the top of the bag. Officer Saunders inquired about the contents of the plastic bag, and Walker responded that he obtained the items from his family and friends and that some of the games belonged to his children. Walker consented to allow Officer Saunders to look in the bag and informed the officer that the items were not stolen. During the search, Officer Saunders noticed that the DVD player had the serial number scratched off. Officer Saunders contacted his supervisor, who instructed him to tell Walker that if the items in the bag were his, that he could bring proof or a receipt to police headquarters and that the items would be returned to him if he could prove that they were his.

"Shortly after his encounter with Walker, Officer Saunders received another domestic dispute call to the same residence on Spruce Street where he

> had previously responded to two calls the day before. The same complaining witness, Rosa Moore, informed him that the subject's name was not Clint Walker, but in fact Earnest Walker. Thereafter, Walker was detained by police in the area and was arrested for obstruction of justice for giving a false name to Officer Saunders.
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> "City of Mobile Police Department Detective Joanne Watson observed Walker after his arrest and noticed that he had fresh scars and scratches on him. She called P.R. and asked her if she had any items that were missing from her home. P.R. described the items which Detective Watson testified appeared to be the exact same items sitting in front of her that had been seized from Walker. One item that was missing from the victim's residence was a John Cena wrestler T-shirt, which was found in a garbage can in front of the residence where Walker was living at the time of the crime."

Walker timely filed the instant petition on February 7, 2011.[2] (C. 26-147.) Walker amended his petition four times, and the State filed an answer and a motion to dismiss each petition. (C. 736, 794, 1201, 1214, 1224, 1228, 1270.) In his fourth amended petition, Walker alleged: (1) that he was constructively denied counsel between the time of his preliminary hearing and his arraignment 11 months later (C. 1228); (2) that his trial counsel "failed to properly advise

[2]Walker filed his petition pro se, and the circuit court granted Walker's request to proceed in forma pauperis. (C. 791.) Although Walker was declared indigent, by April 2012 Walker had retained attorney W. Gregory Hughes to represent him in the Rule 32 proceedings. (C. 799, 1224.)

[Walker] about sentencing and the trial court gave [Walker] incorrect advice on time to be served on a 25-year sentence" (C. 1232); (3) that his sentences are "illegal because the prior convictions offered to invoke the habitual felony offender act were not valid" (C. 1236); (4) that his "trial counsel was ineffective for failing to properly investigate and prepare for trial" (C. 1238); (5) that his "appointed appellate counsel was furnished ... an incomplete transcript on appeal and submitted his brief based on the incomplete transcript" (C. 1244); (6) that his "trial counsel was ineffective for refusing to allow [Walker] to testify" (C. 1248); and (7) that his "right to counsel was violated by appointed counsel" (C. 1248).

In its answer and motion to dismiss the fourth amended Rule 32 petition, the State asserted that Walker's claims were successive under Rule 32.2(b), Ala. R. Crim. P., were precluded under Rule 32.2(a) and Rule 32.2(c), Ala. R. Crim. P., were insufficiently pleaded under Rule 32.3 and Rule 32.6(b), Ala. R. Crim. P., and were without merit under Rule 32.7(d), Ala. R. Crim. P. (C. 1270.)

The circuit court judge--the same judge who had presided over Walker's original trial--denied Walker's petition without an evidentiary hearing. (C. 1421.) Walker filed a motion to reconsider the denial of his petition. (C. 1458.) That motion was denied by operation of law, and Walker filed a timely notice of appeal.

Rule 32.7(d) permits a circuit court to summarily dismiss a Rule 32 petition if the claims in the petition are insufficiently pleaded, precluded, or without merit. This Court reviews a circuit court's summary dismissal of a Rule 32 petition for an abuse of discretion. Lee v. State, 44 So. 3d 1145, 1149 (Ala. Crim. App. 2009). Under most circumstances, "we may affirm a ruling if it is correct for any reason." Bush v. State, 92 So. 3d 121, 134 (Ala. Crim. App. 2009).

On appeal, Walker reiterates the claims raised in his fourth amended petition. He also argues that the circuit court's order was an improper "verbatim adoption of the State's proposed order" and that the circuit court did not specifically deny his "'unrefuted' pro se issues" (Walker's brief, pp. 9, 47).

I.

Walker argues that the circuit court erred in denying his constructive-denial-of-counsel claim. (Walker's brief, p. 14.) Walker conceded that he was represented by counsel at his preliminary hearing on November 29, 2007, but he alleged that his counsel "took no further action" in his case from the time of his preliminary hearing until his arraignment on October 23, 2008. (C. 1229.) Walker asserted that during that time his counsel should have taken several actions such as (1) investigating the claims against him and possible defenses; (2) contacting potential witnesses; and (3) negotiating a potential plea bargain. Walker alleged that he did not have to prove prejudice or, alternatively, that he was actually prejudiced by the constructive denial of counsel. (C. 1229-32.)

A claim alleging constructive denial of counsel is a type of ineffective-assistance-of-counsel claim in which, in some cases, a petitioner may not have to prove that he or she was prejudiced--i.e., prejudice may be presumed under the second prong of the Strickland v. Washington, 466 U.S. 668 (1984), framework used to evaluate an ineffective-assistance claim.

Cf. Haynes v. Cain, 298 F.3d 375, 381 (5th Cir. 2002) (noting the "distinction between ineffective assistance of counsel and the constructive denial of counsel."). This Court has stated the Strickland framework as follows:

> "'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, 1025-26 (Ala. Crim. App. 2013). Additionally, '"[w]hen courts are examining the performance of an experienced trial counsel, the presumption that his 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)).

"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). This Court, however, has held that when the same judge presides over both the original trial and the postconviction proceeding ... and finds that, under the second prong of Strickland, trial counsel's errors would not have resulted in prejudice, '[w]e afford the experienced judge's ruling "considerable weight."' Washington v. State, 95 So. 3d 26, 53 (Ala. Crim. App. 2012) (emphasis added) (affirming the circuit court's denial of Washington's postconviction ineffective-assistance- of-counsel claim by applying the 'considerable weight' standard). See also State v. Gamble, 63 So. 3d 707, 721 (Ala. Crim. App. 2010) (affirming the circuit court's granting of Gamble's

> postconviction ineffective-assistance-of-counsel claim by applying the 'considerable weight' standard) (citing Francis v. State, 529 So. 2d 670, 673 n.9 (Fla. 1988) ('Postconviction relief motions are not abstract exercises to be conducted in a vacuum, and this finding is entitled to considerable weight.'))."

Marshall v. State, 182 So. 3d 573, 582–83 (Ala. Crim. App. 2014). For prejudice to be presumed under the second prong of Strickland, a petitioner alleging constructive denial of counsel must show that "defense counsel entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." Haynes, 298 F.3d at 381.

The circuit court found Walker's ineffective-assistance-of-counsel claims precluded as successive under Rule 32.2(b), Ala. R. Crim. P., because Walker had filed a previous Rule 32 petition in which he had raised claims alleging ineffective assistance of counsel. Walker filed his first petition in 2009--before the direct appeal of his convictions was final. And it appears that his first petition was dismissed "without prejudice" at Walker's request. (C. 1292.)

The State argues that the circuit court erred in concluding that Walker's ineffective-assistance-of-counsel claims were successive because they had been raised in a prior

petition. According to the State, a nonjurisdictional claim raised in a prior petition is subject to the bar against successive petitions in Rule 32.2(b), Ala. R. Crim. P., only if that claim was decided "on the merits" in the prior petition. Even so, the State argues that the claims were successive because they could have been raised on direct appeal but were not. See Rule 32.2(a)(5), Ala. R. Crim. P.

In McAnally v. State, [Ms. CR-18-0656, Sept. 20, 2019] ___ So. 3d ___ (Ala. Crim. App. 2019), this Court held that a 2002 amendment to Rule 32.2(a)(4), Ala. R. Crim. P., "abrogated the requirement that a claim raised in a previous petition must have been decided on its merits before it is subject to preclusion under Rule 32.2(a)(4) or Rule 32.2(b) ... at least with respect to nonjurisdictional claims." There is no dispute that Walker raised ineffective-assistance-of-counsel claims in his first Rule 32 petition. But because Walker's claims in the instant petition are insufficiently pleaded, without merit, or simply refuted by the record, we need not decide whether the rule announced in McAnally applies to bar those claims.

A Rule 32 petitioner has the burden of pleading "the

facts necessary to entitle the petitioner to relief." Rule 32.3, Ala. R. Crim. P. See also Rule 32.6, Ala. R. Crim. P. To avoid summary dismissal, the petitioner must provide "the full factual basis for the claim in the petition itself." Hyde v. State, 950 So. 2d 344, 356 (Ala. Crim. App. 2006). And those facts, if assumed true, must show that the petitioner is entitled to relief. Boyd v. State, 913 So. 2d 1113, 1125 (Ala. Crim. App. 2003). If the factual allegations when assumed true do not show that the petitioner is entitled to relief, the circuit court may summarily dismiss the petition. See Rule 32.7(d), Ala. R. Crim. P.; Bryant v. State, 181 So. 3d 1087, 1102 (Ala. Crim. App. 2011).

Walker did not plead facts showing that the alleged failures of his counsel in the 11-month period at issue led to a complete "fail[ure] to subject the prosecution's case to meaningful adversarial testing." Thus, Walker had to plead facts showing that he was prejudiced by his counsel's action or inaction during the 11 months at issue. But Walker did not do so. He did not, for example, plead facts showing actual prejudice such as any possible defense that counsel could have presented or the testimony of any potential witness that

counsel should have located or interviewed.[3] See, e.g., Chandler v. United States, 218 F.3d 1305, 1318 n.22 (11th Cir. 2000) ("As we have recognized, Strickland's approach toward investigation 'reflects the reality that lawyers do not enjoy the benefit of endless time, energy or financial resources.' Rogers [v. Zant], 13 F.3d [384,] 387 [(11th Cir. 1994)]. How a lawyer spends his inherently limited time and resources is also entitled to great deference by the court. See White [v. Singletary], 972 F.2d [1218,] 1224 [(11th Cir. 1992)] ('[G]iven the finite resources of time and money that face a defense attorney, it simply is not realistic to expect counsel to investigate substantially all plausible lines of defense. A reasonably competent attorney often must rely on his own experience and judgment, without the benefit of a substantial investigation, when deciding whether or not to forego [sic] a particular line of defense ....')."). Rather, Walker pleaded mere summary conclusions like counsel's conduct resulted in Walker's being "grossly unprepared at trial to defend

[3]As discussed in Part III, Walker pleaded facts in support of another claim showing that the State in fact offered him a plea bargain--which he rejected. That the State offered him a plea bargain, however, does not support his claim that his counsel's alleged inaction from the time of his preliminary hearing until his arraignment prejudiced him.

himself." (C. 1232.) Summary dismissal of this claim was appropriate. Rule 32.7(d), Ala. R. Crim. P. See also Hyde, 950 So. 2d at 356 ("Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b)[, Ala. R. Crim. P.]").

II.

Walker alleged a separate claim that his "trial counsel was ineffective for failing to properly investigate and prepare for trial." (C. 1238.) In support of this claim, Walker asserted that defense counsel "interviewed less than two potential witnesses for the defense" and did not "consult and retain expert witnesses to assist the defense." (C. 1240.)

This claim, like Walker's claim alleging the constructive denial of counsel, is insufficiently pleaded. Walker supported his claim with only conclusory assertions, not specific facts. See, e.g., Chandler, supra; Stallworth v. State, 171 So. 3d 53, 68 (Ala. Crim. App. 2013); Yeomans v. State, 195 So. 3d 1018, 1028 (Ala. Crim. App. 2013) ("'The claim offers a conclusion--inadequate performance of counsel--where no facts creating the offered conclusion have been disclosed. As the circuit court correctly found, Boyd's petition does not

disclose what type of expert counsel should have been obtained, or the manner in which any such expert would have countered the State's expert testimony. ... This claim amounts to a bare general assertion of Boyd's subjective opinion that because he was convicted, his counsel should have performed differently. Thus, the circuit court correctly ruled that the claim had not been sufficiently pleaded.'" (quoting Boyd v. State, 913 So. 2d 1113, 1133 (Ala. Crim. App. 2003)). Summary dismissal of this claim was appropriate. Rule 32.7(d), Ala. R. Crim. P.

III.

Walker's next claim alleging ineffective assistance of counsel is that his "trial counsel failed to properly advise [Walker] about sentencing." (C. 1232.) Walker also alleges that "the trial court gave [Walker] incorrect advice on time to be served on a 25-year sentence." (C. 1232.) Walker insufficiently pleaded these claims, and the record refutes them.

Before Walker's trial, the district attorney stated that she had offered Walker a plea deal with a recommendation of a 25-year sentence but that Walker had refused to plead guilty.

(Supp. Record in CR-08-1521, R. 3-4.[4]) The district attorney also stated that, if the cases went to trial and Walker was convicted, the State would seek to have Walker sentenced, as a habitual felony offender, to life imprisonment without the possibility of parole. The following then occurred:

> "THE COURT: Mr. Walker, with all of that out there, do you understand what the state has offered, which is 25 to serve as opposed to what they're going to ask me to punish you with should a jury find you guilty of these crimes?
>
> "MR. WALKER: Yes, ma'am.
>
> "THE COURT: And you are willing to go forward at this point because from this point forward it's a blind plea only? And you're willing to waive your opportunity to settle this case on the terms that the State has offered and go forward with the trial on this matter?
>
> "MR. WALKER: On the terms that the State has offered, yes, I refuse that. If there was other terms, then I would consider it.
>
> "THE COURT: Just make sure that we're very clear, you're looking at life without the possibility of parole. And that is what the State is telling me and I've never heard [the district attorney] back off of this, that her recommendation to me, should you be found guilty by a jury, it is

[4]The reporter's transcript of this pretrial hearing states that the hearing occurred on January 9, 2010. That date appears to be a clerical error. According to Walker's motion to supplement the record, the hearing occurred on January 9, 2009, which was before Walker's trial that occurred in March 2009.

> life without the possibility of parole versus 25 years to serve. [Defense counsel] has told you how much time you would probably serve if you took 25 on these other cases that are not [Class] A [felony offenses], right?
>
> "[DEFENSE COUNSEL]: Judge, you can go through the scenario of what the Department of Corrections might do, but you can't guarantee what they might do.
>
> "THE COURT: Absolutely not, but 25 years is--you would serve every bit of 25 years, Mr. Walker, you understand that's less time than life without the possibility of parole?
>
> "MR. WALKER: Yes, ma'am, I understand that.
>
> "[DEFENSE COUNSEL]: That means you would never get out.
>
> "MR. WALKER: I understand."

(Supp. Record in CR-08-1521, R. 4-6.) Walker now alleges that he would have been eligible for parole in 15 years had he taken the plea deal with a sentence of 25 years. He also argues that his attorney was ineffective for not "ma[king] an effort to correct the misinformation" in the circuit court's statement that "you would serve every bit of 25 years, Mr. Walker."

In summarily dismissing this claim, the circuit court noted first that Walker had "rejected the State's offer prior to the now complained of comments." (C. 1427.) The circuit

court also found that Walker's attorney "gave [Walker] correct advice" when his attorney stated: "Judge, you can go through the scenario of what the Department of Corrections might do, but you can't guarantee what they might do." (C. 1428.) The circuit court also found that Walker's "express[] reject[ion]" of the plea offer rendered "any misstatement by the court regarding parole eligibility ... harmless ... or a nullity." (C. 1429.)

The record shows, as the circuit court held, that Walker's trial counsel correctly advised him that there were "scenario[s]" of what might happen on the time served on a 25-year sentence and that no "guarantee" could be made. Thus, Walker's case is distinguishable from Frost v. State, 76 So. 3d 862 (Ala. Crim. App. 2011), in which counsel was held to be ineffective because counsel had erroneously informed the petitioner that he would be eligible for parole when, in fact, a statute made him ineligible for parole.

As to Walker's claim that counsel should have corrected the alleged "misstatement by the court regarding parole eligibility," the circuit court's statement that Walker would serve 25 years was made, as the circuit court found, after

Walker had clearly rejected the plea agreement. Also, the circuit court's statement was mere speculation about whether Walker would serve a full 25-year sentence. The circuit court made that statement in the same sentence as its agreement with the statement by Walker's counsel that "you can't guarantee what [the Department of Corrections] might do" on a question of parole. Walker cites no authority showing that trial counsel must correct a circuit court's speculation about whether and when an individual eligible for parole would be paroled.

Summary dismissal of this claim was appropriate. Rule 32.7(d), Ala. R. Crim. P.

IV.

Walker argues that the circuit court erred in denying his claim that his sentence "was illegal because prior convictions offered to invoke the habitual felony offender act were not valid." (Walker's brief, p. 34.) The record from Walker's direct appeal shows that the State sought to use five prior felony convictions to enhance his 2009 sentences under the HFOA. (Record in CR-08-1521, C. 267.) Those prior convictions were Mobile County case no. CC-95-3835 (third-degree robbery),

Mobile County case no. CC-95-3836 (second-degree receiving stolen property), Mobile County case no. CC-04-3797 (first-degree receiving stolen property), Mobile County case no. CC-06-2129 (second-degree receiving stolen property), and Baldwin County case no. CC-02-0957 (second-degree theft). (Id.) At his sentencing hearing, Walker did not object to those felonies being used to enhance his 2009 sentences under the HFOA. (Record in CR-08-1521, April 23, 2009, sentencing hearing R. 15.)

In his petition, Walker alleged that his conviction in case no. CC-02-0957 "was nolle prossed on January 29, 2010." (C. 1237.) He asserted that his conviction in case no. CC-02-0957 was used to enhance his sentence in case no. CC-06-2129 and that he had since been resentenced in case no. CC-06-2129 without the application of the conviction in case no. CC-02-0957 as an enhancement. Walker argued that the resentencing in case no. CC-06-2129, which occurred on September 21, 2011, see Ex parte Walker, 152 So. 3d 1247, 1248-49 (Ala. 2014) ("Walker III"), changed the date of his conviction in case no. CC-06-2129 from June 2006 (when he had originally pleaded guilty) to September 2011 (when he was resentenced).

Walker also alleged in his petition that he would soon be resentenced in case no. CC-04-3797 "because one of the two prior felony convictions used for enhancement purposes has been nolle prossed."[5] (C. 1237.) Walker did not identify which prior felony conviction had been nolle prossed as to his sentence in case no. CC-04-3797. But he asserted that the resentencing in case no. CC-04-3797 would change the date of his conviction in case no. CC-04-3797. (C. 1238.) Thus, Walker argued that "three of the five predicated offenses proffered by the State" to enhance his sentences for the 2009 convictions underlying this Rule 32 petition "were not, and are not valid." (C. 1238.)

As a habitual felony offender with at least three prior felony convictions, Walker was sentenced under § 13A-5-9(c), Ala. Code 1975. Although Walker does not expressly state as much, his argument is that if three of the five prior convictions that enhanced his 2009 the sentences were invalid, he should be resentenced for his 2009 convictions under § 13A-5-9(b), Ala. Code 1975, which applies to a habitual felon with

[5]For the sake of argument, we assume that Walker has been resentenced on two of the prior felonies that were applied to enhance his 2009 sentences.

only two prior felony offenses. But Walker is incorrect in his argument that three of the five prior convictions used to enhance his 2009 sentences were invalid.

Walker's claim turns on the novel argument that, if a petitioner obtains a new sentence through a postconviction proceeding, the date of the new sentence changes the date of the original conviction. The circuit court rejected this argument, holding that the resentencing in cases no. CC-06-2129 and no. CC-04-3797 did not change the original date of Walker's convictions in those cases. The circuit court's holding is correct.

In Gomillion v. State, 100 So. 3d 1135, 1138 (Ala. Crim. App. 2011), this Court noted that the enhancement provisions of the HFOA apply to previous felony convictions. In construing the words "previously convicted of" in § 13A-5-9(c), Ala. Code 1975,[6] Gomillion cited the holding in Carroll

[6]At all times relevant to Walker's cases, § 13A-5-9(c), Ala. Code 1975, provided:

> "(c) In all cases when it is shown that a criminal defendant has been previously convicted of any three felonies and after such convictions has committed another felony, he or she must be punished as follows:

v. State, 599 So. 2d 1253, 1266 (Ala. Crim. App. 1992), that "'[i]n connection with the [HFOA], a conviction means an adjudication of guilt.'" In Gomillion, this Court noted that an adjudication of guilt is not always clear and that in such a case, whether a defendant has been sentenced could determine whether an adjudication of guilt has occurred. Gomillion, 100 So. 3d at 1140-41. Gomillion did not hold, however, that a sentence must be imposed before there is an adjudication of guilt under the HFOA.

Walker cites Walker III, supra, for its statement "that

> "(1) On conviction of a Class C felony, he or she must be punished by imprisonment for life or for any term of not more than 99 years but not less than 15 years.
>
> "(2) On conviction of a Class B felony, he or she must be punished by imprisonment for life or any term of not less than 20 years.
>
> "(3) On conviction of a Class A felony, where the defendant has no prior convictions for any Class A felony, he or she must be punished by imprisonment for life or life without the possibility of parole, in the discretion of the trial court.
>
> "(4) On conviction of a Class A felony, where the defendant has one or more prior convictions for any Class A felony, he or she must be punished by imprisonment for life without the possibility of parole."

a judgment of conviction was entered at the sentencing hearing in this case" and "that, at the sentencing hearing, the trial court reaffirmed its determination of guilt and pronounced sentence; therefore, a judgment of conviction was entered." 152 So. 3d at 1252. Walker's reliance on that case, however, is misplaced.

The issue in Walker III was whether Walker's new sentence on his 2006 conviction, which Walker obtained in 2011 through a Rule 32 petition challenging only his sentence in that case, was appealable. The Supreme Court did not hold that the 2006 conviction was appealable. Rather, the Court held that the new sentence was appealable under § 12-22-130, Ala. Code 1975, which provides for an appeal from a "judgment of conviction" but does not expressly reference an appeal from a "sentence." Walker III, 152 So. 3d at 1253 ("[D]ue process mandates that Walker have an opportunity to appeal his new sentence" (emphasis added)). The Supreme Court in Walker III was not construing the HFOA, and its decision in Walker III does not support Walker's argument.

At the time of sentencing for his underlying 2009 convictions, Walker had been adjudicated guilty of at least

five prior felonies. According to his petition, one of those prior felony convictions has been nolle prossed, leaving four prior felony convictions. Based on that one conviction being nolle prossed, Walker alleges that he has obtained subsequent resentencing in two of the remaining four prior felony convictions that enhanced his 2009 sentences.

In Waters v. State, 155 So. 3d 311, 316-17 (Ala. Crim. App. 2013), this Court stated:

> "Rule 32, which provides a procedural vehicle for a defendant to collaterally attack the proceedings that led to his conviction or sentence, authorizes the circuit court to, in essence, reopen the proceedings that led to the petitioner's conviction and sentence if the petitioner demonstrates he is entitled to relief. Our caselaw illustrates that when a Rule 32 petitioner obtains relief, the proceedings are reopened at the point necessary for the circuit court to address the particular problem in that case.
>
> "For example, if a Rule 32 petitioner demonstrates that his sentence is illegal, the circuit court may then reopen the proceedings and resentence the petitioner. See, e.g., McMillian v. State, 934 So.2d 434 (Ala. Crim. App. 2005) (granting Rule 32 relief where the petitioner's sentence was improperly enhanced under the Habitual Felony Offender Act and instructing the circuit court to resentence the petitioner without the application of the Habitual Felony Offender Act). Additionally, if a Rule 32 petitioner shows that his conviction must be overturned then the conviction--and the corresponding sentence for that conviction--will be set aside and the proceedings will continue

> from that point--additional proceedings could include, for example, a new trial, a guilty plea, or the dismissal of the charges."

(Emphasis added.)

Although Walker alleges that he has obtained resentencing in two of the four remaining felony convictions that were used to enhance his 2009 sentences, he has not pleaded facts showing that, in obtaining resentencing in those cases, the underlying convictions (i.e., adjudications of guilt) were set aside or even challenged. As Waters explains, Walker's obtaining the postconviction relief of resentencing reopened the proceedings at the point of resentencing. But it did not affect the date of the original convictions. For purposes of the HFOA, the resentencing in those two cases did not undo or otherwise affect the date of the adjudications of guilt in those two prior convictions; thus, Walker's 2009 sentences were eligible for enhancement under § 13A-5-9(c), Ala. Code 1975 (outlining enhanced penalties for a defendant with three or more prior felony convictions). Walker has not shown that his 2009 sentences, which are within the sentencing ranges under § 13A-5-9(c), Ala. Code 1975, are illegal.

Walker's claim that the circuit court used "invalid"

convictions to enhance his 2009 sentences under the HFOA lacks merit, and summary dismissal was appropriate. Rule 32.7(d), Ala. R. Crim. P.

V.

Walker argues that the circuit "court erred in denying [his] claim that his appointed counsel was furnished with an incomplete transcript on appeal and submitted his brief on appeal based on the incomplete record/transcript." (Walker's brief, p. 37.) This claim is based on the transcript of the January 9, 2009, hearing--discussed in Part III of this opinion--not being a part of the original record submitted in Walker's direct appeal. Walker argues that the failure of his appellate counsel to ensure that the transcript of the January 9, 2009, hearing was a part of the record on appeal was deficient performance and prejudiced him by preventing him from raising the issues discussed in Part III as well as from challenging the circuit court's consolidation of his obstruction-of-justice charge in case no. CC-08-2835 with the other offenses. These claims are insufficiently pleaded or without merit.

As discussed in Part III of this opinion, Walker's claims

that counsel rendered ineffective assistance and that the circuit court made an alleged erroneous statement are insufficiently pleaded or have no merit. Walker's claim based on an alleged improper consolidation of the offenses is likewise insufficiently pleaded. Thus, summary dismissal of these claims was appropriate. Rule 32.7(d), Ala. R. Crim. P. Cf. Yeomans, 195 So. 3d at 1034 ("[B]ecause there is no merit to the legal theory underlying this claim of ineffective assistance, the claim was properly dismissed. See, e.g., Lee v. State, 44 So. 3d 1145, 1173 (Ala. Crim. App. 2009) (counsel cannot be ineffective for failing to raise a claim that has no merit).").

VI.

Walker argues that the circuit "court erred in denying [his] claim that his trial counsel was ineffective for refusing to allow him to testify." (Walker's brief, p. 42.) This claim, which consisted of about one page of conclusory allegations in Walker's petition, is insufficiently pleaded, and Walker's brief on appeal fails to comply with Rule 28(a)(10), Ala. R. App. P., as to this issue.

The claim is also without merit. The record from Walker's

direct appeal shows that Walker did not testify at his trial because of his prior convictions, including a conviction that required him to register as a sex offender. (Record in CR-08-1521, R. 325-32.) After the circuit court engaged in an extensive colloquy with Walker, Walker consulted with his counsel during a brief recess and chose not to testify at trial. Id.

Summary dismissal of this claim was appropriate. Rule 32.7(d), Ala. R. Crim. P.

VII.

Walker argues that the circuit "court erred in denying [Walker's] claim that his right to counsel of choice was violated by appointed counsel." (Walker's brief, p. 44.) In support of this claim, Walker alleged that the circuit court appointed counsel for him without determining that he was indigent and without informing him that he could retain his own counsel if desired. (C. 1249.)

In denying this claim, the circuit court held that it had complied with the provisions of § 15-12-5(a) and § 15-12-20, Ala. Code 1975, in Walker's trial proceedings.[7] The circuit

[7]Section 15-12-5(a), Ala. Code 1975, requires the trial court to determine whether the defendant is indigent. Section

court judge--the same judge who had presided over Walker's trial proceedings--found that, before Walker's arraignment, she had determined that Walker desired the assistance of counsel but was unable to afford counsel.[8] The record supports this finding (Record in CR-08-1521, C. 2), and summary dismissal of this claim was appropriate. Rule 32.7(d), Ala. R. Crim. P. Cf. Musgrove v. State, 144 So. 3d 410, 426 n.6 (Ala. Crim. App. 2012) ("[O]ur caselaw recognizes that if the judge presiding over the Rule 32 petition is the same judge who presided over the petitioner's trial, the judge may use his personal knowledge of the facts underlying the claim to deny that claim if the judge 'states the reasons for the denial in a written order.' Sheats v. State, 556 So. 2d 1094, 1095 (Ala. Crim. App. 1989).").

15-12-20, Ala. Code 1975, requires the trial court to determine before arraignment whether the defendant has the assistance of counsel, whether the defendant desires the assistance of counsel, and whether the defendant is financially able to obtain the assistance of counsel.

[8]The circuit court judge also found this claim--that Walker did not know that he was entitled to the assistance of counsel or that he could retain counsel if he so desired--simply unbelievable given Walker's multiple prior felony convictions and extensive experience with the criminal justice system, both in Alabama and elsewhere. Cf. Musgrove, 144 So. 3d at 426 n.6.

VIII.

Walker argues that "'UNREFUTED' pro se issues were not denied by the circuit court's October 6, 2015, order nor its September 6, 2018, order. Therefore, they must be taken as true." (Walker's brief, p. 47.) This claim has no merit.

First, Walker did not specifically identify the "'UNREFUTED' pro se issues" he contends were not addressed. Thus, Walker's argument does not comply with Rule 28(a)(10), Ala. R. App. P.

Second, the circuit court's October 6, 2015, order directed Walker to file a fourth amended Rule 32 petition setting forth each ground for relief. (C. 1226-27.) Walker did not object to this order, and he, through counsel, filed a fourth amended petition. The State filed a response, and Walker, again through counsel, filed a reply to the State's response. The fourth amended petition, by order of the circuit court, was intended to replace any prior petition, and, any prior claims not reasserted in it were abandoned. Smith v. State, 160 So. 3d 40, 48 (Ala. Crim. App. 2010) (an amended Rule 32 petition supersedes the previously filed petition and becomes the operative pleading if the amended petition "was

clearly intended to replace the original petition"). The circuit court's order summarily dismissing the fourth Rule 32 petition disposed of all claims. Walker has no right to relief.

IX.

Walker contends that the circuit "court's verbatim adoption of the State's proposed order was 'clearly erroneous.'" (Walker's brief, p. 9.) The record shows that Walker filed a proposed order along with an objection to a "proposed order" filed by the State. (C. 1367, 1377, 1385.) Walker's objection to the State's "proposed order" includes specific references to pages and lines of that "proposed order," but the record does not include a separate proposed order from the State. Thus, it appears that Walker's argument is that the circuit court erroneously adopted the State's motion to dismiss the petition.

Walker raised this issue in a motion to reconsider, thereby preserving the issue for appellate review. Walker is not, however, entitled to relief.

> "'Alabama courts have consistently held that even when a trial court adopts verbatim a party's proposed order, the findings of fact and conclusions of law are those of the trial court and they may be

> reversed only if they are clearly erroneous.' McGahee v. State, 885 So. 2d 191, 229–30 (Ala. Crim. App. 2003). '[T]he general rule is that, where a trial court does in fact adopt the proposed order as its own, deference is owed to that order in the same measure as any other order of the trial court.' Ex parte Ingram, 51 So. 3d 1119, 1122 (Ala. 2010). Only 'when the record before this Court clearly establishes that the order signed by the trial court denying postconviction relief is not the product of the trial court's independent judgment' will the circuit court's adoption of the State's proposed order be held erroneous. Ex parte Jenkins, 105 So. 3d 1250, 1260 (Ala. 2012)."

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

The only notable error that Walker points out in the circuit court's order is the statement that Walker "still has four prior felony convictions and a Class A felony (CC-08-2838) [and thus] his only possible sentence is still life without parole." (C. 1431.) Although Walker had four prior felony convictions to support the HFOA enhancements for his 2009 sentences, none of those prior convictions was for a Class A felony.[9] But this erroneous statement does not support his claim that the circuit court's order was an improper adoption of the State's proposed order. Indeed, the State's

[9]The conviction the circuit court referenced--in case no. CC-08-2838--was one of the convictions for which Walker was sentenced in 2009, not a prior conviction that could be used to enhance the 2009 sentences.

motion to dismiss was not the source of that error--the State's motion to dismiss correctly noted that Walker had four prior felony convictions.[10] (C. 1277-78 ("Contrary to [Walker's] assertions four (4) of the five (5) convictions used to enhance his sentence were valid and are still valid. [Walker] has therefore failed to state a claim and he has failed to raise a material issue of fact or law which would entitle him to relief.").)

Nor has Walker shown any right to relief based on the erroneous statement that he had a prior Class A conviction. As noted in Part IV of this opinion, Walker argued that he had a right to relief because he had only two prior felony convictions that could be used to enhance his 2009 sentences; for the reasons stated, Walker in fact had four prior felony convictions that could be used to enhance his 2009 sentences,

[10]The record in appeal no. CR-08-1521 shows that in 2009, before Walker was originally sentenced, the State correctly advised the circuit court that Walker did not have any prior Class A felony convictions and that the HFOA did not require a sentence of life imprisonment without the possibility of parole. (Supp. Record in CR-08-1521, R. 4 ("No, it is not mandatory, it is up to the Court because he does not have a prior Class A conviction, but I've told his counsel I'm putting it on the record that we do intend to ask the Court to sentence him to life without the possibility of parole if we convict him with that.").)

and his 2009 sentences thus are not illegal. See § 13A-5-9(c), Ala. Code 1975. At most, the circuit court's erroneous statement about Walker having a prior Class A felony conviction was harmless. See Rule 45, Ala. R. App. P.

Walker has not shown that the circuit court's order was not the product of its own judgment. The court's findings were its own and were "not merely an unexamined adoption of the proposed order submitted by the State." Riley, 270 So. 3d at 298.

The judgment of the circuit court is affirmed.

AFFIRMED.

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