Rel: July 10, 2020

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-19-0298

Ramiro Delreal Contreras

v.

State of Alabama

Appeal from Lee Circuit Court
(CC-12-858.60)

KELLUM, Judge.

Ramiro Delreal Contreras appeals the circuit court's summary dismissal of his petition for postconviction relief filed pursuant to Rule 32, Ala. R. Crim. P., in which he attacked his 2014 conviction for felony murder and his

resulting sentence of 50 years' imprisonment. This Court affirmed Contreras's conviction and sentence on direct appeal.[1] Contreras v. State, 257 So. 3d 337 (Ala. Crim. App. 2016). The Alabama Supreme Court initially issued a writ granting certiorari review but later quashed the writ. This Court issued a certificate of judgment on February 21, 2018.

On February 20, 2019, Contreras, through counsel, timely filed the underlying, his first, Rule 32 petition. In his petition, Contreras alleged that the felony-murder statute, § 13A-6-2(a)(3), Ala. Code 1975, is unconstitutionally vague as applied to him, and that his counsel were ineffective for not raising that issue at trial and on appeal.[2] On May 10, 2019, the State filed a response and a motion for summary dismissal, arguing that Contreras's claims were insufficiently pleaded, that they were time-barred by Rule 32.2(c), Ala. R. Crim. P., that they were precluded by Rules 32.2(a)(2), (a)(3), (a)(4), and (a)(5), Ala. R. Crim. P., and that they were meritless,

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

[2]Contreras was represented by the same attorneys at trial and on appeal.

and that no material issue of fact or law existed that would entitle Contreras to relief. On May 14, 2019, Contreras filed a reply to the State's response, arguing that the State violated his right to due process and the Alabama Supreme Court's holding in Ex parte Rice, 565 So. 2d 606 (Ala. 1990), by asserting in its response a laundry list of preclusions, some of which are mutually exclusive. On November 15, 2019, the circuit court summarily dismissed Contreras's petition. The court found that Contreras's challenge to the constitutionality of § 13A-6-2(a)(3) was precluded by Rules 32.2(a)(3) and (a)(5) because it could have been, but was not, raised and addressed at trial and on appeal, and that it was meritless because § 13A-6-2(a)(3) is not unconstitutionally vague. The court also found that Contreras's claim of ineffective assistance of counsel was meritless because the claim underlying it -- that § 13A-6-2(a)(3) is unconstitutionally vague -- was meritless. Contreras did not file a postjudgment motion.

I.

On appeal, Contreras reasserts the two claims he raised in his Rule 32 petition and argues that the circuit court

erred in summarily dismissing those claims without conducting an evidentiary hearing. We disagree.

A.

Contreras's substantive claim challenging the constitutionality of § 13A-6-2(a)(3) is nonjurisdictional and subject to the preclusions in Rule 32.2. See, e.g., Griggs v. State, 980 So. 2d 1031, 1032 (Ala. Crim. App. 2006) (holding that a challenge to the constitutionality of a statute is a nonjurisdictional claim and is subject to the preclusions in Rule 32.2). Specifically, that claim is, as the circuit court found, precluded by Rules 32.2(a)(3) and (a)(5) because it could have been, but was not, raised and addressed at trial and on appeal. Moreover, for the reasons explained in Part I.B. of this opinion, that claim is meritless.

B.

Contreras's claim that his counsel were ineffective for not arguing at trial and on appeal that § 13A-6-2(a)(3) was unconstitutionally vague as applied to him is properly raised in this, Contreras's first, and timely filed, Rule 32 petition. However, we agree with the circuit court that this claim is meritless.

In Strickland v. Washington, 466 U.S. 668, 687 (1984), the United States Supreme Court articulated two criteria that must be satisfied to show ineffective assistance of counsel. A defendant has the burden of showing (1) that counsel's performance was deficient and (2) that the deficient performance actually prejudiced the defense. "To meet the first prong of the test, the petitioner must show that his counsel's representation fell below an objective standard of reasonableness. The performance inquiry must be whether counsel's assistance was reasonable, considering all the circumstances." Ex parte Lawley, 512 So. 2d 1370, 1372 (Ala. 1987). "A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. To meet the second prong of the test, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. "The standards for determining whether appellate counsel was ineffective are the same as those for

determining whether trial counsel was ineffective." Jones v. State, 816 So. 2d 1067, 1071 (Ala. Crim. App. 2000), overruled on other grounds by Brown v. State, 903 So. 2d 159 (Ala. Crim. App. 2004).

> "'"The doctrine of vagueness ... originates in the due process clause of the Fourteenth Amendment, see Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939), and is the basis for striking down legislation which contains insufficient warning of what conduct is unlawful, see United States v. National Dairy Products Corporation, 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963).
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> "'"Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. United States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808, 811, 98 L.Ed. 989, 996 (1954). A vague statute does not give adequate 'notice of the required conduct to one who would avoid its penalties,' Boyce Motor Lines v. United States, 342 U.S. 337, 340, 72 S.Ct. 329, 330, 96 L.Ed. 367, 371 (195[2]), is not 'sufficiently focused to forewarn of both its reach and coverage,' United States v. National Dairy Products Corporation, 372 U.S. at 33, 83 S.Ct. at 598, 9 L.Ed.2d at 566, and 'may trap the innocent by not providing fair warning,' Grayned

> v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222, 227-28 (1972).
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> "'"As the United States Supreme Court observed in Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840 (1948):
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> > "'"'There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act, or in regard to the applicable tests to ascertain guilt.'
>
> "'"333 U.S. at 515-16, 68 S.Ct. at 670, 92 [L.Ed. at] 849-50 [citations omitted]."
>
> "'McCrary v. State, 429 So. 2d 1121, 1123-24 (Ala. Cr. App. 1982), cert. denied, 464 U.S. 913, 104 S.Ct. 273, 78 L.Ed.2d 254 (1983).'

"McCall v. State, 565 So. 2d 1163, 1165 (Ala. Crim. App. 1990).

> "'"'As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not

> encourage arbitrary and discriminatory enforcement.' Kolender v. Lawson, 461 U.S. 352 [357], 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983) (citations omitted). A statute challenged for vagueness must therefore be scrutinized to determine whether it provides both fair notice to the public that certain conduct is proscribed and minimal guidelines to aid officials in the enforcement of that proscription. See Kolender, supra; Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)."'

"Timmons v. City of Montgomery, 641 So. 2d 1263, 1264 (Ala. Crim. App. 1993), quoting McCorkle v. State, 446 So. 2d 684, 685 (Ala. Crim. App. 1983). However,

> "'"'[t]his prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. Many statutes will have some inherent vagueness, for "[i]n most English words and phrases there lurk uncertainties." Robinson v. United States, 324 U.S. 282, 286, 65 S.Ct. 666, 668, 89 L.Ed. 944 (1945). Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid.'"'

"Sterling v. State, 701 So. 2d 71, 73 (Ala. Crim. App. 1997), quoting Culbreath v. State, 667 So. 2d 156, 158 (Ala. Crim. App. 1995), abrogated on other

> grounds by Hayes v. State, 717 So. 2d 30 (Ala. Crim. App. 1997), quoting in turn, Rose v. Locke, 423 U.S. 48, 49–50, 96 S.Ct. 243, 46 L.Ed.2d 185 (1975).
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> "'"Mere difficulty of ascertaining its meaning or the fact that it is susceptible of different interpretations will not render a statute or ordinance too vague or uncertain to be enforced."' Scott & Scott, Inc. v. City of Mountain Brook, 844 So. 2d 577, 589 (Ala. 2002), quoting City of Birmingham v. Samford, 274 Ala. 367, 372, 149 So. 2d 271, 275 (1963). The judicial power to declare a statute void for vagueness 'should be exercised only when a statute is so incomplete, so irreconcilably conflicting, or so vague or indefinite, that it cannot be executed, and the court is unable, by the application of known and accepted rules of construction, to determine, with any reasonable degree of certainty, what the legislature intended.' Jansen v. State ex rel. Downing, 273 Ala. 166, 170, 137 So. 2d 47, 50 (1962)."

Vaughn v. State, 880 So. 2d 1178, 1194-96 (Ala. Crim. App. 2003).

Contreras was originally indicted for murder made capital because the victim was under 14 years of age. The trial court instructed the jury on felony murder predicated on the felony of aggravated child abuse as a lesser-included offense of the capital-murder charge. Contreras objected to the instruction, arguing that, under the merger doctrine, the offense of aggravated child abuse merged with the homicide and, therefore, could not serve as the predicate felony for felony

murder. The trial court overruled the objection and, on appeal, a majority of this Court held that the merger doctrine did not apply to aggravated child abuse under the facts in Contreras's case. Contreras, 257 So. 3d at 339-42. At the time of the crime, aggravated child abuse was not a predicate felony specifically enumerated in § 13A-6-2(a)(3) but fell under the residual clause of "any other felony clearly dangerous to human life."[3] At that time, § 13A-6-2(a)(3) provided:

> "A person commits the crime of murder if he or she does any of the following:
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> "....
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> "(3) He or she commits or attempts to commit arson in the first degree, burglary in the first or second degree, escape in the first degree, kidnapping in the first degree, rape in the first degree, robbery in any degree, sodomy in the first degree, any other felony clearly dangerous to human life and, in the course of and in furtherance of the crime that he or she is committing or attempting to commit, or in immediate flight therefrom, he or she, or another participant if there be any, causes the death of any person."

[3]Section 13A-6-2(a)(3) was subsequently amended, effective May 1, 2016, to include, as an enumerated predicate felony, the offense of aggravated child abuse. However, "[i]t is well settled that the law in effect at the time of the commission of the offense controls the prosecution." Minnifield v. State, 941 So. 2d 1000, 1001 (Ala. Crim. App. 2005).

(Emphasis added.)

Contreras alleged in his petition, and argues on appeal, that his counsel were ineffective for not arguing at trial and on direct appeal that the phrase "any other felony clearly dangerous to human life" is unconstitutionally vague as applied to him. In support of his vagueness argument, Contreras relies on the United States Supreme Court's opinions in Johnson v. United States, 576 U.S. ___, 135 S.Ct. 2551 (2015), and Sessions v. Dimaya, 584 U.S. ___, 138 S.Ct. 1204 (2018).[4]

In Johnson, the United States Supreme Court addressed the constitutionality of the residual clause in 18 U.S.C. § 924(e)(2)(B), which defined the term "violent felony" for purposes of the Armed Career Criminal Act of 1984 ("the

[4]Both Johnson and Dimaya were decided after Contreras had been convicted and sentenced. We recognize that "'trial counsel cannot be held to be ineffective for failing to forecast changes in the law.'" Reeves v. State, 226 So. 3d 711, 755 (Ala. Crim. App. 2016) (quoting Dobyne v. State, 805 So. 2d 733, 748 (Ala. Crim. App. 2000), aff'd, 805 So. 2d 763 (Ala. 2001)). However, Contreras does not argue that his counsel should have predicted the holdings in Johnson or Dimaya or that Johnson and Dimaya constituted changes in the law. He argues only that his counsel should have challenged the constitutionality of § 13A-6-2(a)(3), and he cites Johnson and Dimaya only as support for his argument § 13A-6-2(a)(3) is, in fact, unconstitutionally vague as applied to him.

ACCA"). Under federal law, a person convicted of unlawfully possessing firearms is subject to an enhanced sentence if he or she has three or more previous convictions for a "violent felony." 18 U.S.C. § 924(e)(2)(B) defined "violent felony" for purposes of the ACCA as follows:

> "(B) the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that --
>
> > "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> >
> > "(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another ...."

(Emphasis added.)

The Court struck down as unconstitutionally vague the phrase "involves conduct that presents a serious potential risk of physical injury to another," explaining:

> "In Taylor v. United States, 495 U.S. 575, 600, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), this Court held that the Armed Career Criminal Act requires courts to use a framework known as the categorical approach when deciding whether an offense 'is

burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.' Under the categorical approach, a court assesses whether a crime qualifies as a violent felony 'in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.' Begay[v. United States], [553 U.S. 137,] 141, 128 S.Ct. 1581 [(2008)].

"Deciding whether the residual clause covers a crime thus requires a court to picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury. James[v. United States], [550 U.S. 192,] 208, 127 S.Ct. 1586 [(2007)]. The court's task goes beyond deciding whether creation of risk is an element of the crime. That is so because, unlike the part of the definition of a violent felony that asks whether the crime 'has as an element the use ... of physical force,' the residual clause asks whether the crime 'involves conduct' that presents too much risk of physical injury. What is more, the inclusion of burglary and extortion among the enumerated offenses preceding the residual clause confirms that the court's task also goes beyond evaluating the chances that the physical acts that make up the crime will injure someone. The act of making an extortionate demand or breaking and entering into someone's home does not, in and of itself, normally cause physical injury. Rather, risk of injury arises because the extortionist might engage in violence after making his demand or because the burglar might confront a resident in the home after breaking and entering.

"We are convinced that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges. Increasing a

defendant's sentence under the clause denies due process of law.

"....

"Two features of the residual clause conspire to make it unconstitutionally vague. In the first place, the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime. It ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements. How does one go about deciding what kind of conduct the 'ordinary case' of a crime involves? 'A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?' United States v. Mayer, 560 F.3d 948, 952 (C.A.9 2009) (Kozinski, C.J., dissenting from denial of rehearing en banc). To take an example, does the ordinary instance of witness tampering involve offering a witness a bribe? Or threatening a witness with violence? Critically, picturing the criminal's behavior is not enough; as we have already discussed, assessing 'potential risk' seemingly requires the judge to imagine how the idealized ordinary case of the crime subsequently plays out. ...

"At the same time, the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. It is one thing to apply an imprecise 'serious potential risk' standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction. By asking whether the crime 'otherwise involves conduct that presents a serious potential risk,' moreover, the residual clause forces courts to interpret 'serious potential risk' in light of the four enumerated crimes -- burglary, arson, extortion, and crimes involving the use of explosives. These offenses are 'far from clear in respect to the degree of risk each poses.' Begay, 553 U.S., at 143, 128 S.Ct. 1581. Does the ordinary burglar invade an occupied home by night or

> an unoccupied home by day? Does the typical extortionist threaten his victim in person with the use of force, or does he threaten his victim by mail with the revelation of embarrassing personal information? By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.
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> "....
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> "... Each of the uncertainties in the residual clause may be tolerable in isolation, but 'their sum makes a task for us which at best could be only guesswork.' United States v. Evans, 333 U.S. 483, 495, 68 S.Ct. 634, 92 L.Ed. 823 (1948). ..."

576 U.S. at ___, 135 S.Ct. at 2557-60 (some emphasis added).

Subsequently, in Dimaya, the United States Supreme Court addressed the constitutionality of the residual clause in 18 U.S.C. § 16(b), which defined the term "crime of violence." 18 U.S.C. § 16 stated:

> "The term 'crime of violence' means --
>
> "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> "(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

(Emphasis added.)

Relying on Johnson, supra, the Court struck down the residual clause in 18 U.S.C. § 16(b) as unconstitutionally vague, explaining:

> "To decide whether a person's conviction 'falls within the ambit' of [18 U.S.C. § 16(b)], courts use a distinctive form of what we have called the categorical approach. Leocal v. Ashcroft, 543 U.S. 1, 7, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004). The question, we have explained, is not whether 'the particular facts' underlying a conviction posed the substantial risk that § 16(b) demands. Ibid. Neither is the question whether the statutory elements of a crime require (or entail) the creation of such a risk in each case that the crime covers. The § 16(b) inquiry instead turns on the 'nature of the offense' generally speaking. Ibid. (referring to § 16(b)'s 'by its nature' language). More precisely, § 16(b) requires a court to ask whether 'the ordinary case' of an offense poses the requisite risk. James v. United States, 550 U.S. 192, 208, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007); see infra, at 1213-1214.
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> "....
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> "... Johnson effectively resolved the case now before us. For § 16's residual clause has the same two features as ACCA's, combined in the same constitutionally problematic way. Consider those two, just as Johnson described them:
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> "'In the first place,' Johnson explained, ACCA's residual clause created 'grave uncertainty about how to estimate the risk posed by a crime' because it 'tie[d] the judicial assessment of risk' to a hypothesis about the crime's 'ordinary case.' Id., at ___, 135 S.Ct., at 2557. Under the clause, a

court focused on neither the 'real-world facts' nor the bare 'statutory elements' of an offense. Ibid. Instead, a court was supposed to 'imagine' an 'idealized ordinary case of the crime' -- or otherwise put, the court had to identify the 'kind of conduct the "ordinary case" of a crime involves.' Ibid. But how, Johnson asked, should a court figure that out? By using a 'statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?' Ibid. (internal quotation marks omitted). ACCA provided no guidance, rendering judicial accounts of the 'ordinary case' wholly 'speculative.' Ibid. Johnson gave as its prime example the crime of attempted burglary. One judge, contemplating the 'ordinary case,' would imagine the 'violent encounter' apt to ensue when a 'would-be burglar [was] spotted by a police officer [or] private security guard.' Id., at ___, 135 S.Ct., at 2558. Another judge would conclude that 'any confrontation' was more 'likely to consist of [an observer's] yelling "Who's there?" ... and the burglar's running away.' Id., at ___, 135 S.Ct., at 2558. But how could either judge really know? 'The residual clause,' Johnson summarized, 'offer[ed] no reliable way' to discern what the ordinary version of any offense looked like. Ibid. And without that, no one could tell how much risk the offense generally posed.

"Compounding that first uncertainty, Johnson continued, was a second: ACCA's residual clause left unclear what threshold level of risk made any given crime a 'violent felony.' See ibid. The Court emphasized that this feature alone would not have violated the void-for-vagueness doctrine: Many perfectly constitutional statutes use imprecise terms like 'serious potential risk' (as in ACCA's residual clause) or 'substantial risk' (as in § 16's). The problem came from layering such a standard on top of the requisite 'ordinary case' inquiry. As the Court explained:

> "'[W]e do not doubt the constitutionality of laws that call for the application of a qualitative standard such as "substantial risk" to real-world conduct; the law is full of instances where a man's fate depends on his estimating rightly ... some matter of degree[.] The residual clause, however, requires application of the "serious potential risk" standard to an idealized ordinary case of the crime. Because the elements necessary to determine the imaginary ideal are uncertain[,] this abstract inquiry offers significantly less predictability than one that deals with the actual ... facts.' Id., at ___, 135 S.Ct., at 2561 (some internal quotation marks, citations, and alterations omitted).

"So much less predictability, in fact, that ACCA's residual clause could not pass constitutional muster. As the Court again put the point, in the punch line of its decision: 'By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause' violates the guarantee of due process. Id., at ___, 135 S.Ct., at 2558.

"Section 16's residual clause violates that promise in just the same way. To begin where Johnson did, § 16(b) also calls for a court to identify a crime's 'ordinary case' in order to measure the crime's risk. ... Nothing in § 16(b) helps courts to perform that task, just as nothing in ACCA did. We can as well repeat here what we asked in Johnson: How does one go about divining the conduct entailed in a crime's ordinary case? Statistical analysis? Surveys? Experts? Google? Gut instinct? See Johnson, 576 U.S., at ___, 135 S.Ct., at 2557; supra, at 1213-1214; post, at 1231-1232 (GORSUCH, J., concurring in part and concurring in judgment). And we can as well reiterate Johnson's

example: In the ordinary case of attempted burglary, is the would-be culprit spotted and confronted, or scared off by a yell? See post, at 1231-1232 (opinion of GORSUCH, J.) (offering other knotty examples). Once again, the questions have no good answers; the 'ordinary case' remains, as Johnson described it, an excessively 'speculative,' essentially inscrutable thing. 576 U.S., at ___, 135 S.Ct., at 2558; accord post, at 1256 (THOMAS, J., dissenting).

"And § 16(b) also possesses the second fatal feature of ACCA's residual clause: uncertainty about the level of risk that makes a crime 'violent.' In ACCA, that threshold was 'serious potential risk'; in § 16(b), it is 'substantial risk.' See supra, at 1211, 1212. ... Once again, the point is not that such a non-numeric standard is alone problematic: In Johnson's words, 'we do not doubt' the constitutionality of applying § 16(b)'s 'substantial risk [standard] to real-world conduct.' Id., at ___, 135 S.Ct., at 2561 (internal quotation marks omitted). The difficulty comes, in § 16's residual clause just as in ACCA's, from applying such a standard to 'a judge-imagined abstraction' -- i.e., 'an idealized ordinary case of the crime.' Id., at ___, ___, 135 S.Ct., at 2558, 2561. It is then that the standard ceases to work in a way consistent with due process.

"In sum, § 16(b) has the same '[t]wo features' that 'conspire[d] to make [ACCA's residual clause] unconstitutionally vague.' Id., at ___, 135 S.Ct., at 2557. It too 'requires a court to picture the kind of conduct that the crime involves in "the ordinary case," and to judge whether that abstraction presents' some not-well-specified-yet-sufficiently-large degree of risk. Id., at ___, 135 S.Ct., at 2556-2557. The result is that § 16(b) produces, just as ACCA's residual clause did, 'more unpredictability and arbitrariness than the Due

> Process Clause tolerates.' Id., at ___, 135 S.Ct., at 2558."

Dimaya, 584 U.S. at ___, 138 S.Ct. at 1211-16 (footnotes omitted; some emphasis added).

The residual clause in § 13A-6-2(a)(3) does not have the same two infirmities that rendered the residual clauses in 18 U.S.C. § 924(e)(2)(B) and 18 U.S.C. § 16(b) unconstitutionally vague -- uncertainty about how to estimate the risk posed by a crime and uncertainty about how much risk it takes for a crime to qualify as a covered crime. Although one of those infirmities is present in § 13A-6-2(a)(3) -- uncertainty in how much risk it takes for a crime to qualify as one "clearly dangerous to human life" -- the United States Supreme Court made it clear in both Johnson and Dimaya that uncertainty in how much risk it takes for a crime to qualify as a covered crime does not render a statute unconstitutionally vague if the test used by courts to make that determination is based on real-world conduct, as opposed to an idealized version of the crime. As the California Court of Appeals explained in addressing a similar challenge to California's felony-murder statute:

> "A close reading of Johnson illuminates the critical difference between how a court assesses crimes under the residual clause [in 18 U.S.C. § 924(e)(2)(B)] and the second degree felony-murder rule [which, similar to Alabama's felony-murder statute, proscribes the killing of another person during the commission of a felony that is inherently dangerous to human life]. As discussed above, Johnson held the core infirmity with the ACCA residual clause is that it anchors risk to hypothetical facts. That is, the residual clause impermissibly 'ties the judicial assessment of risk to a judicially imagined "ordinary case" of a crime, not to real-world facts or statutory elements.' (Johnson, supra, 135 S.Ct. at p. 2557, italics added.) Implicit in this holding is that a crime is not unconstitutionally vague if a court assesses risk by one of two alternative methods: consideration of the real-world facts underlying the conviction or consideration of the statutory elements of the crime."

People v. Frandsen, 33 Cal. App. 5th 1126, 1143, 245 Cal. Rptr. 3d 658, 673 (2019) (some emphasis omitted; some emphasis added).

In Ex parte Mitchell, 936 So. 2d 1094 (Ala. Crim. App. 2006), this Court adopted a factual approach to determining whether a crime is clearly dangerous to human life under § 13A-6-2(a)(3). "'[T]he trier of fact consider[s] the facts and circumstances of the particular case to determine if such felony was inherently dangerous in the manner and the circumstances in which it was committed.'" Ex parte Mitchell,

936 So. 2d at 1101 (quoting State v. Stewart, 663 A.2d 912, 919 (R.I. 1995)).

> "Under this Court's decision in Mitchell, 936 So. 2d at 1101, a person commits felony murder under § 13A-6-2(a)(3), Ala. Code 1975, if that person or another participant in the crime causes the death of any person during the commission of an enumerated felony or during the commission of an unenumerated 'felony [that was committed in a manner that was] clearly dangerous to human life.' § 13A-6-2(a)(3), Ala. Code 1975."

Washington v. State, 214 So. 3d 1225, 1229 (Ala. Crim. App. 2015). The factual approach Alabama uses was implicitly recognized in Johnson as constitutional when the United States Supreme Court rejected the government's argument that the holding in Johnson would render unconstitutional "dozens of federal and state criminal laws us[ing] terms like 'substantial risk,' 'grave risk,' and 'unreasonable risk.'" 576 U.S. at ___, 135 S.Ct. at 2561. The Court in Johnson specifically noted that those "cited laws require gauging the riskiness of conduct in which an individual defendant engages on a particular occasion," and that it did "not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct." 576 U.S. at ___, 135 S.Ct. at 2561. Because

Alabama uses real-world conduct, not an idealized version of the crime, to gauge the risk posed by the crime, the circuit court correctly found that the residual clause in § 13A-6-2(a)(3) is not unconstitutionally vague as applied to Contreras.

We note that, in his brief on appeal, Contreras points out that our decision in Ex parte Mitchell, supra, which the circuit court cited in its order, predates the United States Supreme Court's decisions in Johnson and Dimaya. Although Contreras is correct that Ex parte Mitchell was decided almost a decade before Johnson and Dimaya, that has no impact on our reliance on Ex parte Mitchell or our ultimate holding that § 13A-6-2(a)(3) is not unconstitutionally vague. This Court in Ex parte Mitchell did not address the constitutionality of the residual clause in § 13A-6-2(a)(3); we simply adopted the fact-based approach for determining whether a felony is clearly dangerous to human life. And neither Johnson nor Dimaya directly addressed the propriety of a state adopting such a fact-based approach, although they both clearly indicated that such an approach could save a statute from unconstitutional vagueness. Therefore, neither Johnson nor

Dimaya affects our holding in Ex parte Mitchell adopting a fact-based approach for determining whether a felony is clearly dangerous to human life under § 13A-6-2(a)(3).

"'Counsel is not ineffective for failing to file a motion for which there is no "legal basis."'" Patrick v. State, 680 So. 2d 959, 963 (Ala. Crim. App. 1996) (quoting Hope v. State, 521 So. 2d 1383, 1386 (Ala. Crim. App. 1988), quoting in turn, United States v. Caputo, 808 F.2d 963, 967 (2nd Cir. 1987)). And "counsel could not be ineffective for failing to raise a baseless objection." Bearden v. State, 825 So. 2d 868, 872 (Ala. Crim. App. 2001). Moreover, "appellate counsel cannot be held to be ineffective for failing to raise a meritless issue on appeal." Thigpen v. State, 825 So. 2d 241, 245 (Ala. Crim. App. 2001). Because § 13A-6-2(a)(3) is not unconstitutionally vague as applied to him, Contreras's counsel were not ineffective for not raising that issue at trial and on appeal. See, e.g., Lee v. State, 44 So. 3d 1145, 1173 (Ala. Crim. App. 2009) ("Because the substantive claim underlying the claim of ineffective assistance of counsel has no merit, counsel could not be ineffective for failing to raise this issue.").

II.

Contreras also contends on appeal, as he did in his reply to the State's response to his petition, that the State violated his right to due process and the Alabama Supreme Court's holding in Ex parte Rice, 565 So. 2d 606 (Ala. 1990), by asserting in its response a laundry list of preclusions, some of which are mutually exclusive.

In Ex parte Rice, 565 So. 2d 606, 607 (Ala. 1990), the State, in its response to the petition, asserted "that the petition should be denied 'on grounds of preclusion as provided in Rule 20.2,'" Ala. R. Crim. P. Temp., now Rule 32.2, Ala. R. Crim. P. The Alabama Supreme Court held that the petitioner had been denied due process by the State's failure to allege a specific ground of preclusion in its response. The Court explained:

> "[T]he State is required to plead the ground or grounds of preclusion that it believes apply to the petitioner's case, thereby giving the petitioner the notice he needs to attempt to formulate arguments and present evidence to 'disprove [the] existence [of those grounds] by a preponderance of the evidence.' Temp. Rule 20.3, Ala. R. Crim. P. [now Rule 32.3, Ala. R. Crim. P.] A general allegation that merely refers the petitioner and the trial court to the Rule does not provide the type of notice necessary to satisfy the requirements of due

> process and does not meet the burden of pleading assigned to the State by Rule 20.3."

565 So. 2d at 608. Subsequently, in Hughley v. State, 597 So. 2d 764 (Ala. Crim. App. 1992), this Court extended the holding in Ex parte Rice to include the State's listing in its response every preclusion in Rule 32.2(a), some of which are mutually exclusive. We explained:

> "The above response filed by the district attorney appears to be nothing more than an attempt to circumvent the requirements of Rice. By listing each subsection of Rule 32.2[(a)] as a ground of preclusion, the district attorney has not become more specific, only more confusing. He has not met his burden of pleading required by Rule 32.3.
>
> "It is possible that each of the grounds for preclusion set forth in Rule 32.2 is mutually exclusive. Contending that Rule 32.2(a)(2) is a ground of preclusion while also contending that Rule 32.2(a)(3) is a ground of preclusion, amounts to a factual impossibility, because (a)(2) allows preclusion where the petitioner's assertion was raised or addressed at trial, and (a)(3) allows preclusion where such issue could have been, but was not raised at trial. The petitioner could not have both asserted and not asserted the same issue at trial. The same analysis may be applied to Rule 32.2(a)(4) and (a)(5). The district attorney's nonspecific response can only be considered a violation of the Rice holding. His response fails to 'provide the type of notice necessary to satisfy the requirements of due process and does not meet the burden of pleading assigned to the State by Rule [32.3].'"

597 So. 2d at 765.

Here, the State asserted in its response that Contreras's claims were precluded because they were raised and addressed at trial and on appeal, see Rules 32.2(a)(2) and (a)(4), and because they were not raised and addressed at trial and on appeal, see Rules 32.2(a)(3) and (a)(5). Therefore, the State's response ran afoul of Ex parte Rice and Hughley and denied Contreras due process. However, Rule 45, Ala. R. App. P., provides:

> "No judgment may be reversed or set aside, nor new trial granted in any civil or criminal case on the ground of misdirection of the jury, the giving or refusal of special charges or the improper admission or rejection of evidence, nor for error as to any matter of pleading or procedure, unless in the opinion of the court to which the appeal is taken or application is made, after an examination of the entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties."

(Emphasis added.) The harmless-error rule applies in Rule 32 proceedings, see Bryant v. State, 181 So. 3d 1087, 1140 (Ala. Crim. App. 2011) (opinion on return to remand), and "most constitutional errors can be harmless." Arizona v. Fulminante, 499 U.S. 279, 306 (1991). "The purpose of the harmless error rule is to avoid setting aside a conviction or sentence for small errors or defects that have little, if any,

likelihood of changing the result of the trial or sentencing." Davis v. State, 718 So. 2d 1148, 1164 (Ala. Crim. App. 1995), aff'd, 718 So. 2d 1166 (Ala. 1998).

In this case, we have no trouble concluding that the violation of Contreras's due-process rights was harmless. Although the circuit court found, and this Court agrees, that Contreras's substantive claim challenging the constitutionality of § 13A-6-2(a)(3) was precluded by Rules 32.2(a)(3) and (a)(5), the circuit court nevertheless addressed the merits of that claim, as has this Court, because it is necessary to do so in order to address the merits of Contreras's claim of ineffective assistance of counsel. Thus, because Contreras received a ruling on the merits on the primary contention in his petition -- that § 13A-6-2(a)(3) is unconstitutionally vague as applied to him -- the violation of his right to due process was harmless.

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

> "[i]f the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would 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 also appropriate when the petition is obviously without merit or where the record directly refutes a Rule 32 petitioner's claim." Lanier v. State, [Ms. CR-18-0474, May 24, 2019] ___ So. 3d ___, ___ (Ala. Crim. App. 2019). Because Contreras's claims were precluded and/or meritless, summary disposition of Contreras's Rule 32 petition without an evidentiary hearing was appropriate.

Based on the foregoing, the judgment of the circuit court is affirmed.

AFFIRMED.

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