REL: July 9, 2021

Alabama Court of Criminal Appeals

OCTOBER TERM, 2020-2021

CR-19-0231

Westley Devone Harris

v.

State of Alabama

Appeal from Crenshaw Circuit Court
(CC-02-106.60; CC-02-107.60; and CC-04-36.60)

KELLUM, Judge.

The appellant, Westley Devone Harris, appeals the circuit court's summary dismissal of his petition for postconviction relief filed pursuant

to Rule 32, Ala. R. Crim. P., in which he attacked his capital-murder convictions and sentence of death.[1]

Facts and Procedural History

In June 2005, Harris was convicted of four counts of capital murder for murdering Mila Ruth Ball, John Ball, Joanne Ball, and Tony Ball during the course of a burglary and one count of capital murder for murdering six victims -- Mila Ruth Ball, Willie Haslip, Joanne Ball, Jerry Ball, Tony Ball, and John Ball -- pursuant to one scheme or course of conduct. The jury recommended, by a vote of 7 to 5, that Harris be sentenced to life imprisonment without the possibility of parole. The trial court overrode the jury's recommendation and sentenced Harris to death.[2]

[1]In the record in this appeal, Harris's first name is spelled "Westley," but in the record from Harris's direct appeal and in our opinion on direct appeal, Harris v. State, 250 So. 3d 880 (Ala. Crim. App. 2007), his name is spelled "Westly." In this opinion, we use the spelling that appears in the record in this appeal.

[2]"Sections 13A-5-45, 13A-5-46, and 13A-5-47, Ala. Code 1975, were amended by Act No. 2017-131, Ala. Acts 2017, to eliminate judicial override and to place the final sentencing decision in the hands of the jury. That Act, however, does not apply retroactively to [Harris]. See § 2, Act No. 2017-131, codified at § 13A-5-47.1, Ala. Code 1975." Stanley v. State, [Ms. CR-18-0397, May 29, 2020] ___ So. 3d ___, ___ n. 1 (Ala. Crim. App. 2020).

This Court affirmed Harris's convictions and death sentence on direct appeal. Harris v. State, 2 So. 3d 880 (Ala. Crim. App. 2007). The Alabama Supreme Court denied certiorari review, and this Court issued a certificate of judgment on August 15, 2008. The United States Supreme Court subsequently denied certiorari review. Harris v. Alabama, 555 U.S. 1155 (2009).

In our opinion affirming Harris's convictions and sentence, this Court set out the facts surrounding the six murders:

> "The evidence adduced at trial tended to show the following. Mila Ruth Ball, 65, was the matriarch of a family that lived on a farm in Moody's Crossroads in Crenshaw County. Her daughter, Joanne, 35, was married to Willie Haslip, 40; they lived in a trailer on the farm with their three sons, Jerry Ball, 19, Tony Ball, 17, and John Ball, 14. Joanne and Willie also had a daughter, Janice Ball, 16, who lived with her grandmother Mila Ruth in the house at the farm.
>
> "Janice was 14 years old when she met then-19-year-old Harris. Three months after the two met, Janice became pregnant, and the two had a daughter, Neshay, whom they called 'Shay.' Janice testified that when she told Harris she was pregnant, she did not see him much until Shay was born. Then, Janice said, she and Harris lived together in a trailer in Luverne. Harris became 'violent,' Janice said, so she moved back home to the farm and lived with her grandmother in the house. (R. 7421–22.)

"Her father, Willie, then bought a trailer and put it on the farm because, Janice said, he wanted her and Harris 'to stay together for he wanted him to kind of take care of his own baby and just have a family together.' (R. 7422.) Janice testified that she and Harris lived together in the trailer her father had bought 'off and on' because Harris was 'still violent and controlling.' (R. 7423.)

"On Friday, August 23, 2002, Janice said, she and Harris were in the trailer Willie had bought for them. Janice asked Harris to pay her back some money he had borrowed from her so that she could buy Shay some diapers. Janice said Harris refused to give her any money and slapped her. She threw a telephone at him and told him to pack his belongings and leave.

"Their argument took them outside, where Janice's brother Jerry saw them. He got a shotgun for Janice, and she admitted that she held the gun on Harris, but then gave it back to Jerry. Harris left the farm that night. Janice stayed in Mila Ruth's house.

"The next day, Saturday, Harris called Janice at the McDonald's restaurant where she worked and asked her whether her family planned to press charges against him. Janice did not answer his question. On the following day, Harris again called Janice to see whether she or her family were planning to press charges against him. Again, Janice did not answer his question.

"That evening, Harris came back to Mila Ruth's house at the Ball farm to speak with Janice. Janice said that Harris sat on the porch while she stayed inside the house and talked with Harris through the screen door. Janice said she then went to the bedroom to tell Mila Ruth that Harris was there. Mila

Ruth went to the door and told Harris she was going to have him arrested and that she was going to call Janice's father over. Harris started backing up, Janice said, and told Mila Ruth 'that he didn't want any trouble.' (R. 7444.) Mila Ruth called Willie, and he, Joanne, and Janice's brothers Jerry and John came over to Mila Ruth's house from their trailer. Janice said Willie and Jerry had shotguns with them. Harris had already left the porch, but Willie shouted out for him to leave the farm before he got hurt. (R. 7444.) Harris left the farm, and Janice and her family went back inside their respective homes and went to bed. Janice shared a bedroom with Mila Ruth.

"The next morning, Monday, Janice awoke about 8:30 when her bed was shaking. Shay was in bed with her. Janice said she heard the lock on the kitchen door, then heard some mumbling that she could not make out. Then, she said, she saw her grandmother, Mila Ruth, 'walking back into the bedroom and Westly [Harris] had a shotgun pointed to her stomach.' (R. 7449.)

"Harris made Janice and Mila Ruth move into the kitchen and made Mila Ruth get on the floor. He handed Janice a roll of tape and told her to use it to tie Mila Ruth's hands. Janice said after she finished, Harris snatched the tape away from her and, while resting the gun between his legs, he tied Mila Ruth's hands tightly with the tape. Harris told Mila Ruth that 'it was going to be a lot better without her now.' (R. 7451.) Harris then taped Janice's hands together.

"Harris told Mila Ruth that she needed to say her prayers. As Mila Ruth began saying the Lord's prayer, Harris shot her in the face with a shotgun.

"Harris made Janice go back to the bedroom, and he bound her to one of the beds with a telephone line and an extension cord. He placed some toys on the bed for Shay and put Shay up on the bed with Janice. He then asked Janice what time her brother Tony usually got up and came over to Mila Ruth's house. Janice told him that Tony usually came over about noon or 12:30 p.m. Tony was the only other person at the farm at that time.

"Harris left Mila Ruth's house. Janice said she heard the shotgun go off again, then she heard the front door to the house open. Harris came into the bedroom, cocked the shotgun so that a shell came out, then threw it on Janice, saying, 'That was your brother.' (R. 7466.) Evidence showed that Tony died of a gunshot wound to the back of his head while he was still in bed.

"After shooting Tony and coming back into Mila Ruth's house, Harris took Shay into the living room of Mila Ruth's house and watched television. Janice was still tied to the bed. She said Harris would come check on her periodically and told her he would not hurt her if she 'didn't try nothing stupid.' (R. 7467.)

"At about 3:30 that afternoon, Janice said, she heard her brother Jerry's car pull up in the yard. As usual, Jerry had brought John home from Luverne Middle School, then went back to work. Janice was still tied up on the bed and, by this time, Harris had gagged her with a towel. Harris left Mila Ruth's house, but then Janice heard the door open again and she heard Harris say, 'Get over there.' (R. 7472.) The shotgun went off again, and Janice heard something fall.

"The evidence indicated that, when Jerry pulled away after dropping off John, Harris went over to the trailer where

John lived. The State posited that John put up a fight with Harris because his autopsy showed that he had suffered two gunshot wounds from the pistol, one of which lodged in his spine and would have caused paralysis. After shooting John twice, Harris somehow got John back to Mila Ruth's house, where John was shot once in the eye with a shotgun. John's body was discovered next to Mila Ruth's in the kitchen at Mila Ruth's house.

"About 4:00 p.m., a half-hour after John was killed, Janice said, she heard her father's pickup truck pull up in the yard. She said she watched through the window as Willie drove to the back of the yard. Harris was in the room with her. He had told Janice he would kill her if she tried to warn Willie. When the truck went by, Janice said, Harris took a shotgun and a pistol and left the house. She said she did not hear a gunshot, but she did hear the truck start again. It pulled up next to her grandmother's house and stopped, then Harris came back inside holding a shotgun.

"Haslip's body was discovered under a piece of metal in the hog pen. He, too, had been shot in the face with a shotgun.

"After shooting Haslip, Harris came back into Mila Ruth's house and cut the bonds holding Janice to the bed. He told Janice to get Shay a bottle and a pacifier, then had them climb out the bedroom window. Harris was still carrying a shotgun, and he told Janice he would shoot her if she tried to run. Janice said she did not try to get away when Harris climbed out the window because she was holding Shay. Harris led [Janice] to the trailer where her parents and brothers lived.

"At about 5:30 or 5:45 that evening, Janice said, her mother, Joanne, came home. Harris told Janice that if she

tried to warn her mother, he would shoot Janice. Harris, armed with a shotgun, sat down in a chair that would be behind the front door when the door was opened. When Joanne came into the trailer, Janice said, she saw Harris, looked at Janice, then walked into the living room. She asked Janice where Tony was, and Harris told her to get on her knees. Joanne looked at Harris and said, 'Fuck you.' (R. 7482.) Joanne took a step toward Janice, again asked where Tony was, and Harris shot her. The shot hit Joanne in the back of the neck. She turned and tried to run for the door but Harris got up and shot her again from behind. He then propped the shotgun on the inside wall of Joanne and Willie's bedroom and dragged Joanne into the room.

"Harris spent some time trying to clean the blood from the living room floor before Jerry came home. He also began taking items like a radio, speakers and an amplifier from Janice's parents' closet. He also took Willie's wallet and telephone from Willie's body as it lay in the hog pen. Janice said Harris packed the belongings into her mother's car, a red Grand Am. She was with him as he walked around the yard and packed the car.

"At one point, Harris told Janice to go behind the trailer. She said she was on the side of the trailer when Jerry pulled into the yard in his car. Harris hid the shotgun behind his back as Jerry got out of the car. Harris asked Jerry to take him to the store. Janice said that she heard Jerry say something, then the shotgun went off again. She came out from behind the trailer and saw Jerry running up the porch toward the door. Jerry called her name as he was reaching for the door, then Harris shot him again. Jerry was shot once in the chest and once in the head.

"Harris put Jerry's body in the trunk of Jerry's car. Harris then tried to clean up the blood on the porch and had Janice scoop up dirt from the yard and use it to try to cover the blood.

"Harris put clothes and other cloths he had used to try to clean the blood from Jerry and Joanne's wounds into a garbage bag, then put the bag into the trunk of the car with Jerry's body. He closed the trunk and moved the car out of the front yard and into the hog pen. He also moved Willie's truck and then Joanne's truck into the pen. Janice said Harris kept the gun with him while he moved the vehicles.

"Afterwards, Janice said, Harris made her hand him the shotguns and pistol as he put them in the trunk of the Grand Am. He also made Janice pack a backpack for her and Shay into the trunk. He threatened to shoot the family's white bulldog, which had blood all over it, but Janice told him not to kill it. Harris put the dog into the trunk as well, then he, Janice and Shay left the Ball farm in the Grand Am.

"Harris, Janice and Shay then began a three-day odyssey traveling around Crenshaw County. Their first stop was at a service station in Luverne, where Harris sent Janice inside to buy snacks while he pumped gas. Janice said she did not seek help from anyone inside the service station because, she said, since he had just killed her entire family, she was afraid Harris would kill others if she sought help from them.

"Harris then drove to the home of his cousin, Andre 'A.J.' Robinson in Luverne. Robinson testified that Harris gave him two shotguns. He said there was also a white bulldog in the car's trunk, which Harris left with him. A few days later, Robinson said, a friend of his told him to get rid of the guns, so he threw them in the woods, where law-enforcement officials

recovered them. Harris also sold three shotguns to an acquaintance, Wendell Edwards.

"Harris next went to Dozier, where he met briefly with his friend Jarvis 'Jabo' Scanes. Harris then went to see his closest friend, Greg Daniels. Harris gave Daniels three guns, which Daniels hid in the woods near his house. Daniels testified that Harris told him he had 'offed' the Ball family. (R. 6847.) Janice said she did not seek help from either Scanes or Daniels because they were friends of Harris's and she was wary of them.

"After leaving Daniels, Harris drove to Andalusia to the home of his friend Leon, and Leon's sister, Kiki. Janice said that at about daybreak, she and Shay were able to sleep for a while at Leon's house, and she and Harris both cleaned up.

"After leaving Leon's house, Harris went back to Luverne, Rutledge, and Dozier, where he stopped at other friends' houses. Again, Janice said she never sought help because every place they stopped, they were with Harris's friends and she believed they would be more inclined to help Harris than to help her.

"Harris, still driving the red Grand Am, eventually drove to a club, Cole's Lounge, near Rutledge. Harris broke into the club, and he, Janice and Shay stayed there for two days. During that time, Harris's aunt persuaded him to turn himself over to law-enforcement officials. Agents from the Alabama Bureau of Investigation ('ABI'), accompanied by Harris's aunt, went to Cole's Lounge and picked up Harris, Janice and Shay. They were then taken to the Lowndes County Sheriff's Office."

Harris, 2 So. 3d at 888-92.

Harris confessed to police that, the day before the murders, he had a disagreement with Janice and her family and that her family had pointed guns at him. He then said:

> "When I got home I thought about what happened regarding them getting their guns at me and sexual assaulting Janice. I also thought that they were sexually assaulting my one (1) year old daughter.
>
> "On Monday, [August 26, 2002], sometime that morning, I walked to Janice's house. I don't know what got into me. I just lost it. Plus I had been using illegal drugs. Upon arrival at Janice and her grandmother's house I tied her up therefore she had nothing to do with this incident.
>
> "I shot Tony with a .20 gauge shotgun. I also shot John and Jerry with a .20 gauge shotgun. I shot Willie with a 12 gauge shotgun. I don't remember what gun I used to shot Joanne Ball or Janice's grandmother."

(Record on Direct Appeal ("RDA"), C. 702-03.)[3]

We note that Harris's convictions were the result of his second trial for the six murders. His first trial ended in a mistrial after one of

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

Harris's friends spoke to several jurors. In our opinion on direct appeal, we explained:

> "During Harris's first trial on the charges arising from the murders of the Ball family and Haslip, the trial court learned of a three-way telephone conversation among Harris and two friends. During that conversation, which was recorded by jail officials, Harris's friend [Theresa] Rogers assured him that she had spoken to one of the jurors, who told her there was not sufficient evidence to convict Harris and there would be a hung jury.
>
> "The trial court conducted a hearing, during which Rogers testified that she had talked with juror W.F.J. about the lies being told in the trial. Rogers said the conversation with juror W.F.J. took place at her house. Two other jurors were present when she talked with others about the trial as she did errands in town. One of the jurors, who was shopping at the same grocery store as Rogers, walked off, Rogers said.
>
> "After Rogers testified, the trial court spoke individually with each juror hearing the case to determine the extent, if any, to which they had heard anything about the case outside of the courtroom. W.F.J. denied going to Rogers's house to speak with her."[4]

[4]As a result of what occurred at Harris's first trial, Theresa Rogers pleaded guilty to jury tampering and W.F.J. pleaded guilty to perjury in the second degree.

Harris, 2 So. 3d at 918-19. As a result of what occurred at Harris's first trial, Rogers pleaded guilty to jury tampering and W.F.J. pleaded guilty to perjury in the second degree.

In August 2009, Harris timely filed his Rule 32 petition. He filed his first amended petition in February 2010, his second amended petition in November 2010, and his third amended petition in July 2011. In January 2012, Harris filed an amendment to his third amended petition.[5] The State filed an answer and a motion to dismiss Harris's petition and submitted a proposed order. In November 2019, the circuit court summarily dismissed Harris's petition. Harris filed a postjudgment motion, which was denied by operation of law 30 days after the circuit court's summary dismissal of Harris's petition. See, e.g., Loggins v. State, 910 So. 2d 146, 148-49 (Ala. Crim. App. 2005). This appeal followed.

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[5]Each amended petition was a complete petition and superseded the previously filed petition. See, e.g., Reeves v. State, 226 So. 3d 711, 722 (Ala. Crim. App. 2016), and Smith v. State, 160 So. 3d 40, 47-48 (Ala. Crim. App. 2010). The amendment to the third amended petition, on the other hand, merely added to that petition and did not supersede it. All references in this opinion to Harris's petition are to the third amended petition or the amendment thereto.

Standard of Review

"[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" and is reviewed " 'de novo.' " Ex parte Beckworth, 190 So. 3d 571, 573 (Ala. 2013) (quoting Ex parte Lamb, 113 So. 3d 686, 689 (Ala. 2011)). Moreover, when a trial court makes its judgment "based on the cold trial record," we apply a de novo standard of review. Ex parte Hinton, 172 So.3d 348, 352 (Ala. 2012).

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, 296 So. 3d 341, 343 (Ala. Crim. App. 2019).

The circuit court summarily dismissed some of Harris's claims on the ground that they were insufficiently pleaded. Rule 32.3, Ala. R. Crim. P., states that "[t]he petitioner shall have the burden of pleading ... the facts necessary to entitle the petitioner to relief." Rule 32.6(b), Ala. R. Crim. P., states that "[t]he petition must contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient

to warrant any further proceedings." As this Court noted in Boyd v. State, 913 So. 2d 1113 (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, entitle a petitioner to relief. After facts are pleaded, which, if true, entitle the petitioner to relief, the petitioner is then entitled to an opportunity, as provided in Rule 32.9, Ala. R. Crim. P., to present evidence proving those alleged facts."

913 So. 2d at 1125.

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

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

> "Although postconviction proceedings are civil in nature, they are governed by the Alabama Rules of Criminal Procedure. See Rule 32.4, Ala. R. Crim. P. The 'notice pleading' requirements relative to civil cases do not apply to Rule 32 proceedings. 'Unlike the general requirements related to civil cases, the pleading requirements for postconviction

> petitions are more stringent....' Daniel v. State, 86 So. 3d 405, 410–11 (Ala. Crim. App. 2011). Rule 32.6(b), Ala. R. Crim. P., requires that full facts be pleaded in the petition if the petition is to survive summary dismissal. See Daniel, supra. Thus, to satisfy the requirements for pleading as they relate to postconviction petitions, Washington was required to plead full facts to support each individual claim."

Washington v. State, 95 So. 3d 26, 59 (Ala. Crim. App. 2012). "The pleading requirements of Rule 32 apply equally to capital cases in which the death penalty has been imposed." Taylor v. State, 157 So. 3d 131, 140 (Ala. Crim. App. 2010).

The circuit court also summarily dismissed some of Harris's claims on the merits. "[A] circuit court may, in some circumstances, summarily dismiss a postconviction petition based on the merits of the claims raised therein." Bryant v. State, 181 So. 3d 1087, 1102 (Ala. Crim. App. 2011). Here, the circuit judge who ruled on Harris's Rule 32 petition was the same judge who presided over Harris's capital-murder trial.

> " ' "In some cases, recollection of the events at issue by the judge who presided at the original conviction may enable him summarily to dismiss a motion for postconviction relief." Little v. State, 426 So. 2d 527, 529 (Ala. Cr. App. 1983). "If the circuit judge has personal knowledge of the actual facts underlying the allegations in the petition, he

> may deny the petition without further proceedings so long as he states the reasons for the denial in a written order." Sheats v. State, 556 So. 2d 1094, 1095 (Ala. Cr. App. 1989).' "

Ray v. State, 646 So. 2d 161, 162 (Ala. Crim. App. 1994) (quoting Norris v. State, 579 So. 2d 34, 35 (Ala. Crim. App. 1991)). This is true even with respect to claims of ineffective assistance of counsel.

> "Neither this Court nor the Alabama Supreme Court has ever held that an evidentiary hearing must be conducted on every postconviction petition that raises a claim of ineffective assistance of counsel. Such a requirement would burden an already overburdened judiciary. 'An evidentiary hearing on a coram nobis petition [now Rule 32 petition] is required only if the petition is "meritorious on its face." Ex parte Boatwright, 471 So. 2d 1257 (Ala. 1985).' Moore v. State, 502 So. 2d 819, 820 (Ala. 1986)."

Jackson v. State, 133 So. 3d 420, 444-45 (Ala. Crim. App. 2009). See also Ex parte Hill, 591 So. 2d 462, 463 (Ala. 1991) ("[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."); and Partain v. State, 47 So. 3d 282, 286 (Ala. Crim. App. 2008) ("[A] circuit judge who has personal knowledge of the facts underlying an

allegation of ineffective assistance of counsel may summarily deny that allegation based on the judge's personal knowledge of counsel's performance.").

Moreover, on direct appeal, this Court reviewed the trial proceedings for plain error. See Rule 45A, Ala. R. App. P. However, the plain-error standard of review does not apply in a postconviction proceeding. See, e.g., Ferguson v. State, 13 So. 3d 418, 424 (Ala. Crim. App. 2008). With certain exceptions not applicable here, "this Court may affirm the judgment of the circuit court for any reason, even if not for the reason stated by the circuit court." Acra v. State, 105 So. 3d 460, 464 (Ala. Crim. App. 2012).

Analysis

I.

Harris contends that Circuit Judge Edward McFerrin erred in refusing to recuse himself from presiding over the postconviction proceedings. (Issue IX in Harris's brief.) Specifically, Harris argues, as he did in his motion seeking Judge McFerrin's recusal, that Judge McFerrin should have recused himself because, he says, Judge McFerrin

"had impermissibly prejudged" Harris's claims of ineffective assistance of counsel when, in sentencing Harris to death, Judge McFerrin stated that Harris's counsel had been effective in representing him. (Harris's brief, p. 94.)

In his order sentencing Harris to death, Judge McFerrin stated, in relevant part:

> "Finally, this Court notes that Harris was ably represented by Ms. Charlotte Tesmer and Mr. Steven Townes at both trials. Harris's attorneys were well-prepared, diligent, and performed admirably in their defense of Harris. Based on the overwhelming evidence against Harris in this case and the eventual outcome, this Court avers that Harris's attorneys provided effective assistance throughout Harris's trial."

(RDA, C. 497.) In denying Harris's motion to recuse, Judge McFerrin stated:

> "Before this Court is the motion to recuse of the defendant, based on the comment of this Court in its sentencing order that counsel conducted themselves in an effectual manner during trial. The State responded to the motion.
>
> "This Court notes that judges on post-trial motions and in Rule 32 proceedings are often and regularly called on to revisit issues they have specifically ruled on adversely to the person making the request. This Court has no bias or prejudice against the defendant, or for or against his former

> counsel whom he claims misrepresented him. I am aware of no reason that would preclude this Court from fairly considering any factual or legal claim related to the defendant's petition.
>
> "Counsel for the defendant has put together a resourceful argument for recusal but it is not persuasive to the undersigned. The cases cited by the defendant to support legal propositions are distinguishable from the circumstances present here."

(C. 728.)

All judges are presumed to be impartial and unbiased, Cotton v. Brown, 638 So. 2d 870 (Ala. 1994), and the burden is on the party seeking recusal to prove otherwise. Ex parte Melof, 553 So. 2d 554, 557 (Ala. 1989). Canon 3.C(1), Alabama Canons of Judicial Ethics, provides, in relevant part:

> "(1) A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned, including but not limited to instances where:
>
> > "(a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> >
> > "(b) He served as a lawyer in the matter in controversy, or a lawyer with whom he previously

> practiced law served during such association as a lawyer in the matter, or the judge or such lawyer has been a material witness concerning it."

As the Alabama Supreme Court explained in Ex parte Duncan, 638 So. 2d 1332 (Ala. 1994):

> "Under Canon 3(C)(1), Alabama Canons of Judicial Ethics, recusal is required when 'facts are shown which make it reasonable for members of the public or a party, or counsel opposed to question the impartiality of the judge.' Acromag-Viking v. Blalock, 420 So. 2d 60, 61 (Ala. 1982). Specifically, the Canon 3(C) test is: 'Would a person of ordinary prudence in the judge's position knowing all of the facts known to the judge find that there is a reasonable basis for questioning the judge's impartiality?' Matter of Sheffield, 465 So. 2d 350, 356 (Ala. 1984). The question is not whether the judge was impartial in fact, but whether another person, knowing all of the circumstances, might reasonably question the judge's impartiality -- whether there is an appearance of impropriety. Id; see Ex parte Balogun, 516 So. 2d 606 (Ala. 1987); see, also, Hall v. Small Business Administration, 695 F.2d 175 (5th Cir. 1983)."

638 So. 2d at 1334.

> "A trial judge's ruling on a motion to recuse is reviewed to determine whether the judge exceeded his or her discretion. See Borders v. City of Huntsville, 875 So. 2d 1168, 1176 (Ala. 2003). The necessity for recusal is evaluated by the 'totality of the facts' and circumstances in each case. Dothan Pers. Bd., 831 So. 2d at 2. The test is whether ' "facts are shown which make it reasonable for members of the public, or a party, or counsel opposed to question the impartiality of the judge." ' In

> re Sheffield, 465 So. 2d 350, 355-56 (Ala. 1984) (quoting Acromag-Viking v. Blalock, 420 So. 2d 60, 61 (Ala. 1982))."

Ex parte George, 962 So. 2d 789, 791 (Ala. 2006).

Rule 32.6(d), Ala. R. Crim. P., provides that a Rule 32 petition "shall be assigned to the sentencing judge where possible, but for good cause the proceeding may be assigned or transferred to another judge."

> "Rule 32.6(d) favors the policy of giving a judge already familiar with the case the opportunity to correct any errors which may have occurred. The Rule states that the petition shall be assigned to the sentencing judge, if possible, but for 'good cause' may be assigned to or transferred to another judge. If a petitioner files a motion for the judge to whom the petition is assigned to disqualify himself, then petitioner must show 'good cause' why the motion should be granted."

H. Maddox, Alabama Rules of Criminal Procedure, § 32.6(d), p. 988 (3d ed. 1999).

> "While the American Bar Association's Standards for Criminal Justice do not decide whether post-conviction proceedings should be handled by the same judge, there is no policy against using the same judge in a post-conviction proceeding. See Berg v. State, 403 N.W.2d 316, 318 (Minn. Ct. App. 1987) (stating it is not improper for the trial judge to also be the post-conviction judge). Our cases make clear, '[a] ruling adverse to a party in the same or prior proceeding does not render a judge biased so as to require disqualification.' Farm Credit Bank v. Brakke, 512 N.W.2d 718, 720 (N.D. 1994) (citing In re Hipp, Inc., 5 F.3d 109, 116 (5th Cir. 1993) and

> Sargent County Bank v. Wentworth, 500 N.W.2d 862, 879 n. 10 (N.D. 1993))."

Falcon v. State, 570 N.W.2d 719, 722-23 (N.D. 1997). See also Woodward v. State, 276 So. 3d 713, 731-32 (Ala. Crim. App. 2018), and the cases cited therein.

We cannot say that a reasonable person, knowing all the facts and circumstances, would question Judge McFerrin's impartiality simply because he commented in his sentencing order on the performance of trial counsel, performance he observed during Harris's trial. Judge McFerrin's comments do not indicate that he had prejudged Harris's claims of ineffective assistance of counsel, nor do they make him incapable of rendering a fair decision on those claims. Therefore, Harris's motion for recusal was properly denied.

II.

Harris contends, as he did in his postjudgment motion, that the circuit court's order summarily dismissing his petition denied him due process. (Issue VIII in Harris's brief.) He makes two arguments in support of this contention.

A.

First, Harris argues that the circuit court erroneously adopted "in a wholesale, near-verbatim manner" the State's proposed order as its order summarily dismissing his petition. (Harris's brief, at p. 89.) According to Harris, such a wholesale adoption of the State's proposed order indicates that there was no independent judgment made by the circuit court regarding his claims. We disagree.

"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).

Unlike Ex parte Ingram, supra, in which the circuit court made patently erroneous statements that it had personal knowledge of the case and had " 'presided over Ingram's capital murder trial and personally observed the performance of both lawyers throughout Ingram's trial and sentencing,' " 51 So.3d at 1123 (citation and emphasis omitted), when, in fact, it had not, the circuit court's order here contains no such patently erroneous statements. In addition, unlike Ex parte Scott, 262 So. 3d 1266, 1274 (Ala. 2011), in which the circuit court adopted verbatim as its order the State's answer to the petition, which, "by its very nature, is adversarial and sets forth one party's position in the litigation," the court here adopted the State's proposed order, not the State's answer. Moreover, the record indicates that almost five years passed between the State's submission of the proposed order and the court's dismissal of Harris's petition, and the circuit court's order was substantially longer (69 pages) than the State's proposed order (37 pages). Although many of the changes the circuit court made to the proposed order involved style,

spelling, and spacing, it is nonetheless clear that the proposed order had been thoroughly evaluated by the circuit court before it was adopted.

After thoroughly reviewing the record, we conclude that the circuit court's order was the product of its own independent judgment and not "merely an unexamined adoption of a proposed order submitted by the State." Miller v. State, 99 So. 3d 349, 359 (Ala. Crim. App. 2011). Therefore, there was no error on the part of the circuit court in adopting the State's proposed order.

B.

Second, Harris argues that the circuit court contravened Rule 32.9, Ala. R. Crim. P., by not making specific findings of fact regarding each of his claims. According to Harris, the circuit court "repeatedly dismissed [his claims] in a general fashion without making any express findings as to their purported insufficiency." (Harris's brief, pp. 92-93.)

> "The general rule is that a circuit court is not required to make specific findings of fact when summarily dismissing a Rule 32 petition. See Fincher v. State, 724 So.2d 87, 89 (Ala. Crim. App. 1998) ('Rule 32.7 does not require the trial court to make specific findings of fact upon a summary dismissal.'). ... ' "Rule 32.9(d), Ala. R. Crim. P., requires the circuit court to make specific findings of fact only after an evidentiary hearing

> or the receipt of affidavits in lieu of a hearing."' Daniel v. State, 86 So. 3d 405, 412 (Ala. Crim. App. 2011) (quoting Chambers v. State, 884 So. 2d 15, 19 (Ala. Crim. App. 2003)). The exception to this general rule is when the circuit judge presided over the petitioner's trial and summarily dismisses a claim on its merits based on the judge's own personal knowledge. See, e.g., Ex parte Walker, 800 So. 2d 135, 138 (Ala. 2000) ('A circuit court may summarily dismiss a Rule 32 petition without an evidentiary hearing if the judge who rules on the petition has "personal knowledge of the actual facts underlying the allegations in the petition" and "states the reasons for the denial in a written order." Sheats v. State, 556 So. 2d 1094, 1095 (Ala. Crim. App. 1989)."); and Fincher [v. State], 724 So. 2d [87] at 89 [(Ala. Crim. App. 1998)] ('Rule 32.7 does not require the trial court to make specific findings of fact upon a summary dismissal. It would be absurd to require the trial court to resolve a factual dispute where none exists.... [However,] any time a circuit court states that a Rule 32 petition is being disposed of on the merits, the circuit court must provide specific findings of fact supporting its decision -- even if there has been no evidentiary hearing and no affidavits, written interrogatories, or depositions have been submitted in lieu of an evidentiary hearing.')."

Woodward v. State, 276 So. 3d 713, 737 (Ala. Crim. App. 2018).

Here, the circuit court summarily dismissed some of Harris's claims on the merits and some of Harris's claims on the ground that Harris had failed to satisfy his burden of pleading. In its order, the circuit court stated its reasons for summarily dismissing each of Harris's claims and, contrary to Harris's contention, the circuit court made specific findings of

fact regarding those claims it dismissed on the merits. As for those claims it dismissed on inadequate-pleading grounds, the circuit court was not required, as Harris contends, to make "express findings as to their purported deficiency," although for the most part, the court did so anyway. The circuit court's order complies with Alabama law.

III.

Harris contends that the circuit court erred in summarily dismissing his claims of juror misconduct. (Issues I and II in Harris's brief.)

> "To sufficiently plead a claim of juror-misconduct, a Rule 32 petitioner must, at a minimum, identify the juror who the petitioner believes committed the misconduct, must allege specific facts indicating what actions that juror took that the petitioner believes constituted misconduct, and must allege specific facts indicating how that juror's actions denied the petitioner a fair trial."

Reeves v. State, 226 So. 3d 711, 753-54 (Ala. Crim. App. 2016). "The proper standard for determining whether juror misconduct warrants a new trial, as set out by this Court's precedent, is whether the misconduct might have prejudiced, not whether it actually did prejudice, the defendant." Ex parte Dobyne, 805 So. 2d 763, 771 (Ala. 2001). "The might-have-been-prejudiced standard, although on its face a light

standard, actually requires more than simply showing that juror misconduct occurred." Bryant v. State, 181 So. 3d 1087, 1125 (Ala. Crim. App. 2011). "[T]he question whether the jury's decision might have been affected is answered not by a bare showing of juror misconduct, but rather by an examination of the circumstances particular to the case." Ex parte Apicella, 809 So. 2d 865, 871 (Ala. 2001).

A.

Harris argues that jurors R.J. and R.G. failed to disclose critical information during voir dire examination.

> "It is true that the parties in a case are entitled to true and honest answers to their questions on voir dire, so that they may exercise their peremptory strikes wisely. See Fabianke v. Weaver, 527 So. 2d 1253 (Ala. 1988). However, not every failure to respond properly to questions propounded during voir dire 'automatically entitles [the defendant] to a new trial or reversal of the cause on appeal.' Freeman v. Hall, 286 Ala. 161, 166, 238 So. 2d 330, 335 (1970); see also Dawson v. State, [710 So. 2d 472,] 474 [(Ala. 1997)]; and Reed v. State, [547 So. 2d 596 (Ala. 1989)]. As stated previously, the proper standard to apply in determining whether a party is entitled to a new trial in this circumstance is 'whether the defendant might have been prejudiced by a veniremember's failure to make a proper response.' Ex parte Stewart, 659 So. 2d [122,] 124 [(Ala. 1993)]. Further, the determination of whether a party might have been prejudiced, i.e., whether there was probable prejudice, is a matter within the trial court's discretion. Eaton

v. Horton, 565 So. 2d 183 (Ala. 1990); Land & Assocs., Inc. v. Simmons, 562 So. 2d 140 (Ala. 1989) (Houston, J., concurring specially).

> " 'The determination of whether the complaining party was prejudiced by a juror's failure to answer voir dire questions is a matter within the discretion of the trial court and will not be reversed unless the court has abused its discretion. Some of the factors that this Court has approved for using to determine whether there was probable prejudice include: 'temporal remoteness of the matter inquired about, the ambiguity of the question propounded, the prospective juror's inadvertence or willfulness in falsifying or failing to answer, the failure of the juror to recollect, and the materiality of the matter inquired about.' "

"Union Mortgage Co. v. Barlow, 595 So. 2d [1335,] 1342–43 [(Ala. 1992)] (quoting Freeman v. Hall, supra (other citations omitted)). ...

"The form of prejudice that would entitle a party to relief for a juror's nondisclosure or falsification in voir dire would be its effect, if any, to cause the party to forgo challenging the juror for cause or exercising a peremptory challenge to strike the juror. Ex parte Ledbetter, 404 So. 2d 731 (Ala. 1981); Warrick v. State, 460 So. 2d 320 (Ala. Crim. App. 1984); and Leach v. State, 31 Ala. App. 390, 18 So. 2d 285 (1944). If the party establishes that the juror's disclosure of the truth would have caused the party either to (successfully) challenge the juror for cause or to exercise a peremptory challenge to strike the juror, then the party has made a prima facie showing of prejudice. Id. Such prejudice can be established by the obvious tendency of the true facts to bias the juror, as in

> Ledbetter, supra, or by direct testimony of trial counsel that the true facts would have prompted a challenge against the juror, as in State v. Freeman, 605 So. 2d 1258 (Ala. Crim. App. 1992)."

Ex parte Dobyne, 805 So. 2d at 771-73.

> "This Court has recognized that '[i]n examining a juror-misconduct claim based on a juror's failure to answer questions truthfully, the phrasing of the exact question is critical.' Bryant v. State, 181 So. 3d 1087, 1125 (Ala. Crim. App. 2011). 'Unless a juror is asked a question which applies to him in a manner demanding response, it is permissible for a juror to remain silent; the juror is under no duty to disclose.' Parish v. State, 480 So. 2d 29, 30 (Ala. Crim. App. 1985)."

Brownfield v. State, 266 So. 2d 777, 792-93 (Ala. Crim. App. 2017).

1.

First, Harris argues that R.J. failed to disclose that she had seen Harris the day after the murders when he drove past her house in a red automobile. In his petition, Harris alleged, in relevant part:

> "As the record demonstrates, [R.J.] indicated both in her questionnaire and in voir dire that she did not have any firsthand knowledge of Mr. Harris's case beyond her acquaintance with Harris through her son. Indeed, she said that she had only heard about the case from newspapers and television, but that she did not remember any details. However, [R.J.'s] responses in her questionnaire and in voir dire were not accurate.

"[R.J.] did indeed have firsthand knowledge of the case; she simply failed to disclose it.

"In August 2002, [R.J.] was already personally acquainted with Mr. Harris. She had met him because he was in the same circle of friends as her son. On one occasion, Mr. Harris had come into [R.J.'s] home along with other friends of [R.J.'s] son.

"On Tuesday, August 27, 2002, [R.J.] mowed the lawn outside her house on a riding lawn mower. ...

"While [R.J.] was mowing the lawn outside her house ... she saw Westley Harris drive past her house in a red car. She saw Mr. Harris drive south on School Street and then make a left onto Tyner Road. ... [R.J.] could see Mr. Harris's face very clearly. However, Mr. Harris did not wave to her or otherwise acknowledge her in any way.

"Ordinarily, Mr. Harris would have waved to [R.J.] or otherwise acknowledged her if he was driving by her house and she was outside. Because Mr. Harris did not wave to [R.J.] when he drove past her when she was mowing the lawn on Tuesday, August 27, 2002, [R.J.] felt that something unusual was going on.

"[R.J.] was able to remember that the events described above occurred on Tuesday, August 27, 2002, because she later learned from news reports that six family members of Mr. Harris's girlfriend had been killed.... When [R.J.] saw the news reports, she thought that Mr. Harris must have been involved in the killings and must have had them on his mind when he drove past her on August 27, 2002.

> "During the guilt phase of Mr. Harris's trial, the prosecution presented evidence about where Mr. Harris went in the days and hours after the killings. ... The prosecution's evidence included testimony that Mr. Harris visited a man named Jarvis 'Jabo' Scanes in Dozier, Alabama, on Tuesday, August 27, 2002. ...
>
> "[R.J.] knew that Mr. Scanes's family had been living on Tyner Road in Dozier, Alabama, in August 2002.
>
> "The prosecution's evidence that Harris went to visit Mr. Scanes on August 27, 2002, was consistent with the fact that [R.J.] saw Harris turning onto Tyner Road on August 27, 2002. Therefore, [R.J.] believed that the prosecution's evidence was correct."

(C. 855-57.)

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

> "[R.J.] was not specifically asked if she had seen Harris at any time after the murders; therefore, she did not commit misconduct by failing to disclose that information. See Davis v. State, 283 So. 2d 650, 652 (Ala. Crim. App. 1973) (holding that '[v]eniremen cannot be expected to reveal information not elicited by the litigants.'). ...
>
> "[R.J.] admitted knowing Harris when asked and otherwise actively engaged in voir dire by responding to numerous other questions asked by the State and defense counsel. (R. 5403-5504, 5419, 5430, 5439-5440, and 5512.) Her active participation in voir dire is strong evidence she did not commit misconduct. See Jones v. State, 753 So. 2d [1171,]

> 1201 [(Ala. Crim. App. 1999) (finding it 'significant' in rejecting Jones's claim a juror failed to respond truthfully during voir dire that the juror 'actively engaged in voir dire and when asked admitted that he knew the victims.'). Harris did not allege in his amendment that [R.J.'s] alleged failure to disclose certain information 'was in any way willful or intentional.' Bryant v. State, [181 So. 3d 1087, 1126 (Ala. Crim. App. 2011).]
>
> "This Court finds that this claim of juror misconduct is without merit; therefore, it is denied. Rule 32.7(d), Ala. R. Crim. P."

(C. 1067-69.) We agree with the circuit court.

The record from Harris's direct appeal shows, and Harris concedes, that R.J. responded during voir dire that she knew Harris and that he was in a group of friends that included her son. R.J. also stated that, even though she knew Harris, she had not formed an opinion on his guilt or innocence and that she could base her decision on the evidence presented at trial. As the circuit court noted, prospective jurors were not asked if they had seen Harris following the murders. "There is no nondisclosure if counsel does not ask a clear question." Massey v. Carter, 238 S.W.3d 198, 201 (Mo. Ct. App. 2007). Alabama has never imposed a duty on a prospective juror to volunteer information during voir dire examination.

In 1973, this Court in Davis v. State, 51 Ala. App. 200, 202, 283 So. 2d 650, 652 (Ala. Crim. App. 1973), held that "[v]eniremen cannot be expected to reveal information not elicited by the litigants." It is well settled that, " '[u]nless a juror is asked a question which applies to him in a manner demanding response, it is permissible for a juror to remain silent; the juror is under no duty to disclose.' " Green v. State, 591 So. 2d 576, 579 (Ala. Crim. App. 1991) (quoting Parish v. State, 480 So. 2d 29, 30 (Ala. Crim. App. 1985)). As this Court stated in Woodson v. State, 794 So. 2d 1226 (Ala. Crim. App. 2000):

> "[T]he appellant argues that jurors S.M. and M.L. committed misconduct when they did not disclose that they knew his family. The record does not reflect that the parties or the trial court asked the veniremembers whether they knew the appellant's family. 'Veniremen cannot be expected to reveal information not elicited by the litigants.' Davis v. State, 51 Ala. App. 200, 202, 283 So. 2d 650 (Ala. Crim. App. 1973). See also Marshall v. State, 668 So. 2d 891 (Ala. Crim. App. 1995). Therefore, because neither party specifically asked S.M. and M.L. whether they knew the appellant's family, they did not have an obligation to volunteer that information. Accordingly, the appellant's argument is without merit."

794 So. 2d at 1230.

Harris argues, however, that when R.J. was asked if she had any information about the case, she was required to disclose that she had seen Harris driving by her house the day after the murders. We disagree. There was no indication during voir dire that Harris's driving through the community the day after the murders would be a material issue in the case (and indeed it was not) so as to alert R.J. to the need to disclose that she had seen Harris. In Jones v. State, 753 So. 2d 1174 (Ala. Crim. App. 1999), this Court considered whether there was misconduct when a juror failed to disclose that he had been in the victim's house, where she was murdered, on two or three occasions. Finding no misconduct, we stated:

> "We are unwilling to say that J.M. responded untruthfully to the question posed by the trial court during voir dire examination and that his failure to respond constituted juror misconduct. The question, 'Do any [of you] know anything about the facts of this case which would influence your verdict one way or the other?' left room for subjective interpretations. From the testimony presented at the Rule 32 hearing, Juror J.M. had limited knowledge of the victims' house. We do not find the fact that Juror J.M. had made two or three service calls and knew the kitchen and back porch of the victims' house, in light of the fact that the murders occurred in another location in the house, to constitute 'facts of this case.' Moreover, Jones had been informed that J.M. knew the victims and counsel could have explored during voir dire examination the basis of that

> knowledge. Finally, Jones has failed to establish that J.M.'s failure to indicate that he had frequented the victims' house on two or three occasions before the murders prejudiced him. Therefore, we find no basis for a finding that J.M.'s actions were prejudicial. See also Brownlee v. State, 545 So. 2d 151 (Ala. Cr. App. 1988), aff'd, 545 So. 2d 166 (Ala.), cert. denied, 493 U.S. 874, 110 S.Ct. 208, 107 L.Ed.2d 161 (1989) (the mere fact that a juror is personally acquainted with the victim does not automatically disqualify him from sitting on the criminal jury)."

753 So. 2d at 1203.

Because R.J. did not fail to disclose information during voir dire, she did not commit misconduct, and summary dismissal of this claim of juror misconduct was proper.

2.

Second, Harris argues that R.G. failed to disclose that he had been a pallbearer at John Ball's funeral. In his petition, Harris alleged, in relevant part:

> "[R.G.] indicated in his questionnaire and in voir dire that he did not have personal knowledge of anyone 'who may be connected with this case' and that he did not remember anything about the case beyond the fact that 'some members, I think, six members of the Ball family had been killed at the home and Westley Devone Harris was the suspect. However, [R.G.'s] responses were not accurate.

> "[R.G.] served as a pallbearer at the funeral service for the victims. He carried John Ball's coffin. [R.G.] and the other pallbearers knew which coffin was which because the name of the decedent in each particular coffin was noted on the coffin.
>
> "Given his service as a pallbearer, [R.G.] knew far more about his case than that it involved 'some members' of the Ball family, as he stated in voir dire. Indeed, [R.G.] was so familiar with the victims that he played a significant role in their funeral. Moreover, [R.G.] himself was 'connected with this case' in that he served as a pallbearer at the funeral, yet he stated in voir dire that he did not know anyone 'who may be connected with [the] case' and that his only knowledge of the case came from television or newspapers.
>
> "If [R.G.] had disclosed in his questionnaire or in voir dire that he had served as a pallbearer at the funeral service for the victims in this case, defense counsel would have challenged him for cause. If defense counsel had challenged [R.G.,] the trial court would have granted the challenge because a person who serves as a pallbearer for the victim of a crime is likely to be prejudiced against the defendant charged with that crime. ... However, even if the trial court had not granted the defense's challenge for cause, defense counsel would have removed [R.G.] from the venire by peremptory strike. Moreover, putting aside the question of whether [R.G.] would have been removed from the jury, his service as a pallbearer and his failure to disclose that service in voir dire demonstrate that he was not an impartial juror."

(C. 851-53.) Harris cited numerous pages in the record from his direct appeal where questions were asked of the prospective jurors concerning how much they knew about the case.

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

> "[R.G.] responded to numerous questions posed by the State and defense counsel during voir dire. (R. 5417-5418, 5425-5426, 5430, 5439-5440, and 5511-5512.) [R.G.] also affirmatively responded during voir dire when defense counsel [asked] if anyone had attended the victims' funeral. (R. 5547-5548.) [R.G.] was not asked any specific questions by the State or defense counsel about what may have occurred at the victims' funeral. Harris did not explain in his amendment why the questions posed to [R.G.] should have prompted him to disclose he served as a pallbearer. ... Even assuming [R.G.] did serve as a pallbearer, he did not commit misconduct by failing to disclose that information. ...
>
> "This Court finds that this claim of juror misconduct is without merit; therefore, it is denied. Rule 32.7(d), Ala. R. Crim. P."

(C. 1065-66.) The circuit court's findings are correct.

The record from Harris's trial shows that the prospective jurors were asked: "Did anyone here, friends or family, go to the funerals that were had for the victims, for the Ball family and Mr. [Willie] Haslip?" (RDA, R. 5547.) R.G. responded that he had attended the victims' funerals. Prospective jurors who had responded affirmatively were then asked if the fact that they had attended the funerals would affect their ability to be

fair and impartial, and each juror, including R.G., answered that it would have no affect on his or her ability to be impartial. R.G. was asked no further follow-up questions to elaborate on his responses, and defense counsel did not ask if R.G., or any other prospective juror, had participated in the funeral. R.G. did not volunteer that he had been a pallbearer, but he did state that he knew Joanne Ball, that he had gone to school with her, that he had not spoken to her after attending school, and that he did not consider himself a close personal friend of Joanne Ball. R.G. also responded that there was nothing that would affect his ability to be impartial. "If counsel does not ask these questions, 'the material information which a juror fails to disclose is not really "withheld." ' " Hicks v. State, 606 S.W.3d 308, 319 (Tex. App. 2020) (quoting Armstrong v. State, 897 S.W.2d 361, 367 (Tex. Cr. App. 1995)).

We agree with the circuit court that, even assuming that R.G. served as a pallbearer at the victims' funerals, because prospective jurors were not asked if they had participated in the victims' funerals, R.G. did not fail to answer any questions truthfully during voir dire and did not commit

misconduct. Therefore, summary dismissal of this claim of juror misconduct was proper.

B.

Harris contends that, during guilt-phase deliberations, jurors bargained for guilt-phase votes with penalty-phase votes to reach a verdict. In pleading this claim in his petition, Harris alleged, in relevant part:

> "Several jurors did not want to find Mr. Harris guilty during the jury's guilt-phase deliberations but agreed to do so pursuant to agreements that other jurors would recommend a sentence of life without the possibility of parole for Mr. Harris at the penalty phase. During the guilt-phase deliberations, each of the twelve jurors ... stated his or her opinion as to the question of penalty and participated in the process of bargaining guilt-phase votes for penalty-phase votes.
>
> "....
>
> "Here, the jurors deliberated on the question of penalty and struck bargains regarding their penalty-phase votes during their guilt-phase deliberations. If the jurors had not deliberated on the question of penalty and struck bargains regarding their penalty-phase votes during their guilt-phase deliberations, Mr. Harris would not have been convicted of capital murder. In addition, if the jurors had not deliberated on the question of penalty and struck bargains regarding their penalty-phase votes during their guilt-phase deliberations, the jury's sentencing recommendation would have been more

> strongly in favor of a sentence of life in prison without the possibility of parole."

(C. 837-40.)

The circuit court summarily dismissed this claim on the merits, finding that "[t]he debates and discussions by jurors during their deliberations cannot form the basis of impeaching the jury's verdict." (C. 1059.) We agree. Rule 606(b), Ala. R. Evid., provides, in pertinent part:

> "[A] juror may not testify in impeachment of the verdict ... as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."

In discussing the scope of Rule 606, the Alabama Supreme Court in Sharrief v. Gerlach, 798 So. 2d 646 (Ala. 2001), explained:

> " 'Generally, affidavits are inadmissible to impeach a jury's verdict. An affidavit showing that extraneous facts influenced the jury's deliberations is admissible; however, affidavits concerning "the debates and discussions of the case by the jury while deliberating thereon" do not fall with this exception.'

"HealthTrust, Inc. v. Cantrell, 689 So. 2d 822, 828 (Ala. 1997). See also Ala. R. Evid. 606(b); this rule is substantially similar to Rule 606(b), Fed. R. Evid. In Peveto v. Sears, Roebuck & Co., 807 F.2d 486, 489 (5th Cir. 1987), the United States Court of Appeals for the Fifth Circuit held that 'by implementing Rule 606(b), Congress has made the policy decision that the social costs of such error are outweighed by the need for finality to litigation.' The Seventh Circuit has held that Rule 606(b) is designed 'to protect the judicial process from efforts to undermine verdicts by scrutinizing the jurors' thoughts and deliberations.' United States v. Ford, 840 F.2d 460, 465 (7th Cir. 1988). Other courts of appeals for the federal circuits have stated that Rule 606(b) promotes 'free and uninhibited discourse during deliberations.' Attridge v. Cencorp Div. of Dover Techs. Int'l, Inc., 836 F.2d 113, 116 (2d Cir. 1987); Maldonado v. Missouri Pac. Ry., 798 F.2d 764 (5th Cir. 1986).

"The plaintiffs misconceive the distinction, under Alabama law, between 'extraneous facts,' the consideration of which by a jury or jurors may be sufficient to impeach a verdict, and the 'debates and discussions of the jury,' which are protected from inquiry. This Court's cases provide examples of extraneous facts. This Court has determined that it is impermissible for jurors to define terms, particularly legal terms, by using a dictionary or encyclopedia. See Fulton v. Callahan, 621 So. 2d 1235 (Ala. 1993); Pearson v. Fomby, 688 So. 2d 239 (Ala. 1997). Another example of juror misconduct leading to the introduction of extraneous facts sufficient to impeach a jury verdict is an unauthorized visit by jurors to the scene of an automobile accident, Whitten v. Allstate Ins. Co., 447 So. 2d 655 (Ala. 1984), or to the scene of a crime, Dawson v. State, 710 So. 2d 472 (Ala. 1997).

"The problem characteristic in each of these cases is the extraneous nature of the fact introduced to or considered by

> the jury. The improper matter someone argues the jury considered must have been obtained by the jury or introduced to it by some process outside the scope of the trial. Otherwise, matters that the jurors bring up in their deliberations are simply not improper under Alabama law, because the law protects debates and discussions of jurors and statements they make while deliberating their decision. CSX Transp. v. Dansby, 659 So. 2d 35 (Ala. 1995). This Court has also noted that the debates and discussions of the jury, without regard to their propriety or lack thereof, are not extraneous facts that would provide an exception to the general rule of exclusion of juror affidavits to impeach the verdict. Weekley v. Horn, 263 Ala. 364, 82 So. 2d 341 (1955)."

798 So. 2d at 652-53. See also Lewis v. State, 725 So. 2d 183, 190 (Miss. 1998) ("Jurors generally may not impeach their own verdict by testifying about motives or influences affecting deliberations."); Miles v. State, 350 Ark. 243, 251, 85 S.W.3d 907, 912 (2002) ("We have unequivocally stated that any effort by a lawyer to gather information in violation of Rule 606(b) to impeach a jury's verdict is improper.").

> "The juror's statements as to his desire to vote not guilty, pressure from the other jurors to change his vote, the juror's 'moral dilemma,' and the jury's reliance upon the defendants' failure to testify fell directly within the purview of Rule 606(2). These statements revealed the juror's mental processes and attempted to impeach the jury's verdicts on the basis of its motives, methods, and discussions during deliberations. As such, the statements were inadmissible and could not have been considered by the district court. "

State v. Stricklin, 290 Neb. 542, 567, 861 N.W.2d 367, 390 (2015).

Because jurors are foreclosed from testifying concerning their reasoning for reaching the verdict they reached, summary dismissal of this claim of juror misconduct was proper.

C.

Harris contends that a third party improperly communicated with jurors. In his petition, Harris pleaded, in relevant part:

> "During both the guilt phase and the penalty phase of Mr. Harris's trial, a member of the victim's [sic] family seated close to the jury box communicated with the jurors. The Ball family member, a man, repeatedly wrote words including 'fear' and 'scared' on pieces of paper in capital letters. He then traced the words over and over so that the jury would see them. Each of the twelve jurors saw both the Ball family member and the words he was tracing.
>
> "....
>
> "In Mr. Harris's case, the communications between the Ball family member tracing the words near the jury box and the twelve jurors in the case affected the jury's deliberations and verdicts at both phases of the trial. After seeing the Ball family member tracing the words, each juror feared that he or she would be harmed or unsafe if he or she voted for a not guilty verdict at the guilt phase or a sentence of life in prison without the possibility of parole at the penalty phase. If the jurors had not been in fear for their own safety as a result of the Ball family member tracing words including 'fear' and

> 'scared' near the jury box, they would not have convicted Mr. Harris of capital murder and would not have assembled five votes in favor of the death penalty.
>
> "Because the communications between the Ball family member and the jurors were improper and prejudiced the defense, they violated Mr. Harris's right to a fair trial and an impartial jury in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution."

(C. 840-41.)

In summarily dismissing this claim, the circuit court stated:

> "Harris did not state in his petition precisely when during the trial this improper conduct occurred. Harris contends that the person was a member of the victim's family but he fails to identify the individual by name. The Court also notes that Harris does not specifically allege in his petition that this conduct, if it occurred, was done to intimidate the jurors to vote a certain way. The Court notes that Janice Ball while testifying made eight or more responses indicating she was afraid of or in fear of Harris, or scared for herself and/or her child. Such writing, if it occurred was more likely a note or recording of her repeated responses. Additionally, this Court normally, if not uniformly, charged jurors to report to the Court if anyone tried to communicate with them about the case, and I do not remember receiving any such report.
>
> "This Court finds that [this] allegation ... of Harris's petition fails to meet the specificity and full factual pleading requirements of Rule 32.6(b), Ala. R. Crim. P.; therefore it is summarily dismissed."

(C. 1059-60.) We agree.

Harris failed to identify by name the Ball family member who formed the basis of this claim, and he failed to allege when during the trial the alleged misconduct occurred. Although he alleged that each juror had seen the words "fear" and "scared" and, as a result, feared for his or her safety, he failed to allege any facts indicating how the jurors knew the individual was a member of the Ball family or why the jurors would have interpreted the note as being a threat directed at them. Moreover, the record from Harris's direct appeal reflects that, given the facts that led to Harris's first trial ending in a mistrial, the trial court frequently instructed the jurors not to talk about the case with anyone and that, if anyone "trie[d] to talk to you, you are obligated to report it to the Court." (RDA, R. 5674.) As the circuit court noted, no such reports were made.

Therefore, summary dismissal of this claim of juror misconduct was proper

D.

Harris contends that jurors improperly engaged in racial stereotying. In his petition, Harris pleaded, in relevant part:

> "Numerous jurors engaged in racial stereotying during both the guilt-phase and penalty-phase deliberations. One juror, a white woman, made racially insensitive comments about the way that black people dress and stated that she did not understand 'how the blacks talk.' Another juror, an older white man, stated during deliberations that Mr. Harris should be taken outside the courthouse and 'strung up'; the juror made that statement while pointing to a tree believed to have been used in hangings of black people in the past. The aforementioned comments and other similar comments were made and perceived by other jurors as derogatory statements about black people -- and more specifically, about Mr. Harris, who is a black man."

(C. 841-42.) The circuit court found this claim to be insufficiently pleaded "because Harris fail[ed] to identify in his petition by name a single juror that engaged in racial profiling." (C. 1061.) We agree. As noted above, identification of the juror alleged to have committed the misconduct is required to sufficiently plead a juror-misconduct claim. See Reeves, 226 So. 3d at 753. Harris failed to identify by name the jurors who allegedly made the racial statements. Therefore, he failed to satisfy his burden of pleading, and summary dismissal of this claim of juror misconduct was proper.[6]

---

[6]We recognize that the United States Supreme Court recently held in Pena-Rodriguez v. Colorado, 580 U.S. ___, ___, 137 S.Ct. 855, 869 (2017), "that where a juror makes a clear statement that indicates he or

E.

Harris contends juror R.J. improperly considered extraneous facts during deliberations, specifically that she had seen Harris drive by her house the morning after the murders. After alleging the same facts he alleged in support of his claim that R.J. failed to disclose information during voir dire, see Part III.A.1. of this opinion, Harris alleged in his petition, in relevant part:

> "Here, [R.J.] considered evidence extraneous to the trial when she recalled her own experience seeing Mr. Harris on Tuesday, August 27, 2002. Her experience caused her to believe the prosecution's evidence and theory of the case and also caused her to believe that the reason Mr. Harris did not wave to her when he drove past her on Tuesday, August 27, 2002, was that he had done something wrong.

---

she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." However, as Justice Thomas noted in his dissent in Tharpe v. Sellers, 583 U.S. ___, ___, 138 S.Ct. 545, 551 (2018): "[N]o reasonable jurist could argue that Pena-Rodriguez applied retroactively on collateral review." In any event, we do not hold here, as we did in Part III. B. of this opinion, that jurors could not testify about racial remarks to impeach the verdict. Rather, we hold that Harris failed to satisfy his burden of pleading the name of the jurors alleged to have committed the misconduct. The holding in Pena-Rodriguez does not affect the pleading requirements of Rule 32.

> "Because [R.J.] considered her own firsthand knowledge of Mr. Harris's movements on Tuesday, August 27, 2002, when evaluating the credibility of the State's evidence and determining whether Mr. Harris was guilty, Mr. Harris was denied his right to a fair trial and an impartial jury under Alabama law and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution."

(C. 845.)

In summarily dismissing this claim, the circuit court stated:

> "Harris failed to proffer any facts in his amendment that, if true, would establish [R.J.'s] verdict was affected by her alleged observations. ... Harris only stated what he contends [R.J.] observed and made the conclusory statement that her observations caused her to believe the State's evidence and theory of the case.
>
> "This Court finds that the claim ... fails to meet the specificity and full factual pleading requirements of Rule 32.6(b); therefore it is summarily dismissed by this Court.
>
> "Alternatively, this Court finds this claim fails to state a ground for postconviction relief. In Bethea v. Springhill Mem'l Hosp., 833 So. 2d 1, 8 (Ala. 2001), the Alabama Supreme Court held:
>
> > " 'In order for information to come within the extraneous-information exception to Rule 606(b), [Ala. R. Evid.,] the information must come to the jurors from some external authority or through some process outside the scope of the trial, either (1) during the trial or the jury's deliberations or (2)

> before the trial but for the purpose of influencing the particular trial.'
>
> "See also Sharrief v. Gerlach, 798 So. 2d 646, 653 (Ala. 2001) (holding that '[t]he improper matter someone argues the jury considered must have been obtained by the jury or introduced to it by some process outside the scope of the trial.').
>
> "The observations that Harris alleges [R.J.] considered do not meet the definition of extrinsic evidence. Therefore, this claim is denied by this Court. Rule 32.7(d), Ala. R. Crim. P."

(C. 1063-64.) We agree with the circuit court.

First, Harris's claim was insufficiently pleaded. Harris made only a bare and speculative allegation that R.J.'s seeing him driving by her house the morning after the murders caused her to believe the prosecution's theory of the case. However, he failed to allege any facts indicating why R.J. would believe the whole of the State's case against him merely because she saw him the day after the murder was consistent with one small part of the State's case -- evidence that he had driven to Dozier, Alabama, to visit Jarvis Scanes. He also failed to allege whether R.J. shared with other jurors the fact that she had seen Harris the morning after the murders and, if so, which jurors.

Second, we agree with the circuit court that the fact that R.J. saw Harris the morning after the murders does not constitute extraneous information. See, e.g., Bethea v. Springhill Mem'l Hosp., 833 So. 2d 1, 7 (Ala. 2001) ("With regard to the 'extraneous prejudicial information' exception in Rule 606(b), we have recently noted that ' "[t]he courts of this state have generally limited the scope of this exception to the visitation of a crime scene by a juror, the introduction of the definition of legal terms in the jury room, and [the reading of] concepts from general reference books." ' Lance, Inc. v. Ramanauskas, 731 So. 2d 1204, 1214 (Ala. 1999)."). See also Titus v. State, 963 P.2d 258, 264 (Alaska 1998) ("[G]eneral community knowledge is not extraneous within the meaning of Rule 606(b), we also conclude that speculation based on such knowledge is not extraneous."); and Campbell v. State, 432 S.W.3d 673, 677 (Ark. App. 2014) ("This court has held that 'knowledge obtained by a juror and brought into the jury room from the ordinary scope of his life experiences, including knowledge obtained through his profession or vocation, does not qualify as ' "extraneous prejudicial information' as contemplated by Rule 606.' ").

> "[The appellant] argues that the jury in this case was exposed to extraneous prejudicial information in the form of a juror's specialized knowledge of medical records and informed consent. We disagree. ... The issue of extraneous prejudicial information has arisen most frequently when jurors have visited an accident scene during trial and reported their observations to other jury members. ... This case, however, does not involve a juror's foray outside the courthouse to gather extrinsic information. Rather, it involves information that the juror learned prior to trial in the ordinary scope of her life experiences and carried with her into the jury room."

Milner v. Luttrell, 384 S.W.3d 1, 7 (Ark. Ct. App. 2011).

Therefore, summary dismissal of this claim of juror misconduct was proper.

IV.

Harris contends that the circuit court erred in summarily dismissing his claims that his trial counsel were ineffective. (Issues III-VII in Harris's brief.)

To prevail on a claim of ineffective assistance of counsel, the petitioner must meet the standard articulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). The petitioner must show: (1) that counsel's performance was deficient, and (2) that the petitioner was prejudiced by his counsel's deficient performance.

466 U.S. at 687. "To meet the first prong of the test, the petitioner must show that his counsel's representation fell below an objective standard of reasonableness. The performance inquiry must be whether counsel's assistance was reasonable, considering all the circumstances." Ex parte Lawley, 512 So. 2d 1370, 1372 (Ala. 1987). " 'This court must avoid using "hindsight" to evaluate the performance of counsel. We must evaluate all the circumstances surrounding the case at the time of counsel's actions before determining whether counsel rendered ineffective assistance.' " Lawhorn v. State, 756 So. 2d 971, 979 (Ala. Crim. App. 1999) (quoting Hallford v. State, 629 So. 2d 6, 9 (Ala. Crim. App. 1992)). "A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. As the United States Supreme Court explained:

> "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct,

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

Strickland, 466 U.S. at 689 (citations omitted).

To meet the second prong of the test, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. "The likelihood of a different result must be substantial, not just conceivable." Harrington v. Richter, 562 U.S. 86, 112 (2011). "When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer -- including

an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695.

> "To sufficiently plead an allegation of ineffective assistance of counsel, a Rule 32 petitioner not only must 'identify the [specific] acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment,' Strickland v. Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), but also must plead specific facts indicating that he or she was prejudiced by the acts or omissions, i.e., facts indicating 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' 466 U.S. at 694, 104 S.Ct. 2052. A bare allegation that prejudice occurred without specific facts indicating how the petitioner was prejudiced is not sufficient."

Hyde v. State, 950 So. 2d 344, 356 (Ala. Crim. App. 2006). "[A]n ineffective-assistance-of-counsel claim is a general claim that consists of several different allegations or subcategories, and, for purposes of the pleading requirements in Rule 32.3 and Rule 32.6(b), '[e]ach subcategory is [considered] a[n] independent claim that must be sufficiently pleaded.' " Bryant v. State, 181 So. 3d 1087, 1104 (Ala. Crim. App. 2011) (quoting Coral v. State, 900 So. 2d 1274, 1284 (Ala. Crim. App. 2003), overruled on other grounds, Ex parte Jenkins, 972 So. 2d 159 (Ala. 2005)).

We note that the record from Harris's direct appeal contains the transcripts of both of Harris's trials. Harris was originally tried in November 2004 and was retried in June 2005 after a mistrial was declared. Harris's trial attorneys, Charlotte Tesmer and Steve Townes, represented Harris in both trials, and Tesmer's fee declaration reflects that she spent 368 hours preparing for Harris's first trial.

A.

Before addressing Harris's specific claims of ineffective assistance of counsel, we first address two arguments Harris makes on appeal regarding the circuit court's handling of those claims.

First, Harris argues that the circuit court erred in considering his claims individually instead of cumulatively. However, as this Court explained in Taylor v. State, 157 So. 3d 131 (Ala. Crim. App. 2010):

> "Taylor also 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, 262 So. 3d 1239 (Ala. Crim. App. 2010); see also McNabb v. State, 991 So. 2d 313, 332 (Ala. Crim. App. 2007); and Hunt v. State, 940 So. 2d 1041, 1071 (Ala. Crim. App. 2005). More to the point, however, is the fact that even when a cumulative-effect analysis is considered, only claims that are properly pleaded and not otherwise due to be summarily dismissed are considered in that analysis. A cumulative-effect analysis does not eliminate the pleading requirements established in Rule 32, Ala. R. Crim. P. An analysis of claims of ineffective assistance of counsel, including a cumulative-effect analysis, is performed only on properly pleaded claims that are not summarily dismissed for pleading deficiencies or on procedural grounds. Therefore, even if a cumulative-effect analysis were required by Alabama law, that factor would not eliminate Taylor's obligation to plead each claim of ineffective assistance of counsel in compliance with the directives of Rule 32."

157 So. 3d at 140. Because, as explained below, many of Harris's claims of ineffective assistance of counsel were properly summarily dismissed because they were insufficiently pleaded, a cumulative-error analysis here would not encompass all of Harris's claims; therefore, the circuit court did not err in not considering the claims cumulatively.

Second, Harris argues that the circuit court "erred in finding much of the evidence trial counsel failed to present at trial, as presented in Harris's petition, 'cumulative' of evidence that trial counsel did present."

(Harris's brief, p. 78.) Specifically, he argues that "the fact that trial counsel has presented some evidence on a topic does not mean [the] defendant cannot be prejudiced by the failure to present additional evidence on the same topic." (Harris's brief, p. 78.) However, he then argues that "[t]he evidence trial counsel omitted cannot properly be viewed as cumulative because trial counsel never presented the evidence in the first place." (Harris's brief, p. 79.) It is unclear if Harris is arguing that the circuit court applied an incorrect legal standard in assessing his claims of ineffective assistance of counsel or that the circuit court made erroneous factual findings that evidence had been presented at Harris's trial when, in fact, it had not. He makes only a general argument in his brief and does not cite to any portion of the circuit court's order where he believes the circuit court erroneously found that evidence pleaded in his petition was cumulative to evidence presented at trial. Be that as it may, because we conclude, for the reasons stated below, that the circuit court properly summarily dismissed all of Harris's claims of ineffective assistance of counsel, any errors the circuit court may have made in this regard are harmless.

B.

Harris contends that his trial counsel were ineffective for not renewing their motion for a change of venue after his first trial ended in a mistrial. In his petition, Harris alleged that, although his counsel moved for a change of venue, attaching an affidavit from Harris, before his first trial, which motion was denied before the first trial, counsel "failed to re-urge [the] ... motion ... after the first trial ended in a mistrial due to charges of jury tampering." (C. 682.) Instead, Harris said, "approximately one month after the mistrial, defense counsel filed a Notice of Withdrawal of Motion for Change of Venue and again attached an affidavit from Mr. Harris." (C. 695.) According to Harris, the community was so saturated with pretrial publicity, not only about the facts of the crimes but also about the facts relating to his first trial ending in a mistrial, that he was unable to obtain a fair trial in Crenshaw County.

In summarily dismissing this claim, the circuit court stated:

> "In Ferguson v. State, 13 So. 3d 418, 439 (Ala. Crim. App. 2008), the Alabama Court of Criminal Appeals held:
>
> > "'Counsel cannot be held ineffective for the informed and voluntary choices of their client.

> Moreover, a defendant cannot voluntarily choose a course of action and then blame trial counsel for that course of action. Ferguson may not claim in his Rule 32 petition that his own choices violated his constitutional rights.'
>
> "Harris executed a sworn affidavit before his second trial in which he informed this Court that he wanted to withdraw the motion for change of venue that had been filed by trial counsel. Harris made no assertion in his petition that his decision to withdraw the motion for a change of venue filed by trial counsel was not an informed and voluntary decision."

(C. 1054.) We agree.

The record from Harris's direct appeal reflects that, when counsel moved to withdraw the motion for a change of venue before Harris's second trial, counsel attached the following affidavit from Harris:

> "I, Westly Devon Harris, do swear, under the pains and penalties of perjury, that I believe that it is [in] my best interest to have the above styled cases tried in Crenshaw County, Alabama. I have discussed this matter with my attorneys and believe I can receive a fair and impartial trial and an unbiased verdict in Crenshaw County.
>
> "I therefore respectfully wish to withdraw the Motion for a Change of Venue previously filed on my behalf."

(RDA, C. 278.)

"[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). Other states have held likewise. See Brawner v. State, 947 So. 2d 254, 264 (Miss. 2006) ("Counsel will not be deemed ineffective for following his client's wishes, so long as the client made an informed decision."); Brown v. State, 894 So. 2d 137, 146 (Fla. 2004) ("An attorney will not be deemed ineffective for honoring his client's wishes."); State v. McNeill, 83 Ohio St. 3d 438, 451, 700 N.E.2d 596, 609 (1998) ("It is not ineffective assistance for counsel to accede to a client's wishes after advising the client of counsel's contrary opinion."); People v. Orange, 168 Ill. 2d 138, 169, 213 Ill. Dec. 589, 603, 659 N.E.2d 935, 949 (1995) ("[C]ounsel's compliance with his client's wishes does not support a claim of ineffective assistance of counsel."); Guinan v. State, 769 S.W.2d 427, 429 (Mo. 1989) ("Counsel is not ineffective simply because he accedes to his client's wishes, regardless how mistaken counsel believes those wishes to be."); and Nelson v. State, 21 P.3d 55, 61 (Okla. Crim. App. 2001) ("Unless there is some clear indication the defendant's trial counsel failed to properly advise him or adequately explain the consequences of that

decision, the trial attorney is not ineffective in failing to abide by his competent client's wishes, even where questionable. Indeed, he acts in a professionally unethical manner if he does not follow those directions.").

It is clear from Harris's affidavit that he wanted to withdraw the motion for a change of venue, and although he acknowledged in his petition that he had submitted the affidavit, he did not plead any facts in his petition regarding the discussions he had with counsel about withdrawing the motion or indicating that he was not adequately advised by his counsel as to the consequences of his decision. Counsel were not ineffective for following their client's wishes.

Therefore, summary dismissal of this claim of ineffective assistance of counsel was proper.

C.

Harris argues that his trial counsel were ineffective for not adequately investigating Janice Ball's account of the murders and her possible role in the murders. In his petition, Harris alleged that Janice had testified at trial that she did not know how to use guns, but that, had counsel investigated, they would have discovered that his two cousins,

Tamara and Monique Robinson, could have testified that they had heard Janice say that she knew how to fire guns and had seen her firing a gun. Harris also alleged that his counsel "was in possession of information that [Janice] harbored deep-seated anger against her family due to years of sexual molestation and abuse by family members." (C. 619.) Finally, he alleged "that there were numerous facts, either known to defense counsel prior to trial or readily discoverable by them through diligence, which strongly indicated that Janice Ball played an active role in the crimes," and he provided a laundry list of those facts, with citations to the record of his trial where the facts were presented. (C. 620.)

In summarily dismissing this claim, the circuit court stated, in relevant part:

> "Harris ... failed to state in his petition what specific information trial counsel had received that would have implicated Ms. Ball in the murders. Harris failed to specifically state what trial counsel could have done to discover such information. Harris contends that there were 'numerous facts' that 'strongly indicated that Janice Ball played an active role in the crime.' (3AP p. 7.) However, Harris did not identify in his petition an individual by name that had admissible information that would have [implicated] Ms. Ball in the murders of her six kinsmen. Harris also did not proffer in his petition what this individual's testimony would have been.

"....

"This Court finds that the allegations of ineffective assistance of counsel ... do not meet the specificity and full factual pleading requirements of Rule 32.6(b), Ala. R. Crim. P.. Harris failed to state specific facts which would demonstrate that what trial counsel actually did during their investigation was deficient or that their strategy was unreasonable. ...

"Harris also failed to specifically state how he was prejudiced under Strickland. Rule 32.6(b), Ala. R. Crim. P. Harris does not state facts which, if true, would establish that if trial counsel had conducted a further investigation that there is a reasonable probability that the result of the guilt phase of his trial would have been different. ...

"Moreover, this Court finds that this allegation of ineffective assistance of counsel is directly refuted by the record. ... Trial counsel's actions during trial demonstrated they investigated the possibility that Ms. Ball participated in the murders. Trial counsel presented the same theory of the case that Harris contends should have been presented. The Alabama Court of Criminal Appeals found on direct appeal that 'Harris's defense in this case was that he did not act alone, and that, in fact, he did not kill all of the people he was accused of murdering. The defense raised the possibility that Janice had been the instigator of the murders or even had taken part in the actual killings of certain members of her family.' Harris v. State, 2 So. 3d 880, 922 (Ala. Crim. App. 2007).

"Trial counsel elicited testimony from Ms. Ball indicating that she had had problems with family members, that family members had abused her, and that she had previously expressed a desire to kill family members. (R. 7605-11, 7637,

> 7776) Trial counsel also elicited from Ms. Ball that when her mother and Harris got into an argument that he attempted to avoid a physical fight, despite her mother hitting Harris. (R. 7646) Trial counsel questioned Ms. Ball more than once about why she did not ask anyone for help or use a phone to call for help following the murders. (R. 7740-71)
>
> "Trial counsel used the testimony they elicited from Ms. Ball during cross-examination to attack her credibility during guilt phase closing arguments. Trial counsel argued: (1) that the relationship between Harris and Ms. Ball was not over; (2) that she had access to a gun; (3) that she did not attempt to get help while she was with Harris in the days following the murders; and, (4) that she had expressed a desire to kill members of her family. (R. 8987-9025) A substantial amount of the evidence that Harris contends in his petition trial counsel should have presented during the guilt phase was, in fact, presented.
>
> "This Court finds that, in addition to being deficiently pleaded, this allegation of ineffective assistance of counsel is directly refuted by the record. Therefore, this allegation of ineffective assistance of counsel is denied. Rul 32.7(d), Ala. R. Crim. P."

(C. 1006-11.) We agree with the circuit court.

Other than testimony from his two cousins regarding Janice's familiarity with guns, Harris failed to identify in his petition any evidence that had not been presented at trial that he believed counsel could have discovered implicating Janice in the murders. See VanPelt v. State, 202

So. 3d 707, 730 (Ala. Crim. App. 2015) (" '[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.' "). In addition, with respect to the testimony of his two cousins, Harris failed to plead any facts in his petition indicating how Janice's alleged familiarity with guns implicated her in the murders.

Moreover, trial counsel raised at trial the possibility that Janice had been involved in the murders, as evidenced by the laundry list of facts identified in Harris's petition that were presented at trial indicating that Janice may have had motive to kill her family. Indeed, during opening statements, Harris's counsel stated:

> "Their whole theory -- he talked about their eyewitness. And their whole theory is based on that eyewitness, being Janice Ball. I will submit to you that we expect the evidence to show that testifying makes her a witness. The State attempts to make her a victim. The evidence will make her much more than. Much more.
>
> "....
>
> "We expect the evidence will show and she will testify that at times there were shotguns leaning up in the room with

her and he's out of the room. That while he loaded the van, she carried guns for him and gave them. She will testify to that. Everything about their case and about their theory wraps around her.

"She gave several statements. You'll hear that. Several different statements to law enforcement and they would go back and back and back.

"We expect the evidence will show that each one tries to bring it in more in line with the physical evidence and remove herself from it further and further and further. It just won't fit. It won't fit the physical evidence and it won't fit the testimony.

"....

"We also expect the evidence to show and I'll ask you to watch closely to this and see that Janice pursued him, wrote that she would fight any girl, that any woman that tried to get between her and him, that he was her savior from that family. And they won't talk about the tumultuous relationship. That Friday night she hit him with a phone and pulled a gun on him and pointed it at him. He didn't flee, Jerry took him. Jerry took him home that night.

"Now, you'll also hear and they talk about her grandmother raising -- helping raise Shay and her mother helping raise Shay. You will hear testimony from her of how they threatened to take Shay away from her. Her mother and her grandmother threatened to take Shay away from her. And she was planning, she will tell you this, she would do and she will tell you, she would do anything to get away from that family. She was making plans to be gone by the end of August. She would do anything to get away. Yes, she was living with

> Mila Ruth, her grandmother, and she'll tell you what Ruth did. She will tell you the reason was because, Willie, her daddy, and her brother had sexually abused her. That's why she was living with Mila Ruth. That's why she wanted to get away."

(R. 6376-83.) The record shows that counsel employed an investigator for both Harris's first trial and his retrial and, as mentioned above, one of Harris's attorneys spent 368 hours preparing for Harris's first trial. It is abundantly clear from the record that counsel did investigate Janice's possible involvement in the murders.

Therefore, summary dismissal of this claim of ineffective assistance of counsel was proper.

D.

Harris contends that his trial counsel were ineffective in cross-examining Janice Ball. In his petition, Harris provided a laundry list of "areas of examination that trial counsel should have pursued" when questioning Janice, including: (1) her involvement in the murders; (2) her familiarity with guns; (3) whether Janice had fired a gun the day of the murders; (4) why the clothing Harris was wearing the day of the murders did not contain blood splatters when Janice testified that he shot six

people and moved some of the bodies; (5) the alleged inconsistency between her statement that she had heard one gunshot when John Ball was killed and forensic evidence indicating that he had been shot four times; (6) how she could have seen Jerry Ball's murder from inside the house through the window when it was dark outside when Jerry was killed; (7) the fact that no gag was found despite her testimony that Harris had gagged her; (8) the fact that no rope was found despite her testimony that she had been tied up with a rope; and (9) the fact that no green nightgown was found despite her testimony that the morning of the murders she had been wearing a green nightgown and had changed clothes. (C. 632.) He then concluded that "Ms. Ball could not have answered the foregoing questions in a manner that would be consistent with or helpful to the State's case against" him. (C. 633.)

In summarily dismissing this claim, the circuit court stated:

> "Although Harris identified questions he contends trial counsel should have asked Ms. Ball, he did not state in his petition what Ms. Ball's responses would have been. Harris also did not state how Ms. Ball's responses would have benefited his defense. Harris did not demonstrate that if trial counsel had asked Ms. Ball the questions ... that her credibility would have been called into question to such a degree there is

> a reasonable probability the outcome of the guilt phase of trial would have been different.
>
> "....
>
> "... Trial counsel engaged Ms. Ball in a lengthy cross-examination. (R. 7600-81) It was apparent to this Court that trial counsel's cross-examination strategy was to elicit testimony from Ms. Ball to call the credibility of her direct testimony into question and to infer that she took part in the murders .... Harris failed to state in his petition specific facts that, if true, would demonstrate trial counsel's cross-examination of Ms. Ball did not fall 'within the wide range of reasonable professional assistance[.]' Strickland v. Washington, 466 U.S. at 689."

(C. 1020-22.) The circuit court was generous in its assessment that Harris had identified what questions he believed counsel should have asked. Harris identified "the areas of examination," he believed his counsel should have broached when questioning Janice, but, for the most part, he alleged only generally that counsel should have "asked her pointed questions" in those areas, without identifying the specific questions he believed should have been asked. In addition, other than a conclusory allegation that Janice could not have answered the unidentified "pointed questions" in a manner consistent with the State's theory of the case, Harris failed to alleged in his petition what Janice's answers would have

been or how those answers would have been beneficial to his defense. Therefore, Harris failed to satisfy his burden of pleading.

Moreover, the record from Harris's direct appeal reflects that counsel cross-examined Janice about virtually every issue Harris alleged in his petition she should have been asked about. For example, trial counsel asked Janice about her familiarity with guns, about her being tied with a telephone line and extension cord, about her hearing one shot when John Ball was killed, and about the green nightgown that she had been wearing the day of the murders. Counsel also elicited testimony from Janice that she had expressed a desire to kill her family, and that she had received approximately $98,000 from their estates. Counsel questioned Janice about other derogatory remarks she had made concerning her family, about the fact that she did not want her daughter to grow up around "these ignorant people" and about the fact that she was aware that her grandmother and parents had talked about taking her daughter away from her. (RDA, R. 7615.) Counsel further repeatedly challenged Janice about inconsistencies in her testimony, letters she had written to

relatives, and previous statements she had made to police. Counsel was well prepared and thorough in their cross-examination of Janice.

Therefore, summary dismissal of this claim of ineffective assistance of counsel was proper.

E.

Harris contends that his trial counsel were ineffective for not retaining certain experts.

"When pleading a postconviction claim that trial counsel was ineffective for failing to secure the services of an expert, this Court has required that the petitioner include in its pleading the expert's identity and the content of that expert's expected testimony." Woods v. State, 221 So. 3d 1125, 1137 (Ala. Crim. App. 2016). Moreover, "[c]ounsels' failure to call an expert witness is not per se ineffective assistance, even where doing so may have made the defendant's case stronger, because the State could always call its own witness to offer a contrasting opinion." Marshall v. State, 20 So. 3d 830, 841 (Ala. Crim. App. 2008) (quoting People v. Hamilton, 361 Ill.App.3d 836, 847, 297 Ill.Dec. 673, 683, 838 N.E.2d 160, 170 (2005)). "There is no per se rule that requires trial attorneys to seek

out an expert." Woodward v. State, 276 So. 3d 713, 763 (Ala. Crim. App. 2018) (citations omitted). " '[T]he mere fact a defendant can find, years after the fact, a[n] ... expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial.' " Daniel v. State, 86 So. 3d 405, 423 (Ala. Crim. App. 2011) (quoting Davis v. Singletary, 119 F.3d 1471, 1475 (11th Cir. 1997)).

1.

First, Harris argues that his counsel were ineffective for not retaining a crime-scene-reconstruction expert "to analyze and reconstruct the crime scene." (Harris's brief, p. 48.) In his petition, Harris alleged that, "[i]f trial counsel had obtained a competent independent evaluation of the evidence at the crime scene, defense counsel would have been able to demonstrate a number of inconsistencies between Ms. Ball's statements when compared to the physical evidence." (C. 622.) He provided a laundry list of these alleged inconsistencies, ranging from the lack of gunshot residue and blood spatter on Harris and his clothing, to the fact that Janice stated that she had put her mother's purse in a backpack but the purse was later found loose in the trunk of her mother's vehicle.

Harris also alleged that "an independent evaluation of the crime scene evidence would have enabled defense counsel to demonstrate that the crime scene investigation conducted by law enforcement authorities failed to meet reasonably accepted professional standards and that possible exculpatory evidence was destroyed or unpreserved." (C. 625.) He again provided a laundry list of what he claims were "ineffective investigatory methods" used by law enforcement, including failing to collect certain evidence, not photographing certain evidence that was collected, and not subjecting certain evidence to forensic testing. He then alleged that he had consulted with forensic scientist and crime-scene-reconstruction expert Marilyn T. Miller, who, he said, would have been available to testify at his trial, listed her credentials, and asserted that he was "prepared to present Dr. Miller at an evidentiary hearing." (C. 628.)

In addressing this claim, the circuit court made the following findings, in relevant part:

> "The alleged inconsistencies between Ms. Ball's testimony and the physical evidence were apparent at trial. These alleged inconsistencies were heard by and, therefore, known to the jurors and were known to this Court. Harris does not state any new facts ... to support his allegation [that]

trial counsel were ineffective for not retaining a crime scene reconstruction expert. Harris did not proffer any specific facts detailing how the testimony of a crime scene reconstruction expert could have demonstrated that Harris did not commit all six murders. Harris did not state any facts ... that, if true, would establish there is a reasonable probability that if trial counsel had retained a crime scene reconstruction expert that the outcome of the guilt phase at his trial would have been different.

"....

"... Harris alleged trial counsel were ineffective for not retaining a crime scene reconstruction expert to review the methods law enforcement used to investigate the murders. Harris contends that it was 'possible exculpatory evidence was destroyed or unpreserved' because law enforcement officers followed 'ineffective investigatory methods[.]' (3AP p. 12) Harris also contends that investigators 'failed to collect, preserve and examine relevant crime scene evidence' and did not 'sufficiently' test certain evidence that was collected.

"....

"... Harris did not state in his petition any argument that trial counsel could have made to this Court that would have established he would have been entitled to State funds to retain a crime scene reconstruction expert. Harris did not identify in his petition any examples of exculpatory evidence that was destroyed or not recovered by law enforcement during the investigation. ... An allegation that law enforcement's investigation fell below accepted standards that does not include what specific evidence would have been recovered with additional investigation and testing is not enough to meet the pleading requirements of Rule 32.6(b), Ala. R. Crim. P. ...

> "This Court finds that the allegations of ineffective assistance of counsel ... do not meet the specificity and full factual pleading requirements of Rule 32.6(b); therefore, they are summarily dismissed."

(C. 1014-17.) The circuit court's findings are correct. In addition, we point out that, although Harris identified by name the expert in crime-scene reconstruction that he believed his counsel should have retained, he made only a bare allegation that he was prepared to present that expert's testimony at an evidentiary hearing, without alleging in his petition what he believed the content of her testimony could be, as he was required to do to satisfy his burden of pleading.

Therefore, summary dismissal of this claim of ineffective assistance of counsel was proper.

2.

Second, Harris argues that his trial counsel were ineffective for not securing the services of a DNA expert. In his petition, Harris alleged:

> "During its case, the State relied on expert testimony concerning traces of DNA from two of the victims -- Jerry Ball and John Ball -- that were purportedly found on shoes and clothing that Mr. Harris was alleged to have worn the day of the murders.

"Other than the fingerprint evidence found on the trunk of the car in which Jerry Ball's body was found, the DNA evidence was the only forensic evidence relied upon by the State during trial. The DNA testimony presented by the State was not without controversy. One of the State's witnesses, Phyllis Rollan, admitted that she issued a report on April 23, 2003, stating that a certain stain on the heel of one of Harris's shoes was consistent with DNA from John Ball, Janice Ball, and Harris. (R. 8541.) But then, after consulting with prosecutors, she issued an amended report on August 26, 2003, which removed any mention of Janice Ball's DNA on this same stain.

"Mr. Harris's trial counsel failed to present a DNA expert to contradict the State's experts or provide the jury an alternative explanation regarding the blood and to whom it belonged. Such a DNA expert would have evaluated the viability of obtaining a positive DNA match on such small amounts of blood and, had the DNA expert indicated that it was impossible to obtain reliable DNA results on these samples, it would have removed a key type of physical evidence from the case. Such a DNA expert would have also been able to explain to the jury that there was no scientific basis for Rollan's 'amendment.'

"....

"Here, there was a clear need and relevance for a testifying DNA expert. It is highly unlikely this Court would have denied trial counsel a request for sufficient funds to obtain a testifying DNA expert for trial. Trial counsel, however, never asked this Court to obtain such an expert. By failing to do so, trial counsel could not subject the prosecution's case to meaningful adversarial testing as required by the United States Constitution."

(C. 628-30.)

The circuit court found this claim to be insufficiently pleaded because "Harris did not identify in his petition a DNA expert by name or proffer what testimony such an expert could have provided that would have undermined the State's DNA expert such that the outcome of the guilt phase would have been different." (C. 1018.) We agree. By failing to identify by name a DNA expert who counsel could have retained or what he believed the testimony of such a DNA expert could be, Harris failed to satisfy his burden of pleading.

Moreover, we note that the record from Harris's direct appeal shows that, before Harris's first trial, counsel filed motions requesting that the defense be permitted to examine and test all physical evidence that had been collected by the State and that the State produce all evidence and information related to any DNA testing, and both motions were granted. Counsel also wrote to the State's DNA expert, requesting that she provide to Dr. Ronald T. Acton all information relating to the Alabama Department of Forensic Sciences's method of conducting DNA testing. At a pretrial hearing before Harris's second trial, counsel again requested

that they be permitted to retain the services of Dr. Acton, "who was our DNA expert."[7] (RDA, R. 4551.) Thus, contrary to Harris's pleading, it is clear that counsel did retain a DNA expert. Although counsel did not call Dr. Acton to testify at Harris's trial, instead choosing to rely on cross-examination of the State's expert, " 'the failure to call an expert and instead rely on cross-examination does not constitute ineffective assistance of counsel.' " Stallworth v. State, 171 So. 3d 53, 87 (Ala. Crim. App. 2013) (quoting State v. Nicholas, 66 Ohio St.3d 431, 436, 613 N.E.2d 225, 230 (1993)).

Therefore, summary dismissal of this claim of ineffective assistance of counsel was proper.

3.

Third, Harris argues that his trial counsel were ineffective for not retaining the services of a false-confession expert. In pleading this claim, Harris asserted:

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[7]In other published cases, Dr. Acton is stated to be an expert in DNA analysis. See Sharp v. State, 151 So. 3d 308, 317 (Ala. Crim. App. 2008), rev'd on other grounds, 151 So. 3d 329 (Ala. 2009); and Turner v. State, 924 So. 2d 737, 765 (Ala. Crim. App. 2002).

> "During its case, the State relied on inculpatory statements given by Mr. Harris to law enforcement.
>
> "The fictitious nature of the statements can be demonstrated by the fact that they contain little to no detail as to how the murders actually occurred and that little detail appears in the statements is not supported by the evidence of record. For example, in his August 29, statement, Harris stated: 'I don't know who died first.' (C. 635.) If he had murdered all six victims, as the State contended, Mr. Harris obviously would have known which victim he killed first. Then in his August 30 statement, he stated: 'I don't remember what gun I used to shoot Joanne ... Ball or Janice's grandmother.' (C. 703.) He then purported to identify the type of gun he allegedly used with respect to the other four victims, but these statements were not consistent with the evidence at trial. For example, in his statement, he claimed to have shot John Ball with a '.20 gauge shotgun,' (C. 703) but at trial the State asserted that John Ball was killed with a pistol. (R. 6340) ('When Harris shot John with a pistol, another weapon he had stolen, [he] shot John with a pistol three times. ...')
>
> "Law enforcement officers did not make a video or audio recording of any of Harris's statements or of any of their interrogations of Harris.
>
> "Under these circumstances, it was incumbent upon trial counsel to retain an expert in the field of forensic or social psychology to explain to the trier of fact why Harris would have given fictitious confessions to law enforcement and to demonstrate that Harris' statements accepting full responsibility for the six murders were in fact false."

(C. 630-31.)

The circuit court found this claim to be insufficiently pleaded because "Harris did not identify in his petition a forensic or social psychologist by name or proffer what testimony a psychologist could have provided that would have undermined the trustworthiness of Harris's confessions such that the outcome of the guilt phase would have been different." (C. 1019). We agree. Because Harris failed to identify any false-confession expert by name or to allege what he believed such an expert could have testified to, he failed to satisfy his burden of pleading.

Therefore, summary dismissal of this claim of ineffective assistance of counsel was proper.

F.

Harris contends that his trial counsel were ineffective for not presenting more witnesses to testify at the guilt phase of the trial about his actions and demeanor immediately before the murders. In his petition, Harris pleaded, in relevant part:

> "A central theme of the State's case was that Mr. Harris was driven to kill the Ball family as a result of a domestic dispute between Mr. Harris and Janice Ball that occurred on Friday, August 23, 2002, was followed up by a telephone call to Janice Ball's place of employment on Saturday, August 24,

> 2002, and culminated in the members of the Ball family (not Janice) chasing Mr. Harris from their premises on the night of Sunday, August 25, 2002. ...
>
> "....
>
> "While trial counsel did present testimony from a single witness, Henry Mack Peoples, concerning Mr. Harris's demeanor on the night before the murders (R. 8599-8600), had trial counsel conducted an adequate investigation, they would have interviewed additional persons with information concerning Mr. Harris's actions and demeanor during the weekend leading up to the murders. If interviewed, Mr. Harris's friends and relatives would have told trial counsel that they saw no change in his demeanor during this critical time period (when the State alleges that he became so 'mad' that he became a 'predator'). For example, Betty Joyce Jackson would have told trial counsel that Mr. Harris called her after midnight on Sunday night (i.e., early in the morning of the day of the murders), that the two had a pleasant conversation and that Ms. Jackson did not sense any change in his personality or that Mr. Harris was agitated in any way. Marco Rogers would have told trial counsel that he was present when, over the course of the weekend before the murders, Mr. Harris socialized with two of the victims, Tony Ball and John Ball, and that he did not see any change in Mr. Harris's behavior or sense any tension between Mr. Harris and the Balls."

(C. 634-35.)

In addressing this claim, the circuit court stated, in pertinent part:

> "Harris admitted in his petition that trial counsel presented evidence about his demeanor the night before the

> murders through Henry Mack Peoples. (3AP p. 22) Harris contends that trial counsel were ineffective for not presenting additional evidence about his actions the weekend before the murders, including that he socialized with two of the victims. (3AP pp. 22-23)
>
> "....
>
> "Harris did not explain in his petition how or why more testimony about his actions and demeanor the weekend immediately before the murders would have benefitted his defense. As well, Harris did not explain in his petition why evidence that he had socialized with two of his victims, even if it were true, would have caused a different result at the guilt phase of trial.
>
> "This Court finds that the allegation of ineffective assistance of counsel ... does not meet the specificity and full factual pleading requirements of Rule 32.6(b); therefore it is summarily dismissed."

(C. 1022-24.) We agree.

> As we have stated:
>
> "To sufficiently plead a claim that counsel was ineffective for not calling witnesses, a Rule 32 petitioner is required to identify the names of the witnesses, to plead with specificity what admissible testimony those witnesses would have provided had they been called to testify, and to allege facts indicating that had the witnesses testified there is a reasonable probability that the outcome of the proceeding would have been different."

Mashburn v. State, 148 So. 3d 1094, 1151 (Ala. Crim. App. 2013). Harris failed to plead how he was prejudiced by counsel's failure to present more witnesses -- specifically Betty Joyce Jackson and Marco Rogers, the only two witnesses he identified in his petition -- to testify as to Harris's actions and demeanor the weekend before the murders.

Therefore, summary dismissal of this claim of ineffective assistance of counsel was proper.

G.

Harris contends that his trial counsel were ineffective for not presenting evidence of his good character at the guilt phase of his trial. In his petition, Harris stated, in relevant part:

> "Another central theme in the State's case was that 'over the course of [Mr. Harris's relationship with Janice Ball] the defendant was violent, he was abusive and he manipulated and controlled Janice through violence and abuse.' (R. 8893.)
>
> "Defense counsel failed to identify and interview witnesses who would have testified that, contrary to the State's argument, Mr. Harris was a loving and doting father to his daughter Sh[ay] and a good partner to Janice. For example, Mr. Harris's uncle, King Robinson, could have testified that Mr. Harris talked about marrying Janice someday. Further, Mr. Harris's cousin Tamekia Robinson could have testified that Mr. Harris told her he wanted to

> enroll in a Job Corps program to earn his GED, but that he would only consider a program that allowed him to have Sh[ay] on site with him. Numerous witnesses, including Ida Mae Harris, Nedra Harris, Angela Robinson, and Tequisha Harris, could have testified that, despite the difficulties in his relationship with the Ball family, he refused to extricate himself from the situation because he felt an obligation to Janice and Sh[ay]. He particularly felt that his responsibilities as Sh[ay]'s father required him to stay and make the relationship with Janice work.
>
> "Without such testimony, the State's extremely negative description of Mr. Harris's character went unrebutted during the culpability phase of the trial."

(C. 636.)

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

> "This Court finds that the proffered testimony from the individuals identified ... would not have been admissible during the guilt phase of his trial. Testimony that Harris said he wanted to attend Job Corp would clearly have been inadmissible hearsay. Also, testimony that Harris felt an obligation to Ms. Ball and to his daughter would have been comments on Harris's state of mind or mental operation and, thus, would not have been admissible. Because the testimony proffered ... would not have been admissible during the guilt phase of trial, trial counsel's failure to present it does not demonstrate that their performance was deficient and prejudicial under Strickland. ...

> "This Court finds that the allegation of ineffective assistance of counsel ... is without merit; therefore, it is denied."

(C. 1025.)

As the circuit court correctly found, all the testimony Harris alleged witnesses could have provided was based on statements Harris had made to them and, thus, was hearsay and inadmissible pursuant to Rule 801, Ala. R. Evid. Moreover, none of the testimony that Harris alleged witnesses could have provided involved his reputation in the community. As this Court explained in Seay v. State, 751 So.2d 32 (Ala. Crim. App. 1999):

> "Rule 404(a)(1), Ala. R. Evid., states '[e]vidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: ... Evidence of character offered by the accused...." Alabama law has long held that:
>
> > " 'Generally, character evidence (acts, reputation, or opinion of character) is inadmissible when offered as a basis from which to infer how a person acted on the occasion in question. A special exception to this general exclusionary rule, however, is afforded the criminally accused. The criminal defense, under what is often termed the "mercy rule," may take the initiative to prove the accused's good character in order to infer, from

> such character, that the accused did not commit the crime charged.
>
> "'While the accused is given special exemption from the prohibition on character, good character may be evidenced through only one medium of proof. The accused's character evidence is limited to general reputation in the community. No allowance is made, as is true under the federal mercy rule, for a character witness' opinion as to the accused's character. The accused's reputation may be as a whole or attached to a trait that is pertinent to the crime serving as the basis of the prosecution.'
>
> "Charles W. Gamble, Gamble's Alabama Rules of Evidence, § 404(a)(1)(A) at 59 (1995); see also Ex parte Woodall, 730 So. 2d 652 (Ala. 1998); Jones v. State, 53 Ala. App. 690, 304 So. 2d 34 (1974). ..."

751 So. 2d at 35 (emphasis added.) '"Counsel will not be deemed ineffective for failing to present inadmissible evidence."'" Daniel, 86 So. 3d at 421 (quoting Kuehne v. State, 107 S.W.3d 285, 294 (Mo. Ct. App. 2003), quoting in turn Barnum v. State, 52 S.W.3d 604, 608 (Mo. Ct. App. 2001)).

Therefore, summary dismissal of this claim of ineffective assistance of counsel was proper.

H.

Harris contends that his trial counsel were ineffective for not adequately investigating and presenting mitigating evidence at the penalty phase of his trial which, he says, resulted in the trial court making erroneous findings regarding mitigating circumstances when sentencing him to death.[8]

> " ' "[T]rial counsel's failure to investigate the possibility of mitigating evidence [at all] is, per se, deficient performance." Ex parte Land, 775 So. 2d 847, 853 (Ala. 2000), overruled on other grounds, State v. Martin, 69 So. 3d 94 (Ala. 2011). However, "counsel is not necessarily ineffective simply because he does not present all possible mitigating evidence." Pierce v. State, 851 So. 2d 558, 578 (Ala. Crim. App. 1999), rev'd on other grounds, 851 So. 2d 606 (Ala. 2000). When the record reflects that counsel presented mitigating evidence during the penalty phase of the trial, as here, the question becomes whether counsel's mitigation investigation and counsel's decisions regarding the presentation of mitigating evidence were reasonable.

[8]The circuit court treated Harris's argument that the trial court made erroneous findings in sentencing him to death as a separate claim of ineffective assistance of counsel. A review of Harris's petition, however, indicates that this argument is simply an argument regarding why he believes counsel's performance during the penalty phase of the trial, despite the jury's recommendation that he be sentenced to life imprisonment without the possibility of parole, prejudiced him.

> " ' " '[B]efore we can assess the reasonableness of counsel's investigatory efforts, we must first determine the nature and extent of the investigation that took place. ...' Lewis v. Horn, 581 F.3d 92, 115 (3d Cir. 2009). Thus, '[a]lthough [the] claim is that his trial counsel should have done something more, we [must] first look at what the lawyer did in fact.' Chandler v. United States, 218 F.3d 1305, 1320 (11th Cir. 2000)."

" 'Broadnax [v. State], 130 So. 3d [1232,] 1248 [(Ala. Crim. App. 2013)]....'

"Reeves v. State, 226 So. 3d 711, 751 (Ala. Crim. App. 2016).

"As this Court explained in Woodward v. State, 276 So. 3d 713 (Ala. Crim. App. 2018):

> " 'Whether trial counsel were ineffective for not adequately investigating and presenting mitigating evidence " 'turns upon various factors, including the reasonableness of counsel's investigation, the mitigation evidence that was actually presented, and the mitigation evidence that could have been presented.' " McMillan v. State, 258 So. 3d 1154, 1168 (Ala. Crim. App. 2017) (quoting Commonwealth v. Simpson, 620 Pa. 60, 100, 66 A.3d 253, 277 (2013)).
>
> > " ' " '[W]hen, as here, counsel has presented a meaningful concept of mitigation, the existence of alternate or

> additional mitigation theories does not establish ineffective assistance.' State v. Combs, 100 Ohio App. 3d 90, 105, 652 N.E.2d 205, 214 (1994). 'Most capital appeals include an allegation that additional witnesses could have been called. However, the standard of review on appeal is deficient performance plus prejudice.' Malone v. State, 168 P.3d 185, 234–35 (Okla. Crim. App. 2007)."

" 'State v. Gissendanner, 288 So. 3d 923, 965 (Ala. Crim. App. 2015). "[C]ounsel does not necessarily render ineffective assistance simply because he does not present all possible mitigating evidence." Williams v. State, 783 So. 2d 108, 117 (Ala. Crim. App. 2000), overruled on other grounds by Ex parte Taylor, 10 So. 3d 1075 (Ala. 2005).

" '... "[W]hen a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland v. Washington, 466 U.S. 668, 695, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "To assess that probability, we consider 'the totality of the available mitigation evidence -- both that adduced at trial, and the evidence adduced in the habeas proceeding' -- and 'reweig[h] it against the evidence in aggravation.' " Porter v. McCollum, 558 U.S. 30, 41, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) (quoting

> Williams v. Taylor, 529 U.S. 362, 397–98, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). We " 'must consider the strength of the evidence in deciding whether the Strickland prejudice prong has been satisfied.' " McWhorter v. State, 142 So. 3d 1195, 1231 (Ala. Crim. App. 2011) (quoting Buehl v. Vaughn, 166 F.3d 163, 172 (3d Cir. 1999)).'

"276 So. 3d at 773-74.

> " ' "[T]he assessment should be based on an objective standard that presumes a reasonable decisionmaker," Williams v. Allen, 542 F.3d 1326, 1345 (11th Cir. 2008), and, in an override case, necessarily includes considering whether the totality of the available mitigating evidence would have persuaded additional jurors to recommend a sentence of life imprisonment without the possibility of parole. See Ex parte Carroll, 852 So. 2d 833, 836 (Ala. 2002) ("[A] jury's recommendation of life imprisonment without the possibility of parole ... is to be treated as a mitigating circumstance. The weight to be given that mitigating circumstance should depend upon the number of jurors recommending a sentence of life imprisonment without parole, and also upon the strength of the factual basis for such a recommendation in the form of information known to the jury."). Although a jury's recommendation of life imprisonment without the possibility of parole does not preclude a finding of prejudice under Strickland, it does weigh against such a finding. See, e.g., McMillan v. State, 258 So. 3d 1154 (Ala. Crim. App. 2017); Spencer v. State, 201 So. 3d 573, 613 (Ala. Crim. App. 2015); Jackson v. State, 133 So. 3d 420, 449 (Ala. Crim. App. 2009); Hooks v.

> State, 21 So. 3d 772, 791 (Ala. Crim. App. 2008); and Boyd v. State, 746 So. 2d 364, 389 (Ala. Crim. App. 1999).' "

"Woodward, 276 So. 3d at 739."

Stanley v. State, [Ms. CR-18-0397, May 29, 2020] ___ So. 3d ___, ___ (Ala. Crim. App. 2020).

At the penalty phase of the trial, trial counsel called 10 witnesses. King Robinson, Harris's paternal uncle, testified that his brother fathered Harris when his brother was married to a woman who was not Harris's mother and when he was living in a different city; that his brother had had no contact with Harris when Harris was a child; that Harris lived with his mother, grandmother and sisters, and that they did not have a home of their own but went from one relative's house to another relative's house; and that Harris had no male figure in his life when he was growing up, but Harris looked after his younger siblings, and had a good relationship with Robinson's children. West Robinson, Harris's father, testified that he fathered six children with Harris's mother when he was married to another woman and was not a part of Harris's life when Harris was growing up. West said that he started to have a relationship with

Harris when Harris was 13 or 14 years old, after he had gotten divorced; that Harris took care of his siblings; that Harris and the Ball family were practically raised together; and that Harris loved Janice and his daughter and wanted to be there for his daughter. Ida Robinson, West's wife, testified that she did not meet Harris until he was a young adult but that she now frequently communicates with Harris, and that Harris always talks about his daughter and is a devoted father.

Katie Cole, Harris's maternal aunt, testified that Harris had lived with her for a time when he was 14 years old; that Harris had had a hard life, and had moved from house to house; that Harris never lived with his father and was not acknowledged by his father when he was young; that she tried to help Harris when he became a father; and that Harris encouraged her to be a part of Shay's life. Kamesia Tyson, Harris's cousin, testified that Harris was a good father to Shay and that he talked about her often, including in letters that he had written to Tyson, and that Harris would sometimes babysit her children and one time bought one of her children a new pair of shoes.

A.Z. Burnett testified that he was Harris's childhood baseball coach in 1991 and 1992 and that Harris had been a quiet, easygoing, and polite

child. Lisa Melvin testified that she was Harris's youth minister when Harris was a teenager and that Harris was mild-mannered and likeable and that he never caused trouble. Even after she left the church, Melvin said, she kept in contact with Harris, including after his arrest.

Sheriff Charles West of Crenshaw County testified that Harris had been in his jail since 2002 (as noted above, Harris's second trial was in 2005), and that Harris had always followed the rules and adapted easily to jail life. Martha Smith, a jailer at Crenshaw County jail, testified that Harris followed the jail rules; that Harris was respectful to her; and that Harris was friendly.

Dr. John Goff, a clinical neuropsychologist, testified that he evaluated Harris and administered intelligence tests to Harris and that he was in possession of numerous documents concerning Harris, including records from the Alabama Department of Public Safety, medical records, school records, and a forensic evaluation that had been conducted by Dr. Karl Kirkland. He also interviewed Harris's aunt and spoke to Harris for six hours. Dr. Goff said that Harris's IQ is 70 and that Harris reads at a fifth-grade level. In Dr. Goff's opinion, Harris suffers from a cognitive disorder and a personality disorder and has difficulty distinguishing

reality from fiction; is a substance abuser; and, as the result of falling and striking his head when he was in the seventh grade, has migraines and a seizure disorder.

As noted previously in this opinion, at the conclusion of the penalty phase of the trial, the jury recommended, by a vote of 7 to 5, that Harris be sentenced to life imprisonment without the possibility of parole. The trial court overrode the jury's recommendation and sentenced Harris to death.

> "In its findings, the trial court found the existence of the following statutory aggravating circumstances: (1) that Harris killed two or more people during one scheme or course of conduct; and (2) that Harris was engaged in the commission of a burglary at the time the capital offense was committed. The court noted that Harris had been convicted of four counts of murder made capital because the murders occurred during the commission of a burglary. The court found that because Harris went in and out of the houses several times during the day, the evidence showed that each murder took place during a separate burglary. Accordingly, the court treated each instance as a separate aggravating factor. See Calhoun v. State, 932 So. 2d 923, 973 (Ala. Crim. App. 2005).
>
> "The trial court found the existence of one statutory mitigating circumstance, that is, that Harris had no prior significant criminal history. It further found a number of nonstatutory mitigating circumstances.
>
> "The trial court acknowledged that, while Harris is not mentally retarded, he does possess below-average intelligence

and mental capabilities. The trial court said that those factors do not excuse murder 'as even persons with low intelligence know that murder is wrong' (C. 505), but it did give 'some weight' to Harris's low mental capabilities as a mitigating factor.

"The trial court also considered as a mitigating factor the fact that Harris suffered from migraines that may have been the result of a head injury Harris suffered as a child. The court also noted that Harris had had seizures, but that they were infrequent to the point of being 'virtually nonexistent.' (C. 505.)

"The trial court also considered that Harris did not have a father figure early in his life, that he moved frequently as a child, and that he may have had problems with self-esteem. The court tempered this finding with the evidence that Harris had had loving relationships and friends during his childhood.

"The trial court considered as nonstatutory mitigating factors Harris's care for other people's children, which included buying clothes for those children; evidence that Harris was a model prisoner; evidence that Harris attempted to be a family man (but that his dependent personality prevented him from doing so successfully); and Harris's plea for mercy.

"The trial court stated that it considered the heaviest mitigating factor in this case to be the jury's recommendation that Harris be sentenced to life in prison without the possibility of parole. In its order, the trial court outlined its reasons for overriding the jury's verdict recommending a sentence of life without parole. It added that it had seen no case in which a defendant had killed six victims pursuant to one scheme or course of conduct. It cited a number of cases with multiple victims -- all of which involved fewer than six victims -- in which the trial courts overrode the juries' recommendations for life in prison without the possibility of

> parole. In each case, this Court upheld the trial courts' decisions to override the juries' recommendations. As the trial court pointed out, when compared with the facts of similar cases, a task the jury could not undertake, 'the only disproportionate sentence in this case would be to sentence Harris to life without parole instead of death.' (C. 516.)"

Harris v. State, 2 So. 3d 880, 929-30 (Ala. Crim. App. 2007).

1.

In his petition, Harris first listed 24 witnesses by name whom, he said, counsel should have called to testify at the penalty phase of his trial -- 4 aunts, 6 siblings, 6 cousins, 5 friends, 1 former employer, 1 teacher, and 1 youth minister[9] -- and he alleged what testimony they could have provided in mitigation. His pleadings, for the most part, are narrative in nature and are separated into several categories: (1) his childhood and teenage years which, he says, were plagued by "poverty, violence, and dysfunction" (C. 31); (2) the "disturbing history of incest in the Ball family" dating back to Janice's grandparents (C. 656); (3) the history of tension between Harris's family and the Ball family resulting from Willie Haslip's alleged extramarital affair with Harris's cousin and Joanne Ball's

[9]Harris alleged that his counsel was ineffective for not calling youth minister Lisa Melvin to testify. However, as noted above, counsel did call Melvin to testify.

knowledge of that affair; (4) his relationship and commitment to Janice and his daughter Shay despite the Ball family's repeated threats and violence against him; (5) the Ball family's sexual abuse of Janice Ball; (6) his and Janice's move to the Ball property and the resulting escalation of tension between him and the Ball family; and (8) evidence that the Ball family was sexually abusing Shay.

With respect to categories (2), (3), (5), and (8), as set out above, the circuit court stated, in relevant part:

> "This Court has reviewed the evidence proffered ... and concludes much of it would not have been admissible during the penalty phase of his trial. As an example, evidence that two relatives of Janice Ball had incestuous relations years before Janice was born, even if true, would not have been admissible as mitigating evidence because it was irrelevant. Likewise, prior difficulties between Janice's mother and Harris's cousin and sister, before Janice and Harris started dating, were irrelevant. ...
>
> "Arguably, some of the proffered testimony relating to Janice being sexually harassed or abused by one or more relatives or family members may have been relevant, but ... [a]t best it would have been cumulative. ...
>
> "Similarly, there was no actual evidence proffered that their child was subjected to sexual abuse regardless of what Harris may have believed. One 'lopsided' diaper and a baby crying with a red genital area, at a different time when her diaper needed, changing, is no more than abject speculation of

> sexual abuse. It likely says more to diminish the idea that Harris was a good and caring father than anything else.
>
> "....
>
> "... [T]he proffered evidence, if admitted and believed, showed Harris in an unfortunate, undesirable, and regrettable state, but it would not have changed this Court's conclusion that the aggravating circumstances overwhelmingly outweighed the statutory and non-statutory [mitigating] circumstances."

(C. 1035-37.) As to the remaining categories, which centered around Harris's life and character, the circuit court stated:

> "The upshot of Harris's allegation is that the jury and this Court did not hear a more detailed accounting of Harris's life. Harris did not specifically plead how this additional mitigation information would have caused more jurors to conclude that the six aggravating circumstances would not have outweighed the statutory and non-statutory mitigating circumstances. This Court finds that trial counsel made a decision to pursue a specific strategy and that trial counsel's performance was reasonable. Trial counsel called ten witnesses to testify during the penalty phase, including nine fact witnesses and one expert witness. ... The testimony from the nine fact witnesses focused on presenting a depiction of Harris's life. Trial counsel presented testimony showing that Harris was a family man, had worked with children, had a bad childhood without a father, and was a model prisoner. Trial counsel proved through testimony from Dr. John Goff that Harris had suffered from seizures as a child and had a cognitive dysfunction. (R. 9382-9384)
>
> "... While not entirely dispositive on the issue, this Court finds that the fact that the jury recommended, by a vote of

seven to five, that Harris be sentenced to life without the possibility of parole is compelling evidence that trial counsel's performance during the penalty phase was not deficient. ...

"The weight of the aggravating circumstances was overwhelming when compared to the mitigating circumstances. Harris failed to proffer additional mitigating evidence that would call this Court's conclusion that 'the only disproportionate sentence in this case would be to sentence Harris to life without parole instead of death' into question. (C.R. 516) This Court also notes that some of the evidence that Harris contends should have been presented was, in fact, presented. For example, testimony that Harris made a number of moves in his youth ... and that he lack[ed] a father figure was presented by trial counsel during the penalty phase and considered mitigating by this Court. (C.R. 506) ...

"Trial counsel persuaded seven jurors that had previously found beyond a reasonable doubt that Harris had murdered six people to recommend he be sentenced to life imprisonment without parole. Even if this Court were to assume that the facts proffered ... were true and had been offered in addition to the evidence presented by trial counsel, this Court concludes that there is no reasonable probability that the outcome of the penalty phase of trial would have been more favorable for Harris. This Court can say beyond a reasonable doubt, that even if the additional facts proffered in the paragraphs cited above had been presented, this Court would have still concluded that the six aggravating circumstances outweighed the statutory and non-statutory mitigating circumstances.

"This Court finds that Harris's allegation that trial counsel were ineffective for not presenting the testimony proffered ... [in] his petition is without merit; therefore, it is denied. Rule 32.7(d), Ala. R. Crim. P."

(C. 1030-34.) We agree with the circuit court.

Evidence regarding the Ball family's history of incestuous relationships before Janice was born and interactions between the Ball family and Harris's family before Janice and Harris began dating would not have been relevant as mitigating circumstances. "Although a defendant's right to present proposed mitigating evidence is quite broad, evidence that is irrelevant and unrelated to a defendant's character or record or to the circumstances of the crime is properly excluded." Woods v. State, 13 So. 3d 1, 33 (Ala. Crim. App. 2007). In addition, we agree with the circuit court that the facts that Shay had a lopsided diaper after the Ball family had been watching her and, at another time, had redness in her genital area, do not establish that the Ball family was abusing Shay. Although such evidence may, as Harris argues, support his assertion that he believed the Ball family was abusing Shay, the jury was aware of Harris's belief in this regard because, in his statement to police, Harris said that he believed that the Ball family was sexually abusing Shay just as they had sexually abused Janice.

Moreover, much of the evidence about his life and character that Harris alleged in his petition should have been presented at the penalty

phase of his trial was, in fact, presented. "'"[A] claim of ineffective assistance of counsel for failing to investigate and present mitigation evidence will not be sustained where the jury was aware of most aspects of the mitigation evidence that the defendant argues should have been presented."'" Brownfield v. State, 266 So. 3d 777, 810 (Ala. Crim. App. 2017) (quoting Walker v. State, 194 So. 3d 253, 288 (Ala. Crim. App. 2015), quoting in turn Frances v. State, 143 So. 3d 340, 356 (Fla. 2014)). As this Court has stated:

> "Although '[t]here has never been a case where additional witnesses could not have been called,' State v. Tarver, 629 So. 2d 14, 21 (Ala. Crim. App. 1993), 'there comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties.' Bobby v. Van Hook, 558 U.S. 4, 11, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009). See also Jalowiec v. Bradshaw, 657 F.3d 293, 319 (6th Cir. 2011) ('[F]ailing to introduce additional mitigation evidence that is only cumulative of that already presented does not amount to ineffective assistance.'); Jones v. State, 998 So. 2d 573, 586 (Fla. 2008) ('We have repeatedly held that counsel is not ineffective for failing to present cumulative evidence.'); Coble v. Quarterman, 496 F.3d 430, 436 (5th Cir. 2007) ('The decision not to present additional testimony does not constitute ineffective assistance of counsel.'); and Clark v. Mitchell, 425 F.3d 270, 286 (6th Cir. 2005) ('Counsel is not required to call additional witnesses to present redundant or cumulative evidence.')."

Walker v. State, 194 So. 3d 253, 288 (Ala. Crim. App. 2015).

We have carefully examined the evidence presented by the State at trial in aggravation, the mitigating evidence presented by Harris at trial, and the mitigating evidence pleaded in Harris's petition. We have reweighed the evidence in aggravation against all the evidence in mitigation -- that presented at trial and that pleaded in Harris's petition -- and we conclude that the omitted mitigating evidence would not have altered the balance of the aggravating circumstances and the mitigating circumstances in this case. This is so even assuming that the additional mitigating evidence would have swayed more of, or even all, the jurors to vote for life imprisonment without the possibility of parole. Even had the jury unanimously recommended a sentence of life imprisonment without the possibility of parole, the strength of the six aggravating circumstances would have outweighed the whole of the mitigating evidence presented at trial and pleaded in Harris's petition.

Therefore, summary dismissal of this claim of ineffective assistance of counsel was proper.

2.

Harris also alleged in his petition that his trial counsel should have obtained his medical, school, social-services, and child-support records to

present at the penalty phase of the trial. He alleged that his medical records would have shown that he had had head injuries that resulted in him suffering from migraines and a seizure disorder; that his school and social-services records would have shown "the abuse and neglect he suffered as a child" and that he "was unclean, malnourished, and unhealthy"; and that the child-support records would have shown that his father did not pay child support and demonstrated that he had lived in poverty as a child. (C. 672-73.)

In addressing this claim, the circuit court stated:

> "Harris did not state in his petition what specific medical records should have been introduced, i.e., records from which specific hospitals or specific doctors. Harris also did not state in his petition what specific information is in his medical records and how that information would have been beneficial during the penalty phase. ...
>
> "... Harris alleged trial counsel were ineffective for not presenting his school records and DHR records to the jury and this Court to prove he was 'unclean, malnourished, and unhealthy' as a child. ... Harris alleged trial counsel were ineffective for not obtaining child support records to prove he lived in poverty. However ... Harris's assertions about what these records would show are insufficient to warrant further proceedings.
>
> "This Court finds that Harris's allegations that trial counsel were ineffective for not obtaining records fail to meet

> the specificity and full factual pleading requirements of Rule 32.6(c); therefore, they are summarily dismissed."

(C. 1039.) We agree.

Harris failed to identify the specific medical, school, social-services, and child-support records he believed counsel should have obtained. He also made broad general allegations regarding what those records would have shown, without pleading any facts indicating the specific content of those records. Therefore, Harris failed to satisfy his burden of pleading. In addition, the record from Harris's direct appeal reflects that counsel did, in fact, request the records Harris now claims should have been obtained and presented and that his expert at the penalty phase, Dr. Goff, reviewed those records as part of his evaluation. "[T]rial counsel is not ineffective for delegating the responsibility of investigating mitigation evidence to subordinates." Marshall v. State, 182 So. 3d 573, 601 (Ala. Crim. App. 2014).

Therefore, summary dismissal of this claim of ineffective assistance of counsel was proper.

3.

Finally, Harris alleged in his petition that his counsel should have obtained the services of a social worker or a psychiatrist to testify at the penalty phase of the trial. In his petition, Harris pleaded:

> "Counsel should also have meaningfully employed the services of other expert witnesses, such as a social worker and/or psychiatrist, to explain how the tragic circumstances of Mr. Harris's life came together to predispose him to engage in criminal behavior. These experts would have explained the difference between risk factors and protective factors, educating jurors and the Court that risk factors are negative experiences that impact on an individual's development in ways that increase the risk of violence. When risk factors accumulate, a young person is left increasingly vulnerable to profound developmental, emotional, physical, and psychological harm. Once damaged and struggling to manage mounting negative experiences, a young person's ability to cope or bounce back with resilience is impaired and he is rendered unable to manage crises and conflicts in life. Such an expert would have explained that the numerous risk factors in Mr. Harris's life overwhelmed him and left him impaired and exceptionally vulnerable to engage in violent acts.
>
> "Post-conviction counsel has consulted with Dr. Richard Dudley, Jr., a psychiatric expert with over 25 years experience in capital post-conviction proceedings. Dr. Dudley would have been available to testify during Mr. Harris's trial had prior counsel sought to pursue a reasonable strategy with respect to the presentation of mitigating evidence."

(C. 673-74.)

In summarily dismissing this claim, the circuit court stated, in relevant part:

> "[T]estimony from a social worker or psychiatrist that Harris was 'predisposed' to commit crimes, even if it were available and admissible, would have been in direct conflict with the statutory mitigating circumstance that Harris did not have a significant criminal history. It would have been entirely contrary for trial counsel to argue, on the one hand, that Harris was predisposed to commit criminal acts and, on the other hand, argue that Harris's lack of prior criminal activity should be considered mitigating. ...
>
> "This Court finds that the allegation of ineffective assistance of counsel ... is without merit; therefore, it is denied. Rule 32.7(d), Ala. R. Crim. P."

(C. 1040-41.) We agree.

The record from Harris's direct appeal reflects that counsel relied on Harris's lack of prior criminal activity as a statutory mitigating circumstance under § 13A-5-51(1), Ala. Code 1975. To present evidence that Harris's upbringing predisposed him to commit violent criminal acts would have been in direct contradiction to this mitigating circumstance. "Counsel cannot be deemed ineffective merely because postconviction counsel disagrees with trial counsel's strategic decisions." Hannon v. State, 941 So. 2d 1109, 1119 (Fla. 2006). " '[T]he mere existence of a potential alternative defense theory is not enough to establish ineffective

assistance based on counsel's failure to present that theory.' " Hunt v. State, 940 So. 2d 1041, 1067 (Ala. Crim. App. 2005). Moreover, "[a]n ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword." Reed v. State, 875 So. 2d 415, 437 (Fla. 2004).

The record also shows that counsel did, in fact, obtain the services of, and present testimony from, a mental-health expert, specifically, clinical neuropsychologist Dr. John Goff, at the penalty phase. Further, counsel retained the services of a mitigation expert. Counsel cannot be ineffective for not retaining experts that counsel did, in fact, retain.

Therefore, summary dismissal of this claim of ineffective assistance of counsel was proper.

I.

Harris contends that his trial counsel were ineffective during penalty-phase closing arguments.

In addressing this claim, the circuit court stated:

> "Harris alleged that trial counsel provided ineffective assistance during their penalty phase closing arguments. Trial counsel were ineffective because, according to Harris, their closing arguments were inadequate 'to persuade the jury and the Court that there were circumstances about [his] life

> which required that he not be sentenced to the death penalty.' (3AP p. 64) Harris quoted portions of trial counsel's penalty phase closing arguments in his petition and contends that these arguments did not contain 'any meaningful description of the trying circumstances surrounding [his] life.' (3 AP p. 64)
>
> "....
>
> "Trial counsel argued, inter alia, that jurors would consider as mitigating that Harris (1) was a role model; (2) had a low IQ; (3) had a dependent personality ; and (4) had adopted well to jail. ...
>
> "....
>
> "... The jury voted seven to five in favor of Harris being sentenced to life imprisonment without parole.
>
> "Harris failed to plead ... what specific arguments trial counsel could have made concerning his IQ scores, seizures, and mental health that would have been so compelling it would have caused more jurors to recommend he be sentenced to life imprisonment without parole. This Court finds that nothing proffered ... would have persuaded this court not to override the jury's life without parole recommendation.
>
> "This Court finds that the allegation of ineffective assistance of counsel ... fails to meet the specificity and full factual pleading requirements of Rule 32.6(b); therefore, it is summarily dismissed."

(C. 1045-48.) We agree with the circuit court.

Harris alleged that counsel were ineffective in closing argument but failed to allege what counsel should have argued or how he was prejudiced by counsel's closing. Moreover,

> "Closing argument is an area where trial strategy is most evident." Flemming v. State, 949 S.W.2d 876, 881 (Tex. App. 1997). 'Entirely satisfactory representation may include a brief closing argument intended to focus the jury's attention on a single item of strategy which counsel deems most likely to achieve a favorable verdict.' State v. Messiah, 538 So.2d 175, 188 (La. 1988)."

Washington v. State, 95 So. 3d 26, 55 (Ala. Crim. App. 2012).

Therefore, summary dismissal of this claim of ineffective assistance was proper.

J.

Harris contends that his trial counsel were ineffective for arguing residual doubt during the penalty phase of the trial.[10] In his petition, Harris alleged that residual doubt is not a valid mitigating circumstance under Alabama law and that counsel's argument urging the jury to

[10]"Residual doubt has been described as 'a lingering uncertainty about facts, a state of mind that exists somewhere between "beyond a reasonable doubt" and "absolute certainty." ' " State v. McGuire, 80 Ohio St. 3d 390, 402, 686 N.E.2d 1112, 1122 (1997) (quoting Franklin v. Lynaugh, 487 U.S. 164, 188 (1988)).

consider residual doubt "misled the jury on the law and created an impetus for th[e] Court's subsequent override of the jury's life recommendation." (C. 679.) According to Harris, the trial court's decision to override the jury's sentencing recommendation in his case "was largely based upon the jury's consideration of residual doubt." (C. 679.)

The circuit court found this claim to be meritless. First, the court found that trial counsel's residual-doubt argument was only one part of his entire closing argument during the penalty phase. Second, the court stated, in relevant part:

> "This Court did acknowledge in its sentencing order that trial counsel referred to 'doubt' in their closing arguments. Harris was not prejudiced, however, because this Court concluded that there were other, more substantial reasons for overriding the jury's 7-5 life without parole recommendation. ...
>
> "This Court's decision to override the jury's recommendation was based on a number of strong factors and not based solely on the jury's potential reliance on residual doubt. ...
>
> "In Harris's sentencing order this Court concluded that '[e]ven if "residual doubt" was a valid mitigator, there is certainly an absence of a strong factual basis before the jury in this case.' (C.R. 510.) Harris's contention that 'the Court's decision to override the jury's recommendation of life imprisonment without parole was largely based upon the jury's consideration of residual doubt' is simply incorrect.

> "This Court finds that this allegation of ineffective assistance of counsel is without merit; therefore, it is denied. Rule 32.7(d), Ala. R. Crim. P."

(C. 1049-50.) We agree.

Although Harris is correct that residual doubt is not a mitigating circumstance in Alabama, see Floyd v. State, 289 So. 3d 337, 437-38 (Ala. Crim. App. 2017), and the cases cited therein, we decline to hold that trial counsel is per se ineffective for arguing residual doubt to the jury during the penalty phase of a capital trial, especially when, as here, that argument is but one small part of counsel's penalty-phase presentation. See, e.g., State v. Maxwell, 139 Ohio St. 3d 12, 54, 9 N.E. 3d 930, 974-75 (2013) ("[T]rial counsel did not rely exclusively on residual doubt in arguing that [the defendant] should not be sentenced to death. [The defendant] also does not explain how raising residual doubt during closing arguments was prejudicial."); Moon v. State, 258 Ga. 748, 759-60, 375 S.E.2d 442, 452 (1988) ("Although the trial court did not give [the defendant's] requested charge on residual doubt, the court observed that the defense could argue residual doubt. ...").

Therefore, summary dismissal of this claim of ineffective assistance of counsel was proper.

K.

Harris contends that his trial counsel were ineffective for not objecting to the trial court's consideration of the presentence report on the ground that it violated it his right to confrontation under Crawford v. Washington, 541 U.S. 36 (2004). In his petition, Harris pleaded, in relevant part:

> "[T]rial counsel failed to raise a meritorious objection to the presentence investigation report. The probation officer who prepared the report did not provide testimony in court, yet trial counsel failed to object to the report as a violation of Harris's Sixth Amendment right to confront the witnesses against him.
>
> "On June 16, 2005, the jury recommended that Mr. Harris be sentenced to life in prison without the possibility of parole. (R. 9538-39) On July 18, 2005, probation officer Al Gaston submitted a presentence investigation report to the trial court. On August 1, 2005, Mr. Harris's counsel objected to the presentence investigation report on the ground that it contained clerical errors and omissions. The trial court, after stating on the record that it had considered the changes and additions that counsel had suggested, considered the presentence investigation report in sentencing Mr. Harris to death. ... Mr. Gaston never took the stand as a witness."

(C. 700-01.) The circuit court summarily dismissed this claim on the ground that it lacked merit. We agree.

In Petric v. State, 157 So. 3d 176 (Ala. Crim. App 2013), this Court addressed the admissibility of a presentence investigation report at a capital-sentencing proceeding against a confrontation challenge under Crawford; we stated, in relevant part:

> "Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949), is very similar to the present case. In Williams, after considering a statutory presentence report, the trial court rejected the jury's recommendation of life imprisonment and sentenced the defendant to death. In deciding to sentence the defendant to death, the trial court relied on statements in the presentence report that 'revealed many material facts concerning [the defendant's] background which though relevant to the question of punishment could not properly have been brought to the attention of the jury in its consideration of the question of guilt.' Williams, 337 U.S. at 244. On appeal, the defendant argued that his constitutional due-process rights had been violated because, he said, 'the sentence of death was based upon information supplied by witnesses with whom the accused had not been confronted and as to whom he had no opportunity for cross-examination or rebuttal.' Id. at 243. The United States Supreme Court rejected the defendant's confrontation argument and held that, at sentencing in even a capital case, the trial court is permitted to consider out-of-court information. Id. at 251–52.
>
> "....
>
> "... Under § 13A–5–47(b), Ala. Code 1975, Petric had the right to respond to the presentence report and to present evidence about any part of the report that was the subject of a factual dispute, and the trial court did not deny Petric that right. ...

> "Furthermore, contrary to Petric's allegation, it is far from obvious that Crawford and Melendez–Diaz [v. Massachusetts, 557 U.S. 305 (2009),] applied to his sentencing. All the post-Crawford decisions of the Courts of Appeals that have decided this issue have stated that Crawford does not apply to capital sentencing. Petric points to one pre-Crawford case from the Eleventh Circuit Court of Appeals that recognizes a right to cross-examination in the context of capital sentencing, 'at least where necessary to ensure the reliability of the witnesses' testimony.' See Proffitt [v. Wainwright, 685 F.2d 1227 (11th Cir. 1982)]. However, that case disregards a United States Supreme Court decision that has never been overruled and that explicitly rejects a right to confront and to cross-examine at sentencing. See Williams [v. New York, 337 U.S. 241 (1949)]. Further, post-Crawford, the Eleventh Circuit has explicitly declined to decide whether Crawford applies at capital sentencing, even after recognizing its prior decision in Proffitt. See [United States v.] Brown, [441 F.3d 1330 (11th Cir. 2006)]."

157 So. 3d at 246. See Lockhart v. State, 163 So. 3d 1088, 1133 (Ala. Crim. App. 2013) ("We express doubt that the Confrontation Clause applies at sentencing, even in capital cases."). See also People v. Banks, 237 Ill.2d 154, 200-03, 934 N.E.2d 435, 460-62, 343 Ill.Dec. 111, 136-37 (2010); and Summers v. State, 122 Nev. 1326, 1331-33, 148 P.3d 778, 781-83 (2006) (both holding that Crawford does not apply to capital sentencing proceedings).

Here, as in Petric, Harris had the opportunity to respond to the presentence reports[11] and Harris's counsel did so, objecting to factual inaccuracies and clerical errors and arguing that the reports did not include a copy of the psychological report prepared by the defense expert, Dr. John Goff. Counsel requested that the court order that all factual and clerical errors be corrected, that the reports include Dr. Goff's report, and that the reports include a copy of Harris's "scholastic records" that were in possession of the State via a subpoena for those records. (RDA, C. 466.) The trial court agreed. Because Harris had the opportunity to rebut the presentence reports, the trial court properly considered them. "[C]ounsel could not be ineffective for failing to raise a baseless objection." Bearden v. State, 825 So. 2d 868, 872 (Ala. Crim. App. 2001).

Therefore, summary dismissal of this claim of ineffective assistance of counsel was proper.

L.

Harris contends that his trial counsel were ineffective for not objecting to the trial court's considering the sentences imposed in other

[11]Two presentence reports were prepared in relation to this case; those reports are dated July 7, 2005, and July 18, 2005.

capital-murder cases when overriding the jury's sentencing recommendation and sentencing Harris to death. In his petition, Harris alleged that the State had filed a written request for the trial court to override the jury's recommendation, encouraging the court to look at the sentences imposed in other cases and that the court had "relied heavily on the sentences imposed in other cases" in imposing sentence. (C. 703.) According to Harris, the trial court "justified its consideration of the sentences imposed in other cases by citing Ala. Code § 13A-5-53(b)(3). However, that provision applies specifically to appellate courts -- not to trial courts." (C. 705.) Harris maintained that "trial courts are forbidden from engaging in comparative proportionality analysis by the Eighth Amendment" and that, had trial counsel "objected to the court's consideration of the sentences imposed in other cases, the court would have sustained the objection and would not have had sufficient reason to override the jury's sentencing recommendation." (C. 706.)

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

> "In reviewing the propriety of this Court's sentencing order the Alabama Court of Criminal Appeals specifically recognized that this Court considered a number of capital

> murder cases in which the jury's life without parole recommendation had been overridden by the trial court. Harris v. State, 2 So. 3d at 930. If this Court's consideration of other capital cases was in any way improper or violated Harris's substantial rights the Criminal Court of Appeals would have recognized it despite the fact it was not raised on appeal. See Rule 45A, Ala. R. App. P.
>
> "This Court finds that the allegation of ineffective assistance of counsel ... is without merit; therefore, it is denied. Rule 32.7(d), Ala. R. Crim. P."

(C. 1057-58.) We agree.

> On direct appeal, this Court stated:
>
> "The trial court stated that it considered the heaviest mitigating factor in this case to be the jury's recommendation that Harris be sentenced to life in prison without the possibility of parole. In its order, the trial court outlined its reasons for overriding the jury's verdict recommending a sentence of life without parole. It added that it had seen no case in which a defendant had killed six victims pursuant to one scheme or course of conduct. It cited a number of cases with multiple victims -- all of which involved fewer than six victims -- in which the trial courts overrode the juries' recommendations for life in prison without the possibility of parole. In each case, this Court upheld the trial courts' decisions to override the juries' recommendations. As the trial court pointed out, when compared with the facts of similar cases, a task the jury could not undertake, 'the only disproportionate sentence in this case would be to sentence Harris to life without parole instead of death.' (C. 516.)"

Harris v. State, 2 So. 3d 880, 930 (Ala. Crim. App. 2007). Had the trial court's noting in its sentencing order the sentences imposed in other cases

been improper, this Court would have recognized the error on direct appeal.

In addition, we have carefully reviewed the trial court's sentencing order and we are confident that the trial court's imposition of the sentence was based solely on the evidence presented at trial. Although the trial court did compare the facts of Harris's case to the facts in other cases in which the defendant had been convicted of killing multiple people and stated that "the only disproportionate sentence in this case would be to sentence Harris to life without parole instead of death," there is no indication that the trial court improperly relied on the sentences imposed in those other cases in weighing the aggravating circumstances and mitigating circumstances and sentencing Harris to death. See, e.g., Woodward v. State, 123 So. 3d 989, 1029-32 (Ala. Crim. App. 2011). Rather, it appears that the trial court noted the other cases for the purpose of providing support for its conclusion that it was authorized to override the jury's sentencing recommendation -- each of the cases cited by the trial court were cases in which the trial court had overridden the jury's sentencing recommendation. "[C]ounsel could not be ineffective for

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

Therefore, summary dismissal of this claim of ineffective assistance of counsel was proper.

Conclusion

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

AFFIRMED.

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