REL: 08/30/2013

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2012-2013

CR-10-0224

David Eugene Davis

v.

State of Alabama

Appeal from St. Clair Circuit Court
(CC-96-0091.60)

BURKE, Judge.

David Eugene Davis pleaded guilty to capital murder wherein two or more people were murdered by one act or pursuant to one scheme or course of conduct, in violation of § 13A-5-40(a)(10), Ala. Code 1975. As required by § 13A-5-42,

Ala. Code 1975, the State presented evidence to a jury in order to prove Davis's guilt beyond a reasonable doubt.[1] The jury returned a guilty verdict and, after the penalty phase of the trial, recommended that Davis be sentenced to death by a vote of 11 to 1. The trial court accepted the jury's recommendation and sentenced Davis to death. This Court affirmed the judgment of the trial court in Davis v. State, 740 So. 2d 1115 (Ala. Crim. App. 1998). The Alabama Supreme Court affirmed this Court's decision in Ex parte Davis, 740 So. 2d 1135 (Ala. 1999), and the United States Supreme Court denied certiorari review. Davis v. Alabama, 529 U.S. 1039 (2000).

On March 16, 2001, Davis filed a timely petition for postconviction relief pursuant to Rule 32, Ala. R. Crim. P. Davis amended his petition three times, and, for various

[1]Section 13A-5-42, Ala. Code 1975, provides: "A defendant who is indicted for a capital offense may plead guilty to it, but the state must in any event prove the defendant's guilt of the capital offense beyond a reasonable doubt to a jury. The guilty plea may be considered in determining whether the state has met that burden of proof. The guilty plea shall have the effect of waiving all non-jurisdictional defects in the proceeding resulting in the conviction except the sufficiency of the evidence. A defendant convicted of a capital offense after pleading guilty to it shall be sentenced according to the provisions of Section 13A-5-43(d)."

reasons, the case was assigned to different judges over an 11-year period.[2] Ultimately, the case was assigned to Judge William Cardwell, who summarily dismissed Davis's third amended petition on November 4, 2010. This appeal follows.

We first note that § 13A-5-42, Ala. Code 1975, provides, in part, that a "guilty plea shall have the effect of waiving all non-jurisdictional defects in the proceeding resulting in the conviction except the sufficiency of the evidence." In Hutcherson v. State, 727 So. 2d 846, 851 (Ala. Crim. App. 1997), this Court interpreted the phrase "proceeding resulting in conviction" to mean the guilt phase of a capital trial. Accordingly, on direct appeal, this Court reviewed the proceedings before and during the guilt phase of Davis's trial for jurisdictional errors. Davis v. State, 740 So. 2d at 1117. Additionally, we reviewed the penalty phase of the proceedings for any error, whether preserved or plain, as required by Rule 45A, Ala. R. App. P., which provides:

> "In all cases in which the death penalty has been imposed, the Court of Criminal Appeals shall notice any plain error or defect in the proceedings

[2]Because Davis does not raise any issues regarding the extended procedural history of the underlying proceedings, we find it unnecessary to recite that history.

> under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial right of the appellant."

As noted, this Court found no such error and affirmed Davis's conviction and sentence.

We also note that, "'even though this petition challenges a capital conviction and a death sentence, there is no plain-error review on an appeal from the denial of a Rule 32 petition.'" Boyd v. State, 913 So. 2d 1113, 1122 (Ala. Crim. App. 2003), quoting Dobyne v. State, 805 So. 2d 733, 740 (Ala. Crim. App. 2000). "'In addition, "[t]he procedural bars of Rule 32 apply with equal force to all cases, including those in which the death penalty has been imposed."'" Burgess v. State, 962 So. 2d 272, 277 (Ala. Crim. App. 2005), quoting Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995), quoting in turn State v. Tarver, 629 So. 2d 14, 19 (Ala. Crim. App. 1993).

The facts from Davis's case were set forth in this Court's opinion on direct appeal as follows:

> "At around 9 p.m. on June 23, 1996, [Davis] was drinking alcohol with his ex-brother-in-law, Tommy Reed. He told Reed he wanted to kill his ex-wife, from whom he had recently been divorced, and he said

he knew where he could get a firearm. He left Reed, and around 10 p.m., he asked two people at a service station for directions to the victims' home. At the time, he was aggressive and seemed to be in a hurry. According to his statements to police, he went to the victims' home and spoke to Kenneth Douglas. At some point, he got into a confrontation with Douglas during which he took a firearm from Douglas and shot him. When he heard another person moving in the bedroom, he shot into that room, killing John Fikes. He then started collecting various items belonging to the victims, including several firearms, which he said he intended to sell to obtain crack cocaine. As he was doing so, he noticed a kerosene lantern and decided to set the house on fire.

"Around 1:30 a.m. the following morning, a relative of one of the victims noticed that the victims' house was on fire and telephoned 911. Also around 1:30 a.m., [Davis] went to Louis Dodd's home and attempted to sell Dodd some of the firearms he took from the victims' home. Dodd described [Davis] as being 'scared to death' and said he appeared to be 'drunk and on drugs.' When Dodd told him not to come to his house at that time of the morning asking to sell stolen properly, he told Dodd, 'They come from far away.' Shortly thereafter, the Trussville Police Department received a complaint about a man walking door-to-door, holding a sawed-off shotgun in one hand and a jug in the other, and asking for gasoline for his vehicle. When they arrived at the scene, the officers recognized [Davis's] vehicle and located [Davis]. As the officers were trying to arrest [Davis], he dropped the shotgun behind some bushes. The officers testified that [Davis] was aware of what was happening as they arrested him and that he probably was not intoxicated to such a degree that he could be arrested for driving under the influence. They also testified that the area where they arrested [Davis] was known for drug activity. The officers found numerous items in his vehicle that belonged to the victims.

> "Tommy Reed, [Davis's] ex-brother-in-law, testified that, on June 24, 1996, he talked to [Davis] while [Davis] was in the Trussville jail. When Reed asked him how bad it was, [Davis] responded that it was 'real bad' and 'more than life.' He then said, 'I'll see you in heaven.'
>
> "At trial, some of the witnesses speculated that [Davis] was under the influence of drugs and alcohol when he committed the murders.
>
> "The medical examiner testified that the victims died from the gunshot wounds."

Davis v. State, 740 So. 2d at 1118-19. The record also reveals that Davis gave two written statements to the police in which he admitted to shooting Kenneth Douglas and John Fikes, the victims, gathering their belongings, and setting fire to their house. (R1. 260.)[3]

Standard of Review

Generally, "[t]he standard of review on appeal in a post conviction proceeding is whether the trial judge abused his discretion when he denied the petition." Elliott v. State, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992). "'A judge abuses his discretion only when his decision is based on an

[3]"R1" denotes the record on appeal from Davis v. State, 740 So. 2d 1115 (Ala. Crim. App. 1998). This Court may take judicial notice of its own records. Hull v. State, 607 So. 2d 369 (Ala. Crim. App. 1992).

erroneous conclusion of law or where the record contains no evidence on which he rationally could have based his decision.'" Hodges v. State, 926 So. 2d 1060, 1072 (Ala. Crim. App. 2005), quoting State v. Jude, 686 So. 2d 528, 530 (Ala. Crim. App. 1996)(internal citations omitted). 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). Additionally, in Ex parte Hinton, [Ms. 1110129, November 9, 2012] ___ So. 3d ___, ___ (Ala. 2012), the Alabama Supreme Court held that when a circuit court's decision in a Rule 32 petition is based solely on the "'cold trial record,'" it is "in no better position than ... an appellate court to make the determination it made." Therefore, in that situation, the reviewing court should apply a de novo standard of review. Id. The judge who presided over Davis's Rule 32 proceedings was not the judge who had presided over Davis's trial; and, because the petition was summarily dismissed, no evidentiary hearing was held. Accordingly, we will review the issues raised by Davis de novo.

In his third amended petition, Davis raised multiple issues and subissues. However, we will only address those issues that Davis has argued in his brief on appeal. Allegations that are not expressly argued on appeal are deemed to be abandoned and will not be reviewed by this Court. Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995).

I.

First, Davis asserted that he was denied the right to be present when the trial court gave supplemental instructions to the jury during the guilt phase of his trial. Specifically, Davis claimed in his third amended Rule 32 petition:

> "Outside the presence of Mr. Davis, his counsel, and the prosecution, the trial court stated the following to the jury:
>
> > "'Ladies and Gentlemen, you began deliberation yesterday afternoon, and you have been back this morning and you have further deliberated for two hours. The allegations in this case are very serious, and don't get the idea I'm telling you not to deliberate. What I want to make sure is that you stay focused on the issues in this case. Your determination at this point is whether there is proof beyond a reasonable doubt that the defendant committed the offense of capital murder. If you do not find such proof beyond a reasonable doubt of the elements of capital murder as I have explained them to you, then you would also consider if the defendant was guilty of any

> lesser included offenses or whether the defendant was not guilty. What you are to consider -- and the only things you are to consider in this case is the evidence that has been brought to you from the witness stand, the exhibits that have been introduced. You may consider the defendant's plea of guilt in this case. You may consider any inference arising from the evidence or lack of evidence in this case in your deliberations. The burden is on the State in this case as I previously told you. The first thing I told you at the beginning of my charge yesterday, however, is there are several things you are not to consider. It would be highly improper for you to consider any issues in this case regarding punishment at this point. That is not your job. You are only to consider the facts of this case and consider rendering one of the verdict forms or a combination of verdict forms I have given you in this case, and the matter of any punishment to be rendered based on any verdict that you might render in this case is a matter for separate consideration at a different time. Confine your discussions and deliberation to the evidence you have heard in this case, the inferences you can draw from that evidence, and the other instructions I have given you. With that in mind, you are to return to the jury room and begin deliberations.'"

(C. 1577-78.) Davis argued that, "[u]nder the Sixth and Fourteenth Amendments to the United States Constitution, 'the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his

absence.'" (C. 1578, citing Snyder v. Massachusetts, 291 U.S. 97, 107 (1934).)

In its answer and motion to dismiss Davis's third amended Rule 32 petition, the State argued that this claim was procedurally barred by Rule 32.2(a)(5), Ala. R. Crim. P., because it could have been, but was not, raised on direct appeal. The circuit court agreed with the State and summarily dismissed this claim pursuant to Rule 32.2(a)(5), Ala. R. Crim. P.

Rule 32.2(a)(5) provides that "[a] petitioner will not be given relief under this rule based upon any ground ... [w]hich could have been but was not raised on appeal, unless the ground for relief arises under Rule 32.1(b)." Rule 32.1(b), Ala. R. Crim. P., provides that a petitioner is entitled to relief if "[t]he court was without jurisdiction to render judgment or to impose sentence." In Ex parte Seymour, 946 So. 2d 535, 537 n. 3 (Ala. 2006), the Alabama Supreme Court explained:

> "The language 'jurisdiction to render judgment or impose sentence' [in Rule 32.1(b), Ala. R. Crim. P.,] refers to the court's jurisdiction over the subject matter, as opposed to the person. Although a court must have both personal jurisdiction and subject-matter jurisdiction in an action, Woolf v.

> McGaugh, 175 Ala. 299, 303, 57 So. 754, 755 (1911), defects in personal jurisdiction are waived if they are not raised before trial. City of Dothan v. Holloway, 501 So. 2d 1136, 1139 (Ala. 1986). The Rule 32.1(b) exception applies only to claims alleging that the trial court lacked subject-matter jurisdiction."

This Court has held that "[a] constitutional challenge is nonjurisdictional and therefore subject to the procedural bars set forth in Rule 32, Ala. R. Crim. P." Abrams v. State, 978 So. 2d 794, 795 (Ala. Crim. App. 2006), citing Ex parte Sanders, 792 So. 2d 1087 (Ala. 2001). See also Jackson v. State, 12 So. 3d 720, 721-22 (Ala. Crim. App. 2007)(holding that a defendant's claim that he was not present during initial jury selection did not impinge upon the subject-matter jurisdiction of the trial court). Accordingly, Davis's claim is nonjurisdictional and, therefore, subject to the procedural bars of Rule 32.2, Ala. R. Crim. P.

On appeal, Davis argues that he could not have raised this claim on direct appeal because, he says, "the appellate record alone was not sufficient to establish that Mr. Davis was denied the right to be present." (Davis's brief, at 23.) However, on direct appeal, Davis argued that the above-quoted supplemental instruction was improper. Davis v. State, 740

So. 2d at 1126-27. Thus, Davis would have been aware, at the time he filed his direct appeal, that he was not present when that supplemental instruction was given. Accordingly, Davis could have raised this argument on direct appeal, and the circuit court was correct in finding that this issue was precluded by Rule 32.2(a)(5), Ala. R. Crim. P.

Rule 32.7(d), Ala. R. Crim. P., provides that a circuit court may summarily dismiss a petition if "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 ...." Because Davis's claim regarding his alleged absence when the supplemental jury instruction was given was properly precluded, the circuit court did not err by summarily dismissing that claim.

II.

Next, Davis asserted that the trial judge engaged in improper ex parte communications with the jury. According to Davis, the judge, without prompting from the jury, entered the jury room during both their guilt-phase and their penalty-

phase deliberations and discussed Davis's case. Davis claimed that Judge Austin, the judge who presided over his trial, "told the jury that it was taking too long to reach a decision; that the reason he reinstructed the jury at the guilt phase was that the jury was taking too long to reach a decision; that the victims' family members had asked [him] why the jury was taking so long to reach a decision; and that the jury's decision at the penalty phase was only a recommendation." (C. 1580.) Davis also claimed that the judge commented on Davis's guilty plea "and provided the jurors with additional supplemental instructions about the applicable law." (C. 1580.) Davis asserted that neither he, nor defense counsel, nor appellate counsel, nor the prosecution, nor the court reporter were made aware of these alleged communications.

In its answer and motion to dismiss, the State submitted a sworn affidavit from Judge Austin in which he expressly denied having any ex parte contact with the jury. (C. 1760-62.) In its order dismissing Davis's petition, the circuit court stated:

> "This Court has considered the sworn affidavit executed by Judge Austin and filed by the State

> pursuant to Rule 32.7(a), Ala. R. Crim. P. In his affidavit, Judge Austin specifically denies having any ex parte contact with the jurors during their deliberations. Based on Judge Austin's affidavit, and the fact that Davis did not proffer a single specific fact in his petition that would refute it, this Court finds that the allegation in part II of his petition is without merit."

(C. 1985.)

On appeal, Davis argues that the circuit court's summary dismissal of this claim was improper because, he says, he was required only to plead, not prove, his allegations in order to avoid summary dismissal. Further, Davis argues that it was improper for the circuit court to consider the affidavit submitted by the State without affording him an opportunity either to cross-examine Judge Austin or to submit affidavits of his own. We agree that Davis was not required to submit his own affidavits at the pleading stage of the Rule 32 proceedings. The record does not indicate that the circuit court instructed either party to submit affidavits in lieu of an evidentiary hearing pursuant to Rule 32.9(a), Ala. R. Crim. P.

However, Rule 32.3, Ala. R. Crim. P., provides, in pertinent part, that "[t]he petitioner shall have the burden of pleading and proving by a preponderance of the evidence the

facts necessary to entitle the petitioner to relief." Further, Rule 32.6(b), Ala. R. Crim. P., provides:

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

We find that part II of Davis's petition does not meet the pleading and specificity requirements of Rule 32.3 and Rule 32.6(b), Ala. R. Crim. P.

This Court has held:

> "'An evidentiary hearing on a [Rule 32] petition is required only if the petition is "meritorious on its face." Ex parte Boatwright, 471 So. 2d 1257 (Ala. 1985). A petition is "meritorious on its face" only if it contains a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the facts relied upon (as opposed to a general statement concerning the nature and effect of those facts) sufficient to show that the petitioner is entitled to relief if those facts are true. Ex parte Boatwright, supra; Ex parte Clisby, 501 So. 2d 483 (Ala. 1986).'"

Bracknell v. State, 883 So. 2d 724, 727-28 (Ala. Crim. App. 2003), quoting Moore v. State, 502 So. 2d 819, 820 (Ala. 1986). Additionally, "where the judgment of the circuit court denying a petition for post-conviction relief is correct for any reason, it will be affirmed by this Court, even if the

circuit court stated an incorrect reason for its denial." Swicegood v. State, 646 So. 2d 159, 160 (Ala. Crim. App. 1994).

As noted, Davis alleged that Judge Austin entered the jury room during both the guilt-phase and the penalty-phase deliberations and gave the jury supplemental instructions outside the presence of counsel. However, it is unclear from the petition whether Davis is claiming that the judge made the same ex parte comments during both phases or whether some of the comments were made during the guilt-phase deliberations while others were made during the penalty-phase deliberations. We also note that, although Davis identified the general substance of the alleged communications, he failed to identify the source of the information. Finally, Davis's petition does not indicate when he became aware of this information.

In his reply brief, Davis argues that "[t]here is no mystery as to whom [he] could call at a hearing -- or who could have provided counsel's good-faith basis for raising the claim. Judge Austin's audience is well circumscribed. The only persons who should have been anywhere near the jury room were the jurors and the bailiffs -- fourteen people in total."

(Davis's reply brief, at 12 (emphasis added)). Although Davis is correct in asserting that those were the only people who should have been anywhere near the jury room, his petition alleged that there was at least one additional person near the jury room: Judge Austin. Thus, Davis could have been relying on Judge Austin to admit, at an evidentiary hearing, that he made the alleged statements to the jury. In fact, Davis filed a motion to disqualify Judge Austin from presiding over the Rule 32 proceedings because, he said, "Judge Austin will be a witness to facts critical to the resolution of claims pled in Mr. Davis's amended petition for relief under Rule 32...." (C. 236.) Additionally, there could have been any number of witnesses who were impermissibly near the jury room and overheard the alleged comments, or Davis's information could be based on hearsay statements from jurors to other witnesses.

In Daniel v. State, 86 So. 3d 405, 422 (Ala. Crim. App. 2011), a Rule 32 petitioner claimed that his trial counsel was ineffective for failing to interview his coworkers regarding certain evidence they might have been able to provide at his trial. This Court held that the claim was not sufficiently specific because the petitioner "failed to identify, by name,

any coworker whom counsel should have consulted. Specificity in pleading requires that the petitioner state both the name and the evidence that was in the witness's possession that counsel should have discovered...." Id.; see also Beckworth v. State, [Ms. CR-07-0051, May 1, 2009] ___ So. 3d ___, ___ (Ala. Crim. App. 2009)(holding that a petition lacked specificity because petitioner "failed to include in his petition any facts indicating when he learned of [the codefendant's statement] or indicating that he did not learn about the statement in time to raise the issue in a posttrial motion or on appeal"). Davis's petition is similarly deficient.

Although the circuit court's summary dismissal was not based on a lack of specificity, an appellate court may, in general, affirm the circuit court's dismissal if it is correct for any reason. This Court has held:

> "Because due process is not implicated and Ex parte Clemons[, 55 So. 3d 348 (Ala. 2007),] is not applicable in this case, this Court may apply the well-settled rule that an appellate court may affirm a circuit court's judgment if that judgment is correct for any reason. As the Alabama Supreme Court explained in Liberty National Life Insurance Co. v. University of Alabama Health Services Foundation, P.C., 881 So. 2d 1013 (Ala. 2003):

> "'Nonetheless, this Court will affirm the trial court on any valid legal ground presented by the record, regardless of whether that ground was considered, or even if it was rejected, by the trial court. Ex parte Ryals, 773 So. 2d 1011 (Ala. 2000), citing Ex parte Wiginton, 743 So. 2d 1071 (Ala. 1999), and Smith v. Equifax Servs., Inc., 537 So. 2d 463 (Ala. 1988). This rule fails in application only where due-process constraints require some notice at the trial level, which was omitted, of the basis that would otherwise support an affirmance, such as when a totally omitted affirmative defense might, if available for consideration, suffice to affirm a judgment, Ameriquest Mortgage Co. v. Bentley, 851 So. 2d 458 (Ala. 2002), or where a summary-judgment movant has not asserted before the trial court a failure of the nonmovant's evidence on an element of a claim or defense and therefore has not shifted the burden of producing substantial evidence in support of that element, Rector v. Better Houses, Inc., 820 So. 2d 75, 80 (Ala. 2001) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed. 2d 265 (1986), and Kennedy v. Western Sizzlin Corp., 857 So. 2d 71 (Ala. 2003))."

"881 So. 2d at 1020."

A.G. v. State, 989 So. 2d 1167, 1180-81 (Ala. Crim. App. 2007). See also McNabb v. State, 991 So. 2d 313, 335 (Ala. Crim. App. 2007)(This court may sua sponte apply the specificity requirement contained in Rule 32.6(b), Ala. R. Crim. P.). Similarly, Ex parte Clemons, 55 So. 3d 348 (Ala.

2007), is not applicable to this issue and Davis's due-process rights are not implicated by the sua sponte application of Rule 32.6(b).

We also note that in Ex parte McCall, 30 So. 3d 400 (Ala. 2008), the Alabama Supreme Court further limited an appellate court's ability to affirm a circuit court's dismissal on any valid legal ground. In McCall, the circuit court held an evidentiary hearing but ultimately dismissed the petition. However, the circuit court failed to include written findings of fact in its order dismissing the petition. This Court nevertheless affirmed the dismissal, by an unpublished memorandum, because "[t]he circuit court's order correctly found that McCall did 'fail to state a claim.' Rule 32.7(d)[, Ala. R. Crim. P.]" McCall v. State, (No. CR-06-0021, Dec. 14, 2007), 19 So. 3d 259 (Ala. Crim. App. 2007)(table). The Alabama Supreme Court reversed this Court's decision and held that, by holding an evidentiary hearing, "the [circuit] court implicitly found that the issues presented were 'material issue[s] of law or fact ... which would entitle [McCall] to relief, Rule 32.7(d), and, under Rule 32.9(d), the trial court therefore had a responsibility to make findings of fact as to

each of those issues." Ex parte McCall, 30 So. 3d at 404. Accordingly, the circuit court's judgment was reversed and the case was remanded with instructions that the circuit court enter written findings of fact. McCall v. State, 30 So. 3d 404, 405 (Ala. Crim. App. 2009).

Thus, the affirm-on-any-valid-legal-ground rule does not allow this Court to absolve a circuit court of its duty to enter written findings of fact under Rule 32.9(d), Ala. R. Crim. P.[4] See also Andrews v. State, 38 So. 3d 99, 104 (Ala. Crim. App. 2009)("Although it seems a waste of scarce judicial resources to remand this case for the trial court to enter a new order setting forth its specific findings of fact, we are nevertheless bound by the [Alabama Supreme] Court's holding in Ex parte McCall."). Once a circuit court holds an evidentiary hearing or takes evidence by affidavits in lieu of a hearing, see Rule 32.9(a), Ala. R. Crim. P., it is required to enter written findings of fact related to each material issue of law or fact that could entitle the petitioner to relief.

[4]Rule 32.9(d), Ala. R. Crim. P., provides that, if an evidentiary hearing is held, a circuit court "shall make specific findings of fact related to each material issue of fact presented."

Had the circuit court in this case held a hearing or directed the parties to submit affidavits in lieu of a hearing, then McCall would have compelled this Court to remand the case for the entry of factual findings despite the fact that the petition was deficiently pleaded. However, the proceedings in the present case did not include, or require, an evidentiary hearing. Although the circuit court considered an affidavit submitted by the State, it did not hold a hearing or direct either party to submit affidavits pursuant ro Rule 32.9(a). Thus, McCall is inapposite. Accordingly, because Davis failed to fully plead the facts that would have entitled him to relief, the circuit court did not err by summarily dismissing his claim.

We also note that Judge Austin's affidavit was executed on July 13, 2005, and was first filed on July 19, 2005, as an exhibit attached to the State's response to Davis's first amended petition. (C. 621.) Because Davis's petition was not ruled on until October 31, 2010, Davis had notice of the existence of the affidavit for more than five years. Although Davis was not required to submit his own affidavits in response to the affidavit submitted by the State, nothing

precluded him from doing so in the intervening five-year period.

III.

Next, Davis contended that his trial counsel were ineffective for several reasons both before and during his trial. With regard to ineffective-assistance-of-counsel claims, this Court has held:

> "When reviewing claims of ineffective assistance of counsel, we apply the standard adopted by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). To prevail on a claim of ineffective assistance of counsel a petitioner must show: (1) that counsel's performance was deficient; and (2) that the petitioner was prejudiced by the deficient performance.
>
> > "'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. Cf. Engle v. Isaac, 456 U.S. 107, 133-34 (1982). 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." See Michel v. Louisiana, [350 U.S. 91] at 101 [(1955)]. 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 v. Washington, 466 U.S. at 689, 104 S.Ct. 2052.
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> > "'"'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, 104 S. Ct. 2052.'
>
> "A.G. v. State, 989 So. 2d 1167, 1171 (Ala. Crim. App. 2007)."

Lee v. State, 44 So. 3d 1145, 1154-55 (Ala. Crim. App. 2009).

Additionally,

> "[w]hen an appellant's claim of ineffective assistance of counsel arises from alleged errors

> committed by counsel in the guilty plea process, the prejudice prong of the Strickland analysis is satisfied by the appellant's establishing 'that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'"

Culver v. State, 549 So. 2d 568, 572 (Ala. Crim. App. 1989), quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985). With these principles in mind, we will now address each of Davis's ineffective-assistance-of-counsel claims.

A.

First, Davis contended that his trial counsel were ineffective for failing to adequately investigate and advise him regarding the defenses of provocation, self-defense, and intoxication. Davis asserted that "[i]f trial counsel had not failed to investigate fully and independently the prosecution's case as well as all avenues of defense and mitigation available to [him], there is a reasonable probability that [he] would have maintained his not guilty plea and his defenses would have had sufficient evidentiary support to succeed at trial." (C. 1588.) Additionally, Davis argued that, but for counsels' alleged deficiencies, they would have discovered mitigating evidence that could have been presented to the jury during the penalty phase of his trial.

According to Davis, the jury would have likely returned a different advisory verdict had it been able to consider such evidence.

Davis asserted that a reasonable investigation into his state of intoxication on the night of the offense would have revealed that he ingested substantial amounts of alcohol and cocaine in the hours leading up to the murders. Davis also claimed that his counsel failed to uncover evidence regarding Davis's long history of substance abuse. Additionally, Davis contended that his counsel should have retained a toxicology expert to present this evidence to the jury. According to Davis, such evidence could have been used in his defense in order to show that he was too intoxicated at the time of the offense to form the specific intent to kill the victims.

Davis also claimed that his counsel failed to adequately investigate the character and background of Kenneth Douglas, one of his victims. According to Davis, a reasonable investigation would have revealed that Douglas had a violent temper; that Douglas had assaulted a police officer in 1994; and that Douglas's wife had accused Douglas of being violent and had sought a temporary restraining order against him.

Davis argued that evidence regarding Douglas's violent character would have supported theories of self-defense and heat-of-passion manslaughter. Additionally, Davis claimed that this evidence, as well as testimony from ballistics experts and crime-scene-reconstruction experts would have served to dispute the State's theory of the circumstances leading up to Kenneth Douglas's death. The circuit court found that these claims were either meritless or lacked the specificity required by Rule 32.6(b), Ala. R. Crim. P.

In Jones v. State, 753 So. 2d 1174, 1191 (Ala. Crim. App. 1999), this Court discussed counsel's duty to investigate:

> "While counsel has a duty to investigate in an attempt to locate evidence favorable to the defendant, 'this duty only requires a reasonable investigation.' Singleton v. Thigpen, 847 F. 2d 668, 669 (11th Cir.(Ala.) 1988), cert. denied, 488 U.S. 1019, 109 S.Ct. 822, 102 L.Ed.2d 812 (1989) (emphasis added). See Strickland, 466 U.S. at 691, 104 S.Ct. at 2066; Morrison v. State, 551 So. 2d 435 (Ala. Cr. App. 1989), cert. denied, 495 U.S. 911, 110 S.Ct. 1938, 109 L.Ed.2d 301 (1990). Counsel's obligation is to conduct a 'substantial investigation into each of the plausible lines of defense.' Strickland, 466 U.S. at 681, 104 S.Ct. at 2061 (emphasis added). 'A substantial investigation is just what the term implies; it does not demand that counsel discover every shred of evidence but that a reasonable inquiry into all plausible defenses be made.' Id., 466 U.S. at 686, 104 S.Ct. at 2063.

> "'The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information.'
>
> "Id., 466 U.S. at 691, 104 S.Ct. at 2066."

Additionally, in Smith v. State, 112 So. 3d 1108 (Ala. Crim. App. 2012), quoting Brooks v. State, 929 So. 2d 491, 503-04 (Ala. Crim. App. 2005), this Court, in discussing an appellant's claim that his counsel performed a deficient investigation, noted:

> "'"There is no doubt that counsel did not exhaustively investigate every single detail and aspect of this case. The law, however, does not require such and, in fact does not even require an investigation into every possible theory of defense. Moreover, because the chosen theory of defense was reasonable, 'it is immaterial that some other reasonable courses of defense (that the lawyer did not think of at all) existed and that the lawyer's pursuit of [a reasonable-doubt defense] was not a deliberate choice between [it and some other course].' Chandler v. United States, 218 F. 3d 1305, 1316, n. 16 (11th Cir. 2000)(en banc). The 'inquiry is limited to whether [the chosen defense] might have been a reasonable one.' Id., citing Harich v. Dugger, 844 F. 2d 1464, 1470-71 (11th Cir. 1988)(en banc); Bonin v. Calderon, 59 F. 3d 815, 838 (9th Cir. 1995)."'"

112 So. 3d at 1140-41.

The record reveals that Davis gave two written statements to police in which he admitted to killing Kenneth Douglas and John Fikes. Davis also admitted to the police that, after shooting them, he "started gathering up all [the] firearms, rod and reels, and then poured Coleman lantern fuel in the living room and lit it and left." (R1. 260.) When Davis was arrested later that same day, the victims' belongings were discovered in Davis's vehicle.

Davis's counsel would have known about this evidence before trial. In his petition, Davis noted the following regarding the advice he received from counsel:

> "On June 2, 1997, one week before trial was scheduled to commence, trial counsel met with Mr. Davis at the St. Clair County jail. Trial counsel's notes reflect that counsel discussed '[three] options' with Mr. Davis during the June 2 meeting: (1) proceeding to trial on the plea of not guilty; (2) proceeding to trial on a not guilty by reason of insanity plea; and (3) changing his plea from not guilty to guilty. Trial counsel's notes from the June 2 meeting indicate that counsel advised Mr. Davis that the first option would result in a 'for sure death' sentence. With respect to the second option, trial counsel's notes indicate that counsel advised Mr. Davis that there was 'no med[ical] evid[ence] to supp[ort]' proceeding on an 'insanity plea.' However, with respect to the third option, trial counsel's notes indicate that counsel advised Mr. Davis that by entering a guilty plea to capital

> murder he would 'keep out horrible pictures' and enable the defense to make an 'att[empt] at mercy for life w[ith]out the [possibility of parole].' At the bottom of counsel's notes about the three options discussed with Mr. Davis, trial counsel wrote: 'We recommend #3.'"

(C. 1609-10.) Thus, it appears that counsels' strategy was to have Davis plead guilty and accept responsibility for his actions in hopes that the jury would recommend life without the possibility of parole as opposed to the death penalty. Aggressively pursuing and presenting theories of self-defense, intoxication, and provocation would have likely undermined that strategy.

Although counsels' strategy proved to be unsuccessful, this Court must "avoid using 'hindsight' to evaluate the performance of counsel" and "evaluate all the circumstances surrounding the case at the time of counsel's actions before determining whether counsel rendered ineffective assistance." Lee v. State, 44 So. 3d at 1155. Based on the overwhelming evidence that the State had, including two written statements in which Davis admitted to shooting the victims, taking their property, and setting their house on fire, we cannot say that counsels' strategy constituted deficient performance.

Accordingly, even if we assume that the allegations in Davis's petition regarding counsels' investigation are true, Davis's claim was not meritorious on its face because it did not meet the first prong of the standard set out in Strickland v. Washington, 466 U.S. 668 (1984), i.e., that counsels' performance was deficient. In order to succeed on a claim of ineffective assistance of counsel, a petitioner must meet both prongs of the standard set out in Strickland. Lee v. State, 44 So. 3d at 1154.

We also note that, during the guilty-plea colloquy, the following exchange took place:

> "THE COURT: ... If you went to trial on these offenses in front of a jury, a jury would have the opportunity to consider whether you were guilty instead of a capital offense, of any lesser included offenses. I would anticipate in this case that the issue to be submitted to the jury -- lesser included offenses of murder and possibly manslaughter. It would be any other lesser included offenses supported by the evidence in this case. Do you understand a jury would have the option of determining whether or not you were guilty instead of a capital offense, of a lesser included offense. Have your lawyers talked to you about that?
>
> "[Davis]: Yes, sir."

(C. 592-93.) Thus, it appears from the record that Davis's counsel did discuss the possibility of lesser-included

offenses with him. This would refute Davis's claim that he was not advised of other options that were available to him. Nevertheless, Rule 32.7(d), Ala. R. Crim. P., states that a circuit court may summarily dismiss a petition if "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 ...." Because Davis failed to plead a facially meritorious claim of ineffective assistance of counsel as to this issue, the circuit court did not err by summarily dismissing the claim.

B.

Next, Davis claimed that counsel were ineffective because they advised him to plead guilty based on a misunderstanding of the law. Davis asserted that counsel negotiated a plea agreement with the State whereby the State would dismiss Count II of the indictment, which charged Davis with murder made capital because it was committed during the course of a robbery, a violation of § 13A-5-40(a)(2), Ala. Code 1975, in exchange for Davis's pleading guilty to Count I, which charged

Davis with murder made capital because two or more persons were murdered by one act or pursuant to one scheme or course of conduct, a violation of § 13A-5-40(a)(10), Ala. Code 1975. According to Davis, counsel advised him to enter into the agreement based on their erroneous belief that the State would be precluded from relying on the robbery that was the basis of Count II as an aggravating circumstance pursuant to § 13A-5-49(4), Ala. Code 1975.

A review of the record reveals that Davis's counsel did attempt to prevent the State from relying on the robbery as an aggravating circumstance. Before the beginning of the penalty phase, counsel for Davis stated:

> "Your Honor, we would object to the State offering or attempting to offer aggravating circumstances being in the Code as No. 4 [murder during a robbery]. Based on the fact or at least the partial fact that the indictment charging the defendant with robbery or attempt to rob was dismissed by the State.... It would be inadmissible now for the State, after dismissing that count of the indictment, to come back and use it as an aggravating circumstance."

(R1. 352.) The trial court overruled the objection.

In his petition, Davis claimed that counsel were deficient for failing to understand the applicable law. Specifically, he argued that, "[b]ecause the plea bargain

agreement negotiated by trial counsel was premised on an erroneous belief that dismissal of Count II would preclude the State from attempting to establish the murder-robbery aggravating factor under Ala. Code § 13A-5-49, counsel's assistance in connection with securing the plea agreement was deficient." (C. 1613.) Davis claimed that counsels' alleged deficiency prevented him from making a knowing, intelligent, and voluntary decision to plead guilty and that, but for counsel's alleged error, there is a reasonable probability that the determination of his guilt and his sentence would have been different.

In its order dismissing Davis's petition, the circuit court noted that Davis was informed during the guilty-plea colloquy that the State would "seek to prove beyond a reasonable doubt that the capital offense was committed during the commission or an attempt to commit a robbery." (R1. 13-14.) Thus, the circuit court concluded that the record refuted Davis's claim that his plea was not knowingly, intelligently, and voluntarily made. Accordingly, the circuit court found the claim to be meritless.

On appeal, Davis argues that the circuit court's ruling was improper. Davis contends that the fact that the trial court informed him that the State would "'seek to prove' the robbery-murder aggravating circumstance ... does not disprove [his] allegation that counsel misadvised him that the State would be unable to establish it." (Davis's brief, at 62-63.) Although we agree that the record does not necessarily refute Davis's claim that counsel gave him erroneous advice, we note that "where the judgment of the circuit court denying a petition for post-conviction relief is correct for any reason, it will be affirmed by this Court, even if the circuit court stated an incorrect reason for its denial." Swicegood v. State, 646 So. 2d 159, 160 (Ala. Crim. App. 1994).[5]

As we noted earlier, in order to prevail on a claim of ineffective assistance of counsel, a petitioner must show: (1) that counsel's performance was deficient; and (2) that the petitioner was prejudiced by the deficient performance. Strickland v. Washington, 466 U.S. 668 (1984). Additionally, this Court has held:

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[5]This general rule is subject to exceptions not applicable here. See, e.g., Ex parte Clemons, 55 So. 3d 348 (Ala. 2007).

> "'[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.'"

Smith v. State [Ms. CR-08-0638, September 30, 2011] ___ So. 3d ___, ___ (Ala. Crim. App. 2011), quoting Strickland, 466 U.S. at 697.

A review of Davis's petition reveals that he failed to allege that he was prejudiced by counsel's erroneous advice. "When an appellant's claim of ineffective assistance of counsel arises from alleged errors committed by counsel in the guilty plea process, the prejudice prong of the Strickland analysis is satisfied by the appellant's establishing 'that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" Culver v. State, 549 So. 2d 568, 572 (Ala. Crim. App. 1989), quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985). Although Davis asserted that, "but for counsel's deficient performance there is a reasonable probability that the determination of guilt and sentence would

have been different" (C2. 247), he did not assert that he would have otherwise insisted on going to trial. Accordingly, even if the allegations in Davis's petition are true, he would not be entitled to relief because they do not establish that Davis was prejudiced, as required under Strickland. Therefore, the circuit court did not err by summarily dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

C.

Next, Davis claimed that his counsel were ineffective during the guilt phase of his trial for the following reasons: (1) failing to request a jury instruction on heat-of-passion manslaughter, (2) failing to object to the prosecutor's erroneous statement that intoxication is not a defense to capital murder, and (3) failing to object to the trial court's erroneous jury instruction that the State's burden of proof was "merely beyond a reasonable doubt." (Davis's brief, at 66.) In dismissing Davis's petition, the circuit court found that these claims were meritless.

1.

When a defendant pleads guilty to capital murder, he is not entitled to jury instructions on lesser-included offenses.

In Hutcherson v. State, 727 So. 2d 846, 854 (Ala. Crim. App. 1997), the appellant raised a similar argument.

> "The appellant's second argument is that the trial court erred in refusing to charge the jury on the lesser included offense of felony murder. After the State rested, the appellant asked the trial court to instruct the jury on the lesser included offense of felony murder because there was evidence that he did not intend to commit a murder at the time he committed the burglary. In response, the trial court stated as follows:
>
> "'....
>
> "'This is a guilty plea. This is not a trial. I don't think he is entitled to be convicted on lesser-included offenses on a guilty plea to a capital case. If the jury decided that the State didn't prove beyond a reasonable doubt, what I would do is let him —- set aside the plea and try the case on the merits. I mean, that's -— unless the State has some objection, that's going to be the procedure that I would employ. Because this is not, in fact, a trial. The State, under the statute, must prove beyond a reasonable doubt that the Defendant committed the capital offense.
>
> "'I will mention to the jury that if there are lesser-included offenses, then they would not return a verdict of guilty. Although the opinion that was decided refers to other possible verdicts.
>
> "'....
>
> "'I am not going to allow the Defendant to take advantage of a situation

> where we have not tried the case but have tried it as a guilty plea.'
>
> "Although this was a non-jurisdictional matter which was waived by the appellant's guilty plea, we note that the trial court's analysis was correct. As the State correctly asserts, the jury was empaneled to determine only whether the State had proven beyond a reasonable doubt that the appellant was guilty of burglary-murder. Therefore, the appellant was not entitled to have the jury instructed on lesser included offenses."

Although the trial court in this case did instruct the jury on the lesser-included offense of manslaughter (R1. 330-32), it was not required to do so.[6]

This Court has held that counsel is not ineffective for failing to raise a meritless claim. See Patrick v. State, 680 So. 2d 959, 963 (Ala. Crim. App. 1996)("The law does not require a useless act.... 'Counsel is not ineffective for failing to file a motion for which there is "no legal basis."' Hope v. State, 521 So. 2d 1383, 1386 (Ala. Cr. App. 1988), quoting United States v. Caputo, 808 F. 2d 963, 967 (2nd Cir. 1987)."); see also Bearden v. State, 825 So. 2d 868, 872 (Ala. Crim. App. 2001)("[C]ounsel could not be ineffective for failing to raise a baseless objection."). Therefore, Davis's

[6]Davis did not raise any issues in his Rule 32 petition specifically challenging the trial court's jury instructions.

counsel was not deficient for failing to request a jury instruction on heat-of-passion manslaughter. Accordingly, Davis's claim did not satisfy the first prong of the standard set out in Strickland and the circuit court did not err by summarily dismissing it. See. Rule 32.7(d), Ala. R. Crim. P.

2.

Similarly, Davis's argument regarding counsel's failure to object during the State's closing argument is without merit. During the State's rebuttal to Davis's closing argument, the prosecutor stated:

> "Let me say this: the last time I looked, and I have been doing this a long time. I didn't see anything on the criminal books in Alabama that said that because a person has a drug problem or a history of drug use, that that sets up a defense for killing two people. It don't exist."

(R1. 307.) Later, the prosecutor said:

> "I don't care if he is whacked out on all the cocaine in the world. That is not a defense under Alabama law for killing two people -- gunning them down, taking everything they own to swap for crack."

(R1. 314.) Davis argued that these comments were improper and that his attorneys were ineffective for failing to object and request a curative instruction.

However, the prosecutor's remarks were not an incorrect statement of the law. Section 13A-3-2(a), Ala. Code 1975, provides:

> "Intoxication is not a defense to a criminal charge, except as provided in subsection (c)[7] of this section. However, intoxication, whether voluntary or involuntary, is admissible in evidence whenever it is relevant to negate an element of the offense charged."

Thus, the prosecutor's assertion that voluntary intoxication is not a defense under Alabama law was correct. Accordingly, counsel could not have been ineffective for failing to object. See Bearden v. State, 825 So. 2d at 872 ("[C]ounsel could not be ineffective for failing to raise a baseless objection.").

To the extent that the prosecutor's comments could have been misleading, we do not find that counsels' failure to object constituted deficient performance. The trial court instructed the jury that "what the lawyers have said to you and what they have suggested to you in opening statements, closing statements, and what they have said during questions that have been asked is not evidence." (R1. 316.)

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[7]Section 13A-3-2(c), Ala. Code 1975, deals with involuntary intoxication.

Additionally, the trial court instructed the jury regarding voluntary intoxication as follows:

> "If because of voluntary intoxication of the defendant, you are not convinced beyond a reasonable doubt that the defendant possessed the necessary intent to kill either of those individuals whose death has been made the subject of the indictment, then you could not find the defendant guilty of capital murder because he lacked that specific intent to kill required of capital murder."

(R1. 332.) Thus, the trial court clarified any confusion that might have existed regarding the law as it pertains to intoxication, and a jury is presumed to have followed a trial court's instructions. See Mitchell v. State, 84 So. 3d 968, 983 (Ala. Crim. App. 2010), quoting Frazier v. State, 758 So. 2d 577, 604 (Ala. Crim. App. 1999)("'The jury is presumed to follow the instructions given by the trial court.'").

Accordingly, even if Davis's counsel were deficient for failing to object to the prosecutor's comments, we do not find that Davis suffered prejudice. Because Davis was not prejudiced by the alleged deficiency, he did not satisfy the second prong of the Strickland standard. Therefore, Davis's claim was, therefore, meritless, and the circuit court properly dismissed it. See Rule 32.7(d), Ala. R. Crim. P.

Finally, Davis claimed that his counsel were ineffective for failing to object to the trial court's jury instructions regarding reasonable doubt. Specifically, Davis claimed that the trial court "improperly diminished the reasonable doubt standard" by telling "the jury twice that the State's burden of proof was 'merely beyond a reasonable doubt.'" (C. 1629, quoting R1. 318.) Additionally, Davis claimed that the following instruction was improper and that counsel was ineffective for failing to object to it: "'If after considering all the evidence in this case, you have an abiding belief in the guilt of the defendant to a moral certainty, then you are convinced beyond a reasonable doubt.'" (C. 1629, quoting R1. 319.) According to Davis, the court's instruction was improper because, he argued, the "moral certainty" language was disavowed by the United States Supreme Court in Cage v. Louisiana, 498 U.S. 39 (1990).

The circuit court found that the trial court's instructions, when taken as a whole, were not misleading and did not diminish the State's burden of proof. Additionally, the circuit court quoted this Court's opinion in Price v. State, 725 So. 2d 1003, 1021 (Ala. Crim. App. 1997), in which

we held that "[t]he use of the term 'moral certainty' alone in defining reasonable doubt d[oes] not create the error defined and discussed in Cage v. Louisiana." Thus, the circuit court held that this ineffectiveness claim was without merit.

A review of the trial court's jury charge, as a whole, reveals that it clearly and adequately explained the concept of reasonable doubt. To the extent that the inclusion of the word "merely" might have been improper, we do not find that it prejudiced Davis in any way. Also, as the circuit court noted, we have held that the use of the term "moral certainty," by itself, does "not create the error defined and discussed in Cage v. Louisiana." Price, 725 So. 2d at 1021. Rather, "it is the use of [that] term in conjunction with other terms, such as 'grave uncertainty' and 'actual substantial doubt,' that served to lessen the burden of proof." Id. The trial court did not use those or other similar terms in its jury charge in the present case. Because the trial court's jury charge was not improper, Davis's counsel could not have been ineffective for failing to raise an objection. See Bearden v. State, 825 So. 2d at 872.

Because Davis's claims regarding counsels' alleged deficiencies in the guilt phase of his trial were without merit, the circuit court did not err by summarily dismissing them. See Rule 32.7(d), Ala. R. Crim. P.

D.

Next, Davis claimed that his trial counsel were ineffective at the penalty phase of his trial for failing to investigate and present available mitigating evidence. Specifically, Davis asserted that his counsel had failed to present evidence at the penalty phase regarding the following: Davis's history of drug abuse and his drug use the night of the offense; Davis's background, including the severity of his emotional disturbance and his history of head injuries; and Davis's "adjustment to incarceration and lack of future dangerousness." (C. 1630.) Davis argued that, if his counsel had presented such evidence, there is a reasonable probability that the determination of his sentence would have been different.

However, a review of the record reveals that Davis's counsel called nine witnesses during the penalty phase, including Davis's pastor, family members, and friends, who

testified regarding Davis's feelings of regret for his actions. Counsel also presented testimony that Davis was extremely upset about the recent death of his brother. Additionally, testimony was elicited suggesting that Davis was intoxicated on the night of the offense and that Davis was a good person when he was not under the influence of drugs and alcohol.

In fact, the trial court found the existence of a statutory mitigating circumstance pursuant to § 13A-5-51(6), Ala. Code 1975. In its sentencing order, the court noted that there was evidence suggesting that Davis, although "not so impaired as to be totally unaware of the criminality of [his] conduct," was "substantially impaired" by alcohol and crack cocaine. (S. 5-6.)[8] Additionally, the trial court found the existence of two nonstatutory mitigating circumstances: that Davis was a good family member to his mother and siblings and that Davis possibly suffered from emotional problems due to the death of his brother. (S. 6-7.)

[8]"S" denotes the sentencing order that is contained in "Supplement Two" to the record on appeal from Davis v. State, 740 So. 2d 1115 (Ala. Crim. App. 1998).

Based on these facts, we find that, even if all the allegations in Davis's petition are true, he has failed to establish that his counsel were deficient under the first prong of Strickland. Although trial counsel may not have presented all the mitigating evidence that was available to them, counsel did present substantial evidence suggesting that Davis felt remorse for his actions and that his intoxication played a significant role in the offense. This was consistent with the trial strategy discussed in section III.A. of this opinion. Although that strategy was ultimately unsuccessful, this 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.' See Michel v. Louisiana, [350 U.S. 91] at 101 [(1955)]. 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 v. Washington, 466 U.S. at 689. Accordingly, the circuit court did not err by summarily dismissing Davis's claim that his counsel were ineffective in presenting mitigating evidence. See Rule 32.7(d), Ala. R. Crim. P.

Additionally, we note that, during a pretrial hearing, the trial court asked defense counsel whether they had discussed with Davis "the fact that mitigating circumstances can be anything related to his childhood, his upbringing, [and that] any good parts of his life can be used for mitigation." (C. 173.) One of Davis's defense counsel stated that he discussed those matters with Davis but that Davis "did not want to bring or discuss with me certain aspects of his past." (C. 173.) Counsel went on to state that they "brought in an investigator who made a quite extensive investigation into the background of the defendant." (C. 174.) Thus, it appears that Davis did not cooperate with counsels' attempt to investigate his background for possible mitigating evidence. Under the doctrine of invited error, "the appellant cannot allege as error proceedings in the trial court that were invited by [him] or that were a natural consequence of [his] own action." Inmin v. State, 668 So. 2d 152, 155 (Ala. Crim. App. 1995), citing Bamberg v. State, 611 So. 2d 450, 452 (Ala. Crim. App. 1992).

E.

Next, Davis further claimed that his trial counsel were ineffective during the penalty phase of his trial for four reasons: (1) failing to request instructions to guide the jury in its consideration of nonstatutory mitigating evidence; (2) failing to request a limiting instruction regarding the use of prior-bad-acts evidence; (3) failing to object to and request a curative instruction on the prosecutor's alleged improper argument regarding nonstatutory aggravation; and (4) failing to argue remorse and acceptance of responsibility as mitigation at the judicial sentencing proceeding.

1.

First, Davis claimed that his counsel were ineffective for failing to request instructions to guide the jury in its consideration of nonstatutory mitigating evidence. During the penalty phase, Davis presented testimony demonstrating that he was a nice person when he was not under the influence of drugs and alcohol. To rebut that evidence, the State introduced six prior felony convictions that were marked as State's exhibits 27 through 32. The State also introduced a prior conviction for second-degree robbery in order to establish the aggravating circumstance that Davis had been convicted of a

felony involving the use or threat of violence to another person pursuant to § 13A-5-49(2), Ala. Code 1975. That conviction was marked as State's exhibit number 26. The trial court gave the following instruction to the jury regarding how each of those convictions were to be considered:

> "At this time, I'm going to instruct you that certain prior offenses are being offered by the State. The purpose of these prior offenses that are marked Exhibits No. 27 through 32, and they will be clipped together —- the purpose of those offenses as evidence may not be considered by you as an aggravating circumstance. The purpose of those exhibits being offered into evidence and questioning concerning those offenses goes rather to the State's burden of disproving by a preponderance of the evidence certain facts and allegations made by the defendant in mitigation of a sentence of death.
>
> "The State is allowed and has a duty to affirmatively disprove by a preponderance of the evidence mitigating circumstances. That is the only purpose you may consider Exhibits No. 27 through 32. Do not confuse that with Exhibit No. 27, [sic] which is a certified copy of a conviction for robbery in the second degree that was admitted in support of and was admitted as proof of an aggravating circumstance that the State is required to prove beyond a reasonable doubt. It is very important you keep these convictions and their purposes separately."

(R1. 452-54)(emphasis added). Davis contended that this instruction caused the jury to consider all of his prior convictions as proof of aggravating circumstances. He argued

that his counsel were ineffective for not objecting to or otherwise noting the trial court's misstatement regarding the exhibit numbers.

However, when the trial court gave the jury its final instructions, the court correctly stated how each conviction should be used:

> "As I told you toward the end of this hearing, the State has introduced certain exhibits which are certified copies of prior convictions of the defendant for certain felony offenses. These are Exhibits 27 through 32, and I hope they are in some sort of a clip or something. These exhibits may not be considered by you as aggravating circumstances. That is as circumstances tending to indicate the defendant should be punished by death. The State introduced these exhibits, rather in support of their burden of disproving a mitigating circumstance that may exist based on the defendant's prior works or the defendant's good character or prior good reputation, which it is the burden of the State to disprove by a preponderance of the evidence. That was the only purpose for which those exhibits were offered, and the only purpose for which those exhibits may be considered.
>
> "Now Exhibit No. 26, however, was the certified copy of the robbery conviction which the State introduced in support of proving its aggravating circumstances of the defendant's prior conviction involving the use or threat of violence to a person."

(R1. 506-08.)

It is well settled that "'[t]he jury is presumed to follow the instructions given by the trial court.'" Mitchell v. State, 84 So. 3d 968, 983 (Ala. Crim. App. 2010), quoting Frazier v. State, 758 So. 2d 577, 604 (Ala. Crim. App. 1999). Davis did not plead any facts indicating that the jury did not follow the trial court's instructions or that the jurors were otherwise confused by the judge's earlier misstatement. Therefore, Davis failed to demonstrate that he was prejudiced by counsels' failure to object and, thus, did not meet the second prong of the Strickland standard. See Rules 32.3 and 32.6(b), Ala. R. Crim. P. Accordingly, he was not entitled to relief on that claim, and the circuit court did not err by summarily dismissing it. See Rule 32.7(d), Ala. R. Crim. P.

Moreover, on direct appeal, Davis argued that these instructions were "confusing in relation to the instruction regarding the use of a prior robbery conviction as an aggravating circumstance." Davis v. State, 740 So. 2d at 1122. He further argued "that the jury may have been confused as to the proper 'use' of the six prior convictions." Davis v. State, 740 So. 2d at 1122. This Court held:

> "[T]he trial court was careful to distinguish the robbery conviction from the other prior convictions.

> It explicitly stated that the robbery conviction was being used to prove an aggravating circumstance and that the other six convictions were being used to rebut mitigating evidence the defense introduced concerning [Davis's] good character or reputation. In addition, the trial court properly defined the State's burden of disproving a mitigating circumstance by a preponderance of the evidence. § 13A-5-45(g), Ala. Code 1975. The trial court correctly stated the law and the facts of the case, and its instructions were not confusing or misleading. Therefore, we find no plain error in the trial court's instructions."

Davis v. State, 740 So. 2d at 1123-24. Thus, even if counsel were deficient for failing to note the trial court's misstatement and request a curative instruction, Davis was not prejudiced by that failure.

2.

Second, Davis alleged that his counsel were ineffective for failing to request a limiting instruction regarding the use of prior-bad-acts evidence. As noted in the previous subsection, the State offered several prior felony convictions in order to rebut Davis's mitigation evidence. Specifically, the State introduced a 1985 conviction for third-degree burglary and a 1986 conviction for third-degree robbery. The State also introduced a 1980 conviction for second-degree robbery that was the basis for one of the aggravating

circumstances it sought to prove. Davis contended that his counsel were ineffective for failing to request an instruction prohibiting the jury from considering these prior convictions "as bad acts which may not be used to establish conduct in conformity therewith." (C. 1633.) Davis further argued that, "[g]iven the similarity between [the] prior convictions offered by the State and the aggravating circumstance the State was seeking to prove pursuant to § 13A-5-49(4), there is a reasonable probability that the jury improperly considered the prior crimes as aggravating evidence." (C. 1633.)

However, a review of the record reveals that the trial court instructed the jury as to how it was to consider each of the convictions offered by the State. Specifically, the trial court told the jury that exhibits 27 through 32[9] "may not be considered by you as aggravating circumstances." (R1. 507.) The court further informed the jury that the State offered those convictions "in support of [its] burden of disproving a mitigating circumstance that may exist based on the defendant's prior works or the defendant's good character or

[9]Exhibits 27 through 32 were prior felony convictions offered by the State to disprove Davis's mitigation evidence.

prior good reputation.... That was the only purpose for which those exhibits were offered, and the only purpose for which those exhibits may be considered." (R1. 507.) Additionally, the court gave the following instruction: "You may not consider in your deliberations certain other circumstances which you feel would justify a sentence of death other than the two aggravating circumstances alleged by the State. You may not consider any other circumstances as an aggravating circumstance." (R1. 500.)

Again, Davis failed to allege any facts to suggest that the jury did not follow the trial court's instructions or that it otherwise gave improper consideration to the prior felonies offered by the State. Therefore, Davis failed to demonstrate that he was prejudiced by counsels' failure to request such an instruction and, thus, did not meet the second prong of the Strickland standard. See Rules 32.3 and 32.6(b), Ala. R. Crim. P. Accordingly, he was not entitled to relief on that claim, and the circuit court did not err by summarily dismissing it. See Rule 32.7(d), Ala. R. Crim. P.

3.

Next, Davis alleged that counsel were ineffective for failing to object to and request a curative instruction on the prosecutor's alleged improper argument. During closing arguments, the prosecutor argued that Davis was "a career criminal" who "has been committing crimes against this state since 1980." (R1. 464.) Davis claimed that those comments were offered to improperly argue that a significant criminal history is an aggravating circumstance.

However, those comments were made during the State's rebuttal and were not improper. The State had a duty to rebut the mitigating evidence proffered by Davis indicating that Davis was a person of good character. The prosecutor's comments served that purpose. Accordingly, counsel was not ineffective for failing to raise a baseless objection. See Bearden v. State, 825 So. 2d at 872 ("[C]ounsel could not be ineffective for failing to raise a baseless objection.").

Additionally, there is nothing in the record to suggest that the State was attempting to mislead the jury into believing that Davis's criminal history was an aggravating circumstance. The prosecutor's comment was a proper and legitimate inference from the evidence. As noted above, the

trial court instructed the jury regarding aggravating circumstances, and Davis failed to allege any facts that, if true, would overcome the presumption that the jury followed the court's instructions. Mitchell v. State, 84 So. 3d 968, 983 (Ala. Crim. App. 2010), quoting Frazier v. State, 758 So. 2d 577, 604 (Ala. Crim. App. 1999)("'The jury is presumed to follow the instructions given by the trial court.'").

Davis also pointed to comments that the prosecutor made that, according to Davis, were "open appeals to emotion, prejudice, and personal opinions of Mr. Davis's worth." (C. 1635.) Specifically, Davis takes issue with the following statements:

> "How many people we got to kill in this country before Alabama law is going to apply, and we send someone to die? How many times we got to be incarcerated or in touch with the legal system before we look at someone and say they are a defected [sic] human being. Because that is what he is. Defective human beings, that is what we are here to decide about aren't we? If we cut through the muck, dirty burned out house where two men are dead sleeping in their own bed. It is a dirty case. He is defective and he is here for your consideration.
>
> "....
>
> "All these seven or eight convictions -- I don't know anybody who has had any more take with the

> system that could have had help. How many lives does it take for the Alabama law to apply?
>
> "....
>
> "[The Trussville police] were concerned about a man that has this kind of history for you to consider that [defense counsel] said 'We are making him look bad.' We didn't make him look bad. He made himself look bad."

(R1. 486-87, 489, and 490.) According to Davis, his counsel were ineffective for failing to object to those comments.

In Ex parte Parker, 610 So. 2d 1181, 1183 (Ala. 1992), the Alabama Supreme Court held that "whether the prosecutors' remarks constituted plain error depended on whether those remarks, when viewed in the context of the entire closing argument and in the context of the entire trial, undermined the fundamental fairness of the trial and, thus, constituted a miscarriage of justice." Additionally, it is not improper for a prosecutor to make a general appeal to law enforcement. See Ex parte Waldrop, 459 So. 2d 959, 962 (Ala. 1984)("In Alabama, the rule is that a district attorney in closing argument may make a general appeal for law enforcement.").

We agree with the circuit court's finding that the isolated comments quoted by Davis, when viewed in the context of the entire trial, were not improper. Accordingly, counsel

were not ineffective for failing to raise an objection. See Bearden v. State, 825 So. 2d at 872.

4.

Finally, Davis claimed that his counsel were ineffective for failing to argue remorse and acceptance of responsibility at the sentencing hearing. The circuit court found that this assertion was refuted by the record and summarily dismissed the claim.

At the sentencing hearing, the State waived any opening statements but re-offered and incorporated by reference the prior testimony and evidence from the trial. The court stated that it was "obviously aware of all the testimony" and that it had a transcript of all the proceedings. Davis's counsel presented evidence during the penalty phase regarding his remorse and acceptance. Davis's pastor, Greg Hook, testified that Davis "had been real up front that he did this crime, and he was the one involved, and he had pulled the trigger." (R1. 379.) Hook also testified that Davis had "been very remorseful." (R1. 379.) Thus, there was evidence before the trial court demonstrating that Davis expressed remorse and acceptance of responsibility.

Additionally, Davis personally made a statement at the sentencing proceeding. Davis stated: "I want to apologize for what I did to the families of the victims." (R1. 523.) After a brief recess, Davis asked to speak again, and he stated:

> "I didn't know if the victims' families heard me earlier. I would like to apologize to y'all. I wish there was some way I could bring them back. I'm sorry it ever happened. I just wanted y'all to know that. I know it will not ease the pain."

(R1. 524-25.) Therefore, we find that the trial court was aware that Davis accepted responsibility for the crimes and expressed remorse for his actions. Davis's counsel offered testimony, through Davis, that he was remorseful for his actions. Accordingly, Davis's claim is refuted by the record, and the circuit court was correct to summarily dismiss it. See Rule 32.7(d), Ala. R. Crim. P.

IV.

Next, Davis contended that his guilty plea was not knowing, intelligent, and voluntary for four reasons: (1) his trial counsel were ineffective; (2) Davis was not competent to understand and appreciate the nature and consequences of the plea; (3) Davis was not adequately informed of the nature of

the charges against him; and (4) Davis was not adequately informed of the defenses available to him.

In support of the first and fourth allegations, Davis incorporated his arguments from paragraphs 116 to 135 of his petition. Those arguments were addressed in section III of this opinion. Because we have determined that those claims were properly dismissed by the circuit court, we hold that Davis's first and fourth were properly dismissed for the same reasons stated in section III. We will now address Davis's second and third arguments.

A.

In his petition, Davis claimed that his guilty plea was not entered into knowingly, intelligently, and voluntarily because, he argued, he lacked the competence "to understand and appreciate the nature and consequences of the plea at the time he entered it." (C. 1644.) Specifically, Davis claimed that, at the time he entered his plea, he was "suffering from severe depression, borderline intelligence, and withdrawal from both legal and illegal drugs." (C. 1645.) According to Davis, the combination of those factors impaired his mental state to the point that he was unable to consult with his

attorneys with a reasonable degree of rational understanding. Davis also claimed that his mental condition rendered him unable to understand the nature and consequences of his guilty plea. In support of these allegations, Davis recited a detailed history of his mental illness, drug abuse, and low intelligence. Davis also pointed to an exchange in a pretrial hearing in which he expressed to the court his desire "'to plead guilty to the death penalty' because he was unable to smoke and watch television at the St. Clair County Jail." (C. 1647.)

In its order dismissing this claim, the circuit court noted that Davis had been examined by two clinical psychologists before trial. A review of the record reveals that both psychologists determined that Davis was competent to stand trial. Additionally, the circuit court found "nothing in the colloquy between Davis and Judge Austin giving the slightest indication that Davis was incompetent to plead guilty." (C. 2052.)

On appeal, Davis argues that the circuit court's reliance on the fact that Davis was competent to stand trial was "plainly erroneous." (Davis's brief, at 109.) He compares

his case to the facts in Teasley v. State, 704 So. 2d 104 (Ala. Crim. App. 1997). In Teasley, the petitioner alleged that his guilty plea was not voluntary because "he was under the influence of a number of medications, including Prozac, lithium, and Valium and, consequently, he was unable to understand the nature of the charges against him and the consequences of pleading guilty to these charges." 704 So. 2d at 105. Davis asserts that, in Teasley, "the circuit court summarily dismissed the petition, but because the petitioner stated a facially meritorious claim, this Court remanded the case for further proceedings." (Davis's brief, at 110.)

However, in Teasley, the circuit court summarily dismissed the petition with an entry on the case-action summary and a notation on the petition that it was "'considered and denied.'" 704 So. 2d at 104. The State requested that this Court remand the case so that the circuit court could "enter an order setting forth the reasons for its summary dismissal of the petition." 704 So. 2d at 104. We also noted that "[i]f the circuit court finds that further action is necessary, it may hold an evidentiary hearing or take evidence by any means set forth in Rule 32, Ala. R. Crim.

P." 704 So. 2d at 105. On remand, the circuit court found, based on its knowledge of the proceedings in question, that Teasley's claims were meritless and denied his petition. This Court affirmed that decision on return to remand. We did not hold, as Davis suggests, that Teasley stated a facially meritorious claim because he alleged that he was under the influence of prescription medications when he entered his guilty plea.

Davis also cites Godinez v. Moran, 509 U.S. 389, 401 (1993), for the proposition that competence to stand trial "is not all that is necessary before [a defendant] may be permitted to plead guilty...." Godinez goes on to note the difference between a competency determination and a determination as to whether a defendant's decision to plead guilty is knowing and voluntary:

> "The focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the ability to understand the proceedings. See Drope v. Missouri, supra, 420 U.S. [162], at 171, [1975](defendant is incompetent if he 'lacks the capacity to understand the nature and object of the proceedings against him')(emphasis added). The purpose of the 'knowing and voluntary' inquiry, by contrast, is to determine whether the defendant actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced."

509 U.S. at 401 n.12.

As the circuit court noted, Davis was found to be competent to stand trial by two psychologists. Thus, the only question to be resolved by the trial court was whether Davis's plea was knowing and voluntary, i.e., whether Davis understood the significance and consequences of his guilty plea. Both this Court and the Alabama Supreme Court found that "[t]he trial court engaged [Davis] in a thorough colloquy, as required by Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), and Rule 14.4, Ala. R. Crim. P., during which [Davis] admitted his guilt and expressed his desire to enter a guilty plea." Davis v. State, 740 So. 2d at 1117; Ex parte Davis, 740 So. 2d at 1136 ("The trial court engaged Davis in a thorough colloquy, as required by Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), and Rule 14.4, Ala. R. Crim. P., during which Davis admitted his guilt and expressed his desire to enter a guilty plea."). The purpose of such a colloquy is for the trial court to ascertain, among other things, "that the defendant has a full understanding of what a plea of guilty means and its consequences" and "that the plea is voluntary and not the

result of force, threats, or coercion, nor of any promise apart from the plea agreement that has been disclosed to the court...." Rule 14.4(a), Ala. R. Crim. P.

We have reviewed Davis's plea colloquy and have determined that it was adequate to ensure that Davis's plea was knowing and voluntary. During the plea colloquy, the following exchange took place:

> "THE COURT: ... What I want you to do, Mr. Davis, and before I could accept this plea, I have to make sure you fully understand what your rights are in this case, and that you understand what you are pleading guilty to and the effects of your plea. The offense in this case that you are charged with is the offense of capital murder. You are specifically charged with intentionally causing the death —- Count I is the two individuals, in the same course of conduct. That is the capital murder charge that you will be entering your plea to. Do you understand that?
>
> "[Davis]: Yes, sir.
>
> "....
>
> "THE COURT: That shouldn't be the first time you have heard these rights, since you and your attorneys have gone over these rights. Are you presently under the influence of any alcohol, drugs, narcotics or medication?
>
> "[Davis]: No, sir.
>
> "THE COURT: And you understand what you are doing?
>
> "[Davis]: Yes, sir.

> "THE COURT: The offense you are charged with is the offense of capital murder. There is a section here that delineates this as a Class A felony with some penalty ranges. Actually, capital murder is its own special offense. It is an intentional murder. The penalties for capital murder are that if you are convicted or if you plead guilty, the penalties for capital murder are only two options -- either life in prison without parole, or a sentence of death. Do you understand what you are charged with and the maximum and minimum penalties for that?
>
> "[Davis]: Yes, sir."

(R1. 5-9.) After the jury was empaneled, the trial court addressed Davis a second time:

> "THE COURT: ... One thing I did not talk with you in any detail with is the fact that you are charged with this offense, and that the only potential punishment for this offense, if you are found guilty, would be life without parole and death. If you went to trial on these offenses in front of a jury, a jury would have the opportunity to consider whether you were guilty instead of a capital offense of any lesser included offenses. I would anticipate in this case that the issue to be submitted to the jury -- lesser included offenses of murder and possibly manslaughter. It would be any other lesser included offenses supported by the evidence in this case. Do you understand a jury would have the option of determining whether or not you were guilty instead of a capital offense, of a lesser included offense. Have your lawyers talked to you about that?
>
> "[Davis]: Yes, sir.
>
> "....

> "THE COURT: ... Do you have any questions as to what your rights are in this case?
>
> "[Davis]: No, sir.
>
> "THE COURT: Since this morning, are you under the influence of any alcohol, narcotics, drugs or medications at all?
>
> "[Davis] No, sir.
>
> "THE COURT: Are you pleading guilty voluntarily and of your own free will?
>
> "[Davis]: Yes, I am."

(R. 44-47.) Nothing in the record suggests that Davis was unable to understand the nature and consequences of his guilty plea. This Court is convinced that Davis's claim that his plea was not entered knowingly and voluntarily is without merit, and, therefore, the circuit court did not err by summarily dismissing it. See Rule 32.7(d), Ala. R. Crim. P.

B.

Davis next argued that his plea was not knowing and voluntary because, he contended, he was not adequately informed of the nature of the charges against him. However, a review of the record reveals that the trial court thoroughly informed Davis of the nature and elements of capital murder.

In addition to the above-quoted excerpts from Davis's guilty-plea colloquy, the trial court stated the following:

> "You are charged in Count I of the indictment with the offense of murder wherein two or more persons are murdered by the defendant by one act or pursuant to one scheme or course of conduct.... In order for a jury to find you guilty of murder wherein two or more persons are murdered, the jury would have to find that you intentionally caused the death of two or more persons; and that in intentionally causing the death of two or more persons, you did so by one act or you did so by one scheme or course of conduct."

(R1. 9-10.) Davis indicated that he understood the charges.

However, in his petition, Davis argued that neither the court nor his counsel defined for him the element of intent. According to Davis, had he understood the meaning of the word intent, he would not have pleaded guilty. Therefore, he argued, his plea was not knowingly, intelligently, and voluntarily entered. Davis cited Henderson v. Morgan, 426 U.S. 637, 644-45 (1976), for the proposition that a plea cannot be voluntary unless a defendant has adequate notice of the nature of the charge against him. Davis appears to argue that Henderson requires that a trial court define the element of intent in a guilty-plea colloquy. However, the Supreme Court in Henderson found as improper that "[t]here was no

discussion of the elements of the offense of second-degree murder, no indication that the nature of the offense had ever been discussed with respondent, and no reference of any kind to the requirement of intent to cause the death of the victim." 426 U.S. at 642-43.

Thus, Henderson is distinguishable from the present case. A review of the record reveals that the trial court informed Davis that intent was a required element of capital murder multiple times. Before accepting Davis's plea, the trial court asked:

> "Are you pleading guilty to intentionally causing the death of John Fikes by shooting him with a rifle and intentionally causing the death of Kenneth Douglas by shooting him with a rifle pursuant to one scheme or course of conduct? Are you pleading guilty to that because you are guilty?"

(R1. 49.) Davis answered in the affirmative. Thus, the trial court satisfied the requirements of Henderson and, as noted, satisfied the requirements of Rule 14.4, Ala. R. Crim. P., and Boykin v. Alabama, 395 U.S. 238 (1969). Davis has cited no other caselaw that specifically requires a trial court to explicitly define the element of intent when engaging a defendant in a guilty-plea colloquy. Accordingly, we find that Davis's claim that his plea was not knowing and voluntary

because he was not given the definition of intent is without merit. Therefore, the circuit court was correct to summarily dismiss the claim. See Rule 32.7(d), Ala. R. Crim. P.

V.

Next, Davis claimed that the State withheld exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). Specifically, he asserted that the State withheld (1) evidence indicating that there was $2,000 in cash on the nightstand near one of the victims, (2) that the State had evidence indicating that the victims could have been shot with a single gun as opposed to two guns, and (3) that the State suppressed evidence indicating that one of the victims had a violent temper. Davis asserted that this evidence was not known to him or his counsel before trial or in time to file a posttrial motion and that it could not have been discovered through the exercise of reasonable diligence. Davis argued that, had the State disclosed this evidence, trial counsel could have presented an effective defense. Specifically, Davis contended that counsel could have effectively argued self-defense or heat-of-passion manslaughter.

The circuit court held that, based on Payne v. State, 791 So. 2d 383, 397-98 (Ala. Crim. App. 1999), postconviction Brady claims must meet the requirements of claims asserting newly discovered evidence under Rule 32.1(e), Ala. R. Crim. P. The court then found that none of the allegedly withheld evidence met all five criteria.

On appeal, Davis argues that the decision in Payne conflicts with the decisions in Ex parte Pierce, 851 So. 2d 606, 613 (Ala. 2000), and Smith v. State, 71 So. 3d 12 (Ala. Crim. App. 2008). According to Davis, those cases stand for the proposition that a Brady claim is a constitutional claim and thus falls under Rule 32.1(a), Ala. R. Crim. P.,[10] and not Rule 32.1(e), Ala. R. Crim. P. Davis acknowledges that a Brady claim is still subject to the procedural bars of Rule 32.2, Ala. R. Crim. P. However, he contends that the State failed to argue in the circuit court that Davis could have raised this claim at trial or on appeal. (Davis's brief, at 122 n. 57.)

[10]Rule 32.1(a), Ala. R. Crim. P., provides for postconviction relief on the ground that "[t]he constitution of the United States or of the State of Alabama requires a new trial, a new sentence proceeding, or other relief."

However, in its answer and motion to dismiss Davis's petition, the State argued:

> "[The circuit court] should, therefore, find that the Brady claims in part VI of Davis's petition are procedurally barred from post-conviction review. See Williams v. State, 782 So. 2d 811, 818 (Ala. Crim. App. 2000)('The appellant did not assert that this [Brady] claim was based on newly discovered evidence[;] [t]herefore, it is procedurally barred because he could have raised it at trial and on direct appeal, but did not.')."

(C. 1749(emphasis added).) The circuit court used similar language in its order dismissing Davis's petition. Accordingly, we find that the State raised the procedural bars of Rules 32.2(a)(3) and (5), Ala. R. Crim. P., in its motion to dismiss.

In McWhorter v. State, [Ms. CR-09-1129, September 30, 2011] ___ So. 3d ___, ___ (Ala. Crim. App. 2011), the appellant similarly argued that Ex parte Pierce stood "for the proposition that the newly-discovered-evidence standard of Rule 32.1(e) [did] not apply to Rule 32 claims based on alleged violations of [a] defendant's constitutional rights." This Court held:

> "McWhorter's argument is misplaced because his Brady claim is procedurally barred. In Pierce, the Alabama Supreme Court held that Rule 32.1(e) did not apply to a juror-misconduct claim because the

> petitioner's claim was a constitutional claim under Rule 32.1(a). The Court, however, went on to State that '[a]lthough Rule 32.1(e) does not preclude Pierce's claim, Rule 32.2(a)(3) and (5) would preclude Pierce's claim if it could have been raised at trial or on appeal.' Pierce, 851 So. 2d at 614. The Court stated that Pierce's claim was barred under Rule 32.2(a)(3) and 32.2(a)(5) unless 'he established that the information [forming the basis of his claim] was not known, and could not reasonably have been discovered, at trial or in time to raise the issue in a motion for new trial or on appeal.' Pierce, 851 So. 2d at 616. Thus, although McWhorter does not have to prove that his Brady claim is based on 'newly discovered material facts' as defined under Rule 32.1(e)(1)-(5), he must still plead facts indicating that his claim could not have been raised at trial or on direct appeal to avoid being procedurally barred under Rule 32.2(a)(3) and 32.3(a)(5). This requires McWhorter to plead that the State's alleged concealment of Rice's statement 'was not known, and could not reasonably have been discovered, at trial or in time to raise the issue in a motion for new trial or on appeal.' Pierce, 851 So.2d at 616."

Id. at ___. Although Davis claimed that the allegedly withheld evidence "was not known by [him] or his counsel at the time of trial and sentencing or in time to file a post-trial motion[,]" Davis did not allege that the evidence could not have been discovered in time to raise the issue on direct appeal. Accordingly, Davis's Brady claim is procedurally barred by Rule 32.2(a)(5), Ala. R. Crim. P., and the circuit

court did not err by summarily dismissing it. See Rule 32.7(d), Ala. R. Crim. P.

VI.

On August 20, 2010, Davis filed an amended motion for postconviction discovery in which he sought various records from the State in order "to ensure a fair Rule 32 hearing." (C. 1560.) Specifically, Davis sought the following records:

> "(1) the complete file of the St. Clair County District Attorney's Office from Mr. Davis's capital case, with the exception of work-product materials, including physical evidence, photographs, statements, and reports;
>
> "(2) all records and evidence pertaining to Mr. Davis or his case generated or maintained by the St. Clair Sheriff's Department, which investigated the crime;
>
> "(3) all records pertaining to Mr. Davis or his case generated or maintained by the Trussville Police Department, which arrested Mr. Davis on the night of the crime;
>
> "(4) all records pertaining to Mr. Davis or his case generated or maintained by the Trussville City Jail, the St. Clair County Jail in Ashville, and the St. Clair County Jail in Pell City, the three jails at which Mr. Davis was held after his arrest;
>
> "(5) the ballistics evidence from Mr. Davis's case, including that which was relied upon by David Higgins from the Alabama Department of Forensic Sciences; and

> "(6) the exhibits from Mr. Davis's trial, which are in the possession of the clerk of the Circuit Court of St. Clair County, Northern Division, Ashville, Alabama, and the Sheriff's Office of St. Clair County, Northern Division."

(C. 1560.) Davis claimed that these requests pertained to the following claims: "(1) that his trial counsel were ineffective in violation of Strickland v. Washington, 466 U.S. 668 (1984); (2) that his plea was not knowing, intelligent, and voluntary in violation of Boykin v. Alabama, 395 U.S. 238 (1969); and (3) that the State suppressed exculpatory, material evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963)." (C. 1561.) The circuit court denied Davis's request because it found that Davis had not demonstrated "good cause" as to why he was entitled to the requested discovery as required by Ex parte Land, 775 So. 2d 847 (Ala. 2000), overruled on other grounds by State v. Martin, 69 So. 3d 94 (Ala. 2011).[11] The circuit court noted that its decision to deny the discovery

[11]The circuit court held that, under Martin v. State, 4 So. 3d 1196, 1202 (Ala. Crim. App. 2008), Davis was entitled to access the exhibits that were admitted during his trial because those exhibits were public records. Accordingly, the circuit court held that no action was required on its part in order for Davis to access those exhibits. Thus, its denial applied only to items (1) through (5) in Davis's motion.

request was made in light of its order summarily dismissing Davis's petition. This Court has held:

> "When ascertaining whether discovery is warranted in a Rule 32 proceeding, the court must first determine whether the Rule 32 petitioner has shown good cause for disclosure of the requested materials. As the Alabama Supreme Court stated in Ex parte Land, 775 So. 2d 847 (Ala. 2000):
>
> > "'We agree with the Court of Criminal Appeals that "good cause" is the appropriate standard by which to judge postconviction discovery motions. In fact, other courts have adopted a similar "good-cause" or "good-reason" standard for the postconviction discovery process. See [State v.] Marshall, [148 N.J. 89, 690 A.2d 1, cert. denied, 522 U.S. 850 (1997)]; State v. Lewis, 656 So. 2d 1248 (Fla. 1994); People ex rel. Daley v. Fitzgerald, 123 Ill.2d 175, 121 Ill. Dec. 937, 526 N.E.2d 131 (1988). As noted by the Illinois Supreme Court, the good-cause standard guards against potential abuse of the postconviction discovery process. See Fitzgerald, supra, 123 Ill.2d at 183, 121 Ill.Dec. 937, 526 N.E.2d at 135....
> >
> > "'... By adopting this standard, we are only recognizing that a trial court, upon a petitioner's showing of good cause, may exercise its inherent authority to order discovery in a proceeding for postconviction relief. In addition, we caution that postconviction discovery does not provide a petitioner with a right to "fish" through official files and that it "is not a device for investigating possible claims, but a means of vindicating actual claims." People v. Gonzalez, 51 Cal.3d

> 1179, 1260, 800 P.2d 1159, 1206, 275 Cal.Rptr. 729, 776 (1990), cert. denied, 502 U.S. 835, 112 S.Ct. 117, 116 L.Ed.2d 85 (1991). Instead, in order to obtain discovery, a petitioner must allege facts that, if proved, would entitle him to relief.'

"775 So. 2d at 852.

"Though Alabama has had little opportunity to define what constitutes 'good cause,' in Ex parte Mack, 894 So. 2d 764, 768 (Ala. Crim. App. 2003), we quoted with approval an Illinois case the Alabama Supreme Court relied on in Land -- People v. Johnson, 205 Ill.2d 381, 275 Ill.Dec. 820, 793 N.E.2d 591 (2002):

> "'"A trial court has inherent discretionary authority to order discovery in post-conviction proceedings. See People ex rel. Daley v. Fitzgerald, 123 Ill.2d 175, 183, 121 Ill.Dec. 937, 526 N.E.2d 131 (1988); People v. Rose, 48 Ill.2d 300, 302, 268 N.E.2d 700 (1971). A court must exercise this authority with caution, however, because a defendant may attempt to divert attention away from constitutional issues which escaped earlier review by requesting discovery.... Accordingly, the trial court should allow discovery only if the defendant has shown 'good cause,' considering the issues presented in the petition, the scope of the requested discovery, the length of time between the conviction and the post-conviction proceeding, the burden of discovery on the State and on any witnesses, and the availability of the evidence through other sources. Daley, 123 Ill.2d at 183-84, 121 Ill.Dec. 937, 526 N.E.2d 131; see People v. Fair, 193 Ill.2d 256, 264-65, 250 Ill.Dec.

> 284, 738 N.E.2d 500 (2000). We will reverse a trial court's denial of a post-conviction discovery request only for an abuse of discretion. Fair, 193 Ill.2d at 265, 250 Ill.Dec. 284, 738 N.E.2d 500. A trial court does not abuse its discretion in denying a discovery request which ranges beyond the limited scope of a post-conviction proceeding and amounts to a 'fishing expedition.'"'
>
> "894 So. 2d at 768-69 (quoting Johnson, 205 Ill. 2d at 408, 275 Ill.Dec. at 836-37, 793 N.E.2d at 607-08)."

Jackson v. State, 910 So. 2d 797, 801-02 (Ala. Crim. App. 2005).

In its order, the circuit noted that Davis was not entitled to discovery because the claims for which he sought discovery were either meritless or procedurally barred. Because we have determined in the previous sections of this opinion that the circuit court did not err by summarily dismissing Davis's claims, it follows that Davis did not meet the "good-cause" standard for obtaining postconviction discovery. Accordingly, the circuit court's decision to deny postconviction discovery was correct.

VII.

Finally, Davis argues that this Court should reverse the circuit court's order because, he says, the circuit court

adopted a proposed order that was submitted by the State that is "nearly identical to the State's Answer and Motion to Dismiss...." (Davis's brief, at 142.) Davis claims that the circuit court's order "contains the 'adversarial zeal' of an advocate's pleading" and was "'not a product of [the circuit court's] independent judgment.'" (Davis's brief, at 142-44, quoting Ex parte Scott, [Ms. 1091275, March 18, 2011] ___ So. 3d ___, ___ (Ala. 2011).)

The Alabama Supreme Court addressed this issue in Ex parte Ingram, 51 So. 3d 1119, 1122 (Ala. 2010), and noted:

> "[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. In Dobyne v. State, 805 So. 2d 733, 741 (Ala. Crim. App. 2000), the Court of Criminal Appeals stated:
>
> > "'"'While the practice of adopting the state's proposed findings and conclusions is subject to criticism, the general rule is that even when the court adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous.'"'
>
> "805 So. 2d at 741 (quoting other cases; emphasis added)."

In Ingram, the circuit court's order stated that "'this Court 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(emphasis omitted). However, the Alabama Supreme Court noted that the judge who presided over Ingram's Rule 32 petition was not the same judge who presided over his trial. Therefore, the court found that

> "the patently erroneous nature of the statements regarding the trial judge's 'personal knowledge' and observations of Ingram's capital-murder trial undermines any confidence that the trial court's findings of fact and conclusions of law are the product of the trial judge's independent judgment and that the June 8 order reflects the findings and conclusions of that judge."

Ingram, 51 So. 3d at 1125. The circuit court's order in the present case does not contain such "patently erroneous" errors like the order in Ingram.

Davis also compares his case to Ex parte Scott, [Ms. 1091275, March 18, 2011] ___ So. 3d ___, ___ (Ala. 2011). However, in Scott, the Alabama Supreme Court held that "because the trial court adopted verbatim the State's answer as its order, the order is infected with the same adversarial zeal of the State's counsel as is the answer." We have reviewed the State's response, as well as the circuit court's order dismissing Davis's petition, and have found none of the "adversarial zeal" that was described in Scott. In fact,

Davis does not identify any specific portions of the circuit court's order that he believes contains such "adversarial zeal," nor does he allege that any portions are clearly erroneous. Instead, he merely points to two typographical errors that appear in both the State's proposed order and the circuit court's order. In Scott, the Alabama Supreme Court stated: "We do not consider the few typographical errors at issue here, by themselves, as sufficient evidence upon which to base a conclusion that the trial court's order is not a product of the trial court's independent judgment." ___ So. 3d at ___. Accordingly, we hold that the circuit court did not commit reversible error by adopting the State's proposed order as its own.

For the foregoing reasons, the judgment of the circuit court is affirmed.

AFFIRMED.

Kellum and Burke, JJ., concur specially; Maddox, Special Judge,[12] concurs specially as to Section II; Welch and Joiner,

[12]Retired Associate Justice Hugh Maddox was appointed on May 29, 2013, to be a Special Judge in regard to this appeal. See § 12-3-17, Ala. Code 1975.

JJ., concur in part and dissent in part, with opinions; Windom, P.J., recuses herself.

KELLUM, Judge, concurring specially.

I concur fully with the main opinion. I write specially only to note that today's opinion implicitly overrules Yeomans v. State, [Ms. CR-10-0095, March 29, 2013] ___ So. 3d ___ (Ala. Crim. App. 2013), to the extent that Yeomans held that this Court may not affirm on pleading grounds a circuit court's summary dismissal of a claim in a Rule 32, Ala. R. Crim. P., petition for postconviction relief if the claim was denied on its merits by the circuit court upon consideration of an unsolicited affidavit submitted by the State with its answer or motion to dismiss the petition. Although I concurred in Yeomans, upon further review and consideration of the facts and law relevant to that case, I believe that my concurrence was in error because the juror-misconduct claim in Yeomans, like the ex-parte-communication claim in this case, was insufficiently pleaded. Therefore, I believe that this Court could have, and should have, affirmed the circuit court's dismissal of the juror-misconduct claim in Yeomans on pleading grounds just as we today affirm the circuit court's dismissal of the ex-parte-communication claim on pleading grounds.

BURKE, Judge, concurring specially.

Judge Kellum notes in her special concurrence that today's opinion implicitly overrules Yeomans v. State, [Ms. CR-10-0095, March 29, 2013] ___ So. 3d ___ (Ala. Crim. App. 2013). I write specially to clarify the effect that, in my view, our decision today has on the holding in Yeomans.

It is my belief that Yeomans limited the general rule that this Court may affirm a circuit court's dismissal of a Rule 32, Ala. R. Crim. P., petition if the dismissal was correct for any reason. Specifically, I believe Yeomans stood for the proposition that, if the circuit court considers matters outside the record in reaching its decision to summarily dismiss a postconviction petition, this Court cannot not affirm the dismissal on the ground that the petition was deficiently pleaded. Yeomans differs from the present case because, in Yeomans, we found that the petition was sufficiently pleaded. Thus, the holding in today's case would not have affected the outcome in Yeomans. Rather, today's opinion narrows the scope of the holding in Yeomans to situations in which the petition is sufficiently pleaded.

MADDOX, Retired Justice, concurring specially as to Section II.

After having reviewed the briefs and having listened to the oral arguments in this case, and after having done other research relating to the issue presented in Section II of the main opinion, I concur with what Judge Burke has written in Section II of the main opinion, and in which Judge Kellum concurs. I write specially only to express an additional reason why I am of the opinion that the trial court did not err in summarily dismissing Davis's Rule 32, Ala. R. Crim. P., postconviction petition as it relates to the claims addressed in Section II of the main opinion.

As I view the legal issue that is presented in Section II of the main opinion, it is, as follows: Does the principle of "notice pleadings" that is applicable in civil cases apply in a postconviction proceeding, especially when, as in this case, the State has filed a motion to dismiss and has attached an affidavit by the judge who tried the case, and in which he has specifically denied the allegations made in the petition that he, as the trial judge, had ex parte communications with the jury, both during the guilt phase and the penalty phase of

this capital case in which the defendant Davis, had entered a plea of guilty? I think not.

Even assuming that the pleading in Davis's petition relating to the alleged ex parte communications on this issue is sufficiently specific, I do not believe that the circuit judge who dismissed Davis's claim abused his discretion, because the State attached to its responsive pleading an affidavit by Judge Austin, who had tried the capital-murder case, and the petitioner presented no evidence to contradict that affidavit, but insists that he did not have to present any evidence at that stage of the proceeding. I believe Davis misconstrues not only Alabama law, but law from other jurisdictions and model rules applicable to postconviction proceedings. I state my reasons below.

The circuit judge in this case entered an order in which he stated:

> "Based on Judge Austin's affidavit, and the fact that Davis did not proffer a single specific fact in his petition that would refute it, this court finds that the allegation in part II of his petition is without merit."

(C. 1985.)

In his brief, Davis's counsel states that "[b]ecause Mr. Davis was required to plead, not prove, his claim in order to avoid summary dismissal, and because Mr. Davis was never given the opportunity to cross-examine the trial judge or to present his own evidence in support of his claim, the circuit court's order was improper." (Davis's brief, at 24.)

The State, in its brief, responded to this argument and stated, in pertinent part:

> "The circuit court did not abuse its discretion in considering Judge Austin's affidavit or in dismissing Davis's claim without a hearing. As the circuit court noted, the State submitted Judge Austin's affidavit in accordance with Rule 32.7(a), which provides that after a Rule 32 petition has been filed, the State shall file 'a response, which may be supported by affidavits and a certified record or such portions thereof as are appropriate or material to the issues raised in the petition.' Ala. R. Crim. P. 32.7(a)."

(State's brief, at 33.) In support of its argument, the State cited Ex parte Coleman, 71 So. 3d 627, 633 (Ala. 2010), which is also cited by the petitioner, in support of its position that affidavits can be attached to pleadings in a postconviction proceeding, and noted that "[i]n Ex parte Coleman ... the Alabama Supreme Court referenced affidavits attached to a Rule 32 petition (including an affidavit by the

petitioner himself) [and] specifically discussed the petitioner's affidavit in determining that the petition did satisfy the burden of pleading under Rules 32.3 and 32.6(b). Ex parte Coleman, 71 So. 3d 627, 633 (Ala. 2010)." (State's brief, at 33 n. 6)

Not only did Davis's counsel argue in his initial brief, and in his reply brief, that a petitioner only had to plead, not prove, his allegations relating to the alleged ex parte communications he claimed were prejudicial, but he repeated the same contention at oral argument.

During his oral argument on this point, counsel was questioned by Judge Burke and Judge Kellum about his argument on this issue, and the following transpired:

> "[Judge Burke]: Let me ask you this, do you have jurors who could have signed affidavits to the contrary?
>
> "[Davis's counsel]: We interviewed jurors, yes, sir. And that's the basis of the claim and --
>
> "[Judge Burke]: My question is, do you have jurors who would have signed affidavits to the contrary?
>
> "....
>
> "[Davis's counsel]: Judge, we interviewed the jurors and got their facts on -- their accounts of what happened. That's what we have at this point, and our understanding of the rule was that we don't have

> a burden of presenting proof at the pleading stage. So we alleged the facts that occurred that make up the violation in the petition and that was what we were required to do at that stage, and that's what we did and what I think the record reflects.
>
> "[Judge Kellum]: Well, once the State presented evidence pursuant to Rule 32.9, did it not seem incumbent on you to present counter evidence pursuant to Rule 32.9 in the form of affidavits?
>
> "[Davis's counsel]: I think that's an important question, I think, Judge, and our position is that we never made it to Rule 32.9. Rule 32.9 is the evidentiary hearing provision, and what Rule 32.9 says, is that the circuit court can accept proof by form of affidavits or testimony or other means. We never got to that place. This was summarily dismissed at the pleading stage, and I think -- so I don't think that the affidavit that was submitted by the State changes what the pleading requirements are in terms of a facially meritorious claim and being entitled to a hearing. I think that the court, in its discretion at a future evidentiary hearing could decide to take certain evidence into consideration by affidavit or by testimony or any means. But I think that's at the proof stage, when -- and we're just asking the court to get to that stage, we want to get to the proof stage at which we can -- we can present our own evidence and cross-examine Judge Austin."

(Emphasis added.) It is apparent from counsel's answers to those questions, and from reading his briefs, that counsel is of the opinion that a trial judge cannot summarily dismiss a Rule 32 petition, even when, as here, the State attaches an affidavit to its responsive pleading, in which the judge who

tried the case categorically denied that he had any ex parte communications with the jury at the guilt phase or the penalty phase. Stated differently, it appears that counsel believes that if he specifically pleads his claim, then he is entitled to an evidentiary hearing under the provisions of Rule 32.9, Ala. R. Crim. P., even though there is evidence presented in the form of an affidavit that specifically denies those allegations. In short, it appears that Davis's counsel believes that "notice pleadings" are sufficient in a postconviction case.

I do not believe that the principle of law that, under the circumstances presented, a petitioner only has to plead, not prove his claims, is applicable in this State, or in other states, or is consistent with model rules and standards applicable to postconviction proceedings. For example, in Washington v. State, 95 So. 3d 26 (Ala. Crim. App. 2012), the Court held that summary dismissal of various claims was proper either because the claims were procedurally barred under Rule 32.2(a)(3) and (5), or because the claims were not sufficiently pleaded under Rule 32.2(b), or because no material issue of fact or law entitling the petitioner to

relief was shown to exist, as required by Rule 32.7(d). In Washington, the Court stated:

> "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, 411, (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."

95 So. 3d at 59. Additionally, in Fincher v. State, 724 So. 2d 87 (Ala. Crim. App. 1998), then Judge Cobb, writing for the Court, addressed an issue that is not unlike the issue presented in this case. In Fincher, Judge Cobb, examining and applying the provisions of Rule 32.7 and Rule 32.9, stated that Fincher had mistakenly relied on Rule 32.9, the provision that Davis is relying upon in this case. Judge Cobb wrote:

> "Fincher contends that the trial court erred in dismissing his petition without a hearing. We disagree. Fincher's petition challenged the application of three prior felony convictions for sentence enhancement under the Habitual Felony Offender Act ('HFOA'). Rule 32.7(d), Ala. R. Crim. P., permits summary dismissal when 'no material

issue of fact or law exists which would entitle the petitioner to relief' and no purpose would be served by further proceedings.

"....

"Fincher contends that the trial court failed to issue specific findings of fact when it summarily dismissed his petition. Fincher mistakenly relies on Rule 32.9 for support.

"The circuit court issued an order disposing of the petition on the grounds that the issues were 'without any basis in law or in fact upon which to grant any relief' and that the issues were 'also precluded under the provisions of Rule 32.2(a)(2), and/or (4), Ala. R. Crim. P.' C.R. 29. Rule 32.9(a), Ala. R. Crim. P., provides for evidentiary hearings or the submission of 'affidavits, written interrogatories, or depositions, in lieu of an evidentiary hearing' when disputed issues of material fact exist. Rule 32.9(d), Ala. R. Crim. P., states: 'The court shall make specific findings of fact relating to each material issue of fact presented.' Rule 32.9 requires the circuit court to make specific findings of fact, because, as the trier of fact, its task is to resolve factual disputes and because '"a statement of the basis of the trial court's decision is essential to afford the appellant due process."' Hartzog v. State, [733] So. 2d [461](Ala. Cr. App. 1997) (quoting Owens v. State, 666 So. 2d 31, 32 (Ala. Cr. App. 1994)). However, before a circuit court finds a petitioner to be entitled to a hearing under Rule 32.9, the court must find that the petitioner met his or her burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief. Rule 32.3, Ala. R. Crim. P. 'The petition must contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds.' Rule 32.6(b), Ala. R.

Crim. P. Rule 32.7(d), Ala. R. Crim. P., provides for summary disposition of a Rule 32 petition when 'no material issue of fact or law exists which would entitle the petitioner to relief.' 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. Here, the circuit court correctly ruled that Fincher's petition failed under Rule 32.7.

"Unfortunately, Brown v. State, 677 So. 2d 1266 (Ala. Cr. App. 1996), which I authored, has come to stand for the proposition that the circuit court must make findings of fact where there has been no evidentiary hearing under Rule 32.9 and where the petition was disposed of on procedural grounds under Rule 32.7. We could argue that implicit in the Brown ruling is that the petitioner met the Rule 32.7 hurdle and the case was disposed of on the merits. Nevertheless, Brown has become authority for prison inmates seeking to impose upon the court hearing the Rule 32 petition the duty to provide written findings of fact that the Rule 32 does not require. We overrule Brown v. State, 677 So. 2d 1266 (Ala. Cr. App. 1996), to the extent that it imposes written findings of fact that are not required by the rule. For the sake of clarification we note that 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. When a circuit judge states that a Rule 32 petition is being disposed of on the merits, it is clear that the petitioner passed the Rule 32.7 hurdle and a factual determination was made. Therefore, the circuit court must provide the appellate court with findings of fact. We acknowledge that a circuit judge presiding over a Rule 32 petition often has personal knowledge concerning the allegations

> contained in a petition. 'If the circuit judge has personal knowledge of the 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).
>
> "It has been our observation that courts -- including appellate courts -- at times use the word 'merit' too loosely when the courts really mean 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 the rule and that no purpose would be served by any further proceedings.' Rule 32.7(d), Ala. R. Crim. P. As stated above, a petition precluded under Rule 32.7 does not present the same situation as a petition that has no merit (Rule 32.9). In the interest of judicial economy we encourage the circuit courts to use precise language when disposing of a Rule 32 petition."

724 So. 2d at 88-90 (footnote omitted); see also Washington v. State, supra.

It should be noted that two footnotes in Fincher are instructive. In footnote 1 of that opinion the Court quoted Rule 32.7(d), which provides:

> "(d) Summary Disposition. If 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, the court may either dismiss the petition or grant leave to file an amended petition. Leave to amend shall be freely

> granted. Otherwise, the court shall direct that the proceedings continue and set a date for hearing."

Footnote 2 provides:

> "It would be the better practice for the circuit court to enter an order showing why the petition was dismissed. Justice Hugh Maddox, in Alabama Rules of Criminal Procedure, explains why:
>
> > "'In Hamilton v. State, 635 So. 2d 911, 912 (Ala.Crim.App. 1993), the defendant appealed from the summary denial of his petition for post-conviction relief filed pursuant to Rule 32, Ala. R. Crim. P., on the ground that his sentence was illegal. The Court of Criminal Appeals remanded so that a hearing could be held. The trial court conducted a hearing, and the Court of Criminal Appeals affirmed. This case shows the danger of dismissing summarily a Rule 32 petition, especially if no written order is entered to show why the petition was dismissed.'
> >
> > "Hugh Maddox, Alabama Rules of Criminal Procedure, § 32.9, p. 65 (2d ed. 1994 and cumm. supp. 1997)."

Fincher v. State, 724 So. 2d at 89 n. 2.

Other states have addressed the question whether the principle of "notice pleading" should be applicable in postconviction proceedings because those proceedings are not criminal, but civil, in nature and whether the principle should be applied in a postconviction proceeding arising from

a capital case like this one. In Bishop v. State, 882 So. 2d 135, 156 (Miss. 2004) the Mississippi Supreme Court stated:

> "Notions of notice pleading have no place in post-conviction applications, the very name of which implies that there has been a final judgment of conviction. Respect for the integrity of the judicial process mandates that we require of such applicants a far more substantial and detailed threshold showing, far in excess of that we deem necessary in the case of a plaintiff in a civil action or, for that matter, in the case of the prosecution in a criminal indictment. In this context we understand Section 99-39-9 [Miss Code Ann., relating to postconviction proceedings] suggests a regime of sworn, fact pleadings, based upon personal knowledge."

See also Jordan v. State, 577 So. 2d 368, 369 (Miss. 1990), citing Neal v. State, 525 So. 2d 1279, 1280 (Miss. 1987)("Notice pleadings have no place in the post-conviction process.")

But summary dismissal of postconviction proceedings at the pleading stage is not unique to Alabama and Mississippi. Many states, although some use a term like "summary judgment" instead of the term "summary disposition" used in Rule 32.7, have rules or provisions of law that allow for the summary disposition of postconviction proceedings without a hearing, and other state courts have made similar statements when referring to notice pleadings. See State ex rel. Hopkinson v.

District Court, Teton Cnty., 696 P. 2d 54, 61 (Wyo. 1985)(notice pleading is insufficient because a postconviction petition is not comparable to a civil complaint); State v. Bentley, 201 Wis. 2d 303, 317, 548 N.W. 2d 50, 56 (1996)("The statutory concept of 'notice pleading' has no applicability to a postconviction motion challenging a guilty plea."); and Herman v. State, 330 Mont. 267, 278-79, 127 P. 3d 422, 430 (2006)("[T]he express statutory requirements set forth in § 46-21-104, [Mont. Code Ann., relating to postconviction proceedings], significantly exceed -- and are inconsistent with -- the mere notice pleading requirements for an ordinary complaint in a civil action.")

There is an additional reason why the provisions of Rule 32.7(d) should be construed as providing a procedure to authorize the trial judge to summarily dispose of the case, as he did in this case, at the pleading stage. The first portion of Rule 32.9 states that "Unless the court dismisses the petition, the petitioner shall be entitled to an evidentiary hearing to determine disputed issues of fact ...." In this case, the circuit judge considering Davis's postconviction petition, Judge Cardwell, specifically stated that he was

summarily dismissing this claim in Davis's petition "[b]ased on Judge Austin's affidavit, and the fact that Davis did not proffer a single specific fact in his petition that would refute it," and that, therefore, he found "the allegation in part II of [Davis's] petition [to be] without merit."

Based on all of the foregoing, that included a reading of the portions of the briefs of both parties relating to the specific issue on which this Court is divided, and after listening to the oral arguments related to this issue, and after reviewing the provisions of the Uniform Postconviction Procedure Act and the American Bar Association's Standards for Criminal Justice Relating to Postconviction Remedies ("The ABA Standards"), it appears to me that Alabama caselaw and both the Uniform Post-conviction Procedure Act and the ABA Standards, specifically ABA Standard 22-4.4(d), are applicable to this case. ABA Standard 22-4.4(d) provides that, "[i]n light of the application and response, the court may grant a motion for judgment on the pleadings if there exists no material issue of fact." (Emphasis added.) In my opinion, the language of ABA Standard 22-4.4(d) is strikingly similar to the language of Rule 32.7(d), Ala. R. Crim. P., providing

for summary disposition of Rule 32 petitions, and when, as here, the State, in its response, has filed evidence in the form of an affidavit that disputes the allegations made by the petitioner in his Rule 32 petition, Rule 32.7(d) and ABA Standard 22-4.4(d) both provide that a trial judge may grant a motion for judgment on the pleadings. I reach this conclusion because it is my opinion that a Rule 32 postconviction proceeding is civil in nature, and that when a motion to dismiss filed pursuant to the provisions of Rule 32.7(d) has attached to it an affidavit or other evidence that is not contradicted, then a petitioner is not entitled to an evidentiary hearing. In short, I believe that a Rule 32.7 motion is similar to a motion filed pursuant to the provisions of Rule 12(b)(6) or Rule 56 of the Alabama Rules of Civil Procedure.

Because there is no disagreement regarding the other sections of the main opinion, I express no opinion on those sections on which there is agreement.

WELCH, Judge, concurring in part and dissenting in part.

I join in Judge Joiner's special writing, concurring in part and dissenting in part, except for footnote 1. I do not find a discussion of an analogy to the Alabama Rules of Civil Procedure to be necessary or helpful to the resolution of this case. As Judge Joiner has explained, Yeomans v. State, [Ms. CR-10-0095, March 29, 2013] ___ So. 3d ___ (Ala. Crim. App. 2013), and Ex parte McCall, 30 So. 3d 400 (Ala. 2008), require this Court to remand for further proceedings on the claim addressed in Part II of the majority opinion.

In addition to the reasons Judge Joiner has given that, in my opinion, establish that this case must be remanded, I submit the following reasons.

The majority states in its opinion:

> "Davis argues that the circuit court's summary dismissal of this claim was improper because, he says, he was required only to plead, not prove, his allegations in order to avoid summary dismissal. Further, Davis argues that it was improper for the circuit court to consider the affidavit submitted by the State without affording him an opportunity either to cross-examine Judge Austin or to submit affidavits of his own."

___ So. 3d at ___.

Davis is correct on both points, as I will explain below. The majority, however, has concluded that Davis's claim was not sufficiently pleaded and that summary dismissal was therefore proper for that reason. I disagree.

A.

Davis alleged in Claim II of his third amended petition:

> "20. The jury at Mr. Davis's capital trial began its deliberations on the question of guilt at 4:00 p.m. on Tuesday, June 10, 1997. R. 342. It deliberated until 5:30 p.m., at which point the trial court excused the jurors for the day. R. 342. The jury resumed its deliberations at 8:30 a.m. on Wednesday, June 11, 1997, and deliberated until 10:30 a.m. R. 344. Then the trial court -- without prompting from the jury, the defense, or the prosecution, according to the record -- instructed the jury to 'stay focused on the issues' and to avoid 'consider[ing] any issue in this case regarding punishment.' R. 345-46. The jury resumed its deliberations at 10:35 a.m. and found Mr. Davis guilty of capital murder at 11:10 a.m. R. 347.
>
> "21. At the penalty phase, the jury began its deliberations on Wednesday, June 11, 1997, at 4:55 p.m. R. 516. It deliberated until 5:10 p.m., at which point the trial court excused the jurors until the following day. R. 516. The jury resumed its deliberations at 9:00 a.m. on Thursday, June 12, 1997, R. 517-18, and recommended that Mr. Davis be sentenced to death by a vote of eleven to one at 11:40 a.m. R. 517-18.
>
> "22. During both the guilt-phase and penalty-phase deliberations at Mr. Davis's trial, Judge Austin entered the jury room without prompting from the jury. While in the jury room and out of

> the presence of Mr. Davis, his counsel, the prosecutors, and the court reporter, Judge Austin discussed Mr. Davis's case with the jurors. During those discussions, Judge Austin told the jury that it was taking too long to reach a decision; that the reason he reinstructed the jury at the guilt phase was that the jury was taking too long to reach a decision; that the victims' family members had asked Judge Austin why the jury was taking so long to reach a decision; and that the jury's decision at the penalty phase was only a recommendation. Judge Austin also commented on Mr. Davis's plea and other evidence in the case and provided the jurors with additional supplemental instructions about the applicable law. Judge Austin's statement to the jurors prejudiced the defense by encouraging the jurors to find Mr. Davis guilty of capital murder and to recommend a death sentence.
>
> "23. Neither Mr. Davis nor his trial counsel were informed of any of the ex parte communications between Judge Austin and the jury during the guilt-phase and penalty-phase deliberations at Mr. Davis's trial. In addition, neither Mr. Davis nor his trial or appellate counsel had any information that such communications had occurred."

(C. 1579-80.)

After the State filed its motion to dismiss and the affidavit of Judge Austin, Davis replied, alleging, among other things:

> "Mr. Davis is entitled to an evidentiary hearing on his claim that the trial court engaged in improper ex parte contacts with the jury. The State argues that the claim should be dismissed summarily on the basis of Judge Robert Austin's affidavit. But at the pleading stage, Mr. Davis is required to plead, not prove, his claims, Johnson v. State, 835 So. 2d

> 1077, 1079-80 (Ala. Crim. App. 2001), and he has done precisely that. Moreover, this Court has not yet admitted the affidavit, and Mr. Davis has not yet had an opportunity to cross-examine Judge Austin regarding it."

(C. 1832.)

The circuit court denied Davis's claim on the merits:

> "II. DAVIS' CLAIM THAT JUDGE AUSTIN ENGAGED IN IMPROPER EX PARTE CONTACTS WITH THE JURY IS WITHOUT MERIT.
>
> "12. In part II, pages 8-10 of his petition, Davis alleges that Judge Austin entered the jury room during both guilt phase and penalty phase deliberations and discussed the case with, the jurors.
>
> "13. This Court has considered the sworn affidavit executed by Judge Austin and filed by the State pursuant to Rule 32.7(a), Ala. R. Crim. P. In his affidavit, Judge Austin specifically denies having any ex parte contact with the jurors during their deliberations. Based on Judge Austin's affidavit, and the fact that Davis did not proffer a single specific fact in his petition that would refute it, this Court finds that the allegation in part II of his petition is without merit. The allegation in part II is, therefore, denied by this Court, Rule 32.7(d), Ala. R. Crim. P."

(C. 1985-86.)[13]

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[13]The circuit court's statement that "Davis did not proffer a single specific fact in his petition that would refute" Judge Austin's affidavit unreasonably faults Davis for failing to anticipate evidence the State might submit and to refute it. At the pleading stage, a petitioner is required only to provide "a clear and specific statement of the grounds

When the circuit court went beyond addressing Davis's claim on a procedural basis and, instead, addressed the merits of Davis's claim, it implicitly found the existence of a disputed issue of material fact, the resolution of which required the circuit court to make a factual determination. Otherwise, there would have been no reason to discuss the merits of the claim. Here, the circuit court denied Davis's claim on the merits based primarily on Judge Austin's affidavit that was submitted pursuant to Rule 32.7(a).

The majority affirms by holding that Davis's claim was not pleaded with sufficient specificity. Rule 32.3 and Rule 32.6(b), Ala. R. Crim. P. Even if the claim was not pleaded with sufficient specificity, the majority's holding conflicts with Ex parte McCall, 30 So. 3d 400 (Ala. 2008), and Yeomans v. State, [Ms. CR-10-0095, March 29, 2013] ___ So. 3d ___ (Ala. Crim. App. 2013). In McCall, the Alabama Supreme Court reversed this Court's judgment affirming a circuit court's

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upon which relief is sought." Rule 32.6(b), Ala. R. Crim. P. See, e.g., Ex parte Hodges, [Ms. 1100112, Aug. 26, 2011] ___ So. 3d ___, ___ (Ala. 2011)("Indeed, it is somewhat disingenuous for the State to fault Hodges for providing no evidence in support of his allegations when it was the State that successfully persuaded the trial court to forgo a hearing at which such evidence could have been presented.").

dismissal, on pleading grounds, of a Rule 32 petition; this Court held that McCall had failed to state a claim for relief in the petition. The Alabama Supreme Court explained that a circuit court cannot rely on alleged pleading deficiencies in a Rule 32 petition as a basis for dismissing claims after the circuit court has held an evidentiary hearing. That Court stated:

> "Thus, the trial court must first determine whether the petition raises 'material issue[s] of fact or law ... which would entitle the petitioner to relief under [Rule 32].' Rule 32.7(d). Once a hearing is held on those issues, the trial court is required to make findings of fact as to each of the material issues upon which the hearing was held. See Ex parte Grau, [791 So. 2d 345 (Ala. 2000)].
>
> "In this case, McCall petitioned for postconviction relief alleging 12 grounds of ineffective assistance of counsel. The trial court held an evidentiary hearing on the petition. By holding that hearing, the trial court implicitly found that the issues presented were 'material issue[s] of law or fact ... which would entitle [McCall] to relief,' Rule 32.7(d), and, under Rule 32.9(d), the trial court therefore had a responsibility to make findings of fact as to each of those issues. Instead of issuing any such findings, however, the trial court dismissed McCall's petition on the ground that his 'bare allegations' of prejudice were not sufficient to state a claim of ineffective assistance of counsel. Although this conclusion may have been an appropriate basis for a summary dismissal of the petition before a hearing was held, once a hearing

> has been held Rule 32.9(d) requires findings of fact in support of the judgment."

30 So. 3d at 403-04 (emphasis added; footnote omitted).

Like Judge Joiner, I am not persuaded by the majority's attempt to distinguish this case from Ex parte McCall. The majority holds that, because the circuit court did not hold a hearing or direct the parties to submit affidavits in lieu of a hearing, McCall does not control. Although the circuit court did not direct the State to file the affidavit and although Rule 32.7(a), Ala. R. Crim. P., permits the State to file affidavits or a certified record with its response, the circuit court here explicitly relied on the testimony in the affidavit to determine that Davis's claim was meritless, and its fact-findings supporting that determination were based, in part, on the affidavit. Davis had no opportunity to refute the testimony presented by the State or to offer his own witnesses, and the circuit court should have allowed him that opportunity. See Rule 32.9, Ala. R. Crim. P.

This Court recently reaffirmed that principle in Yeomans.[14] After observing that the circuit court did not give

[14]In her special writing, Judge Kellum states that the majority has implicitly overruled Yeomans. I do not believe

notice to Yeomans that it intended to take evidence by affidavit in lieu of an evidentiary hearing, this Court stated: "Thus, Yeomans was not afforded an opportunity to offer evidence, in the form of an affidavit or otherwise, to counter the affidavit the State offered to disprove Yeomans's claim." ___ So. 3d at ___. Like Yeomans, Davis was not afforded that opportunity here, and, therefore, the case must be remanded.

B.

Affirmance of this case results in the violation of one of the fundamental tenets of American jurisprudence -- the opportunity to be heard.

> "In Ex parte Berryhill, 410 So. 2d 416, 418 (Ala. 1982), we held: 'The fundamental principle is that the decision of a court must be based on evidence produced in open court lest the guarantee of due process be infringed.' See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) ('The essential requirements of due process ... are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.')."

Ex parte R.D.N., 918 So. 2d 100, 104 (Ala. 2005).

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that the majority intended to overrule Yeomans.

Because fundamental due process was denied, the majority's affirmance on a ground other than the one relied on by the circuit court is precluded by Alabama caselaw. Although the majority opinion contains a quotation that, it contends, supports its affirmance of the circuit court's judgment on a ground other than the one relied on by the circuit court, the quotation actually demonstrates that the circumstances in this case are precisely the type in which an affirmance on other grounds is not permitted. The majority relies on the following quotation:

> "Because due process is not implicated and Ex parte Clemons[, 55 So. 3d 348 (Ala. 2007),] is not applicable in this case, this Court may apply the well-settled rule that an appellate court may affirm a circuit court's judgment if that judgment is correct for any reason. As the Alabama Supreme Court explained in Liberty National Life Insurance Co. v. University of Alabama Health Services Foundation, P.C., 881 So. 2d 1013 (Ala. 2003):
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> > "'Nonetheless, this Court will affirm the trial court on any valid legal ground presented by the record, regardless of whether that ground was considered, or even if it was rejected, by the trial court. Ex parte Ryals, 773 So. 2d 1011 (Ala. 2000), citing Ex parte Wiginton, 743 So. 2d 1071 (Ala. 1999), and Smith v. Equifax Servs., Inc., 537 So. 2d 463 (Ala. 1988). This rule fails in application only where due-process constraints require some notice at the trial level, which was omitted, of

> the basis that would otherwise support an affirmance, such as when a totally omitted affirmative defense might, if available for consideration, suffice to affirm a judgment, Ameriquest Mortgage Co. v. Bentley, 851 So. 2d 458 (Ala. 2002), or where a summary-judgment movant has not asserted before the trial court a failure of the nonmovant's evidence on an element of a claim or defense and therefore has not shifted the burden of producing substantial evidence in support of that element, Rector v. Better Houses, Inc., 820 So. 2d 75, 80 (Ala. 2001) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed. 2d 265 (1986), and Kennedy v. Western Sizzlin Corp., 857 So. 2d 71 (Ala. 2003))."

"881 So. 2d at 1020."

A.G. v. State, 989 So. 2d 1167, 1180-81 (Ala. Crim. App. 2007)(emphasis added).

As demonstrated above, due process is implicated here, and Davis was denied notice and the opportunity to be heard. Therefore, it is clear, based on the principles of Liberty National Life Insurance Co. v. University of Alabama Health Services Foundation, P.C., 881 So. 2d 1013 (Ala. 2003), that this Court is not free to affirm the circuit court's judgment on a ground other than the one relied on by the circuit court, even if that other ground was valid.

In conclusion, I join in Judge Joiner's special writing, and, for the foregoing additional reasons, I dissent from the majority's holding in Part II of the opinion. Principles of due process and fundamental fairness require that this case be remanded for the proper resolution of Claim II.

Joiner, J., joins.

JOINER, Judge, concurring in part and dissenting in part.

I concur in all parts of the main opinion except Part II, which affirms the denial of Davis's claim that the trial judge engaged in improper ex parte communication with the jury; as to Part II, I respectfully dissent.

In Yeomans v. State, [Ms. CR-10-0095, March 29, 2013] ___ So. 3d ___ (Ala. Crim. App. 2013), this Court addressed a juror-misconduct claim that had been denied in a manner similar to the denial of Davis's improper-communication claim. In Yeomans, the petition alleged, among other things, that a particular juror--L.J.--had failed to disclose, when asked if she or anyone in her family had been a victim of a crime, that her sister had been a victim of a violent burglary and attempted rape. In its motion to dismiss, the State submitted an affidavit from Juror L.J. in which she "stated that her sister had been the victim of a burglary and an attempted rape but that L.J. did not learn of those facts until ... almost five years after Yeomans's trial." ___ So. 3d at ___. The circuit court relied on Juror L.J.'s affidavit to deny Yeomans's claim.

This Court in Yeomans noted first that Yeomans's juror-misconduct claim was sufficiently pleaded. We then held that although Rule 32.9(a), Ala. R. Crim. P., allows the circuit court to take evidence by affidavits instead of holding an evidentiary hearing, because the circuit court had not given Yeomans notice that it intended to receive evidence by affidavit, the matter had to "be remanded for the circuit court to comply with Rule 32.9(a), Ala. R. Crim. P., and either hold an evidentiary hearing on the juror-misconduct claim or, after giving notice to the parties of its intention to do so, take evidence by one of the alternative means listed in Rule 32.9(a)." ___ So. 3d at ___. Implicit in the Court's reasoning in Yeomans is the principle that to the extent a circuit court, in denying a petition, relies on facts or evidence not included in the facts as alleged in the petition or in the petitioner's trial record or the record on direct appeal, the circuit court's action in that regard is an "implicit[] f[inding] that the issues presented [are] 'material issue[s] of law or fact ... which would entitle [the petitioner] to relief.'" Ex parte McCall, 30 So. 3d 400, 404 (Ala. 2008) (quoting Rule 32.7(d), Ala. R. Crim. P.).

In the present case, the circuit court, like the court in Yeomans, relied on an affidavit to deny the claim at issue. Thus, in denying the claim, the circuit court went beyond the facts as alleged in the petition or included in the record of Davis's direct appeal. In my view, this action in fact "[rose] to the level of an evidentiary hearing," and therefore I disagree with the main opinion's conclusion that "McCall is inapposite."[15] ___ So. 3d at ___.

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[15]I agree with Justice Maddox's point that the notice-pleading requirements applicable under the Alabama Rules of Civil Procedure do not apply to a postconviction petition filed under Rule 32, Ala. R. Crim. P.

Justice Maddox also states "that a Rule 32.7 motion [to dismiss] is similar to a motion filed pursuant to Rule 12(b)(6) or Rule 56 of the Alabama Rules of Civil Procedure." ___ So. 3d at ___. Under that analogy, the State's motion to dismiss in this case would be similar to a motion to dismiss filed under Rule 12(b)(6), Ala. R. Civ. P., and the circuit court's reliance on the affidavit attached to that motion would be similar to the scenario present when a trial court considering a Rule 12(b)(6), Ala. R. Civ. P., motion to dismiss relies on matters outside the pleadings. When a trial court considering a Rule 12(b)(6), Ala. R. Civ. P., motion to dismiss relies on matters outside the pleadings, the motion is converted into a motion for a summary judgment under Rule 56, Ala. R. Civ. P., and the trial court may not enter a summary judgment against the nonmovant without giving the nonmovant "'notice that the motion ha[s] been converted to a motion for a summary judgment, ... the opportunity to be heard, and ... such other procedural relief as contemplated by Rule 56, Ala. R. Civ. P.'" Jacobs v. Whaley, 987 So. 2d 1143, 1145 (Ala. Civ. App. 2007) (quoting Singleton v. Alabama Dep't of Corr.,

In sum, under my reading of Yeomans and Ex parte McCall, the circuit court's reliance on Judge Austin's affidavit to deny Davis's improper-communication claim means that we no longer have the option to "look back" and hold that the claim is insufficiently pleaded. "Although this conclusion [i.e., that a claim was not sufficiently pleaded] may have been an appropriate basis for a summary dismissal of the petition before a hearing was held [or, as in Davis's case, before the circuit court received evidence by affidavit in lieu of a hearing,] once a hearing has been held [or once the circuit court has received evidence by affidavit in lieu of a hearing] Rule 32.9(d) requires findings of fact in support of the judgment." Ex parte McCall, 30 So. 3d at 404 (emphasis added). Accordingly, I would remand the case for the circuit court to conduct further proceedings consistent with Yeomans

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819 So. 2d 596, 600 (Ala. 2001)).

Although I do not think that Davis was necessarily entitled to all the procedural protections afforded a nonmovant under Rule 56, Ala. R. Civ. P., I do think that under our caselaw interpreting Rule 32, Ala. R. Crim. P., he was entitled, at the very minimum, to notice that the circuit court intended to deny his claim based solely on new evidence the State had submitted along with its motion to dismiss.

and Ex parte McCall on the claim addressed in Part II of the main opinion.

Welch, J., joins, in part.