

# 2008 CIRCUIT AND DISTRICT JUDGES' SUMMER CONFERENCE



## **RULE 32**

# **POST CONVICTION REMEDIES**

Prepared by Christina Van Der Hulst  
Legal Research Assistant  
Alabama Sentencing Commission



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## **RULE 32 Ala.R.Crim.P. – POSTCONVICTION REMEDIES**

### **I.**

#### **BACKGROUND**

This paper updates the previous papers on Rule 32 - Postconviction remedies; 'Criminal Law Update Rule 32', compiled by the Honorable Sue Bell Cobb in 1999, and 'Rule 32 – Quo Vadis', compiled by the Honorable Hugh Maddox in 2001. Since 2001, Rule 32 has been amended, in 2002 and again in 2005; in addition, case law in this area has developed. This paper details these changes and updates the issues that were raised in the previous papers.

### **II.**

#### **STATISTICAL INFORMATION**

A total of 1,820 cases were appealed to the Court of Criminal Appeals during the 2006-2007 term of court. Of these appeals, 713 sought relief from judgments on Rule 32 petitions. These 713 appeals constituted 39.2% of the total number of appeals filed in the 2006-2007 term, the largest number of cases in any single category of appeals filed during this term. Of these 713 appeals, ten sought relief in cases in which the death penalty had been imposed. These ten appeals constituted .5% of the total number of appeals that were filed during this period.

During the 2006-2007 term, the Court of Criminal Appeals disposed of 1,641 appeals. Of this number, 626 involved adverse judgments on Rule 32 Petitions, and five of these 626 dispositions sought post-conviction relief from convictions in which the death penalty had been imposed. These 626 dispositions made up 38.1% of the total number of appeals disposed in the 2006-2007 term. For these 626 dispositions, the average time from notice of appeal to disposition equaled 210 days (200 days for the 621 non death Rule 32 petitions and 918 days for the five Rule 32 petitions seeking relief in death penalty cases). The average time from notice of appeal to disposition in all other types of appeals was 243 days.

### **III.**

#### **AMENDMENTS**

***Rule 32 was amended in 2002 and again in 2005.*** See Appendix.

***In summary, the amendments made in 2002 are as follows:***

- Inserted a provision in Rule 32.1 enabling a court to dismiss, without prejudice, a petition that challenges multiple judgments entered in more than a single trial or guilty plea;
- Reduced the time limitations provision in Rule 32.2 from two years to one year. This was followed up by a Supreme Court Order explaining the effective date as it related to the time limitation.

- Inserted a provision in Rule 32.2 clarifying the preclusion of remedies with respect to cases with jurisdictional issues.
- Expanding on provisions in Rule 32.6 relating to the commencement of Rule 32 proceedings to further explain the form, filing fees, *in forma pauperis* applications and verification requirements. Authorization for the subsequent assessment and collection of filing fees is also included for *in forma pauperis* petitions alleging claims of relief that are precluded by the rule.

***The amendments made in 2005 are as follows:***

- Inserted Rule 32.1(f) to allow for out-of-time petitions if; through no fault of the petitioner, (s)he failed to timely file an appeal from the conviction or sentence, or file an appeal from dismissal or denial of a prior Rule 32 petition.
- Clarified that the limitation period in Rule 32.2(c) for an out-of-time appeal is 6 months from time petitioner discovers denial or dismissal of prior petition; and
- Included the Court's Comment to the amendment of Rule 32.2(c) that "set[s] a deadline of six months from discovery for filing a Rule 32.1(f) petition seeking an out-of-time appeal from the dismissal or denial of a previously filed Rule 32 petition," noting that the amended rule "expressly preserves the existing one-year deadlines for the filing of the previously filed petition."

**IV.**

**APPELLATE COURT STANDARD OF REVIEW**

In a series of postconviction cases, the appellate courts have clearly stated that the standard for reviewing a circuit court's judgment denying a petition for postconviction relief is "whether the circuit court exceeded the scope of its discretion in denying the petition." *Ex parte Woods*, 957 So.2d 533 (Ala. 2006); *Jackson v. State*, 963 So.2d 150 (Ala.Crim.App. 2006); In *Hyde v. State*, 950 So.2d 344 (Ala.Crim.App. 2006), the Court of Criminal Appeals clarified its procedures by restating the position that "[w]hen the facts are undisputed and an appellate court is presented with pure questions of law, that court's review of ruling in a postconviction proceeding is *de novo*; however, where there are disputed facts in a postconviction proceeding and the circuit court resolves those disputed facts, the standard of review on appeal is whether the trial judge abused his discretion when he denied the petition." *Boyd v. State*, 913 So.2d 1113, 1122 (Ala.Crim.App. 2003); *Ex parte White*, 792 So.2d 1097, 1098 (Ala. 2001); *Elliott v. State*, 601 So.2d 1118, 1119 (Ala.Crim.App. 1992). In *Davis v. State*, \_\_\_ So.2d \_\_\_, 2008 WL 902884 (Ala.Crim.App. 2008), where a postconviction petition involved questions of fact (as opposed to questions of law), the Court of Criminal Appeals confirmed that, "[W]hen reviewing a circuit court's denial of a Rule 32 petition we apply an abuse-of-discretion standard." Citing *Elliott v. State*, 601 So.2d 1118, 1119 (Ala.Crim.App. 1992).

The "plain-error standard of review does not apply in Rule 32 petitions." *Hill v. State*, 695 So.2d 1223 (Ala.Crim.App. 1997); *Neeley v. State*, 642 So.2d 494 (Ala.Crim.App. 1993).

## V.

### A REVIEW OF REASONS FOR REMAND

Of the cases returned to the trial court during the 2006-2007 term of court, the majority of the cases were remanded on the basis of inadequate written findings of fact or because the trial judge dismissed the petition without an evidentiary hearing which proved to be required. Of the cases that were remanded for an evidentiary hearing, at least five involved ineffective counsel claims, six claims involved time limitations, six were held not to be procedurally barred and one dismissal was deemed to be an abuse of discretion. Other cases involved failure of the State to respond to the petition, timeliness of filing the petition when mailed from prison, failure of counsel to inform the petitioner of his right to appeal or consequences of his guilty plea, inadequacy of the record, and omission of a determination concerning whether a prior petition was adjudicated on the merits.

Frequently found reasons for remanding a trial court's decision in Rule 32 proceedings are:

#### **A. Most Frequent**

1. Failure to hold an **evidentiary hearing** on a pleading that has merit.
2. Failure to make **written findings of fact on which denial of relief is based**, following an evidentiary hearing.
3. Failure to make **written findings of fact in a claim of ineffective assistance of counsel**.
4. Failure to enter an **order setting out reasons for a summary dismissal and the facts on which the summary dismissal is based**.

#### **B. Less Frequent**

1. Petition not barred by time limitations/preclusion grounds
2. Petition not procedurally barred
3. Abuse of discretion - petition may be amended.

## VI. RULE 32 CHECKLIST

In the paper prepared by the Honorable Sue Bell Cobb, a checklist supplemented by case law was provided for trial judges to consider when dealing with Rule 32 petitions. This paper updates the checklist to reflect the amendments to the Rule and current case law.

Courts should consider the following questions in disposing of a Rule 32 petition:

A. Was petitioner granted *in forma pauperis* status or has filing fee been paid?

- *In forma pauperis* status requested, was a certificate showing the balance of the petitioner's PMOD account over past 12 months submitted?

B. Has the petition been filed in the court of conviction?

C. Has the petition been filed in proper form?

D. Is the petition verified?

E. Is the petition precluded?

- Has the State responded/refuted all petitioners' claims which are not precluded?
- Is the petition a successive petition?
- Is the petition time barred/ is the claim jurisdictional?
- Was there Ineffective assistance of counsel?
- Are exceptions to the preclusion rule applicable?

F. Has the petition been sufficiently pleaded?

G. Is a hearing and written order necessary?

### A. FILING FEE OR *IN FORMA PAUPERIS* STATUS

A defendant's filing fee or the approval of an *in forma pauperis* declaration must be obtained before the trial court acquires jurisdiction to hear the claims presented in a defendant's petition for postconviction relief. To avoid remand, the record should clearly state whether the filing fee has been paid, or waived because the defendant's request to proceed *in forma pauperis* has been granted.

Note: To avoid an abusive litigant, a court cannot refuse payment for the filing fee or an application requesting *in forma pauperis* status. Trial courts, "in regulating the activities of abusive litigants, may impose restrictions under appropriate circumstances, but these restrictions cannot deny the litigant's constitutional right to meaningful access to the courts," Ex parte Ward, 957 So.2d 449 (Ala. 2006), citing Ex parte Coleman, 728 So.2d 703, 707-08 (Ala.Crim.App. 1998),(quoting Coleman v. State, 539 So.2d

454, 457 (Ala.Crim.App.1988).<sup>1</sup> In Ex parte Magouirk, 804 So.2d 308 (Ala.Crim.App. 2000), the Court of Criminal Appeals held that a trial court's order directing the clerk of the court not to "receive or file any future post-conviction actions, Rule 32 or otherwise," submitted by petitioner was overbroad and denied the petitioner meaningful access to the courts.

### 1. Subject Matter Jurisdiction

Absent payment of the filing fee or approval of the *in forma pauperis* declaration, the circuit court does not acquire subject matter jurisdiction. The refusal of the circuit court to accept a petition is not a final judgment and cannot therefore, support an appeal. Mandamus, and not appeal, is the proper method by which to compel the circuit court to determine whether to authorize the petitioner to proceed *in forma pauperis*. Goldsmith v. State, 709 So.2d 1352 (Ala.Crim.App.1997), cited in Goodwin v. State 720 So.2d 1050 (Ala.Crim.App. 1998)

The circuit court lacked subject-matter jurisdiction to consider petition for postconviction relief, where the circuit court did not grant petitioner's request to proceed *in forma pauperis* and the petitioner did not pay the filing fee. Smith v. State, 918 So.2d 141 (Ala.Crim.App. 2005), citing Ex parte McWilliams, 812 So.2d 318 (Ala. 2001); Ray v. State, 895 So.2d 1063 (Ala.Crim.App. 2004); Ex parte St. John, 805 So.2d 684 (Ala. 2001); Goldsmith v. State, 709 So.2d 1352 (Ala.Crim.App. 1997).

### 2. Certificate of Warden or Prison Officer

A prison inmate was not entitled to proceed *in forma pauperis* with respect to his petition for postconviction relief, or to waiver of filing fee on petition, because he failed to provide the court with a certificate of the warden or prison official of the correctional facility in which he was incarcerated showing the balance of his inmate account for 12 months preceding the filing of his postconviction petition, as required by Rule 32.6(a), Ala.R.Crim.P. 32(6). Ex parte Washington, 855 So.2d 1138 (Ala.Crim.App. 2003).

### 3. Acceptance of In Forma Pauperis Application / Receipt of Filing Fee

Remand to the circuit court was required for determination of whether a postconviction relief petitioner paid the circuit court filing fee or whether the circuit court granted the petitioner's request to proceed *in forma pauperis*, Rule 32.6 Ala.R.Crim.P., Broadway v. State, 881 So.2d 1068 (Ala.Crim.App. 2003).

In Maxwell v. State, 897 So.2d 426 (Ala.Crim.App.2004), the Court of Criminal Appeals reviewed the record on appeal and was unable to ascertain from the record whether the circuit court had jurisdiction to rule on the petition. For that reason the court found it necessary, as they did in Broadway v. State, 881 So.2d 1068 (Ala.Crim.App. 2003) and Jackson v. State, 854 So.2d 157 (Ala.Crim.App. 2002), to remand the case for the circuit court to make specific, written findings as to whether the it actually granted the petitioner's request to proceed *in forma pauperis* or whether the petitioner paid the filing fee.

In Ex parte Ward, 957 So.2d 449 (Ala. 2006), the Alabama Supreme Court, held that the trial court's order requiring an inmate to pay the filing fee for his first petition for postconviction relief, which was

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<sup>1</sup> "Access to the courts is a fundamental tenet of our judicial system; legitimate claims should receive a full and fair hearing no matter how litigious the plaintiff may be. In re Oliver, 682 F.2d 443, 446 (3rd Cir.1982)." See also Ex parte Coleman, 728 So.2d 703 (Ala.Crim.App. 1998), and White v. State, 695 So.2d 241 (Ala.Crim.App. 1996).

issued in apparent response to inmate's filing of second petition for postconviction relief, was untimely. The order was issued nine months after the trial court had summarily dismissed the first petition, rather than upon dismissal of the first petition.

#### 4. Denial of Request to Proceed on Appeal *In Forma Pauperis*

The Court of Criminal Appeals will issue a writ of mandamus directing a trial court to state its reasons for denying a prisoner's request to proceed *in forma pauperis* on his postconviction relief petition. Ex parte Amerson, 849 So.2d 1001 (Ala.Crim.App. 2002).

### **B. Jurisdiction – Court of Conviction**

Rule 32.5 provides:

*Petitions filed under this rule shall be filed in and decided by the court in which the petitioner was convicted. If the petition is filed in another court, it shall be transferred to the court where the conviction occurred.*

A circuit court lacks jurisdiction or authority to dispose of a petition for postconviction relief unless it is in the county where the conviction occurred.

In addition, Rule 32.6(d) provides that:

*[T]he proceeding shall be assigned to the sentencing judge where possible, but for good cause the proceeding may be assigned or transferred to another judge.*

Rule 32 is silent on the jurisdiction of cases which are removed from original jurisdiction to another county to be tried. Justice Maddox in the 2006 supplement to his book, *Alabama Rules of Criminal Procedure*,<sup>2</sup> highlights that the Alabama appellate courts have not considered the question of “court of original conviction” when a case has been transferred. Justice Maddox refers to the case of Bulger v. State, 904 So.2d 219 (Ala.Crim.App. 2004), where he makes a comparison between a §13A-5-9.1 (*Kirby*) motion which “specifically provides for the reconstruction of a sentence ‘by the sentencing judge or presiding judge’ ” and a Rule 32 petition, which provides that a petition should be “filed in the court of original conviction.” Justice Maddox concludes that, “[I]f a case is transferred, the ‘court of original conviction’ would seem to be the court to which the case was transferred and tried and in which the defendant was convicted.” This conclusion appears to be supported by the findings in Ex parte Lancaster, 89 So.2d 721(Ala. 1921), which concluded that, “[I]n a case where an order for removal on change of venue is made, the jurisdiction of the county wherein the indictment is returned to try defendant ceases, and the jurisdiction of the county to which the case is removed commences.”

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<sup>3</sup> H. Maddox, *Alabama Rules of Criminal Procedure*, § 13.1, p 82 2006 Cumulative Supplement.

## Transfer

The circuit court where the defendant was not convicted lacked authority or jurisdiction to dispose of a petition for post-conviction relief and should have transferred the case to the county where the conviction occurred, Sloan v. State, 780 So.2d 805 (Ala.Crim.App. 2000).

If a postconviction petition is filed in the wrong court, the circuit court in which petition is filed must transfer the petition to circuit court of original conviction, rather than dismiss the petition. Barker v. State, 766 So.2d 988 (Ala.Crim.App. 2000).

Upon determining that a petition for writ of habeas corpus should have been pursued as a petition for postconviction relief in the court where the petitioner was convicted, the trial court should have transferred the petition to the court of original conviction, rather than dismissing it. Rule 32.5 Ala.R.Crim.P., Long v. State, 673 So.2d 856 (Ala.Crim.App. 1995).

## **C. FORM AND FILING**

### 1. Form.

Rule 32.6(a) provides:

*a) FORM, FILING, AND SERVICE OF PETITION. .... The petition should be filed by using or following the form accompanying this rule. If that form is not used or followed, the court shall return the petition to the petitioner to be amended to comply with the form.*

If a petition is not in the form provided in the appendix to Rule 32, or the petition is styled as a habeas corpus petition, it may be addressed by the trial court (provided it is the court of original jurisdiction). If the court is unable to rule on the petition in its present form, the court should return the petition with instructions to file an amendment to the petition within a specified time.

### a. Amendment

The Court of Criminal Appeal “has consistently held that when a post-conviction petition styled as a petition for writ of habeas corpus is filed and the allegations raised in the petition are cognizable in a proceeding under Rule 32, Ala.R.Crim.P., the cause should be entertained in the court of original conviction and the petitioner should be given the opportunity to file a petition in the proper form as required by Rule 32.6(a).” Glover v. State, 615 So.2d 1331 (Ala.Crim.App. 1993); Drayton v. State, 600 So.2d 1088 (Ala.Crim.App. 1992).

In Smith v. State, 918 So.2d 141 (Ala.Crim.App. 2005), the Alabama Court of Criminal Appeals opined that the “second sentence in Rule 32.6(a) specifically contemplates that defects in the form of the petition are not grounds for dismissal of the petition but are readily curable by amendment, and both the

Supreme Court and this Court have held that defects in the form of a Rule 32 petition in no way implicate the jurisdiction of the circuit court.” See, e.g., Davis v. State, 784 So.2d 1082 (Ala.Crim.App. 2000); Norwood v. State, 770 So.2d 1113 (Ala.Crim.App. 2000); Young v. State, 667 So.2d 141 (Ala.1995);.

b. Disposition of Petition – No Merit

Notwithstanding the provision in Rule 32.6 to “return (the) petition to the petitioner to be amended to comply with the form.,” the Alabama Supreme Court clearly signaled in Ex parte Maddox, 662 So.2d 915 (Ala. 1995), that a trial court can proceed to address the issues and dispose of the petition where the petition clearly does not have merit. In that case the Supreme Court quoted with approval the following:

Rule 32.7(d), Ala.R.Crim.P. also takes precedence, in some cases, over the Rule 32.6(a), Ala. R.Crim.P. requirement that the petition be filed on the “proper form.” “Our blind adherence to the holding of Drayton v. State, 600 So.2d 1088 (Ala.Crim.App. 1992), is a literal exaltation of *form* over substance. It is ridiculous to remand this cause so that the appellant will have the opportunity to file a petition in the proper form that will be promptly dismissed. . . .” 662 So.2d at 915.

Similarly, in Heulett v. State, 842 So.2d 741 (Ala.Crim.App. 2002), the Court of Criminal Appeals concluded “It would be an exaltation of form over substance to remand [this] case to the circuit court so that court could return the petitions to the appellant and so the appellant could refile three separate petitions that, for the reasons set forth above, will be promptly dismissed. Overruling Drayton v. State, 600 So.2d 1088 (Ala.Crim.App. 1992), to the extent Drayton requires that a petition improperly labeled be dismissed and returned to the petitioner so the petitioner can refile the petition in the form required by Rule 32.6(a), Ala.R.Crim.P.

2. Filing

Rule 32.6 provides:

- (a) .. *A petition may be filed at any time after entry of judgment and sentence (subject to the provisions of Rule 32.2(c))...*
- (b).....
- (c) *Notification of Appellate Court. If an appeal of the petitioner's conviction is pending, the clerk shall also promptly send a copy of the petition to the appropriate appellate court, noting in the record the date and manner by which it is sent.*

a. Date of Filing

A Rule 32 petition was deemed filed on the date it was placed in the prison mail system to be mailed to the circuit court clerk, despite the fact that the date stamp supplied by the clerk indicated the petition was not "filed" until six months after the date on which it was mailed. Rash v. State, 968 So.2d 552 (Ala.Crim.App. 2006).

b. While Direct Appeal is Pending

In Barnes v. State, 621 So.2d 329 (Ala.Crim.App.1992), the Court of Criminal Appeal established the procedure to be followed when a defendant files a Rule 32 petition while a direct appeal is pending in the Court of Criminal Appeals. The Court determined that, in such circumstances, it could notify the circuit court to hold the Rule 32 petition in abeyance pending the outcome of the appeal. "Or the appellate court may remand, thus staying the appeal of the petitioner's conviction and transferring jurisdiction to the circuit court to adjudicate the Rule 32 petition. After adjudication, a return to remand would be submitted to this court, and the parties would be allowed to submit issues for review of the circuit court's action on the Rule 32 petition."

In Wilson v. State, 830 So.2d 765 (Ala.Crim.App.2001), under the authority of Barnes, the Court of Criminal Appeals granted Wilson's motion, stayed the appeal, and transferred jurisdiction of the cause to the circuit court for adjudication of the Rule 32 petition. The Court ordered the circuit court to dispose of the petition, and ordered the court reporter to supplement the record on appeal with a transcript of the Rule 32 proceedings.

It should be noted that the dissenting judges in Wilson urged reconsideration of the procedure established in Barnes. "If, and/or when, a case squarely presents that issue to this court [Alabama Criminal Court of Appeals], it will be ripe for consideration. This case, however, does not present that issue to us. Moreover, this court, in reliance on Barnes, clearly sanctioned the procedure and invited the parties to address the issue regarding the illegality of the sentence. Overruling Barnes on the basis of this case would be fundamentally unfair to Wilson, who relied on existing case law and the orders of this court when she presented the issue to this court."

c. Rule 32 Petition Cannot Be Refused Because Appeal from Denial of Prior Petition Is Pending

A circuit court cannot refuse to accept the filing of a postconviction petition while an appeal of a prior postconviction petition is pending; however, any action on the petition must be suspended until a certificate of judgment is issued on appeal of the prior petition; overruling Besselaar v. State, 600 So.2d 980 (Ala.Crim.App.1992). The Court of Criminal Appeals held that entertainment of a subsequent petition while the appeal of a prior petition is pending would be contrary to the orderly and efficient administration of the rules, "to an interest in the appellate court having full perspective of the case, and to conservation of judicial resources. ... [I]t appears that the Alabama Supreme court intended that no interaction or coordination between the circuit court and the appellate court occur when a Rule 32 petition is filed while another one is pending on appeal." Barnes v. State, 621 So.2d 329 (Ala.Crim.App. 1992).

d. Out-of-Time Appeal Provision - Rule 32.2(f)

Rule 32.1(f), authorizes out-of-time appeals in instances in which:

*(f) The petitioner failed to appeal within the prescribed time from the conviction or sentence itself or from the dismissal or denial of a petition previously filed pursuant to this rule and that failure was without fault on the petitioner's part.*

"It is clear from the wording of Rule 32.1(f), that the out-of-time- appeal provision applies only to situations where the notice of appeal is untimely." State v. Carruth, \_\_ So.2d \_\_, 2008 WL 2223060 (Ala.Crim.App. 2008).

#### D. VERIFICATION

Rule 32.6(a) provides:

*"A proceeding under this rule is commenced by filing a petition, verified by the petitioner or petitioner's attorney, with the clerk of the court."*

What amounts to verification for the purpose of Rule 32.6 Ala.R.Crim.P., had not been determined by the Alabama Court of Criminal Appeals when the last papers were written, causing speculation as to what amounts to verification and the consequences for failing to meet such standards. Since then, a number of cases have discussed this issue, culminating in the current position; "That the failure to comply with the verification requirement provided in Rule 32.6(a) Ala.R.Crim.P is **not a jurisdictional defect** that deprives the trial court of subject matter jurisdiction." Smith v. State, 918 So.2d 141 (Ala.Crim.App. 2005).

In the 2007 supplement, to his book, *Alabama Rules of Criminal Procedure*, Justice Maddox highlights that although the 'Court of Criminal Appeals asked the Alabama Supreme Court to change Rule 32.6, so that petitioners would not have to verify their petitions, the Court, in Smith v. State essentially adopted the recommended rule. Justice Maddox concluded that the Supreme Court appeared to be satisfied with the Smith decision, because the Supreme Court, on July 8, 2005, denied certiorari, without opinion; "by denying certiorari review, the Supreme Court apparently was of the opinion that the decision in Smith regarding verification was a good policy choice."<sup>3</sup>

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<sup>3</sup> Maddox J, Alabama Rules of Criminal Procedure, Fourth Edition, 2007 Supplement p. 122.

## Verification Requirements – Can Be Cured By Amendment

In Smith v. State, 918 So.2d 141 (Ala.Crim.App. 2005), the Court of Criminal Appeal held that the failure to comply with the verification requirements of Rule 32.6(a) Ala.R.Crim.P. was not a defect that operates to deprive the circuit court of subject-matter jurisdiction to consider the merits of a Rule 32 petition, overruling to that extent Kelley v. State, 911 So.2d 1125 (Ala.Crim.App. 2004)<sup>4</sup>, Coleman v. State, 911 So.2d 1099 (Ala.Crim.App. 2004)<sup>5</sup>; and Thornton v. State, 859 So.2d 458 (Ala.Crim.App. 2003)<sup>6</sup>. The Court noted that,

“permitting a verification defect to be cured by amendment without requiring the dismissal of the petition for lack of jurisdiction serves to promote the primary policy objectives underlying the verification requirement ensuring that the averments in the petition are based on merit and truth and protecting against the filing of frivolous petitions-without sacrificing judicial economy.”

In Brooks v. State, 929 So.2d 491 (Ala.Crim.App. 2005), holding that the petition was not properly verified as required by Rule 32.6(a), Ala.R.Crim.P. the Court of Criminal Appeals opined in Smith v. State, 918 So.2d 141 (Ala.Crim.App. 2005), that failure to comply with the verification requirements of Rule 32.6(a) was not a defect that would deprive the circuit court of subject-matter jurisdiction to consider the merits of the petition, and that the defect is waived if not raised.

In Loggins v. State, 910 So.2d 146 (Ala.Crim.App. 2005), where a Rule 32 petition was filed in a capital murder case, the Court of Criminal Appeals held that the issue of whether the petition was properly verified was waived because the State did not object to the lack of proper verification.

### **E. IS THE PETITION PRECLUDED?**

Rule 32.2 provides when a petition may be denied on preclusion grounds. There are four subsections that provide for the preclusion based on:

- (a) Procedural issues,
- (b) Time limitations,
- (c) Successive petitions, or
- (d) Ineffective assistance of counsel.

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<sup>4</sup> The Court of Criminal Appeals held that trial court was without jurisdiction to review the petition because it was not signed in the presence of a notary public. (Overruled)

<sup>5</sup> The Court of Criminal Appeals, Cobb, J., held that trial court lacked jurisdiction to consider a postconviction petition that was not verified by the defendant or counsel; however, defendant would be given an opportunity to file a verified petition, which date would relate back to original petition. (Overruled)

<sup>6</sup> Non-attorney exercising power of attorney on behalf of criminal defendants, lacked authority to verify petitions challenging defendants' convictions, as required to convey jurisdiction upon circuit court to rule on such petitions. (Overruled)

## 1. Rule 32.2(a) Preclusion Grounds

The vast majority of Rule 32 petitions are denied because claims are precluded by the provisions in Rule 32.2(a) Ala.R.Crim.P.

Subsection (a) of Rule 32.2 provides:

*(a) Preclusion of grounds. A petitioner will not be given relief under this rule based upon any ground:*

*(1) Which may still be raised on direct appeal under the Alabama Rules of Appellate Procedure or by post trial motion under Rule 24; or*

*(2) Which was raised at trial; or*

*(3) Which could have been but was not raised at trial, unless the ground for relief arises under Rule 32.1(b); or*

*(4) Which was raised or addressed on appeal or in any previous collateral proceeding not dismissed pursuant to the last sentence of Rule 32.1 as a petition that challenges multiple judgments, whether or not the previous collateral proceeding was adjudicated on the merits of the grounds raised; or*

*(5) Which could have been but was not raised on appeal, unless the grounds for relief arises under Rule 32.1(b).*

Petitions that raise jurisdictional claims, procedural issues or claims based on newly discovered evidence may avoid procedural bars being imposed on the petition.

### a. Exceptions to 32.2 (a) Preclusions – Jurisdictional Claims:

#### (1) Juror Oath

A claim that the jury venire and the petit jury were not sworn (cf. a claim based on a defect in a jury oath) is a jurisdictional issue, because a verdict rendered by jurors who have never been sworn is a nullity. Barclay v. State, \_\_So.2d\_\_, 2008 WL 902887 (Ala.Crim.App. 2008); Ex parte Benford, 935 So.2d 421 (Ala.Crim. App. 2006); Brooks v. State, 845 So.2d 849, 850-851 (Ala.Crim.App. 2002).

“It cannot be presumed from a silent record that the jury was sworn; there must be in the record some affirmative showing that the oath was administered to the jury.” Barclay v. State, \_\_So.2d \_\_, 2008 WL 902887 (Ala.Crim.App. 2008) citing Ex parte Deramus, 721 So.2d 242 (Ala. 1998).

## (2) Right to Counsel

Postconviction petitioner's claim that he was arraigned without his counsel present was a jurisdictional claim not subject to the procedural bars set forth in the Rules of Criminal Procedure. Castillo v. State, 925 So.2d 284 (Ala.Crim.App. 2005).

## (3) Illegal Sentence

The contention that the sentence exceeds the maximum authorized by law raised a jurisdictional issue. Steele v. State, 911 So.2d 21, 31 (Ala.Crim.App. 2004).

"When a sentence is clearly illegal or is clearly not authorized by statute, the defendant does not need to object at the trial level in order to preserve that issue for appellate review." English v. State 954 So.2d 1136 (Ala.Crim.App. 2006); Hunt v. State 659 So.2d 998 (Ala.Crim.App. 1994); Ex parte Brannon, 547 So.2d 68 (Ala.1989).

A challenge to an illegal sentence is 'not precluded by the limitations period or by the rule against successive petitions. Jones v. State, 724 So.2d 75, 76 (Ala.Crim.App.1998).

An illegal sentence can be challenged at any time, because when a trial court imposes an illegal sentence, it has exceeded its jurisdiction and the sentence is void. Henderson v. State, 895 So.2d 364, 365 (Ala.Crim.App. 2004).

## (4) Habitual Felony Offender Act

Postconviction petitioner's claim that the record did not affirmatively reflect that he was sentenced under the Habitual Felony Offender Act was procedurally barred, because the claim did not have jurisdictional implications, and it was not raised on appeal. Murray v. State, 922 So.2d 961 (Ala.Crim.App. 2005). See also, Pilgrim v. State, 963 So.2d 697 (Ala.Crim.App. 2006).

In comparison, in Barnes v. State, 708 So.2d 217 (Ala.Crim.App. 1997), the Court of Criminal Appeals held that the defendant was entitled to a hearing on his second petition for postconviction relief alleging that the 15-year sentence imposed for second-degree theft of property exceeded the maximum sentence authorized by statute, despite the State's contention that the sentence was properly imposed pursuant to the Habitual Felony Offender Act and that the petition was successive. The statute authorized a maximum sentence of ten years for the defendant's offenses, and the record contained no indication that defendant was sentenced as a habitual felony offender.<sup>7</sup>

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<sup>7</sup> "Rule 32. 1(b) provides for post-conviction relief where the court was without jurisdiction to render judgment or to impose sentence. "A claim of a lack of jurisdiction to render judgment or to impose sentence is not precluded as a basis for relief by Rule 32.2, even though the question of jurisdiction could have been but was not raised at trial or on appeal." Barnes v. State, 708 So.2d 217 (Ala.Crim.App. 1997)

(5) Double Jeopardy Claim

A claim, raised in defendant's fourth petition for postconviction relief, that the defendant's convictions for both felony murder and the underlying felony offense of robbery violated the constitutional guarantee against double jeopardy, which was raised in defendant's fourth petition for postconviction relief, was not subject to preclusion because it implicated the subject matter jurisdiction of the trial court. Edwards v State, 907 So.2d 1077 (Ala.Crim.App. 2004).

(6) No Offense

Defendant's claim that the offense of "attempted robbery" did not exist under Alabama law, raised a jurisdictional issue, and therefore, the petitioner's postconviction claim that the trial court lacked jurisdiction to accept his guilty plea to a nonexistent offense was not subject to procedural bar for having failed to raise the claim at trial or on direct appeal. Conner v. State, 955 So.2d 473 (Ala.Crim.App. 2006).

b. Exceptions to Rule 32.2 (a) Preclusions - Newly Discovered Evidence

A petitioner may succeed on establishing an otherwise procedurally precluded issue by timely establishing that the claim is based on newly discovered evidence, as defined in Rule 32.1(e)(1) through (5).

Subsection (e) of Rule 32.1 provides:

(e) Newly discovered material facts exist which require that the conviction or sentence be vacated by the court, because:

(1) *The facts relied upon were not known by the petitioner or the petitioner's counsel at the time of trial or sentencing or in time to file a post trial motion pursuant to Rule 24, or in time to be included in any previous collateral proceeding and could not have been discovered by any of those times through the exercise of reasonable diligence;*

(2) *The facts are not merely cumulative to other facts that were known;*

(3) *The facts do not merely amount to impeachment evidence;*

(4) *If the facts had been known at the time of trial or at sentencing, the result probably would have been different; and*

(5) *The facts establish that the petitioner is innocent of the crime for which the petitioner was convicted or should not have received the sentence that the petitioner received.*

Justice Maddox stated the following in his book, *Alabama Rules of Criminal Procedure*, Vol 2, 4<sup>th</sup> ed, 2004. p.1276-1277, concerning newly discovered evidence.

The rule requires that the 'newly discovered material facts' were not known to the petitioner or his counsel during petitioner's trial, sentencing, or within time to file a post trial motion pursuant to Rule 24 or within time to have been included in a previous collateral proceeding, and could not have been discovered by any of those times through the exercise of reasonable diligence. In addition, the facts cannot be merely cumulative; (they must not merely amount to impeachment evidence); and the facts, had they been known at the time of trial, must show that the 'result probably would have been different;' and '[t]he facts [must] establish the petitioner is innocent of the crime for which petitioner was convicted or should not have received the sentence that the petitioner received.' . . . Clearly, subsection (e) . . . places a heavy burden on a petitioner when the ground is 'newly discovered material evidence.'<sup>8</sup>

Defendant's claim in his petition for postconviction relief that the trial court failed to make an individualized sentencing determination when it overrode the jury's recommended sentence of life imprisonment without parole for capital murder and instead imposed the death sentence, could not have been raised at trial for the purpose of determining whether the claim was procedurally barred. Only when an article appeared in the newspaper did the defendant have notice that the trial court appeared to have based its override on the death sentence imposed on a codefendant, (the article appeared five years after trial and at least one month after the appellate judgment was final), and defense counsel could not have anticipated this particular allegation of error. Apicella v. State, 945 So.2d 485 (Ala.Crim.App. 2006).

Evidence is not newly discovered, for purposes of a postconviction relief claim, where the accused knew of the evidence but did not mention it to his counsel. Woods v. State, 957 So.2d 492 (Ala.Crim.App. 2004).

A capital murder defendant who alleged in a petition for postconviction relief that he was entitled to a new trial based on newly discovered evidence, specifically that newly discovered material facts proved that the gun recovered from his mother's home was not the gun used in the murders, was not entitled to relief. The Court of Criminal Appeals held that evidence presented at the evidentiary hearing was cumulative to the evidence that was presented at trial and, thus, would not have changed the outcome of the trial. Rules 32.1(e) and 32.3 Ala.R.Crim.P., Hinton v. State, \_\_\_So.2d\_\_\_ 2006 WL 1125605 (Ala.Crim.App. 2006)

A party who files a petition for postconviction relief based on newly discovered evidence cannot go back after the trial to secure what he considers to be a more qualified expert. Allowing a party to do so would be contrary to the postconviction relief requirement that evidence not be merely cumulative to other

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<sup>8</sup> H. Maddox, *Alabama Rules of Criminal Procedure*, Vol 2, (4th Ed. 2004). p 1276-1277.

facts that were known. Rule 32.1(e)(2) Ala.R.Crim.P., Hinton v. State, \_\_So.2d.\_\_, 2006 WL 1125605 (Ala.Crim.App. 2006).

A postconviction claim that the State withheld exculpatory evidence was procedurally barred where the defendant proffered no facts showing that the claim was based on newly discovered evidence and the claim could have been raised at trial and on direct appeal. Madison v. State, \_\_So.2d.\_\_, 2006 WL 2788983 (Ala.Crim.App. 2006).

## **2. Preclusion under Rule 32.2(b) Successive Petitions.**

Rule 32.2(b) provides:

*(b) SUCCESSIVE PETITIONS. If a petitioner has previously filed a petition that challenges any judgment, all subsequent petitions by that petitioner challenging any judgment arising out of that same trial or guilty plea proceeding shall be treated as successive petitions under this rule. The court shall not grant relief on a successive petition on the same or similar grounds on behalf of the same petitioner. A successive petition on different grounds shall be denied unless (1) the petitioner is entitled to relief on the ground that the court was without jurisdiction to render a judgment or to impose sentence or (2) the petitioner shows both that good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will result in a miscarriage of justice.*

The Court of Criminal Appeals in the case Whitt v. State, 827 So.2d 869 (Ala.Crim.App. 2001), overruled Blount v. State, 572 So.2d 498 (Ala.Crim.App. 1990), to the extent that it states that a subsequent petition on different grounds is not successive unless a prior petition is decided on its merits. "We now interpret Rule 32.2(b) as federal courts interpret habeas corpus petitions to mean that new claims in subsequent petitions are barred as being successive unless 'the petitioner shows both that good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will result in a miscarriage of justice.' Rule 32.2(b) Ala.R.Crim.P."

### **a. Exceptions To Preclusions – Jurisdictional Claims**

In Coleman v. State 927 So.2d 883 (Ala.Crim.App. 2005), the Court of Criminal Appeals confirmed the position that; "[I]t is well settled that "jurisdictional claims are not 'precluded by the limitations period or by the rule against successive petitions.' Grady v. State, 831 So.2d 646, 648 (Ala.Crim.App. 2001), quoting Jones v. State, 724 So.2d 75, 76 (Ala.Crim.App. 1998)."

b. Non-Jurisdictional Claims - Rule 32 Petition Based on Insufficiency of Evidence to Support Guilty Plea to Capital Murder.

In *Ex parte Booker* \_\_ So.2d \_\_, 2008 WL 1838299 (Ala. 2008), the Supreme Court held that a claim of insufficiency of evidence to support the defendant's guilt beyond a reasonable doubt pursuant to § 13A-5-42, applicable to capital cases, "is a nonjurisdictional defect that, when adequately preserved in the trial court, may, despite [the] guilty plea" . . . "be raised on direct appeal." Overruling *Elder v. State*, 494 So.2d 922 (Ala.Crim.App. 1986), *Davis v. State*, 682 So.2d 476 (Ala.Crim.App. 1995), *Benton v. State*, 887 So.2d 304 (Ala.Crim.App. 2003), and *Cox v. State*, 462 So.2d 1047 (Ala.Crim.App. 2003).

The petitioner's Rule 32 claim of insufficiency of the evidence to support his conviction was not jurisdictional and was, therefore, subject to Rule 32 procedural bars.

3. Preclusion under Rule 32.2(c) Limitations Period.

Rule 32.2(c) provides:

*(c) LIMITATIONS PERIOD. Subject to the further provisions hereinafter set out in this section, the court shall not entertain any petition for relief from a conviction or sentence on the grounds specified in Rule 32.1(a) and (f), unless the petition is filed:*

*(1) In the case of a conviction appealed to the Court of Criminal Appeals, within one (1) year after the issuance of the certificate of judgment by the Court of Criminal Appeals under Rule 41, Ala.R.App.P.; or*

*(2) in the case of a conviction not appealed to the Court of Criminal Appeals, within one (1) year after the time for filing an appeal lapses;*

*provided, however, that the time for filing a petition under Rule 32.1(f) to seek an out-of-time appeal from the dismissal or denial of a petition previously filed under any provision of Rule 32.1 shall be six (6) months from the date the petitioner discovers the dismissal or denial, irrespective of the one-year deadlines specified in the preceding subparts (1) and (2) of this sentence; and provided further that the immediately preceding proviso shall not extend either of those one-year deadlines as they may apply to the previously filed petition. The court shall not entertain a petition based on the grounds specified in Rule 32.1(e) unless the petition is filed within the applicable one-year period specified in the first sentence of this section, or within six (6) months after the discovery of the newly discovered material facts, whichever is later; provided, however, that the one-year period during which a petition may be brought shall in no case be deemed to have begun to run before the effective date of the precursor of this rule, i.e., April 1, 1987.*

**a. Statute of Limitation - Not Jurisdictional Bar - Equitable Tolling of Statute of Limitations**

Contrary to prior decisions of the Alabama Court of Criminal Appeals, in Ex parte Ward, \_\_So.2d\_\_, 2007 WL 1576054 (Ala. 2007), the Alabama Supreme Court, held that the “[O]ne-year limitations period governing petitions for postconviction relief was not a jurisdictional bar; rather, the limitations period was an affirmative defense that could be waived if not raised.” As a matter of first impression, the Supreme Court agreed with the defendant's assertion that any court rule that restricted the trial court's jurisdiction over a matter violated the state constitutional provision prohibiting such a restriction. Therefore, the defendant's failure to file his petition within one year after the Court of Criminal Appeals issued the certificate of judgment affirming his conviction and sentence for capital murder, did not deprive the trial court of jurisdiction over his petition. As an additional matter of first impression, the Supreme Court held that the “doctrine of equitable tolling applied to a limitations defense . . . if the defendant could show that extraordinary circumstances beyond the defendant's control existed and were unavoidable even with the exercise of diligence. A petition that does not assert equitable tolling, or that asserts it but fails to state any principle of law or any fact that would entitle the petitioner to the equitable tolling of the applicable limitations provision, may be summarily dismissed without a hearing. Rule 32.7(d), Ala. R.Crim. P.

**b. Date of Filing Set as Date *In Forma Pauperis* Petition Submitted, Not When Granted**

In Hyde v. State, 950 So.2d 344 (Ala.Crim.App. 2006), the Court of Criminal Appeals held that the postconviction relief petition was deemed filed for purposes of the limitations period on the date that the petition, accompanied by request to proceed *in forma pauperis*, was submitted to the circuit court, not the date the circuit court granted the request to proceed *in forma pauperis*, overruling Clemons v. State, \_\_So.2d\_\_, 2003 WL 22047260 (Ala.Crim.App. 2004).

**c. Exception to Time Limitation**

Defendant's claim that the trial court was without jurisdiction to sentence him as a habitual felony offender after he was convicted of child abuse (a misdemeanor offense) was a jurisdictional claim not subject to the time bar of the postconviction relief rule. Mosley v. State, \_\_So.2d\_\_ 2007 WL 2459379 (Ala.Crim. App. 2007).

In Edmond v. State, 954 So.2d 608 (Ala.Crim.App. 2006), the petitioner raised nine claims in his Rule 32 petition. Because the petitioner's claim was filed outside the statutory limitations period provided in Rule 32.2 (c), the Court of Criminal Appeals could only consider the jurisdictional claims, being claims 4, 5 and 6, (alleging that that the trial court was without jurisdiction to render the judgment or to impose the sentence and that the sentence imposed exceeded the maximum authorized by law).

#### 4. Preclusion under Rule 32.2(d) of Claims of Ineffective Assistance of Counsel.

Rule 32.2(d) provides:

*(d) CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL. Any claim that counsel was ineffective must be raised as soon as practicable, either at trial, on direct appeal, or in the first Rule 32 petition, whichever is applicable. In no event can relief be granted on a claim of ineffective assistance of trial or appellate counsel raised in a successive petition.*

“To sufficiently plead an allegation of ineffective assistance of counsel, a Rule 32 petitioner not only must ‘identify the [specific] acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment,’ Strickland v. Washington, 466 U.S. 668, 690 [104 S.Ct. 2052, 80 L.Ed.2d 674] (1984), but must also plead specific facts indicating that he or she was prejudiced by the acts or omissions, i.e., facts indicating that there is a reasonable probability that, but for the counsel’s unprofessional errors, the result of the proceeding would have been different. A bare allegation that prejudice occurred without specific facts indicating how the petitioner was prejudiced is not sufficient.” Rule 32.6(b) Ala.R.Crim.P. Madison v. State, \_\_\_ So.2d \_\_\_, 2006 WL 2788983 (Ala.Crim.App. 2006).

##### a. Review of Claims of Ineffective Assistance of Counsel

In reviewing claims of ineffective assistance of counsel raised in Rule 32 petitions, the appellate courts apply the Strickland v. Washington, 466 U.S. 668 (1984), standard requiring the petitioner to show “1) that counsel’s performance was deficient; and 2) that the petitioner was prejudiced by the deficient performance.” Davis v. State, \_\_\_ So.2d \_\_\_, 2008 WL 902884 (Ala.Crim.App. 2008). The Court of Criminal Appeals in Davis discusses the presumption of effectiveness of counsel and test for reasonableness of counsel’s investigation and preparation.

##### b. Pre and post Ex parte Ingram

If the appellant was convicted before the Alabama Supreme Court’s decision in Ex parte Ingram, 675 So.2d 863 (Ala.1996), the ruling in Ex parte Jackson, 598 So.2d 895 (Ala.1992), with respect to time limitations for newly appointed counsel to file a new trial motion applies. In Jackson, the Supreme Court held that “a trial judge was required to extend a defendant’s time for filing a new trial motion if the defendant’s newly appointed appellate counsel timely moved for such an extension before the 30-day period allowed by Rule 24.1 Ala.R.Crim.P., had expired.”<sup>9</sup> Those same claims of ineffective assistance of trial counsel could have then been presented on direct appeal. Accordingly, if the appellant was convicted before the decision in Ingram, and the appellant was, in fact, represented by separate

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<sup>9</sup> The purpose of the Jackson holding was to facilitate the review of ineffective assistance of counsel claims on direct appeal and thereby cut down on the number of collateral appeals attacking convictions on that basis. The holding was also intended to better protect the rights of convicted persons who have legitimate claims that they have been deprived of the constitutional right to effective assistance of counsel.

appellate counsel, then the allegations of ineffective assistance of trial counsel presented in the Rule 32 petition are precluded from review, because the claims could have been, but were not, raised at trial and on appeal. Rule 32.2(a)(3) and (5), Ala.R.Crim.P." Madison v. State \_\_So.2d\_\_, 2006 WL 2788983 (Ala.Crim.App. 2006); Andersch v. State, 716 So.2d 242, 245 (Ala.Crim.App. 1997).

If the appellant was convicted after Ex parte Ingram, a defendant's ineffective assistance of counsel claim must be presented by his newly appointed appellate counsel in a new trial motion filed before the 30-day jurisdictional time limit for filing new trial motions in order for that claim to be properly preserved for review on direct appeal. Newly appointed appellate counsel cannot move to suspend the 30-day jurisdictional time limit for new trial motions (overruling Ex parte Jackson to the extent that it allowed newly appointed counsel to move to suspend the Rule 24.1(b) Ala.R.Crim.P. 30 day jurisdictional limit for new trial motions). When a defendant makes a claim of ineffective assistance of trial counsel, and that claim cannot reasonably be presented in a new trial motion filed within the 30-day time limit, the proper method for presenting that claim for appellate review is to file a petition for postconviction relief. 32 Ala.R.Crim.P., Ex parte Ingram, 675 So.2d 863 (Ala. 1996).

#### c. Ineffective Counsel and Involuntary Guilty Plea.

It is well settled that claims of ineffective assistance of counsel and involuntary guilt plea may be presented for the first time in a timely filed Rule 32 petition. Murray v. State, 922 So.2d 961, 965 (Ala.Crim.App. 2005), cited with approval in Johnson v. State, \_\_So.2d \_\_, 2007 WL 2459965 (Ala.Crim.App. 2007).

In Kelley v. State, \_\_So.2d.\_\_ 2007 WL 1866749 (Ala.Crim.App. 2007), the Court of Criminal Appeals held that defendant's claims of ineffective assistance of counsel raised for the first time in his postconviction petition were not procedurally barred. The defendant did not file a direct appeal, therefore, his postconviction petition was the first opportunity to challenge counsel's performance.

#### d. Appellate Courts Sua Sponte Application of Procedural Bars in Rule 32.2(a) Ala.R.Crim.P. to Deny a Rule 32 Petition.

The Alabama Supreme Court recently held in Ex parte Clemons, \_\_So.2d \_\_, 2007 WL 1300722 (Ala. 2007), that the "preclusion provisions of Rule 32.2(a) cannot be read as jurisdictional. Because those procedural bars are non-jurisdictional, they may... be waived. Only in extraordinary circumstances may such waiver be overcome by an appellate court acting *sua sponte*," abrogating Davis v. State, \_\_So.2d \_\_, 2006 WL 510508 (Ala.Crim.App. 2006). Stuart J opined: "[I]n addition to these 'exceptional circumstances,' if *sua sponte* application of the waived procedural bar by an appellate court is harmless, i.e., if the *sua sponte* application of the waived procedural bar does not 'probably injuriously affect [the] substantial rights of the petitioner or the State, it is appropriate for the appellate court to apply the procedural bar."

## F. Pleadings

### RULE 32.3 BURDEN OF PROOF

*The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief. The state shall have the burden of pleading any ground of preclusion, but once a ground of preclusion has been pleaded, the petitioner shall have the burden of disproving its existence by a preponderance of the evidence.*

#### 1. The Petition – Specificity of Grounds

Rule 32.6(b) provides:

*(b) Specificity. 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.*

At the pleading stage, a petitioner must provide “a clear and specific statement of the grounds upon which relief is sought. Rule 32.6(b), Ala.R.Crim.P. Once a petitioner has met the burden of pleading so as to avoid summary disposition pursuant to Rule 32.7(d), Ala.R.Crim.P., he is then entitled to an opportunity to present evidence in order to satisfy his burden of proof.” Ford v. State, 831 So.2d 644 (Ala.Crim.App. 2001), cited with approval in Kelley v. State, \_\_So.2d\_\_, 2007 WL 1866749 (Ala.Crim.App. 2007).

“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.” Boyd v. State, 913 So.2d 1113 (Ala.Crim.App. 2003). “The burden of pleading under Rule 32.3 and Rule 32.6(b) is a heavy one. Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b). The full factual basis for the claim must be included in the petition itself. If, assuming every factual allegation in a Rule 32 petition to be true, a court cannot determine whether the petitioner is entitled to relief, the petitioner has not satisfied the burden of pleading under Rule 32.3 and Rule 32.6(b).” 913 So.2d 1113 at 1125 (Ala.Crim.App. 2003).

In McNabb v. State, \_\_So.2d\_\_, 2007 WL 2459405 (Ala.Crim.App. 2007), the Court of Criminal Appeals held that a claim challenging lethal injection as a method of execution did not meet specificity requirements of the Rule of Criminal Procedure and the pleading requirements of the rule governing burden of proof. The court concluded that the “defendant’s argument was largely speculative in nature and was replete with vague and hypothetical allegations that the method could cause pain, and the defendant did not actually allege that the execution procedure, if properly performed, caused unacceptable or unconscionable level of pain.”

“To sufficiently plead an allegation of ineffective assistance of counsel, a Rule 32 petitioner not only must ‘identify the [specific] acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment,’ Strickland v. Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), but also must plead specific facts indicating that he or she was prejudiced by the acts or omissions, i.e., facts indicating ‘that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’ 466 U.S. at 694, 104 S.Ct. 2052. A bare allegation that prejudice occurred without specific facts indicating how the petitioner was prejudiced is not sufficient.” McNabb v. State \_\_So.2d\_\_, 2007 WL 2459405 (Ala.Crim.App. 2007).

It is not the pleading of a conclusion in a petition for postconviction relief which, if true, entitles the petitioner to relief, it is the allegation of facts in the pleading which, if true, entitle a petitioner to relief. Tolbert v. State, 953 So.2d 1269 (Ala.Crim.App. 2005).

## 2. The State’s Response

Rule 32.7 provides:

*(a) Prosecutor’s Response. Within thirty (30) days after the service of the petition, or within the time otherwise specified by the court, the district attorney (or, in the case of a petition filed in the municipal court, the municipal prosecutor) shall file with the court and send to the petitioner or counsel for the petitioner, if any, 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.*

The purpose of Rule 32.3 is to give the petitioner the notice he needs to attempt to formulate arguments and present evidence to disprove the existence of those grounds by a preponderance of the evidence. Nicks v. State, 783 So.2d 895 (Ala.Crim.App. 1999).

In addition to Rule 32.3, Rule 32.7. Requires the State to:

*file a response to the petition, or within the time otherwise specified by the court and send a copy of that response to the petitioner or his counsel.*

The responsibility of the State to respond to a petition was stated in Ex parte Rice, 565 So.2d 606 (Ala. 1990). The Court explained that due process required the State to plead the procedural bars that it maintains apply to the claims in a Rule 32 petition, to give “the petitioner the notice he needs to attempt to formulate arguments and present evidence to ‘disprove [the] existence [of those grounds] by a preponderance of the evidence.’ ” 565 So.2d at 608. See also, Nicks v. State, 783 So.2d 895 (Ala.Crim.App. 1999). The Rice opinion concludes that because the State’s compliance with Rule 32.3 is mandatory, if the State fails to comply with the rule, it waives application of the procedural bars and an appellate court cannot *sua sponte* apply the procedural bars to claims in the petition, unless “exceptional circumstances” are present.

This position was reaffirmed in Ex parte Clemons, \_\_So.2d\_\_, 2007 WL 1300722 (Ala. 2007), abrogating Davis v. State, \_\_So.2d \_\_, 2006 WL 510508 (Ala. 2006). The Supreme Court concluded that procedural bars to postconviction relief contained in criminal procedure rules are not jurisdictional, and, thus, they can be waived. Only in extraordinary circumstances can such waiver be overcome by an appellate court acting *sua sponte*. Rule 32.2(a) Ala.R.Crim.P. The Supreme Court noted that, "[O]f course, the State can avoid most of the issues created by an appellate court's *sua sponte* application of a Rule 32 procedural bar by exercising due diligence and care when answering a postconviction petition."

*Note:* In McNabb v. State, \_\_So.2d \_\_, 2007 WL 2459405 (Ala.Crim.App. 2007), the Court of Criminal Appeals concluded that the appellate court's *sua sponte* application of the pleading requirement in Rule 32.6(b) did not conflict with the Alabama Supreme Court's holding in Ex parte Clemons, \_\_So.2d\_\_, 2007 WL 1300722 (Ala. 2007). This conclusion was based on the following distinction: "Because Rule 32.3 limits the State's burden of pleading to 'grounds of preclusion,' and [we note that] only those provisions in Rule 32.2 entitled 'Preclusion of Remedy' fall within such a description, the pleading requirement in Rule 32.6(b), and Rule 32.7(d) governing summary disposition do not fall within the 'Preclusion of Remedy' as discussed in Ex parte Clemons."

### Harmless Error

After the decision in Ex parte Rice, 565 So.2d 606 (Ala.1990), there were many cases that were remanded because the State failed to file a response to the 32 petition. In Young v. State, 600 So.2d 1073 (Ala.Crim.App. 1992), the prosecutor's failure to file a response to the defendant's petition for postconviction relief was held to be 'harmless error', on the basis that the facts supporting the grounds for precluding the defendant from obtaining relief by his petition were beyond dispute, and thus the prosecutor's response could not have assisted the defendant in formulating any plausible argument or presenting any evidence to disprove the grounds for denial of his petition.

The issue of 'harmless error' was also considered in Ex parte Clemons, \_\_So.2d\_\_, 2007 WL 300722 (Ala. 2007). The State failed to plead the applicability of the procedural bars of Rule 32.2(a) to the petitioner's claims of ineffective assistance of trial counsel, and the trial court did not apply the procedural bars when it addressed those claims. The Court of Criminal Appeals, however, applied the mandatory procedural bars and thus did not address the merits of the petitioner's claims. The question for the Supreme Court was whether the *sua sponte* application of the procedural bars by the appellate court had "probably injuriously affected substantial rights" of the State or the petitioner. The Alabama Supreme Court held, that because it was obvious from the record that the procedural bars were applicable and nothing in the record established that the petitioner's or the State's substantial rights would be injuriously affected, the *sua sponte* application of the Rule 32.2(a) procedural bars by the Court of Criminal Appeals was harmless.

### 3. Amendment of Petition

Rule 32.7 provides:

*(b) Amendment of Pleadings. Amendments to pleadings may be permitted at any stage of the proceedings prior to the entry of judgment.*

*(c).....*

*(d) Leave to amend shall be freely granted.*

The Supreme Court in Ex parte Jenkins, 972 So.2d 159 (Ala. 2005) confirmed its position in Ex parte Rhone, 900 So.2d 455 (Ala. 2004), that “a petitioner does not have the unfettered right to file endless amendments to a Rule 32 petition. The right to amend is limited by the trial court’s discretion to refuse to allow an amendment if the trial court finds that the petitioner has unduly delayed filing the amendment or that an amendment unduly prejudices the State. Such an exercise of the trial court’s discretion would certainly be appropriate, for example, if, on the eve of an evidentiary hearing, a Rule 32 petitioner filed an amendment that included new claims of which the State had no prior notice and as to which it was not prepared to defend.”

The Supreme Court emphasized that the concepts of “undue delay” and “undue prejudice” as discussed in this opinion and in Ex parte Rhone apply to the trial court’s management of its docket and to the petitioner’s attention to his or her case. Those concepts cannot be applied to restrict the petitioner’s right to file an amendment clearly provided for in Rule 32.7 simply because it states a new claim that was not included in the original petition. Ex parte Jenkins, 972 So.2d 159 (Ala. 2005).

#### Relation-Back Doctrine Inapplicable

Reversing a long line of cases, in Ex parte Jenkins, 972 So.2d 159 (Ala. 2005), the Alabama Supreme Court ruled that the “relation-back doctrine” had been misapplied to disallow amendment of Rule 32 petitions, noting that “Rule 32.4 specifically mandates that Rule 32 proceedings are governed by the Rules of Criminal Procedure. “ Agreeing with petitioner that the relation-back doctrine should not preclude an inmate from filing an amendment to a Rule 32 petition that asserts claims not raised in the original petition, the Supreme Court reversed the judgment of the Court of Criminal Appeals that denied the petitioner’s claim of juror misconduct that was first presented in his amended Rule 32 petition. Noting that the rules or procedure and appellate courts have provided that amendments to pleadings should be permitted at any stage of the proceedings prior to the entry of judgment and leave to amend should be freely granted, the Supreme Court also stated its reluctance to provide a strict application of the doctrine of relation back to prohibit reasonable amendments to Rule 32 petitions that are often filed by inmates not represented by counsel. Overruling Harris v. State, 947 So.2d 1079(Ala.Crim.App. 2004); McWilliams v. State, 897 So.2d 437 (Ala.Crim.App. 2004); Giles v. State, 906 So.2d 963 (Ala.Crim.App. 2004); Ex parte Mack, 894 So.2d 764 (Ala.Crim.App. 2003); DeBruce v. State, 890 So.2d 1068 (Ala.Crim.App. 2003); Charest v. State, 854 So.2d 1102 (Ala.Crim.App. 2002); and Garrett v. State, 644 So.2d 977 (Ala.Crim.App. 1994).” Rule 32.7 Ala.R.Crim.P. In Ex parte Jenkins, 972 So.2d 159 (Ala. 2005), the Court stated, “[A] restriction on a Rule 32 petitioner’s right to file an amendment by applying principles found in the Alabama Rules of Civil Procedure, such as the relation-back doctrine,

should be the subject of careful consideration by the Standing Committee on the Alabama Rules of Criminal Procedure. We decline to rewrite the Rules of Criminal Procedure by sanctioning the incorporation of the relation-back doctrine into those rules when nothing of that nature presently appears in them.”

“[T]he concepts of 'undue delay' and 'undue prejudice' . . . apply to the trial court's management of its docket and to the petitioner's attention to his or her case.” Ex parte Woods, 957 So.2d 533 (Ala. 2006).

A petitioner seeking to amend a petition for postconviction relief does not have an initial burden of showing diligence in filing the amendment or that the facts underlying the amendment were unknown to him before filing of original petition, overruling Cochran v. State, 548 So.2d 1062 (Ala.Crim.App. 1989) (and any prior decisions in which “the Court of Criminal Appeals has placed upon a petitioner the erroneous ‘initial burden’). Rule 32.7(b, d) Ala.R.Crim.P., Ex parte Rhone, 900 So.2d 455 (Ala. 2004).

As noted in the previous papers, it is helpful to the appellate courts if the ruling on the motion to amend is contained in the record.

#### 4. One Trial Per Petition

Amendment to Rule 32.1 Ala.R.Crim.P., effective August 1 2002, allows a court to dismiss (without prejudice) a petition that challenges multiple judgments entered in more than a single trial or guilty plea.

Rule 32.1(f) provides:

...  
*A petition that challenges multiple judgments entered in more than a single trial or guilty plea proceeding shall be dismissed without prejudice.*

As noted in Lucas v. State, 855 So.2d 1128 (Ala.Crim.App. 2003), before Rule 32.1 Ala.R.Crim.P. was amended, the Alabama Court of Criminal Appeals had several approaches to a Rule 32 petition that attacked multiple convictions. See Heulett v. State, 842 So.2d 741 (Ala.Crim.App. 2002) (considered the merits of the petition as to all convictions challenged); Reese v. State, 796 So.2d 436 (Ala.Crim.App. 2001) (considered the merits of one conviction and vacating the lower court's judgment as to the other conviction); James v. State, 781 So.2d 361 (Ala.Crim.App. 2000), and Johnson v. State, 755 So.2d 74 (Ala.Crim. App. 1999) (reversing the lower court's ruling on the petition and directed the court to give the defendant the opportunity to file separate petitions attacking each separate conviction). The amendment to Rule 32.1 resolves the problem created by multiple convictions.

In Davis v. State, \_\_\_ So.2d \_\_\_, 2007 WL 4463923 (Ala.Crim.App. 2007), the Court of Criminal Appeals held that where the allegations in a Rule 32 petition make reference to multiple judgments entered in one proceeding (and which is likewise reflected in the court record), the circuit court should consider the claims as they relate to all of the convictions and make specific findings of fact as required by Rule 32.9(d) Ala.R.Crim.P.

In Carr v. State, 884 So.2d 932 (Ala.Crim.App.2004), the Court of Criminal Appeals held that the trial court should have dismissed the defendant's petition for postconviction relief without prejudice rather than ruling on its merits, where the defendant challenged, in a single petition, convictions for assault and sodomy that were entered in separate proceedings.

### Assignment of Rule 32 cases

Rule 32.6(d) states that the “*proceeding shall be assigned to the sentencing judge where possible.*”

This rule allows the disposition of meritless petitions because “[where] 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.Crim.App. 1989), cited in Gilmore v. State, 937 So.2d 547 (Ala.Crim.App. 2005).

This is especially useful when the petition claims ineffective assistance of trial counsel. “[A] judge who presided over the trial or other proceedings and observed the conduct of the attorneys at the trial or other proceedings need not hold a hearing on the effectiveness of those attorneys based on conduct that he observed.” Ex parte Hill, 591 So.2d, 462, 463 (Ala. 1991).

## **G. Is a Hearing and Written Order Necessary?**

### 1. Hearing

When considering whether to conduct an evidentiary hearing, the trial court should review the pleadings and determining:

- Are they sufficient?
- Do they accurately state supporting law?
- Have the allegations been refuted by the State?

“[A]t the pleading stage of Rule 32 proceedings, a Rule 32 petitioner does not have the burden of proving his claims by a preponderance of the evidence. Rather, at the pleading stage, a petitioner must provide only ‘a clear and specific statement of the grounds upon which relief is sought.’ Rule 32.6(b), Ala.R.Crim.P. Once a petitioner has met his burden of pleading so as to avoid summary disposition pursuant to Rule 32.7(d), Ala.R.Crim.P., he is then entitled to an opportunity to present evidence in order to satisfy his burden of proof.” Murray v. State, 922 So.2d 961 (Ala.Crim.App. 2005), quoting Ford v. State, 831 So.2d 641 (Ala.Crim.App. 2001).

As highlighted in Tolbert v. State, 953 So.2d 1269 (Ala.Crim.App. 2005) [quoting Boyd v. State, 746 So.2d 364, 406 (Ala.Crim.App. 1999), and Lancaster v. State, 638 So.2d 1370, 1373 (Ala.Crim.App. 1993)], “it is not the pleading of a conclusion which, if true, entitle[s] the petitioner to relief. It is the allegation of facts in the pleading which, if true, entitle a petitioner to relief. After facts are pleaded,

which, if true, entitle the petitioner to relief; the petitioner is then entitled to an opportunity, as provided in Rule 32.9, to present evidence proving those alleged facts.”

***It should be noted that a failure to have an evidentiary hearing can cause remand.***

a. Evidentiary Hearings

In Sullivan v. State, 944 So.2d 164 (Ala.Crim.App. 2006), the Court of Criminal Appeals cited with approval Boyd v. State, 913 So.2d 1113, 1125 (Ala.Crim.App. 2003), for the proposition that, “[A] Rule 32 petitioner is not automatically entitled to an evidentiary hearing on any and all claims raised in his petition.” A “trial court may summarily dismiss a petition for postconviction relief when a simple reading of the petition shows that, assuming every allegation of the petition is correct, the petition is obviously without merit or is precluded. 913 So.2d 1113, 1126.”

After facts are pleaded that, if true, entitle a postconviction petitioner to relief, the petitioner is then entitled to an opportunity to present evidence proving those alleged facts. Hodges v. State, \_\_So.2d\_\_, 2007 WL 866658 (Ala.Crim.App. 2007).

In Baker v. State, 907 So.2d 465 (Ala.Crim.App. 2004), The petitioner alleged in a successive petition a jurisdictional claim for postconviction relief from a capital murder conviction. The petitioner challenged the circuit court's receipt of an indictment pending his appeal from the juvenile court's order transferring his case to circuit court. The Court of Criminal Appeals held that the petitioner failed to satisfy the specificity and pleading requirements under the criminal rules governing postconviction procedure, and, thus, the trial court was “under no obligation to conduct an evidentiary hearing on his petition,” because the defendant “failed to cite any law that would have prevented the circuit court from merely receiving the indictment, as opposed to proceeding with the case, pending appeal from juvenile court.” Code 1975, §§ 13A-5-40(a)(4), 13A-6-2; Rules 28, 32.2(b), 32.3, 32.6(b), Ala.R.Crim.P.

Where a petition appears meritorious on its face a circuit court judge must conduct an evidentiary hearing on a petition for postconviction relief. Rash v. State, \_\_So.2d\_\_, 2006 WL 3123521 (Ala.Crim.App. 2006).

In Poole v. State, \_\_So.2d\_\_, 2007 WL 1519008 (Ala.Crim.App. 2007), the Court of Criminal Appeals held that an inmate filing a postconviction petition seeking an out-of-time appeal from the denial of his two previous petitions was entitled to an evidentiary hearing on his claim that his failure to appeal the denial of previous petitions was through no fault of his own because he timely mailed notices of appeal, which were apparently lost in the mail and never received by the circuit clerk. The Court noted that the claim was sufficiently pleaded and his factual allegations were unrefuted by the State. See also Fox v. State, \_\_So.2d\_\_, 2007 WL 2460048 (Ala.Crim.App. 2007).

b. Appointment of Counsel

Rule 32.7(c) provides:

(c) Appointment of Counsel. If the court does not summarily dismiss the petition, and if it appears that the petitioner is indigent or otherwise unable to obtain the assistance of counsel and desires the assistance of counsel, and it further appears that counsel is necessary to assert or protect the rights of the petitioner, the court shall appoint counsel.

In Murray v. Giarratano, 482 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989), a Virginia inmate asserted a number of constitutional theories for appointment of counsel in postconviction proceedings, among which were the Eighth Amendment and Due Process Clause of the U.S. Constitution. The United States Supreme Court that no provision of the Constitution requires the appointment of counsel for inmates who seek postconviction relief in state courts.

“It is clear under Alabama law that there is no requirement that indigent petitioners be furnished counsel regarding post-conviction proceedings.” Ex parte Cox, 451 So.2d 235, 237 (Ala.1983), cited in Mayer v. State, 563 So.2d 38 (Ala.Cr.App. 1990) and Ingram v State, \_\_\_ S0.2d \_\_\_, 2006 WL 2788984 (Ala.Crim.App. 2006). The Supreme Court noted that “[t]he Alabama Rules of Criminal Procedure permit a trial court to appoint counsel to represent an indigent petitioner in a postconviction proceeding if it ‘appears that counsel is necessary to assert or protect the rights of the petitioner.’ Rule 32.7(c) Ala.R.Crim.P, [in instances where counsel is provided] [s]uch an appointment occurs only after a petition has been filed.” Ex parte Jenkins, 972 So.2d 159 (Ala. 2005).

c. Summary Disposition of Petitions

Rule 32.7(d) 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.*

(1) Summary Disposition of Time-Barred Nonjurisdictional claims

In Davenport v. State, \_\_So.2d \_\_\_, 2007 WL 4463946 (Ala.Crim.App. 2007), the Court of Criminal Appeals held that a trial court could summarily deny the defendant's petition for postconviction relief without a hearing where the petition that was filed after the limitations period had expired raised only nonjurisdictional claims, and the defendant did not assert equitable tolling in his petition.

## (2) Summary Disposition Personal Knowledge

In Lucious v. State, \_\_\_ So.2d \_\_\_, 2007 WL 2459973 (Ala.Crim.App. 2007), the Court of Criminal Appeals held that “[t]he fact that a circuit court judge ruling on a petition for postconviction relief is not required to conduct an evidentiary hearing on a petitioner’s claims of ineffective assistance of trial counsel if that judge personally observed the conduct of counsel, does not relieve that judge of the responsibility of entering a sufficiently specific order addressing each of the petitioner’s claims of ineffective assistance of trial counsel.” See also Sheats v. State, 556 So.2d 1094, 1095 (Ala.Crim.App.1989), where the Court of Criminal Appeals held that “[i]f the circuit judge has personal knowledge of the actual facts underlying the allegations in the petition, he may deny the petition without further proceedings so long as he states the reasons for the denial in a written order.” See also Dobyn v. State, 805 So.2d 733, 740-41 (Ala.Crim.App. 2000) and Payne v. State, 791 So.2d 383, 394 (Ala.Crim.App. 2000).

## 2. Written Order Necessary

Rule 32.9(d) provides;

*(d) Findings of Fact. The court shall make specific findings of fact relating to each material issue of fact presented.*

In Long v. State \_\_\_ So.2d \_\_\_, 2008 WL 902883 (Ala.Crim.App. 2008), while the Alabama Court of Criminal Appeals recognized “the heavy caseload under which the trial courts of this State toil,” and that “Rule 32 petitions add to that already heavy burden,” the Court reiterated the requirement set out in Rule 32.9(d) to “make specific findings of fact relating to each material issue of fact presented.” See also Ex parte Walker, 652 So.2d 198 (Ala.1994) and Smith v. State, 665 So.2d 954 (Ala.Crim.App. 1994). The Court also noted that; should the trial court finds that a particular allegation fails to meet the specificity requirements of Rule 32.6(b), this should be noted with particularity in its written findings. “It is to do likewise if it finds that a particular allegation fails to state a claim or to present any material issue of fact or law that would entitle [the petitioner] to relief. In other words, the court’s written findings are to address individually each claim not precluded by Rule 32.2.” citing Dedeaux v. State, 976 So.2d 1045 (Ala.Crim.App. 2005).

### a. Specific Findings - Summary Disposition

Where summary denial of a petition is proper, the Court of Criminal Appeals may not remand for failing to make specific findings of fact. In Ingram v. State, 959 So.2d 1151 (Ala.Crim.App. 2006), the Court of Criminal Appeals noted that “ Rule 32.7 does not require the trial court to make specific findings of fact upon a summary dismissal.” Duren v. State, 813 So.2d 928, 930 (Ala.Crim.App. 2000), quoting Fincher v. State, 724 So.2d 87, 89 (Ala.Crim.App. 1998).

However, a written order is required even when no evidentiary hearing is conducted and the judge has relied upon personal observations to dismiss the petition. Lucious v. State, \_\_So.2d.\_\_, 2007 WL 2459973 (Ala.Crim.App. 2007).

In dismissing a Rule 32 petition, a court need not specify the reasons, but if the record on appeal is insufficient to show the basis of the denial, the cause will be remanded for such a determination. Henderson v. State, 570 So.2d 879 (Ala.Crim.App. 1990).

In Hawthorne v. State, \_\_So.2d\_\_, 2007 WL 4463941 (Ala.Crim.App. 2007), the Court of Criminal Appeals, held that the trial court's failure to make specific, written findings of fact regarding the defendant's claims in denying his petition required remand for the trial court to make such findings. Rule 32.9(d) Ala.R.Crim.P.

#### b. Evidentiary Hearing

The court must make specific findings of fact relating to each material issue of fact presented in an evidentiary hearing on the defendant's petition for postconviction relief. Wiggins v. State, \_\_So.2d.\_\_, 2006 WL 1121210 (Ala.Crim.App. 2006).

In Getz v. State, \_\_So.2d.\_\_, 2006 WL 2788976 (Ala.Crim.App. 2006), the Court of Criminal Appeals held that the trial court's failure to make specific findings of fact supporting its dismissal of the defendant's postconviction petition warranted remand. The Rules of Criminal Procedure required the court, if it conducted an evidentiary hearing on a postconviction petition, to make specific findings of fact relating to each material issue of fact presented.

If a court's findings on a petition for postconviction relief are based on the court's personal knowledge of the underlying guilty plea proceedings, then the order should so state. Harris v. State 814 So.2d 1003 (Ala.Crim.App. 2001).

## VII.

### SUGGESTIONS AND SAMPLES

#### A. Suggestions for Trial Judges Regarding Rule 32 Petitions

1. State the specific reasons for dismissing or denying the petition.
2. Clearly indicate whether or not amendment to the petition has been permitted.
3. Include case action summary sheets from the trial/guilty plea proceedings.

4. If a direct appeal was not taken, include a copy of the transcript of the proceedings where possible.
5. Include copies of prior Rule 32 Petitions, orders on those petitions, and the case action summary sheets from those proceedings.
6. If a petitioner is challenging the enhancement of his sentence pursuant to the Habitual Offender Act, include complete copies, (front and back where necessary), of the prior convictions that were used to enhance the sentence.
7. Include a copy of the indictment in the record.
8. If a petitioner is challenging a guilty plea, include copies of the plea agreement, Ireland form, and colloquy (if available) in the record.

## B. SAMPLE ORDERS

**Caveat:** The following Orders are offered as examples only. These Orders were taken from cases appealed and affirmed by the Court of Criminal Appeals; however, the validity of the trial court's order may not have been an issue in the case. Cases cited in any of the following Orders should be checked and independent research conducted for the most recent opinions addressing a particular issue.

### ORDER

*Rule 32 Petition Requesting DNA Testing  
Denied – Successive Petition – Petition Time Barred  
(Existence of DNA testing not new discovery)*

1. This Court takes judicial notice of its own records in the above cited case.
2. Petitioner is precluded from relief by operation of law, as more than one year has elapsed since his conviction was affirmed on \_\_\_\_\_.
3. The Petitioner is precluded from relief by operation of law as this petition is successive to one filed on \_\_\_\_ and denied by this Court on \_\_\_\_\_. The instant petition is also successive to one filed on \_\_\_\_\_, and denied by this Court on \_\_\_\_\_. Rule 32.2(b), *Alabama Rules of Criminal Procedure*.
4. On \_\_\_\_\_, the Petitioner was convicted by jury of \_\_\_\_\_  
\_\_\_\_\_. He was sentenced to \_\_\_\_\_ years on the  
\_\_\_\_\_ conviction. He was also sentenced to \_\_\_\_\_ years in both the  
\_\_\_\_\_ and \_\_\_\_\_ convictions, both to be run  
(concurrent) (consecutive) with the \_\_\_\_\_ conviction. He is now housed at the  
\_\_\_\_\_ Correctional Facility.

Petitioner is again requesting that this Court allow him to have an independent analysis of hair samples that were admitted into evidence during his trial on \_\_\_\_\_ in the \_\_\_\_ Judicial Circuit of the \_\_\_\_\_ County Circuit Court. *Alabama Rules of Criminal Procedure*, Rule 32.2(c). Rule 32.2(c) specifically states that the court “shall not entertain a petition based on the grounds specified in Rule 32.1(e) (i.e. newly discovered material facts) unless the petition is filed within the applicable one-year period specified in the first sentence of this section, or within six (6) months after the discovery of the newly discovered material facts, whichever is later; provided, however, that the one-year period during which a petition may be brought shall in no case be deemed to have begun to run before the effective date of the precursor of this rule, i.e., April 1, 1987.”

The petitioner is specifically requesting Mitochondrial DNA testing. It appears through his own exhibits that he knew about this method of testing as far back as \_\_\_\_\_ when his counsel informed him by letter (Petitioner’s Exhibit \_\_\_\_ ) that this testing was available outside of the State of Alabama, but at great cost. (This letter apparently followed an order from this Honorable Court dated \_\_\_\_\_ for DNA testing to be done at the Alabama Department of Forensic Sciences.)

His present request is \_\_\_\_\_ years past the issuance of the Certificate of Judgment of his convictions by the Alabama Court of Criminal Appeals, and \_\_\_\_\_ years past the discovery, of what would have possibly been newly discovered material facts if the samples had been timely tested and resulted in evidence favorable to the Petitioner.

Alabama courts have recognized the admissibility of DNA testing since 1991. The Alabama Supreme Court, in *Ex parte Perry*, 586 So.2d 242 (Ala. 1991), recognized the existence of a generally accepted theory in the scientific community that supports the conclusion that DNA forensic testing could produce reliable results as to “matching” evidence. Through this decision, the evidentiary predicate was set out that was to be used in determining the admissibility of DNA evidence. The existence of DNA testing is not a new discovery. Furthermore, the existence of Mitochondrial DNA testing is not a new discovery.

The Court finds that this case is bound by the dictates of *Dowell v. State*, 854 So.2d 1195 (Ala. 2002) where a defendant was denied postconviction relief because the court determined that the petition was time-barred under Rule 32.2 (c) of the *Alabama Rules of Criminal Procedure*.

This Court finds that no material issue of law or fact exists that would entitle the Petitioner to relief under Rule 32, and that no purpose would be served by any further proceedings. Rule 32.7, Ala.R.Crim.P.

Therefore, this Petition is due to be and is hereby DENIED. This the \_\_\_\_ Day of \_\_\_\_\_, \_\_\_\_.

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Circuit Judge

**ORDER**

*Petition Alleging Unsworn Petit Jury  
Denied – Preclusion; Successive Petition; Statute of Limitations.*

The Petitioner on \_\_\_\_\_, filed his fifth (5) Rule 32 Petition in this case. The only issue raised by the Petitioner is that the Court failed to swear in the jury pursuant to § 12-16-170, *Code of Alabama* 1975. The Petitioner has raised this same issue in his previous Rule 32 petitions which have been ruled on and appealed and affirmed on appeal

The Petitioner is precluded from relief by operation of law, as his claims could have been raised on appeal. Rule 32.2(a)(5), *Alabama Rules of Criminal Procedure*.

The Petitioner is precluded from relief by operation of law, as more than one year has elapsed since the date of his conviction on \_\_\_\_\_. Rule 32.2 (c), *Alabama Rules of Criminal Procedure*.

The Petitioner is precluded from relief by operation of law, as the instant petition is successive to four previous petitions filed. The first Rule 32 petition was filed on \_\_\_\_\_ and was denied by this Court. The second Rule 32 petition was filed on \_\_\_\_\_, and denied on \_\_\_\_\_. The third Rule 32 petition was filed on \_\_\_\_\_, and denied by this Court on \_\_\_\_\_. The fourth Rule 32 petition was filed on \_\_\_\_\_, and denied by this Court on \_\_\_\_\_. This is the fifth Rule 32 petition which petitioner has filed.

Petitioner has failed to show that both good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard and failure to entertain the instant petition will result in a miscarriage of justice. Rule 32.2(b), Ala.R.Crim.P.

The Petitioner's claim that the petit jury in the trial at issue was not sworn is frivolous and without merit. The Court's records and the trial transcript in this case reflect that the jury was sworn in after jury selection as required by law. In addition, Petitioner's claim is nonjurisdictional and is waived if it is not raised at trial or on appeal. *Sumlin v. State*, 710 So.2d 941 (Ala.Crim.App. 1998)

In addition to the four previous Rule 32 petitions, there have been many other filings, including all sorts of motions which are frivolous and at this time the court file is up to Volume 8, the majority of which is made up of frivolous filing of the petitioner. The pattern and practice of this petitioner is abusive. The U.S. Supreme Court has also held that the Petitioner has been abusive in his filings with that Court as evidenced by a copy of the United States Supreme Court's Order dated \_\_\_\_\_ in Docket number \_\_\_\_\_, and attached as Exhibit \_\_\_ to this Order.

There are no material issues of law or fact that would entitle the petitioner to relief under Rule 32, and the State's motion to dismiss is hereby granted and the petitioner's Rule 32 is hereby dismissed with costs taxed to the petitioner.

Done and Ordered this the \_\_\_\_ day of August, 2005

\_\_\_\_\_  
Circuit Judge

## ORDER

*Rule 32 Petition alleging Oath to jury was not properly administered; Constitutional challenge to Rule 32.*

*Denied: Time Barred Claims and Claims Without Merit.  
Order addresses each claim with specificity*

Petitioner filed a Rule 32 postconviction petition on \_\_\_\_\_. The State responded and a hearing was held on the matter on \_\_\_\_\_. After careful review of the Petitioner's pleadings, the State's response, and the proceedings from the hearing, this Court makes the following findings.

### Procedural History

A jury found Petitioner guilty of felony murder on \_\_\_\_\_. The trial court sentenced the Petitioner to serve \_\_\_\_ years in prison. The Alabama Court of Criminal Appeals affirmed his conviction, in a memorandum opinion, on \_\_\_\_\_. The Supreme Court of Alabama denied his certiorari petition and issued its Certificate of Judgment affirming the Petitioner's conviction on \_\_\_\_\_. The Petitioner filed his Rule 32 petition on \_\_\_\_\_.

### Petitioner's Claims

From the Petitioner's pleadings and the claims raised at the hearing, Petitioner argued the following:

- 1) The judge, instead of the clerk, administered the oath to the petit jury; therefore, the trial court lacked jurisdiction to convict and sentence him.
- 2) Rule 32 of the Alabama Rules of Criminal Procedure is unconstitutional as it denies him access to the courts through the writ of habeas corpus.

### Claim One

Petitioner alleges that the trial court was without jurisdiction to convict and sentence him for felony murder because the petit jury was allegedly not administered a proper oath by the circuit clerk. Petitioner made clear at the hearing that he was not arguing that the petit jury was not sworn, but that the jury was not properly sworn because the judge administered the oath and not the circuit clerk. This issue is not jurisdictional.

In this case, Petitioner has not alleged that no oath was administered at all; thus, he has not pleaded facts sufficient to show that this issue is jurisdictional. Petitioner alleges that the petit jury was not sworn, but he does not allege that the venire was not sworn. Petitioner's claim is based on an alleged defect in the oath, a nonjurisdictional claim subject to the procedural bars in Rule 32.2. *Brooks, v. State*, 845 So.2d 849, 851 (Ala.Crim.App. 2002)

Petitioner is procedurally barred by Rule 32.2(c) of the *Alabama Rules of Criminal Procedure* because he filed his petition outside the one year limitation period.

The Supreme Court of Alabama issued its certificate of judgment on \_\_\_\_\_. Petitioner did not file his petition until \_\_\_\_\_, over \_\_\_\_ years after the limitation period expired; consequently, it is barred under Rule 32.2(c). The claim is also barred by Rule 32.2(a)(3) and (a)(5) of the *Alabama Rules of Criminal Procedure* because the Petitioner could have raised this issue at trial and on direct appeal, but failed to do so.

This claim is also without merit. Rule 18.5(a) of the Alabama Rules of Criminal Procedure states that, “[t]he court shall either remind the jurors that they are still under oath, or may give the jurors the . . . oath . . .” The Committee Comments to this rule also state that “Section (a) conforms to Ala. Code 1975, § 12-16-170, which prescribes the oath petit jurors are to take.” Therefore, the Petitioner’s argument that the trial judge could not administer the oath to the jury is without merit.

A handwritten entry in the case action summary also reads, “Jury selected, sworn[,] and empanelled according to law and trial commences.” This is sufficient evidence to indicate that the jury was properly sworn. See *Abbott v. State*, 494 So.2d 789, 790 (Ala.Crim.App. 1986). The trial transcript also indicates that the jury was sworn: “Following short recess court reconvened and at this time the jury was duly sworn and impaneled to try the issues in this case)[.]” Therefore, the claim is also meritless for these reasons.

#### Claim Two

Petitioner also argues that the procedural bars of Rule 32 unconstitutionally deny him access to the courts through the writ of habeas corpus. This is a constitutional claim under Rule 32.1(a) of the *Alabama Rules of Criminal Procedure*, and is barred by Rule 32.2(c) because it is being raised in an untimely petition. Petitioner’s conviction became final on \_\_\_\_\_, but Petitioner did not file his Rule 32 petition until \_\_\_\_\_, over \_\_\_\_ years after the limitation period had expired.

Petitioner’s claim is also without merit. The courts have held that the grounds of preclusion found in Rule 32 are constitutional and do not result in the suspension of the writ of habeas corpus. See, *Arthur v. State*, 820 So.2d 886, 890 (Ala.Crim.App. 2001); *Cayson v. State*, 778 So.2d 261, 262 (Ala.Crim.App. 2000) (internal citations and quotations omitted) (Rule 32 did not abolish the substantive right to post-conviction review under the statutory remedy of habeas corpus. It merely changed the procedure for seeking habeas corpus relief in most situations.”).

#### Conclusion

Petitioner’s Rule 32 petition is denied because his claims are precluded by Rule 32.2(c) of the *Alabama Rules of Criminal Procedure* as his petition was untimely filed. His claim concerning the allegedly defective oath is also precluded under Rules 32.2(a)(3) and (a)(5) of the *Alabama Rules of Criminal Procedure* because it could have been raised at trial and on appeal, but was not. Finally, his claims are also without merit.

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Circuit Judge

## ORDER

*Rule 32 Petition Alleging Double Jeopardy  
Summary Dismissal: Failure to raise disputed issue of material fact or law  
Order addresses each claim with specificity*

This matter is before the Court on the above defendant's Petition for Post Conviction Relief pursuant to Rule 32, Ala.R.Crim.P., the State's Answer and Motion for Summary Dismissal. Having considered the pleadings, this court makes the following specific findings of fact and conclusions of law:

The defendant, along with an accomplice, \_\_\_\_\_, were jointly indicted for Armed Robbery or Robbery in the First Degree, Section 13A-8-41, *Code of Alabama*, 1975, and Assault in the Second Degree, Section 13A-6-21. On or about \_\_\_\_\_, both defendants robbed the \_\_\_\_\_, while one was armed with a gun and the other armed with a knife. During the robbery, the clerk, \_\_\_\_\_, was thrown to the ground and injured. On \_\_\_\_\_, the defendant entered a plea of guilty to Assault in the Second Degree, as charged, and the lesser included offense of Robbery in the Second Degree, Section 13A-8-42. The defendant received a total sentence of \_\_\_\_ years in the penitentiary. No appeal was taken. The defendant now files the present petition.

The defendant claims (a) the court was without jurisdiction to render the judgment or to impose sentence, and (b) the sentence imposed exceeds the maximum authorized by law, or is otherwise not authorized by law. Both claims are based on a single argument: "The petitioner's conviction of both Robbery and Assault is in violation of the double jeopardy clause of the United States Constitution." (Petition at \_\_\_\_). The defendant claims all the elements of Assault are needed to prove Armed Robbery or Robbery in the First Degree pursuant to Section 13A-8-41, particularly the elements involving "physical injury" and "use of a deadly weapon".

First, the defendant entered a plea of guilty to the charge of Robbery in the Second Degree, not Robbery in the First Degree. Robbery in the second degree requires the use of force or threat of force to take property when aided by an accomplice; while assault requires causing physical injury by using a deadly weapon. The elements of the offense are separate and distinct.

Second, even with the original charge of Robbery in the First Degree, the Assault charge requires an additional element, namely that the defendants actually caused physical injury. This element is not required under a charge of Armed Robbery pursuant to Section 13A-8-41(a)(1), as charged in the indictment. Again, there are separate and distinct elements differentiating each offense.

"In both the multiple punishment and multiple prosecution contexts, this Court has concluded that where the two offenses for which the defendant is punished or tried cannot survive the 'same-elements' test, the double jeopardy bar applies. See, e.g., *Brown v. Ohio*, 432 U.S. 161, 168-169 (1977); *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (multiple punishment); *Gavieres v. United States*, 220 U.S. 338, 342 (1911) (successive prosecutions). The same-elements test, sometimes referred to as the '*Blockburger*' test, inquires whether each offense contains an element not contained in the other; if not, they are the 'same offense' and double jeopardy bars additional punishment and successive prosecution." *United States v. Dixon*, 509 U.S. 688, 696, 113 S.Ct. 2849, 125 L.Ee.2d 556 (1993)." *Yeomans v. State*, 898 So.2d 878, 890 (Ala.Crim.App. 2004).

The petition fails to raise any disputed issue of material fact or law that would entitle the Petitioner to relief; therefore, these claims are due to be denied and the petition is summarily dismissed.

Having fully considered the above issues, it is hereby  
ORDERED, ADJUDGED, AND DECREED that any relief requested by the above named defendant pursuant to the Rule 32 Petition now before the Court is DENIED and the petition is SUMMARILY DISMISSED.

DONE this the \_\_\_\_ day of \_\_\_\_\_ 20\_\_.

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Circuit Judge

**ORDER**

*Rule 32 Petition – Claims of Ineffective Assistance of Counsel, Involuntary Guilty Plea  
Summarily denied; claims time barred and nonjurisdictional*

On \_\_\_\_\_, a jury found the Petitioner guilty of \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_. The Petitioner was sentenced to \_\_\_\_\_. The Alabama Court of Criminal Appeals affirmed the case on \_\_\_\_\_. Petitioner seeks relief under Rule 32 alleging ineffective assistance of counsel. Petitioner also claims that the conviction was obtained by use of a coerced confession, that it was obtained by use of evidence gathered through an illegal search and seizure, and that it was obtained through a violation against self-incrimination.

All of the Petitioner's claims are non-jurisdictional and are therefore barred by limitations under Rule 32.2(c).

Accordingly, this Court is authorized to summarily dismiss the petition without an evidentiary hearing or a response from the State for failure to plead a right of relief, Rule 32.3, for failure to plead his allegations with specificity, Rule 32.6(b), for failure to state a claim, Rule 32.7(d), for failure to raise a material issue of fact or law, Rule 32.7(d), Ala. R. Crim. P.; *Bishop v. State*, 608 So.2d 345, 347-348 (Ala. 1992), adopting *Bishop v. State*, 592 So.2d 664, 665-667 (Ala. Crim. App. 1991); *Tatum v. State*, 607 So.2d 383, 384 (Ala. Crim. App. 1992).

The petition is DENIED.

Done on this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_.

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Circuit Judge

**ORDER**

*Rule 32 Petition Claims Trial Court Lacked Jurisdiction to Render Judgment or Impose Sentence  
And that Sentence Exceeded Maximum Authorized by Law.  
Denied: successive, claims without merit.*

This cause is before the Court on a Rule 32 petition filed by the Petitioner, \_\_\_\_\_. The District Attorney for \_\_\_\_\_ filed a response to the petition, and the Court, having carefully reviewed the petition, the response by the State, and the file, is of the opinion that an order should be entered accordingly.

The Petitioner lists the following grounds for post-conviction relief under Rule 32:

- A. The Court was without jurisdiction to render the judgment or to impose the sentence.
- B. The sentence imposed exceeds the maximum authorized by law, or is otherwise not authorized by law.

It is noted that, on \_\_\_\_\_, the Court of Criminal Appeals issued a Certificate of Final Judgment affirming this Court's denial of the Petitioner's previous Rule 32 Petition.

In support of Ground A, the Petitioner contends he was incompetent before and during his guilty plea, thus divesting the court of jurisdiction to impose a sentence. The Petitioner's allegations are without merit. On \_\_\_\_\_, the Petitioner underwent a court ordered forensic evaluation to assess his competency to stand trial at \_\_\_\_\_ Medical Facility. The clinical assessment, contained in Exhibit "C," evaluated 13 possible court related impairment areas. Dr. \_\_\_\_\_'s summary and recommendations indicated the Petitioner possessed no psychiatric illnesses likely to interfere with his ability to participate in legal proceedings or to impede his ability to understand his current charges or to assist his attorney. The Petitioner's allegations are further contradicted by the Affidavit of Trial Counsel, the Explanation of Rights, the Guilty Plea Form, and the Court Reporter's Transcript of the proceedings. Moreover, the Petitioner's allegation as set out in Ground A was raised in the Petitioner's previous petition, making the instant claim successive and barred under Rule 32.2(b). Accordingly, this Court finds the Petitioner has presented no clear and convincing evidence so as to create substantial and legitimate doubt concerning his competency to enter his plea of guilt.

Ground B is equally without merit, as the Petitioner's allegation is not factually supported. The Petitioner received a \_\_\_\_\_ sentence with the possibility of parole, a sentence clearly within the sentencing range for the offense of \_\_\_\_\_.

It is THEREFORE ORDERED, ADJUDGED AND DECREED, based upon the Exhibits and Affidavits submitted by the parties, and Court's personal knowledge in presiding over the proceedings at issue, the Petitioner's Rule 32 Petition is hereby DENIED.

DONE AND ORDERED, this \_\_\_\_ day of \_\_\_\_\_.

\_\_\_\_\_  
Circuit Judge

## ORDER

*Rule 32 Petition Claimed: Newly Discovered Evidence, Involuntary Guilty Plea, and Sentence Exceeded Maximum Authorized.*

*Denied without an evidentiary hearing.*

*Order specifically addresses each claim.*

This court, having reviewed Petition for Post-Conviction Relief filed pursuant to Rule 32, Ala. R. Crim. P., and the State's Answer, hereby finds as follows:

1. The Petitioner's claim that there is newly discovered material evidence is without merit and is due to be denied.

The Petitioner's claim that "newly discovered evidence" entitles him to relief should be denied because the Petitioner has failed to offer sufficient proof that there is "newly discovered evidence" which entitles him to relief. To establish a claim based on newly discovered material evidence, the Petitioner must show the following:

- 1) The facts relied upon were not known by the petitioner or the Petitioner's counsel at the time of the trial or sentencing or in time to file a post trial motion pursuant to Rule 24, or in time to be included in any previous collateral proceeding and could not have been discovered by any of those times through the exercise of reasonable diligence;
- 2) The facts are not merely cumulative to other facts that were known;
- 3) The facts do not merely amount to impeachment evidence;
- 4) If the facts had been known at the time of the trial or of sentencing, the result probably would have been different; and
- 5) The facts establish that the petitioner is innocent of the crime for which the petitioner was convicted or should not have received the sentence that the petitioner received.

Ala. R. Crim. P. 32.1(e). The Petitioner has failed to show the existence of these elements, and his claim is due to be denied.

Although the Petitioner never fully explains the basis for this claim, he seems to claim that the "newly discovered evidence" consists mainly of the existence of the other grounds raised in his petition. He also seems to base a portion of this claim on a Motion to Withdraw Plea filed by his attorney after the Petitioner pled guilty. (P. at Exhibit \_\_\_\_). This Motion sets forth among its grounds that the victim was agreeable to allowing the Petitioner to plead guilty to \_\_\_\_\_. (P. at Exhibit \_\_\_\_). However, the Petitioner pled guilty to \_\_\_\_\_. As discussed below, that plea was entered into knowingly and voluntarily. Moreover, this information, as well as the other claims raised by the Petitioner, is not in any sense evidence, much less evidence material to guilt or punishment. The Petitioner had ample opportunity to learn this information prior to entering his guilty plea. Whether he did that or not is

outside the knowledge of this Court. But, because none of this information is evidence, and because all of it could have been discovered by reasonable diligence, the Petitioner's claim that this information amounts to "newly discovered evidence" must fail.

In his petition, the Petitioner has not offered any actual proof that this "evidence" is not merely cumulative to facts that were known at the time of his guilty plea. Ala.R.Crim.P. \_\_32.1(e)(2). The Petitioner does state that this "evidence" is not merely cumulative. (P. at \_\_\_\_). But again, the Petitioner never really explained what the "evidence" is, nor does he offer any proof as to how it is not cumulative. Likewise, the Petitioner claims that this "evidence" does not amount to impeachment evidence. (P. at \_\_\_\_). But again, the Petitioner has not fully explained what the evidence is, and he does nothing more than simply state it does not amount to impeachment evidence. The Petitioner has failed to offer any real proof that either of these elements of the definition of "newly discovered evidence" has been satisfied.

The Petitioner does seem to allege that, if this "evidence" had been known when he was sentenced, the result probably would have been different. (P. at \_\_\_\_). However, there has been nothing offered as to how knowledge of any of this information, even if it were considered evidence, would have changed anything. The Petitioner has not made any allegation or offered any facts tending to show that the State would have agreed to reduce the charge to \_\_\_\_\_ based on this new information, even if the victim had requested it. Moreover, if the Petitioner had been provided with any of the other documentation to which he claims he was entitled, it would have had no effect on his conviction or sentence. The Petitioner has failed to meet his burden of pleading on this portion of his claim because he has not offered even one fact from which he could prove that this "evidence" would have made any difference in his case. See *Lockett*, 644 So. 2d 34.

Finally, the Petitioner has also failed to make any claim that he is innocent of the crime with which he was charged. Ala.R.Crim.P. 32.1(e)(5). The Petitioner only claims that he was denied access to this information. However, "this allegation fails to meet the definition of newly discovered evidence recited in Rule 32.1(e)." *Tarver v. State*, 769 So.2d 338, 341 (Ala.Crim.App. 2000). Since the Petitioner has failed to claim innocence, his claim that this "evidence" is newly discovered within the meaning of Rule 32 fails.

"Before a claim may be considered as newly discovered evidence the claim must meet the definition of newly discovered evidence found in Rule 32.1(e)." *Tarver*, 769 So. 2d at 341. Because the Petitioner has failed to show the existence of any facts which satisfies even one of the elements of the definition of "newly discovered evidence" set forth under Rule 32.1(e), his claim is hereby DENIED.

2. The Petitioner's claim that his plea was involuntary is precluded, without merit, and due to be denied.

The Petitioner's first claim is that his guilty plea was involuntarily made because he entered into a "blind" plea expecting a sentence of twenty years split to serve five years and because the State did not provide him with an *Ireland* form explaining to him the range of punishment in this case before he pled guilty. (P. at \_\_\_\_). Although the Petitioner couches this argument as a jurisdictional claim, it is actually nonjurisdictional in nature and is thus precluded by the limitations period set forth in Rule 32.2(c), Ala. R. Crim. P.

While a true jurisdictional claim would not be precluded by the limitations period, the Petitioner has not made a true jurisdictional claim. In *Catchings v. State*, 684 So. 2d 168 (Ala. Crim. App. 1995), petitioner filed a Rule 32 petition alleging, *inter alia*, that his guilty plea was obtained involuntarily. In denying that petitioner's claim, the Court of Criminal Appeals found that the claim was precluded as being outside the statute of limitations, noting specifically that this claim was *not* a jurisdictional issue. *Catchings* 684 So. 2d at 169. Therefore, the Petitioner's claim is subject to the limitations period set forth in Rule 32.2(c).

This claim is precluded as being outside the limitations period set forth under Rule 32.2(c). Under Rule 32.2(c), the Petitioner had one year from the date on which the time for filing an appeal lapsed in which to file his petition. Ala.Crim.P. 32.2(c). The Petitioner had 42 days after sentencing in which to file his appeal. Ala R. App. P. 4(b)(1). The Petitioner was sentenced on \_\_\_\_\_. The last day for filing an appeal would have been \_\_\_\_\_. In 2002 the Supreme Court amended Rule 32.2(c), changing the limitations period from two-years to one-year, effective August 1, 2002. See Ala. R. Crim. P. (Commentary). Thus, the Petitioner had one year from \_\_\_\_\_ to file his petition. The Petitioner filed the present petition on or about \_\_\_\_\_, well past this one-year period. Even if the Petitioner were allowed to proceed under the two-year limitations period in place on the dates he was convicted and sentenced, \_\_\_\_\_ is still more than two years since the time for filing an appeal lapsed. Therefore, the Petitioner's claim would be precluded even under the more lenient limitations period. For these reasons, the Court finds that this claim is precluded, and it is hereby DENIED.

Even if the Court were to rule that the Petitioner's claim was not precluded, it is without merit and would be denied. The Petitioner claims that his sentence should be vacated because he pled with the understanding that there was a sentencing agreement with the State under which he would receive a sentence of twenty years split to serve five years. (P. at \_\_\_\_). However, the Petitioner has already admitted that he entered into a "blind plea," (P. at 4), meaning he pled guilty without any sentencing agreement. Furthermore, the crime for which the Petitioner was convicted was \_\_\_\_\_, a Class A felony. Under the Habitual Felony Offender Act, the Petitioner, with \_\_\_\_\_ prior felony convictions, was subject to a sentence a life or life without parole. See Ala. Code §13A-5-9. Therefore, the State could not have agreed to, nor could this Court have imposed, a sentence of twenty years split to serve five. On the day the Petitioner pled guilty, the Court stated, in his presence, that the sentence would be "either life or life without." (Plea \_\_\_\_ at \_\_\_\_). Later in that same hearing, the Court again informed the Petitioner that the sentencing range for \_\_\_\_\_ with \_\_\_\_\_ prior felony convictions was life or life without parole. (Plea \_\_\_\_\_ at \_\_\_\_). The Court asked the Petitioner if he understood this, to which the Petitioner responded, "Yes." (Plea \_\_\_\_\_ at \_\_\_\_). Furthermore, the Court specifically asked the Petitioner if he was promised anything, if he was threatened, or if he was told he would get an easier sentence if he pled guilty, or if he was told he would receive a harsher sentence if he did not plead guilty. (Plea \_\_\_\_\_ at \_\_\_\_). The Petitioner responded to each of these questions in the negative (Plea \_\_\_\_\_ at \_\_\_\_). The Petitioner did not, at any point, tell the Court he believed there was a sentencing agreement before he pled guilty.

The Petitioner was informed of the sentencing range in this case. The Petitioner admits that he entered into a "blind" plea. The petitioner never stated there was any agreement in place during his plea colloquy. The Court informed the Petitioner of his rights. After stating he understood all of this, the Petitioner pled guilty to \_\_\_\_\_. For these reasons, the Petitioner's claim that his plea was involuntary is without merit and, were it not precluded, it would be DENIED.

3. The Petitioner's claim that his sentence exceeds the maximum sentence authorized by law is without merit and is due to be denied.

In his petition, the Petitioner claims that he was not informed of the sentencing range in this case, and therefore, the life sentence he received in this case exceeds the maximum authorized by law. (P. at \_\_\_\_). As a three-time convicted felon pleading guilty to \_\_\_\_\_, the Petitioner was subject to a sentence of either life or life without parole. Ala. Code §13A-5-9. The Petitioner was informed, at least twice, of the sentencing range in open court. The Petitioner chose to plead guilty after being made aware of the sentencing range, and the Court, as the sentencing authority, was legally correct in sentencing him to \_\_\_\_\_.

Because the Petitioner was made aware of the sentencing range in this case, and because the sentence of life imprisonment is within the range authorized by law, the Petitioner's claim that the Court was without jurisdiction to impose this sentence is without merit and is due to be denied.

4. The Petitioner's claim that the State failed to disclose favorable evidence is precluded and is without merit.

The Petitioner claims that the State violated his constitutional rights by failing to produce an *Ireland*, or Explanation of Rights form, the Court's sentencing order, visitation records from the \_\_\_\_\_ facility, copies of the Transcript of Records, Sentencing Colloquy, and the State's Notice of Intent to Enhance under the Habitual Felony Act. (P. at \_\_\_\_). Under the United States Supreme Court's ruling in *Brady v. Maryland*, 373 U.S. 83(1963), "suppression by the prosecution of *evidence* favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." *Brady* 373 U.S. at 87 (emphasis added). In the Petitioner's case, the documents the Petitioner claims the State failed to provide are not in any sense evidence, much less evidence material to either the Petitioner's guilt or punishment.

First, the *Ireland*, or Explanation of Rights and Plea of Guilty form, is not nor would it ever have been, in the possession of the State, as it is generally prepared by a defendant's attorney. Moreover, the Petitioner's rights were explained to him by this Court. (See Plea \_\_\_\_\_). Second, the Court's sentencing order is not evidence, nor is it in possession of the State. The sentencing order is a document issued *by the Court* after a defendant's guilt has been decided, and it does nothing more than reflect the sentence already decided and imposed by the Court. Third, the visitation records from the Detention Facility purport to reflect who was present when the Petitioner was offered the alleged plea agreement of twenty years split to serve five. As discussed above, this is not evidence as it does not tend to prove or disprove the issue of the Petitioner's guilt of his punishment. Moreover, these records are not, nor have they ever been, in the possession of the State. Fourth, the Transcript of Records and Petitioner's Sentencing Colloquy simply reflect the actions taken in this case. They are in no way evidence material to guilt or punishment. These records are not, nor have they ever been, kept by the State.

Finally, the Petitioner's claim that the State did not provide him with notice that it intended to enhance the Petitioner's sentence under the Habitual Felony Offender Act is false. On \_\_\_\_\_, before the Petitioner entered his plea of guilty, he was provided with the State's Intent to Invoke Sentencing Enhancements, which stated specifically that the State did intend to invoke the Habitual

Felony Offender Act. (See State's Exhibit \_\_). In addition, the Petitioner was put on notice that the State intended to invoke \_\_\_\_ prior felonies under the Habitual Felony Offender Act before he entered his plea of guilty. (Plea \_\_\_\_ at \_\_\_\_). The Petitioner even stipulated to having \_\_\_\_\_ prior felony convictions. (Plea \_\_\_\_\_ at \_\_\_\_).

Since the Petitioner has failed to allege any facts showing that the State failed to provide any evidence material to guilt or punishment, his claims are hereby DENIED.

Upon consideration thereof, and having taken judicial notice of the Court's own records, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Petition is hereby DENIED without an evidentiary hearing.

DONE, this the \_\_\_\_ day of \_\_\_\_\_

\_\_\_\_\_  
Circuit Judge

## ORDER

*Rule 32 Petition Claims Court: Lacked Jurisdiction to Render Judgment and Impose Sentence, Sentence Exceeded Maximum Authorized and Ineffective Assistance of Counsel Denied: Failed to Meet Burden and Time Barred. Order specifically addresses each claim*

This cause came before the Court upon Petition for Relief from Conviction or Sentence pursuant to Rule 32 of the *Alabama Rules of Criminal Procedure*. Based upon the evidence presented, including, *inter alia*, the petition, the original court file, the State's Motion for Summary Judgment/Motion to Dismiss, and the Petitioner's traverse thereto, the Court finds as follows:

### BACKGROUND

Defendant was indicted by the \_\_\_\_\_ term of the \_\_\_\_\_ County Grand Jury for \_\_\_\_\_. Defendant was found indigent and \_\_\_\_\_ and \_\_\_\_\_ were appointed counsel on \_\_\_\_\_. On \_\_\_\_\_ defendant pled guilty to the charge of \_\_\_\_\_. The State filed its petition to treat the defendant as a habitual offender and such was granted by the Court. The defendant was sentenced to a term of \_\_\_\_\_. Petitioner filed this petition for Relief from Conviction or Sentence and *In forma Pauperis* Declaration on \_\_\_\_\_. Petitioner's Motion to Proceed *In forma Pauperis* was granted on \_\_\_\_\_. Petitioner filed a Request for Service of Petition Upon State and Request for Response to Petition Pursuant to Rule 32.7 (a) on \_\_\_\_\_. On \_\_\_\_\_, the Court ordered the State to respond to petitioner's Petition For Relief with thirty (30) days. On \_\_\_\_\_, petitioner filed an Application and Affidavit for Entry of Default and Request for Evidentiary Hearing which was denied on \_\_\_\_\_. On \_\_\_\_\_ the State filed a Motion For Extension Of Time. The motion was Granted and the State given an additional sixty (60) days to respond. Petitioner filed a Notice of Objection and Request for Entry of Default and/or Sanctions on \_\_\_\_\_, which was denied. The State filed Motion For Summary Judgment/Motion to Dismiss on \_\_\_\_\_. Petitioner filed a Traverse to State's Motion for Summary Judgment/Motion to Dismiss on \_\_\_\_\_.

### ALLEGATIONS

In his Petition for Relief from Conviction or Sentence petitioner makes the following claims:

- (1) The Court was without jurisdiction to render the Judgment or impose the sentence.
- (2) The sentence imposed exceeds the maximum authorization by law or is otherwise not authorized by law.
- (3) The Constitution of the United States or of the State of Alabama requires a new trial, a new sentence proceeding or other relief because petitioner was denied the effective assistance of trial counsel.

## CONCLUSIONS

- (1) As to Petitioner's allegation that the Court was without jurisdiction to render judgment or impose sentence he offers the following grounds:
  - (A) Petitioner states that he should not have been sentenced under the Habitual Offender Act because he did not have the requisite three prior felonies.
  - (B) Petitioner states that the felony conviction which the state was required to prove in order to convict the defendant of \_\_\_\_\_ cannot be used for enhancement purposes under the Habitual Offender Act.
  - (C) Petitioner states that one of the prior felonies used for enhancement under the Habitual Offender Act was a youthful offender adjudication and one prior felony conviction was nolle prossed.

As to alleged error (A), the State's motion to treat the defendant as a habitual offender alleged \_\_\_\_\_ prior felony convictions. Certified copies of the convictions were attached. The State properly filed its petition to treat the petitioner under the Habitual Offender Act, and the petition was properly granted.

As to alleged error (B), the petitioner is correct in that the State may not use the underlying felony conviction which the State was required to prove to convict the petitioner of \_\_\_\_\_ to enhance his sentence. *Moncrief v. State*, 551 So. 2d 1175 (Ala.Crim.App. 1989). The State may, however, use all but one of the prior felony convictions to enhance the petitioner's punishment under the Habitual Offender Act. *Moncrief v. State*. The record evidence that there were still three prior felony convictions the State could use to enhance petitioner's punishment.

As to alleged error (C) petitioner states that one of his prior felony convictions was a youthful offender adjudication and another was nolle prossed. Petitioner provides no evidence to support these claims; and contrary to the above said claims, the record does not support either of the petitioner's contentions.

(2) As to Petitioner's allegation that the sentence imposed exceeds the maximum authorized by law, or is otherwise not authorized by law, he alleges the same facts provided to support his claim of the court's lack of jurisdiction. As to alleged error (2) the Court will not address this claim because it has not been timely raised. Rule 32.2, Ala. R. Crim. P.

(3) As to Petitioner's allegation that he was denied the effective assistance of trial counsel, he offers the following grounds:

- (A) Trial counsel \_\_\_\_\_ and \_\_\_\_\_ were ineffective in that they did not adequately explain to petitioner the consequences of being punished under the Habitual Offender Act. Furthermore, petitioner alleges that trial counsel \_\_\_\_\_ and \_\_\_\_\_, were ineffective in that they did not investigate the felony convictions used to enhance petitioner's sentence under the Habitual Offender Act.

As to alleged error (3) the Court will not address this claim because it has not been timely raised. Rule 32.2, Ala. R. Crim. P.

Based on the foregoing, the Court hereby GRANTS the State's Motion for Summary Judgment/Motion to Dismiss and DENIES each and every claim contained within the petitioner's Petition for Relief from Conviction or Sentence.

ORDERED and DONE on this the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Circuit Judge

**ORDER**

*Rule 32 Petition claims: double jeopardy and no authority to sentence under HFOA  
Denied: Claim without merit. Order specifically addresses each claim.*

This matter is before the Court on the Defendant's Rule 32 Petition. Defendant claims that his conviction was obtained in violation of the double jeopardy protections of state and federal law because his conviction for Receiving Stolen Property involves the same personal property that was allegedly stolen as a part of the Defendant's earlier trial for Burglary. The Defendant also claims that the Court had no authority to sentence the Defendant under the Habitual Offender Act because the sentencing order did not contain a reference to the Habitual Offender Act.

With respect to the former, the Defendant's claim is without merit. The Defendant's acquittal, even if true, on the offense of Burglary, would not bar a subsequent trial for the offense of Receiving Stolen Property. The gist of the Burglary charge is the wrongful entering of another's residence or other building structure. The gist of the Receiving Stolen Property charge is the wrongful exercise of control over the personal property of another.

With respect to the latter, the State has correctly pointed that even if the Defendant did not have advance notice of the sentencing being pursuant to the Habitual Offender Act that such notice was waivable rather than jurisdictional. Pursuant to Rule 32.2(c) of the *Alabama Rules of Criminal Procedure*, the claim of the Defendant is precluded at this late date. The Defendant also says that since the State did not deny the merits of his claim that he was not sentenced as a Habitual Offender that the Court is bound to treat the Defendant as a having not been sentenced under Habitual Offender Act. The Defendant ignores the denial of the Defendant's factual allegations set forth in the Answer of the State. The Defendant in his subsequently filed Objection to the State's Answer does not deny that he received notice of the State's intention to invoke the Habitual Felony Offender Act, claiming only that the sentencing order failed to have any reference to the act. A review of the court file in this cause indicates that prior to the sentencing hearing the State gave notice to the Defendant that he would be treated as a Habitual Felony Offender and specified \_\_\_\_\_ prior felony convictions of this Defendant. The only way that a defendant convicted of Receiving Stolen Property can receive a sentence of \_\_\_\_\_: is if the Court finds that the Defendant has been previously convicted of the relevant number of felonies and applies the Habitual Felony Offender Act. The notice of the State, a copy which is attached to the sentencing order as Exhibit \_\_\_, is consistent with this Court's finding, and the Court does find, that the Defendant was sentenced as a Habitual Felony Offender, and that the Defendant has failed to carry the burden of proof that he was not sentenced as a Habitual Felony Offender, and therefore Defendant's request for relief is due to be denied.

In view of the foregoing, it is ORDERED that the Defendant's Petition along with his request for an evidentiary hearing and for the appointment of counsel be and the same are hereby denied.

DONE this the \_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Circuit Judge

## VIII.

### REASONS FOR REMAND 2006/2007 CASES

#### **A. Cases Remanded by the Alabama Supreme Court**

##### **1. Procedural Bars to Postconviction Relief**

Ex parte Davis, \_\_ So.2d \_\_, 2007 WL 2216893 (Ala. 2007).

The defendant filed a Rule 32 petition alleging, among other things, ineffective assistance of counsel. The State did not raise defenses to the defendant's ineffective assistance of counsel claims based on Rule 32.2(a), Ala.R.Crim.P., which establishes grounds for the preclusion of claims for postconviction relief. The trial court's order denying the defendant's Rule 32 petition included determinations on the merits adverse to the petitioner on each of his ineffective assistance of counsel claims. The defendant appealed the trial court's denial to the Court of Criminal Appeals. The Court of Criminal Appeals held, sua sponte, that the defendant's ineffective assistance of counsel claims were procedurally barred by Rule 32.2(a)(3) and 32.2(a)(5), i.e., that they could have been raised at trial or on appeal but were not. Davis v. State, 2006 WL 510508 (Ala.Crim.App. 2006).

The Supreme Court denied the defendants petition for certiorari on February 16, 2007. Ex parte Davis (No. 1051719). Ms. 1051719, August 3, 2007] \_\_ So.2d \_\_ (Ala.2007). However, in light of the Supreme Courts opinion in Ex parte Clemons, \_\_ So.2d \_\_, 2007 WL 1300722 (Ala. 2007), holding that the procedural bars to postconviction relief contained in Rule 32.2(a), Ala. R.Crim. P., were not jurisdictional and therefore could be waived, the Supreme Court withdrew the certificate of judgment it had issued in Ex parte Davis, placed it on rehearing *ex mero motu*, and granted Davis's petition for a writ of certiorari, limited solely to the issue of whether the rule announced in Ex parte Clemons, dealing with waiver of grounds of preclusion, required reversal of the Court of Criminal Appeals' judgment in Davis's appeal from his Rule 32 petition. The Court reversed the judgment of the Court of Criminal Appeals and remanded the case for that court to consider all Davis's ineffective assistance of counsel claims on their merits.

On remand the Court of Criminal Appeals considered the merits of Davis's ineffective assistance of counsel claims that were raised in Davis's brief. After an extensive evidentiary hearing the Court affirmed the circuit court's denial of Davis's claims of ineffective assistance of trial counsel. Davis v. State, \_\_ So.2d \_\_, 2008 WL 902884 (Ala.Crim.App. 2008).

##### **2. Amending Petition**

Ex parte Borden, \_\_ So.2d \_\_, 2007 WL 2343712 (Ala. 2007).

Following affirmance of his capital murder conviction and his sentence of death, 769 So.2d 935 (Ala.Crim.App. 1997) and 769 So.2d 950 (Ala. 2000), defendant filed a petition for postconviction relief. The circuit court dismissed the petition and the defendant appealed. The Court of Criminal Appeals, \_\_ So.2d \_\_, 2004 WL 362256 (Ala.Crim.App. 2004), remanded with directions. The circuit court sentenced defendant to life imprisonment without the possibility of parole. The Supreme Court granted certiorari review.

*Holdings:* The Supreme Court, Bolin, J., held that:

- (1) defendant's brief was sufficient to apprise the Court of Criminal Appeals of the defendant's contentions with regard to his ineffective assistance of counsel claims;
- (2) trial court's ruling that defendant's juror-misconduct claims were procedurally barred was an adverse ruling for the Court of Criminal Appeals to review; and
- (3) to amend his petition for postconviction relief, the defendant did not have the initial burden of showing diligence in filing the amendment or that facts underlying the amendment were unknown to him before filing of the original petition.

A defendant is entitled to amend his petition for postconviction relief to assert additional claims of ineffective assistance of counsel when the amendment is necessary for a full determination on the merits and there would be no undue delay in the hearing because of the amendment or undue prejudice to the State by the filing of the amendment.

### **3. Payment of Filing Fee**

Ex parte Ward, 957 So.2d 449 (Ala. 2006).

An inmate petitioned the Court of Criminal Appeals for writ of mandamus, challenging the order of the circuit court, assessing a filing fee for the inmate's first petition for postconviction relief, and also seeking the granting of his request to proceed *in forma pauperis* in his second postconviction petition, as well as the setting aside of the trial court's order revoking his probation. The Court of Criminal Appeals denied the petition, without opinion. The inmate petitioned the Supreme Court for writ of mandamus.

*Holding:* The Supreme Court, See, J., held that the trial court's order requiring the inmate to pay filing fees for his first petition for postconviction relief, which order was issued in apparent response to inmate's filing of his second petition for postconviction relief, was untimely.

## **B. Cases Remanded by Alabama Court of Criminal Appeals**

### **1. Summary Denial – Claims Could Be Meritorious**

Robinson v. State, \_\_\_ So.2d \_\_\_, 2008 WL 902768 (Ala.Crim.App.2008).

Defendant, convicted of second-degree assault and third-degree burglary, filed a petition for postconviction relief alleging that his trial counsel rendered ineffective assistance. The circuit court summarily denied his petition and the defendant appealed.

*Holding:* The Court of Criminal Appeals, Baschab, P.J., held that the trial court's failure to address the petitioner's claim of ineffective assistance of counsel in its order denying the petition warranted remand because the appellant's claim could be meritorious.

*Welch, J. dissenting, stated that the majority decision was apparently basing its decision on case law which holds that "a misrepresentation by a defendant's counsel, if material, may render a guilty plea involuntary." Ex parte Blackmon*, 734 So.2d 995, 997 (Ala. 1999). *He distinguished this line of cases, which were based on*

*misrepresentations of counsel regarding the sentence he would receive, from the present case in which nothing in the record indicated that the petitioner's counsel promised the court would give a lesser sentence on a blind plea.*

## **2. Failed to Specifically Address Claims that could be Meritorious**

J.S.K. v. State, \_\_ So.2d \_\_, 2008 WL 902771 (Ala.Crim.App. 2008).

Defendant petitioned for postconviction relief from his conviction for first-degree rape, first-degree sodomy, sexual torture, and first-degree sexual abuse. The appellant argued that his pre-trial, trial, and appellate attorneys rendered ineffective assistance in numerous instances. Following an evidentiary hearing on defendant's Rule 32 petition, the circuit court made general findings regarding the allegations and denied the petition. Petitioner appealed.

*Holding:* Since the appellant's allegations could be meritorious, the circuit court erred in not specifically addressing them. On return to remand, the circuit court was instructed to include in the record all of the exhibits the appellant had previously attached to his petition.

*See also*, Long v. State, \_\_ So.2d \_\_, 2008 WL 902883 (Ala.Crim.App. 2008), remanding to the trial court to hold an evidentiary hearing and include a transcript of those proceedings on remand, noting that Rule 32.9(d) requires the trial court to "make specific findings of fact relating to each material issue of fact presented," and Rule 32.2 provides that the court's written findings are to individually address each claim not precluded. In addition, if the findings are based on the court's personal knowledge of the guilty-plea proceedings, "the order should so state." Dedeaux v. State, 976 So.2d 1045 (Ala.Crim.App. 2005), cited with approval in Heidelberg v. State, 965 So.2d 799 (Ala.Crim.App. 2006).

Mendez v. State, \_\_ So.2d \_\_, 2008 WL 902795 (Ala.Crim.App. 2008).

Defendant petitioned for postconviction relief from conviction by guilty plea to murder and 20 year sentence. In his petition, the appellant argued that he did not appeal his conviction through no fault of his own and that his counsel rendered ineffective assistance because he did not file a direct appeal. The State did not refute these claims. The circuit court summarily dismissed petition and the defendant appealed.

*Holding:* The Court of Criminal Appeals, Baschab, P.J., held that the circuit court did not make any findings of fact regarding the appellant claims and because these claims could be meritorious, the circuit court erred in not addressing them.

*See also*, Thomas v. State, \_\_ So.2d \_\_, 2008 WL 902800 (Ala.Crim.App. 2008), on appeal from the summary denial of a Rule 32 petition, remanded for the trial court to make specific written findings of fact concerning the appellant's allegations that the alleging that trial court erroneously sentenced him as a habitual offender.

Graddick v. State, \_\_So.2d\_\_, 2008 WL 2223063 (Ala.Crim.App. 2008).

Alleging that his guilty plea to drug trafficking was not voluntarily and intelligently entered and ineffective assistance of trial counsel, the petitioner argued that his counsel advised him to reject the State's offer of a sentence of 10 years imprisonment, split to serve 3 years, followed by 5 years on probation, without advising him that ten years was the minimum possible sentence for trafficking in marijuana.

*Holding:* The Court of Criminal Appeals held that the circuit court erroneously failed to specifically address the petitioner's claims, which could be meritorious. The Court of Criminal Appeals remanded with instructions for the trial court to make specific, written findings of facts concerning each claim.

Campbell v. State, \_\_So.2d\_\_, 2008 WL 2223110 (Ala.Crim.App. 2008).

The petitioner filed a Rule 32 petition following his guilty plea to robbery and sentence to 30 years in prison, alleging that the circuit court did not have jurisdiction to render judgment and impose sentence because he did not personally enter his guilty plea and the court erroneously accepted his plea without first waiting three (3) days after receipt of notice that the defendant desired to plead guilty. The State did not specifically refute these claims, nor did the court specifically address the claims.

*Holding:* The Court of Criminal Appeals noted that these claims could be meritorious and the circuit court erred in not addressing them.

Ingram v. State, 959 So.2d 1151 (Ala.Crim.App. 2006).

Following appellate affirmance of his conviction for murder and habitual felony offender sentence of life imprisonment, petitioner sought postconviction relief. The circuit court summarily denied the petition and the petitioner appealed.

*Holding:* The Court of Criminal Appeals, Cobb, J., held inter alia that remand was required to permit the court in the postconviction proceeding to make specific findings of fact as to petitioner's claims of ineffective assistance of counsel were pleaded with sufficient specificity.

Gordon v. State, \_\_So.2d\_\_, 2007 WL 3226597 (Ala.Crim.App. 2007).

After direct appeal from sentences imposed for assault, rape, sodomy, and unauthorized use of a motor vehicle convictions was dismissed as untimely, the defendant petitioned for postconviction relief. The circuit court summarily denied the petition and the defendant appealed.

*Holding:* The Court of Criminal Appeals, Baschab, J., held that remand was required in order to make specific written findings of fact concerning the defendant's claim that he failed to appeal his convictions through no fault of his own. The Court noted that the State conceded that the defendant's claim might be meritorious.

Allen v. State, \_\_So.2d\_\_, 2007 WL 1866253 (Ala.Crim.App. 2007).

Following his guilty-plea conviction of unlawful distribution of marijuana and imposition of a habitual offender sentence of 25 years imprisonment, the petitioner sought postconviction relief claiming that the circuit court did not have jurisdiction to impose the sentence under the Habitual Felony Offender Act. The circuit summarily denied the petition and the petitioner appealed.

*Holdings:* The Court of Criminal Appeals, Welch, J., held that the circuit court was required to address all claims which were sufficiently specific to entitle petitioner to relief if true.

Ryles v. State, \_\_So.2d\_\_, 2007 WL 4463875 (Ala.Crim.App. 2007).

After defendant's conviction for second degree receiving stolen property was affirmed, the defendant filed a petition for postconviction relief. The circuit court summarily denied the petition without requiring a response from the State and the defendant appealed.

*Holding:* The Court of Criminal Appeals, Baschab, P. J., held that the trial court was required to make findings of fact in connection with the petition for post-conviction relief, rather than summarily dismiss the petition, as the defendant made claims of ineffective assistance of counsel that could be meritorious. The trial court was required to make findings of fact regarding the petition for postconviction relief filed by the defendant convicted second degree receiving of stolen property, rather than dismiss the petition summarily without requiring a response from the State, where defendant raised ineffective assistance of counsel allegations that could be meritorious.

McNabb v. State, \_\_So.2d \_\_, 2007 WL 2459158 (Ala.Crim.App. 2007).

Appellant was convicted of first degree robbery and was sentenced as a habitual offender to imprisonment for life without the possibility of parole. His conviction was affirmed in an unpublished memorandum. The appellant filed a Rule 32 petition challenging his sentence. After the State responded, the circuit court summarily denied the petition and the petitioner appealed.

*Holding.* In light of the State's response that there was a need to determine whether some of the prior convictions that were used to enhance the appellant's sentence were actually youthful offender adjudications, the Court of Criminal Appeals remanded for the circuit court to make specific written findings concerning the appellant's argument, since they could be meritorious.

### **3. Failure to Make Specific Findings Supporting Dismissal as Required by Rule 32**

Getz v. State, \_\_So.2d\_\_, 2006 WL 2788976 (Ala.Crim.App. 2006).

The defendant was convicted of trafficking in methamphetamines, possession of drug paraphernalia, and speeding. On December 14, 1999, Getz filed the instant Rule 32 petition, in which he alleged (1) 25 claims of ineffective assistance of trial and appellate counsel;(2) that the trial court was without jurisdiction to render judgment or to impose his sentence because, he said, the evidence was insufficient; (3) that his cases had been improperly consolidated; and (4) that the trial court failed to give proper jury instructions. The State filed a response arguing that Getz's claims were both precluded from appellate review and without merit. On September 30, 2004, an evidentiary hearing was conducted, and Getz presented evidence in support of his claims. On November 3, 2005, the trial court issued an order denying Getz's petition. On appeal, Getz reasserts the claims he presented in his petition to the trial court.

*Holding:* The Court of Criminal Appeals, Wise, J., held that the trial court's failure to make specific findings of fact supporting its dismissal of the petition warranted remand because the Rule of Criminal Procedure required the court, if it conducted an evidentiary hearing on a postconviction petition, to make specific findings of fact relating to each material issue of fact presented.

Gordon v. State, \_\_So.2d\_\_, 2006 WL 2457819 (Ala.Crim.App. 2006).

The petitioner sought postconviction relief following a guilty plea and conviction for possession of a controlled substance. The petitioner claimed his guilty plea was not voluntary and that he received ineffective counsel. The circuit court dismissed the petition and defendant appealed.

*Holding:* The Court of Criminal Appeals, Wise, J., held that the trial court could not order dismissal without specifically addressing petitioner's claims.

Hawthorne v. State, \_\_So.2d \_\_, 2007 WL 4463941 (Ala.Crim.App. 2007).

Following defendant's conviction for first-degree escape, he filed petition for postconviction relief challenging his conviction on the basis that the trial court did not have jurisdiction to render a judgment and impose a sentence because he was not competent to stand trial and because his sentence was illegal as he was sentencing as a habitual offender. The circuit court denied the petition and the defendant appealed.

*Holding:* The Court of Criminal Appeals, Baschab, P.J., held that the trial court's failure to make specific, written findings of fact regarding defendant's claims in denying his petition required remand for the trial court to make such findings.

#### **4. Ineffective Assistance of Counsel Claims - Requirement to Make Specific Findings Despite Judge's Personal Observations**

Lucious v. State, \_\_So.2d\_\_, 2007 WL 2459973 (Ala.Crim.App. 2007).

Following affirmance of his convictions for first-degree sodomy, first-degree sexual abuse, and attempted first-degree sodomy, defendant filed a petition for postconviction relief claiming ineffective assistance of counsel. After conducting an evidentiary hearing, the circuit court denied the petition and petitioner appealed.

*Holding:* The Court of Criminal Appeals, Welch, J., held that the circuit court judge, who also presided over defendant's trial, was required to address each of the defendant's claims of ineffective assistance of counsel in its order denying the petition.

The fact that a circuit court judge ruling on a petition for postconviction relief is not required to conduct an evidentiary hearing on a petitioner's claims of ineffective assistance of trial counsel if that judge personally observed the conduct of counsel does not relieve that judge of the responsibility of entering a sufficiently specific order addressing each of the petitioner's claims of ineffective assistance of trial counsel.

Hodges v. State, \_\_So.2d\_\_, 2007 WL 866658 (Ala.Crim.App. 2007).

The defendant was convicted of murder during the course of a robbery. Although the jury recommended life imprisonment without the possibility of parole, the circuit court sentenced the defendant to death. The defendant appealed. The Court of Criminal Appeals, 856 So.2d 875 (Ala.Crim.App. 200100), remanded with directions, affirming on return to remand, and the Supreme Court, in Ex parte Hodges, 856 So.2d 936 (Ala. 2003), affirmed his conviction and sentence. The defendant filed for postconviction relief, which the circuit court denied. The petitioner appealed.

*Holding:* The Court of Criminal Appeals, Shaw, J., held that remand was required to allow the defendant an opportunity to present evidence in support of his claims of ineffective assistance of counsel. The circuit court erred in relying on its personal knowledge of facts without stating the reasons in its order, and petitioner's claims regarding mitigation investigation were facially meritorious and were pleaded with sufficient specificity.

## **5. Requirement to Make Findings of Fact to Allow Meaningful Appellate Review**

Turner v. State, \_\_\_ So.2d \_\_\_, 2007 WL 3226664 (Ala.Crim.App. 2007).

The defendant, convicted of sexual abuse pursuant to a guilty plea, filed a petition for postconviction relief alleging that: (1) the trial court abused its discretion when it granted the State's motion to set aside his original guilty plea to second-degree sexual abuse; (2) he was denied effective assistance of trial and appellate counsel because, he said, counsel failed to preserve his double-jeopardy claim for appeal; and (3) his sentence exceeded the maximum authorized by law. The circuit court summarily denied the petition and the defendant appealed.

*Holding:* The Court of Criminal Appeals, Wise, J., held that trial court was required to make findings of fact specifically addressing defendant's claims presented in his petition for postconviction review.

The trial court was required to make findings of fact specifically addressing defendant's claims presented on post-conviction review in order to allow for meaningful appellate review. The Court noted that it would be premature for it to review Turner's claims without the circuit court first making specific findings of fact as to the petitioner's claims, as required by Rule 32.9(d) Ala.R.Crim.P.

Davis v. State, \_\_\_ So.2d \_\_\_, 2007 WL 2812260 (Ala.Crim.App. 2007).

Following his conviction on a guilty plea for felony murder and first degree robbery, the defendant filed a petition for postconviction relief alleging that the robbery conviction subjected him to double jeopardy. The circuit court denied relief and the defendant appealed.

*Holding:* The Court of Criminal Appeals, McMillan, J., held that the record on appeal was insufficient to determine whether the petitioner's felony murder and first degree robbery convictions were based on the same robbery, which would constitute double jeopardy.

Raney v. State, \_\_\_ So.2d \_\_\_, 2007 WL 2459326 (Ala.Crim.App. 2007).

The defendant filed petition for postconviction relief after he was convicted and sentenced to life imprisonment for robbery. The circuit court summarily dismissed the petition and the defendant appealed.

*Holding:* The Court of Criminal Appeals, Baschab, P.J., held that remand was required in order to determine whether the defendant's failure to seek direct appeal was due to inadequate assistance of counsel and because the circuit court did not specifically address the appellant's claim.

## 6. Remanded in Order to Conduct an Evidentiary Hearing

Miller v. State, \_\_\_ So.2d \_\_\_, 2007 WL 4463943 (Ala.Crim.App. 2007).

The defendant petitioned for postconviction relief from his conviction in a jury trial for reckless manslaughter in the killing of his wife and his sentence as a habitual felony offender. The appellant claimed, *inter alia* that: his trial and appellate counsel had committed numerous instances of ineffective assistance. The circuit court summarily dismissed the petition and the defendant appealed.

*Holdings:* The Court of Criminal Appeals, Welch, J., held that the defendant had sufficiently pleaded facts to entitle him to an evidentiary hearing on claim that his trial counsel was ineffective for failing to call defendant's sister as a witness and for failing to allow defendant to testify.

The petitioner was entitled to an evidentiary hearing on his postconviction claim that his trial counsel was ineffective for failing to call defendant's sister as a witness, since his sister stated in an affidavit that she attended defendant's trial and that she was told by his attorney that she would be called as a defense witness but was never called. Her testimony, if believed by the jury, would have supported the defendant's theory that his wife's death was accidental.

Archie v. State, \_\_\_ So.2d \_\_\_, 2008 WL 2223079 (Ala.Crim.App. 2008).

The petitioner appealed the circuit court's denial of his fifth petition for postconviction relief. The petitioner was convicted of capital murder and was sentenced to life imprisonment without the possibility of parole. His conviction and sentence was affirmed on appeal. In December 1999, the petitioner filed his first Rule 32 petition attacking his conviction. That petition was denied by the circuit court. He filed subsequent petitions in May 2000, September 2002, and April 2004. Those petitions were likewise denied. In January 2007, the petitioner filed his fifth Rule 32 petition. After that petition was denied, the petitioner appealed to the Court of Criminal Appeals. The court dismissed the appeal because the notice of appeal was not timely filed. Before dismissing the appeal the court allowed the petitioner fourteen days to show cause why the appeal should not be dismissed because the notice was untimely filed. On the record it appeared that the defendant did not meet that time frame. In July 2007, the defendant filed his sixth Rule 32 petition seeking an out-of-time appeal from the denial of his fifth Rule 32 petition. The circuit court summarily denied the petition. This defendant appealed arguing that his failure to file a timely notice of appeal was due to a clerical error and was not his fault.

*Holding:* The Court of Criminal Appeals held that since the petitioner's allegations were not refuted by the State they must be taken as true. "When the State does not respond to a petitioner's allegations, the unrefuted statement of facts must be taken as true." Smith v. State, 581 So.2d 1283, 1284 (Ala.Crim.App.1991). The case was remanded to allow the defendant an opportunity to present evidence to support his allegation that the failure to appeal was based on a clerical error and was not his fault.

Connally v. State, \_\_So.2d\_\_, 2007 WL 1228014 (Ala.Crim.App. 2007).

Defendant who pled guilty to manslaughter filed petition for postconviction relief and circuit court summarily denied his petition. Defendant appealed.

*Holdings:* The Court of Criminal Appeals, Shaw, J., concluded that the trial court did not ascertain that the defendant's plea was free from coercion and/or promises; that the defendant had read and understood the plea form before accepting his plea; or whether his trial counsel was ineffective for not explaining to him the elements of the offenses of murder and manslaughter. Because the defendant had pled sufficient facts in support of his claim that his guilty plea was involuntary, the Court held that he was entitled to further proceedings.

## **7. Evidentiary Hearing - No Juror Oath - Jurisdictional Claim**

Barclay v. State, \_\_So.2d\_\_, 2008 WL 902887 (Ala.Crim.App. 2008).

Defendant filed a petition seeking relief from a 1978 child molestation conviction, alleging that the trial court lacked subject-matter jurisdiction because neither the jury venire or petit jury were administered oaths prior to trial. The State filed a motion to dismiss, arguing that Barclay's claim is a nonjurisdictional claim and thus procedurally barred by the limitations period contained in Rule 32.2(c), Ala. R.Crim. P., and procedurally barred because the instant petition is a successive petition, Rule 32.2(b). The circuit court, essentially adopting the State's argument as its holding, summarily denied the petition and the defendant appealed.

*Holding:* The Court of Criminal Appeals, Welch, J., held that the defendant's claim was jurisdictional and

that the petitioner was entitled to an evidentiary hearing. The Court agreed with the appellate that, "[A] claim that no oath was administered at all," i.e., the jury venire and the petit jury were not sworn, would be a jurisdictional issue because ... "a verdict rendered by jurors, who have never been sworn is a nullity." Brooks v. State, 845 So.2d 849, 850-851 (Ala.Crim.App.2002). "It cannot be presumed from a silent record that the jury was sworn; there must be in the record some affirmative showing that the oath was administered to the jury." See Ex parte Deramus, 721 So.2d 242 (Ala.1998).

The Barclay case is identical to Pride v. State, \_\_So.2d\_\_, 2008 WL 541894 (Ala.Crim.App. 2008). In Pride the petitioner alleged that the trial court lacked jurisdiction to render the judgment or to impose sentence because, he said, neither the jury venire nor the petit jury had been sworn. He attached to his petition pages from his trial transcript and from the case-action summary, which failed to reflect that "any oath administered to the jury venire or to the petit jury before the trial began."

## **8. Evidentiary Hearing – Sentence Exceeds Maximum Authorized is a Jurisdictional Claim**

McNeal v. State, \_\_So.2d\_\_, 2008 WL 541893 (Ala.Crim.App. 2008).

Defendant, convicted of sexual abuse, filed a petition for postconviction relief alleging that: (1) the trial court was without jurisdiction to render judgment or to impose his sentence because, his conviction for sexual abuse was obtained in violation of the prohibition against double jeopardy; and (2) his sentence exceeded the maximum authorized by law because, in that it was illegally enhanced using a North Carolina conviction that would be a misdemeanor in Alabama. The circuit court denied the petition and the petitioner appealed.

*Holding.* The Court of Criminal Appeals, Wise, J., held that the defendant was entitled to an evidentiary hearing with respect to his claims that the sentence imposed exceeded the maximum authorized by law, since this was a jurisdictional issue that was not subject to the procedural bars of Rule 32 Ala.R.Crim.P.

See, e.g., Steele v. State, 911 So.2d 21, 31 (Ala.Crim.App. 2004). “A challenge to an illegal sentence is not precluded by the limitations period or by the rule against successive petitions.” Jones v. State, 724 So.2d 75, 76 (Ala.Crim.App. 1998). “[A]n allegedly illegal sentence may be challenged at any time, because if the sentence is illegal, the sentence exceeds the jurisdiction of the trial court and is void.” Rogers v. State, 728 So.2d 690, 691 (Ala.Crim.App. 1998). Thus, the claim is not procedurally barred. An illegal sentence may be challenged at any time, because if the trial court has imposed an illegal sentence, it has exceeded its jurisdiction and the sentence is void. Henderson v. State, 895 So.2d 364, 365 (Ala.Crim.App. 2004).

Kelley v. State, \_\_ So.2d \_\_, 2007 WL 1866749 (Ala.Crim.App. 2007).

The defendant, convicted of theft of property and robbery, filed a petition for postconviction relief claiming that his sentence was illegal, his counsel was ineffective, and his plea was not voluntary. The circuit court summarily denied the petition and the defendant appealed.

*Holding:* The Court of Criminal Appeals, Welch, J., held that the defendant was entitled to postconviction review. That the defendant did not have the burden of proof to support his sentencing claim at the pleading stage of his petition for postconviction relief. His claim that the sentences were illegal was a jurisdictional claim that could be raised at any time and the claim that his counsel was ineffective for failing to object to the illegal sentences was not procedurally barred.

## **9. Evidentiary Hearing for Out-of-Time Petition Where State did not Refute Claims**

Burruss v. State, \_\_ So.2d \_\_, 2007 WL 2812235 (Ala.Crim.App. 2007).

The defendant pleaded guilty to the offense of trafficking in cocaine and was sentenced to 40 years imprisonment. He filed a petition for post-conviction relief alleging ineffective assistance of counsel and an involuntary guilty plea. The trial court denied the petition, the defendant appealed, and the Court of Criminal Appeals dismissed the appeal as untimely. The circuit court denied the defendant's subsequent petition for post-conviction relief requesting an out-of-time appeal from denial of his first petition, and the defendant appealed.

*Holding:* The Court of Criminal Appeals, McMillan, J., held that the allegations set forth in the petition for out-of-time appeal had to be accepted as true, where the State did not refute the defendant's claim in its response to the petition, requiring remand for an evidentiary hearing.

Durry v. State, \_\_ So.2d \_\_, 2007 WL 866213 (Ala.Crim.App. 2007).

Defendant filed a petition for postconviction relief attacking revocation of his probation. The circuit court summarily denied the petition and the defendant appealed.

*Holding:* The Court of Criminal Appeals, Shaw, J., held that the defendant was entitled an opportunity to prove his claim that the trial court failed to conduct a probation revocation hearing without a valid waiver.

Defendant's claim in his petition for postconviction relief that the trial court failed to conduct a probation revocation hearing without a valid waiver from him was jurisdictional and, therefore, was not subject to the procedural bars contained in the rule governing postconviction relief.

Defendant was entitled to an opportunity to prove his claim that the trial court failed to conduct a probation revocation hearing without a valid waiver, since claim was jurisdictional, it was sufficiently pleaded, and was unrefuted by the State.

Poole v. State, \_\_ So.2d \_\_, 2007 WL 1519008 (Ala.Crim.App. 2007).

Following appellate affirmance of his convictions and dismissal of untimely appeal from denial of two postconviction petitions, the petitioner filed two more postconviction petitions seeking an out-of-time appeal from the denial of his two previous petitions. The circuit court summarily denied the petitions and the petitioner appealed.

*Holding:* The Court of Criminal Appeals, Shaw, J., held that the petitioner was entitled to an evidentiary hearing on his claim that his failure to appeal the denial of previous petitions was through no fault of his own, noting that the factual allegations were unrefuted by the State.

#### **10. Evidentiary Hearing – Involuntary Guilty Plea**

Johnson v. State, \_\_ So.2d \_\_, 2007 WL 2459388 (Ala.Crim.App. 2007).

Defendant petitioned for postconviction relief from conviction by guilty plea to murder and a 50 year sentence. The petitioner challenged the voluntariness of his guilty plea, the competence of his trial counsel, and request an out-of-time appeal. The circuit court summarily denied his petition and the defendant appealed.

*Holding:* The Court of Criminal Appeals, Wise, J., held that the claim of ineffective assistance of counsel resulting in entry of an invalid plea was facially sufficient and the claim of ineffective assistance based on counsel's failure to pursue an appeal was facially sufficient. The case was remanded to the trial court with instructions that the court enter a new order specifically addressing the petitioner's claims and if deemed necessary, to hold an evidentiary hearing addressing the petitioner's claims.

English v. State, \_\_ So.2d \_\_, 2007 WL 4463942 (Ala.Crim.App. 2007).

Defendant petitioned for postconviction relief attacking his guilty plea conviction for unlawful possession of a controlled substance and his resulting sentence of 15 years imprisonment. The circuit court summarily denied the petition and the defendant appealed.

*Holding:* The Court of Criminal Appeals, Welch, J., held that the defendant was entitled to an evidentiary hearing on his postconviction relief petition based on allegations that his counsel misinformed him that his sentence would be run coterminous to the earlier sentence he was already serving and that he pleaded guilty based counsel's advice.

Bulger v. State, \_\_ So.2d \_\_, 2007 WL 3226684 (Ala.Crim.App. 2007).

After the defendant pled guilty to felony murder he petitioned for postconviction relief claiming inter alia that his guilty plea was induced and involuntary because his counsel represented to him that he would receive a 20 year sentence, split to serve 5 years imprisonment, but he received a straight sentence of 30 years imprisonment. The circuit court summarily denied the petition and the defendant appealed.

*Holding:* The Court of Criminal Appeals, Welch, J., held that remand was required to allow the defendant an opportunity to present evidence to support the claim that his guilty plea was involuntary.

Postconviction petitioner was entitled to hearing on claim that his guilty plea was involuntary because his counsel allegedly misrepresented that he would receive a 20-year split sentence if he pleaded guilty, where and neither the guilty plea form nor plea colloquy transcript were sufficient to refute his claim. See Ford v. State, 831 So.2d 641 (Ala.Crim.App. 2001).

## **11. Ineffective Counsel Remanded for Proceedings Consistent with Opinion of Court of Criminal Appeals**

Nickens v. State, \_\_ So.2d \_\_, 2007 WL 624708 (Ala.Crim.App. 2007).

Following affirmance on direct appeal of his conviction for first degree theft of property, the defendant filed a petition for postconviction relief. The circuit court summarily denied the petition and the defendant appealed.

*Holding:* The Court of Criminal Appeals, Baschab, P.J., held that defense counsel's failure to request that the trial court instruct the jury on the definition of the term "deprive" and failing to object when the trial court did not instruct the jury on the definition of this term was ineffective assistance of counsel.

## **12. Failure to Consider Each Conviction**

Davis v. State, \_\_ So.2d \_\_, 2007 WL 4463923 (Ala.Crim.App. 2007).

Defendant was convicted of robbery, unlawful possession of a controlled substance, and theft of property, and was sentenced as a habitual felony offender to life imprisonment for the robbery conviction. Defendant filed a petition for postconviction relief alleging that: (1) his failure to file an appeal within the prescribed time was without fault on his part; and (2) he was denied effective assistance of appellate counsel. The circuit court dismissed the petition and the defendant appealed.

*Holding:* The Court of Criminal Appeals held that remand was required in order to conduct an evidentiary hearing on the petitioner's ineffective assistance allegations as they related to all of his convictions.

Heidelberg v. State, \_\_ So.2d \_\_, 2006 WL 1793727 (Ala.Crim.App. 2006).

Defendant filed a petition for postconviction relief claiming that his trial counsel was ineffective for a number of reasons, that his guilty pleas were not knowingly, voluntarily, or intelligently entered, that his convictions were obtained by the use of a coerced confession made without proper Miranda warnings, and that the trial court was without jurisdiction to render the judgments or to impose the sentences

because of alleged defects in the complaints and the arrest warrants. The circuit court denied the petition and the defendant appealed.

*Holdings:* The Court of Criminal Appeals, Wise, J., held that:

(1) remand of defendant's petition for postconviction relief to allow the circuit court to consider the petition as it related to each of defendant's convictions, rather than just his conviction for receiving stolen property, was required, and

(2) claim of ineffective assistance of counsel was sufficiently pleaded with specificity.

### **13. Denial of Due Process – Notice of Orders/State's Response**

Abdeldayem v. State, \_\_ So.2d \_\_, 2007 WL 1866119 (Ala.Crim.App. 2007).

Following affirmance of his conviction for robbery in the first degree and his resulting sentence of 20 years' imprisonment, defendant filed a petition for postconviction relief. The circuit court issued an order summarily denying the petition and the defendant appealed.

*Holding:* On application for rehearing, the Court of Criminal Appeals, Shaw, J., held that the defendant was denied due process when his counsel was not served with the circuit court's orders in the postconviction relief proceeding or the State's response to the petition.

### **14. Claim not Procedurally Barred**

Jackson v. State, \_\_ So.2d \_\_, 2007 WL 4463936 (Ala.Crim.App. 2007).

Following affirmance on direct appeal of defendant's conviction and sentence for capital murder, 452 So.2d 895 (Ala.Crim.App. 1984), and of denial of the defendant's prior petition for postconviction relief, the defendant filed a successive petition for postconviction relief. The circuit court summarily denied his petition and the defendant appealed.

*Holding:* The Court of Criminal Appeals, Welch, J., held that:

Claims that the petit jury was unsworn and that the jury venire was unsworn were not barred by Rule 32's prohibition against successive postconviction petitions.

Claims raised by capital murder defendant in his successive petition for postconviction relief, that the petit jury was unsworn and that the jury venire was also unsworn, were not barred by the prohibition against successive postconviction petitions, as these claims presented a jurisdictional question, i.e., that no oath was administered at all, and the defendant did not raise this jurisdictional transgression in his prior petition for postconviction relief. Rule 32.2(b) Ala.R.Crim.P.

Johnson v. State, \_\_ So.2d \_\_, 2007 WL 2459965 (Ala.Crim.App. 2007).

Defendant who pled guilty to trafficking in marijuana filed a petition for postconviction relief, which the circuit court summarily denied. The defendant appealed.

*Holding:* The Court of Criminal Appeals, Welch, J., held that claims of ineffective assistance of counsel and challenges to voluntariness of a guilty plea could be presented for the first time in a timely filed petition for postconviction relief.

The circuit court erred in finding that Johnson's claims were procedurally barred. "It is well settled that claims of ineffective assistance of counsel and challenges to the voluntariness of a guilty plea may be presented for the first time in a timely filed Rule 32 petition." Murray v. State, 922 So.2d 961, 965 (Ala.Crim.App. 2005). Here, neither the State's motion to dismiss nor the circuit court's order specifically addressed Johnson's allegations.

Woody v. State, \_\_ So.2d \_\_, 2007 WL 2459975 (Ala.Crim.App. 2007).

After defendant's capital murder conviction was affirmed, defendant filed a petition for postconviction relief. The circuit court summarily dismissed the petition and the defendant appealed.

*Holding:* The Court of Criminal Appeals, Welch, J., held that remand of the dismissal was required in order to determine whether the defendant was deprived of counsel at his arraignment. Remand of the trial court's dismissal of the defendant's petition for postconviction relief from a capital murder conviction was required in order for the court to determine whether the defendant was deprived of counsel at his arraignment, as would have rendered the court without jurisdiction to enter the conviction.

Fox v. State, \_\_ So.2d \_\_, 2007 WL 2460048 (Ala.Crim.App. 2007).

After defendant's capital murder conviction and sentence of life without parole were affirmed, the defendant filed a second postconviction petition. The circuit court summarily denied petition and the defendant appealed.

*Holdings:* The Court of Criminal Appeals, Shaw, J., held that:

- (1) claim of ineffective assistance of counsel was numerically barred, Rules 32.1(e), 32.3(b) Ala.R.Crim.P., but
- (2) the defendant was entitled to hearing on his claim that he was denied counsel at his arraignment.

Postconviction petitioner's claim that he was denied counsel at arraignment was jurisdictional and thus was not subject to procedural bars in subsections of the postconviction rule governing limitations period and claims that were raised or addressed, or could have been raised at trial, in a collateral proceeding, or on direct appeal. Rule 32.2(a, c) Ala.R.Crim.P.

Postconviction petitioner's claim that he was denied counsel at arraignment was not subject to procedural bar as a successive petition, where the petitioner did not raise claim in a prior postconviction petition. Rule 32.2(b) Ala.R.Crim.P.

Postconviction petitioner was entitled to an evidentiary hearing on his claim that he was denied counsel at his arraignment, where claim was not procedurally barred, was sufficiently specific, and was meritorious on its face. Neither motions filed by petitioner's trial counsel on the date of arraignment nor trial counsel's references at a subsequent hearing to having been present established counsel's actual presence at arraignment. Nothing indicated that the motions were filed in person and counsel stated at the hearing that he had been present at "arraignment" on the date some six months after the actual date of arraignment, on which date the trial calendar indicated that a pretrial hearing had been held. Rule 32.7(d) Ala.R.Crim.P.

Rash v. State, 968 So.2d 552 (Ala.Crim.App. 2006).

Petitioner sought postconviction relief from his conviction and sentence for breaking and entering a vehicle, alleging ineffective assistance of trial counsel. The circuit court summarily dismissed the petition without requiring a response from State and the petitioner appealed.

*Holding:* The Court of Criminal Appeals, Wise, J., held that the petitioner could not have reasonably presented his claims of ineffective assistance of trial counsel in a motion for new trial and, thus, the petitioner was not procedurally barred from raising the claim in a petition for postconviction relief. See Ex parte Ingram, 675 So.2d 863, 866 (Ala.1996) (the proper method for presenting an ineffective assistance of trial counsel claim that cannot reasonably be presented in a motion for a new trial is by filing a Rule 32 petition). The Court of Criminal Appeals held that the circuit court incorrectly determined that the petitioner's claim was precluded from review.

## **15. Abuse of Discretion by Trial Court**

Broadnax v. State, \_\_\_ So.2d \_\_\_, 2007 WL 1865450 (Ala.Crim.App. 2007).

Following affirmance of his convictions of four counts of capital murder and sentence of death, the defendant filed a petition for postconviction relief, which he subsequently amended. The circuit court summarily dismissed several of defendant's claims, and following evidentiary hearing on remaining claims, denied the petition and defendant's subsequent request to file a second amendment to his Rule 32 petition. The defendant appealed.

*Holdings:* The Court of Criminal Appeals, Shaw, J., held that:

- (1) consideration of second amended postconviction petition would not have caused undue prejudice to the State; and
- (2) consideration of second amended postconviction petition would not have caused undue delay.

Consideration of second amended postconviction petition would not have caused undue prejudice to State, thus, circuit court abused its discretion in striking defendant's second amended petition. Allowing the amendment after a partial judgment had been entered summarily dismissing several of defendant's claims would not have had the effect of vacating the circuit court's dismissal of those claims; State would be required to respond only to new and/or expanded claims. Although motion to amend raised a new claim, motion was not filed on "eve" of scheduled evidentiary hearing, but rather, 45 days before the hearing. Rule 32.7(b) Ala.R.Crim.P.

## 16. Out-of-Time Petition

Mosley v. State, \_\_ So.2d \_\_, 2007 WL 2459379 (Ala.Crim.App. 2007).

After his conviction and sentence for child abuse was upheld on direct appeal, 698 So.2d 799 (Ala.Crim.App. 1996), the defendant petitioned for postconviction relief. The circuit court denied the petition and the defendant appealed.

*Holding:* The Court of Criminal Appeals, Wise, J., held that the defendant's conviction was not subject to enhancement under the Habitual Felony Offender Act (HFOA).

Defendant's claim that the trial court was without jurisdiction to sentence him as a habitual felony offender after he was convicted of child abuse (a misdemeanor) was a jurisdictional claim not subject to time bar of the postconviction relief rule.

Casteel v. State, 976 So.2d 505 (Ala.Crim.App. 2007).

Following his negotiated guilty plea conviction of first degree sexual abuse and sentence as a habitual felony offender to life imprisonment, the petitioner sought leave to file an out-of-time appeal. The circuit court summarily denied the petition and petitioner appealed.

*Holding:* The Court of Criminal Appeals, Baschab, P.J., held that petitioner was entitled to file out-of-time appeal.

Defendant convicted on a negotiated plea of guilty of first-degree sexual abuse was entitled to file an out-of-time appeal from his conviction, where he was not represented by counsel during the portion of time between sentencing and his first appeal, during which time his motion to withdraw his plea was pending; he did not waive his right to counsel during that time, and in fact requested in his motion to withdraw the and requested court appointed counsel to represent him with respect thereto.

Jackson v. State, \_\_ So.2d \_\_-, 2007 WL 3226788 (Ala.Crim.App. 2007).

Defendant filed a petition for postconviction relief. The circuit court summarily denied the petition and the defendant appealed.

*Holding:* The Court of Criminal Appeals, Welch, J., held that the defendant was entitled to an evidentiary hearing on the issue of whether his failure to file a timely appeal was through no fault of his own.

Defendant was entitled to an evidentiary hearing on the issue raised in his postconviction petition of whether failure to timely file a notice of appeal was through no fault of his own, where the defendant contended such failure was caused by his trial counsel.

Holder v. State, \_\_ So.2d \_\_, 2007 WL 4463938 (Ala.Crim.App. 2007).

Following affirmance on direct appeal of his conviction for second degree assault and his 30 year sentence as a habitual felony offender, the defendant filed a petition for postconviction relief, which was denied. Defendant filed a second petition for postconviction relief, asserting that he was entitled to file an out-of-time appeal from denial of his prior postconviction petition. The circuit court denied the petition and the defendant appealed.

*Holding:* The Court of Criminal Appeals, McMillan, J., held that the defendant was entitled to an evidentiary hearing on his petition, because he was never notified by the trial court of the denial of that petition. He pleaded facts that, if true, might entitle him to an out-of-time appeal from the denial of his first petition, and the State did not refute the claim in its response, such that the defendant's allegations had to be accepted as true. Rule 32.1 Ala.R.Crim.P.

### **17. Postconviction petitioner has no burden of proof at the pleading stage of the proceedings.**

Hanna v. State, \_\_ So.2d \_\_, 2007 WL 4463882 (Ala.Crim.App. 2007).

Defendant convicted of attempted murder and unlawful possession of a firearm filed a second petition for postconviction relief. The circuit court summarily denied the petition and the defendant appealed.

*Holding:* The Court of Criminal Appeals, Shaw, J., held that the defendant was entitled to an evidentiary hearing on his second petition, since he pled facts sufficient to establish that he did not timely appeal denial of first petition because he did not receive a copy of the court's order denying it. Rules 32.3, 32.6(b), 32.7(d) Ala.R.Crim.P.

"[A]t the pleading stage of Rule 32 proceedings, a Rule 32 petitioner does not have the burden of proving his claims by a preponderance of the evidence. Rather, at the pleading stage, a petitioner must provide only 'a clear and specific statement of the grounds upon which relief is sought.' Rule 32.6(b), Ala.R.Crim.P. Once a petitioner has met his burden of pleading so as to avoid summary disposition pursuant to Rule 32.7(d) Ala.R.Crim.P., he is then entitled to an opportunity to present evidence in order to satisfy his burden of proof."

### **C. Cases Not Remanded by the Alabama Supreme Court**

Ex parte State In re Joseph Madden, \_\_ So.2d \_\_, 2007 WL 1519866 (Ala. 2007).

Defendant convicted on guilty plea for receiving stolen property filed a petition for post-conviction relief. The circuit court denied relief and the defendant appealed. The Court of Criminal Appeals reversed and remanded.

*Holding:* On the State's petition for certiorari review, reversing the Court of Criminal Appeals, the Supreme Court, Murdock, J., held that the alleged omission from indictment of an essential element was not a jurisdictional defect that could be raised for the first time on postconviction review. The omission in the indictment of the essential element of receiving stolen property, namely that the defendant "intentionally" received stolen property, was not a jurisdictional defect that could be raised for first time on post-conviction review.

Ex parte Ward, \_\_ So.2d \_\_, 2007 WL 1576054 (Ala. 2007).

After conviction and death sentence for capital murder were affirmed on direct appeal, 814 So.2d 899 (Ala.Crim.App. 2000), the defendant filed a petition for postconviction relief. While the petition was pending, defendant filed a motion to amend. The circuit court dismissed the petition on limitations grounds, but then subsequently granted the defendant's motion to amend after the notice of appeal from dismissal was filed. The Court of Criminal Appeals affirmed summary dismissal of the petition and ruled that the circuit court lacked authority to grant the motion to amend after entry of the judgment of dismissal and notice of appeal had been filed.

*Holdings:* On defendant's petition for review, the Supreme Court, affirming in part and reversing in part the Court of Criminal Appeals, See, J., held that:

- (1) motion to amend postconviction petition was not motion for reconsideration, for purposes of trial court's jurisdiction to grant motion to amend;
- (2) **as matter of first impression, one-year limitations period governing postconviction petition was not jurisdictional bar;** and
- (3) **as matter of first impression, doctrine of equitable tolling applied to limitations defense to postconviction petition.**

Motion to amend postconviction petition filed prior to judgment dismissing original petition was not considered as motion for reconsideration, and, thus, trial court lacked authority to grant motion to amend after dismissing the petition on limitations grounds and after notice of appeal had been filed. The defendant merely requested an opportunity to expand upon issues set forth in the original petition, not to have prior information reconsidered. Rule 32.7(b) Ala.R.Crim.P., Rule 4(b)(1) A.R.A.P.

Doctrine of equitable tolling applied to limitations defense to petition for postconviction relief, notwithstanding mandatory language that trial court "shall not" entertain untimely petition, if defendant could establish extraordinary circumstances beyond his control that were unavoidable even with exercise of diligence. Rule 32.2(c) Ala.R.Crim.P.

When a postconviction petition is time-barred on its face, the petitioner bears the burden of demonstrating in his petition that there are such extraordinary circumstances justifying the application of the doctrine of equitable tolling. Rule 32.2(c) Ala.R.Crim.P.

A postconviction petition that does not assert equitable tolling, or that asserts it but fails to state any principle of law or any fact that would entitle the petitioner to the equitable tolling of the applicable limitations provision, may be summarily dismissed without a hearing. Rule 32.7(d) Ala.R.Crim.P.

#### **D. Cases Not Remanded by Alabama Court of Criminal Appeals**

Minshew v. State, 975 So.2d 395 (Ala.Crim.App. 2007).

Defendant convicted of multiple counts of theft pursuant to guilty pleas filed his fourth petition for postconviction relief. The circuit court summarily denied relief and the defendant appealed.

*Holdings:* The Court of Criminal Appeals, Shaw, J., held that:

- (1) appellate review was limited to claims related to single case number that was designated in notice of appeal;
- (2) claims related to defects in indictment were procedurally barred;
- (3) order that five-year sentence of probation run consecutively to five-year probation sentences on other counts resulted in sentence that exceeded statutory maximum of five years probation for felony; and
- (4) sentence of life without possibility of parole for attempted murder rendered moot defendant's challenge to legality of consecutive sentences of probation for theft.

Challenge to the validity of an indictment for theft did not affect the trial court's subject matter jurisdiction over prosecution and, thus, petitioner's claim was procedurally barred from postconviction review since it could have been raised on appeal. Claim was raised in successive petition and petition was filed after limitations period governing petition had expired. Rule 32.2(a)(5), (b, c) Ala.R.Crim.P.

Where the judgment of the circuit court denying a petition for postconviction relief is correct for any reason, it will be affirmed by the Court of Criminal Appeals.

A.G. v. State, \_\_So.2d \_\_-, 2007 WL 3226632 (Ala.Crim.App. 2007).

After juvenile was convicted of first degree sodomy, he petitioned for postconviction relief. The circuit court summarily denied the petition and the juvenile appealed.

*Holding:* The Court of Criminal Appeals, Shaw, J., held that summary denial of the petitioner's postconviction allegations of ineffective assistance of counsel was proper, since claims were single, conclusory sentences unsupported by any factual basis.

To sufficiently plead an allegation of ineffective assistance of counsel, a postconviction petitioner not only must identify the specific acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment, but also must plead specific facts indicating that he or she was prejudiced by the acts or omissions, i.e., facts indicating that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A bare allegation that prejudice occurred without specific facts indicating how the petitioner was prejudiced is not sufficient. Rule 32.6(b) Ala.R.Crim.P.

Patton v. State, 964 So.2d 1247 (Ala.Crim.App. 2007).

Defendant who plead guilty to receiving stolen property and possession of controlled substance, filed petitions for postconviction relief alleging that the trial court lacked jurisdiction (not subject to the limitations period of successive petitions prohibition or preclusion grounds) because the record did not

contain properly signed or notarized informations in either case. The district court denied petitions and the defendant appealed.

*Holding:* The Court of Criminal Appeals, McMillan, J., held that the defendant did not raise jurisdictional claim necessary to survive the one year limitations bar to postconviction relief petition, noting that subject matter jurisdiction and the sufficiency of an information or indictment are two different concepts.

## Appendix

### RULE 32 Annotated with Amendments

#### **Rule 32.1. Scope of remedy.**

Subject to the limitations of Rule 32.2, any defendant who has been convicted of a criminal offense may institute a proceeding in the court of original conviction to secure appropriate relief on the ground that:

(a) The Constitution of the United States or of the State of Alabama requires a new trial, a new sentence proceeding, or other relief.

(b) The court was without jurisdiction to render judgment or to impose sentence.

(c) The sentence imposed exceeds the maximum authorized by law or is otherwise not authorized by law.

(d) The petitioner is being held in custody after the petitioner's sentence has expired.

(e) Newly discovered material facts exist which require that the conviction or sentence be vacated by the court, because:

(1) The facts relied upon were not known by the petitioner or the petitioner's counsel at the time of trial or sentencing or in time to file a post-trial motion pursuant to Rule 24, or in time to be included in any previous collateral proceeding and could not have been discovered by any of those times through the exercise of reasonable diligence;

(2) The facts are not merely cumulative to other facts that were known;

(3) The facts do not merely amount to impeachment evidence;

(4) If the facts had been known at the time of trial or of sentencing, the result probably would have been different; and

(5) The facts establish that the petitioner is innocent of the crime for which the petitioner was convicted or should not have received the sentence that the petitioner received.

(f) The petitioner failed to appeal within the prescribed time from the conviction or sentence itself or from the dismissal or denial of a petition previously filed pursuant to this rule and that failure was without fault on the petitioner's part. *(amended January 13, effective June 1, 2005)*

A petition that challenges multiple judgments entered in more than a single trial or guilty-plea proceeding shall be dismissed without prejudice. *(amended March 22, 2002, effective August 1, 2002)*

## COMMITTEE COMMENTS

Postconviction petitions may be filed in the court of original conviction by any defendant who has been convicted of a criminal offense. Rules 32.6(a), 32.7(a), and 32.10(a) recognize that these petitions may be filed in municipal courts; such postconviction relief, however, will rarely be sought since a defendant is entitled to appeal a municipal-court conviction to the circuit court for a trial de novo.

### **Rule 32.2. Preclusion of remedy.**

(a) PRECLUSION OF GROUNDS. A petitioner will not be given relief under this rule based upon any ground:

(1) Which may still be raised on direct appeal under the Alabama Rules of Appellate Procedure or by post trial motion under Rule 24; or

(2) Which was raised or addressed at trial; or

(3) Which could have been but was not raised at trial, unless the ground for relief arises under Rule 32.1(b); or

(4) Which was raised or addressed on appeal or in any previous collateral proceeding not dismissed pursuant to the last sentence of Rule 32. 1 as a petition that challenges multiple judgments, whether or not the previous collateral proceeding was adjudicated on the merits of the grounds raised; (inserted amendment March 22, 2002, effective August 1, 2002)

(5) Which could have been but was not raised on appeal, unless the ground for relief arises under Rule 32.1(b). *(deleted amendment Mar 22, 2002, re-inserted amendment July 1, 2002 effective immediately)*

(b) SUCCESSIVE PETITIONS. ~~The court shall not grant relief on a second or successive petition on the same or similar grounds on behalf of the same petitioner.~~ If a petitioner has previously filed a petition that challenges any judgment, all subsequent petitions by that petitioner challenging any judgment arising out of that same trial or guilty-plea proceeding shall be treated as successive petitions under this rule. The court shall not grant relief on a successive petition on the same or similar grounds on behalf of the same petitioner. A second or successive petition on different grounds shall be denied unless (1) the petitioner is entitled to relief on the ground that the court was without jurisdiction to render a judgment or to impose sentence or (2) the petitioner shows both that good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will result in a miscarriage of justice. *(Additions and deletion amendment March 22, 2002, effective August 1, 2002)*

(c) LIMITATIONS PERIOD. Subject to the further provisions hereinafter set out in this section, the court shall not entertain any petition for relief from a conviction or sentence on the grounds specified in Rule 32.1(a) and (f), unless the petition is filed: (1) In the case of a conviction appealed to the Court of Criminal Appeals, within one (1) ~~two~~ (2) years after the issuance of the certificate of judgment by the Court of Criminal Appeals under Rule 41, Ala.R.App.P.; or (2) in the case of a conviction judgment not appealed to the Court of Criminal Appeals, within one (1) ~~two~~ (2) years after the time for filing an appeal

lapses; provided, however that the time for filing a petition under Rule 32.1(f) to seek an out-of-time appeal from the dismissal or denial of a petition previously filed under any provision of Rule 32.1 shall be six (6) months from the date the petitioner discovers the dismissal or denial, irrespective of the one-year deadlines specified in the preceding subparts (1) and (2) of this sentence; and provided further that the immediately proceeding proviso shall not extend either of those one-year deadlines as they may apply to the previously filed petition. (amended January 13, effective June 1, 2005) The court shall not entertain a petition based on the grounds specified in Rule 32.1(e) unless the petition is filed within the applicable one-year ~~two-year~~ period specified in the first sentence of this section, or within six (6) months after the discovery of the newly discovered material facts, whichever is later; provided, however, that the one-year ~~two-year~~ period during which a petition may be brought shall in no case be deemed to have begun to run before the effective date of the precursor of this rule, i.e., April 1, 1987. (Additions and deletions amendment March 22, 2002, effective August 1, 2002)

(d) CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL. Any claim that counsel was ineffective must be raised as soon as practicable, either at trial, on direct appeal, or in the first Rule 32 petition, whichever is applicable. In no event can relief be granted on a claim of ineffective assistance of trial or appellate counsel raised in a successive petition. (Addition amendment March 22, 2002, effective August 1, 2002)

Ordered July 1, 2003, in the Supreme Court of Alabama:

"The order of this court issued on March 22, 2002, amending Rule 32.2, Ala.R.Crim.P., provided that the amendment of Rule 32.2 was effective August 1, 2002. IT IS ORDERED that that effective-date language shall be interpreted to mean that defendants in cases in which the Court of Criminal Appeals issued its certificate of judgment or the time for filing an appeal has lapsed during the period between August 1, 2001, and August 1, 2002, would have one year from August 1, 2002, within which to file a postconviction petition pursuant to Rule 32, Ala.R.Crim.P."

COURT COMMENT OF JANUARY 27, 2004, TO AMENDMENT TO RULE 32.2 EFFECTIVE AUGUST 1, 2002

This Court on March 22, 2002, amended Rule 32.2 effective August 1, 2002. That amendment, among other things, changed the period within which a defendant could file a Rule 32 petition from two years to one year. On July 1, 2002, this Court issued an order explaining the effective-date provision as it related to that limitations period. It appears that this Court's intent as to the effective date requires further clarification.

The triggering date for calculating the timeliness of a postconviction petition pursuant to Rule 32, Ala.R.Crim.P., is either the date on which the Court of Criminal Appeals issues its certificate of judgment or, if no appeal is taken, the date upon which the time for filing an appeal lapses. The order of this Court issued on March 22, 2002, amending Rule 32.2, Ala.R.Crim.P., provided that the amendment of Rule 32.2 was effective August 1, 2002. That effective-date language shall be interpreted to mean

- 1) that defendants in cases in which the triggering date occurs on or before July 31, 2001, shall have two years from the triggering date within which to file a postconviction petition pursuant to Rule 32 Ala.R.Crim.P.;

- 2) that defendants in cases in which the triggering date occurs during the period beginning August 1, 2001, and ending July 31, 2002, shall have one year from August 1, 2002, within which to file a postconviction petition pursuant to Rule 32 Ala.R.Crim.P.; and

3) that defendants in cases in which the triggering date occurs on or after August 1, 2002, shall have one year from the triggering date within which to file a postconviction petition pursuant to Rule 32 Ala.R.Crim.P.

#### COURT COMMENT TO AMENDMENT TO RULE 32.2(C) EFFECTIVE JUNE 1, 2005

The amendment to Rule 32.2(c) sets a deadline of six months from discovery for filing a Rule 32.1(f) petition seeking an out-of-time appeal from the dismissal or denial of a previously filed Rule 32 petition; it expressly preserves the existing one-year deadlines for the filing of the previously filed petition.

#### **Rule 32.3. Burden of proof.**

The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief. The state shall have the burden of pleading any ground of preclusion, but once a ground of preclusion has been pleaded, the petitioner shall have the burden of disproving its existence by a preponderance of the evidence.

#### **Rule 32.4. Nature of proceeding and relation to other remedies.**

A proceeding under this rule displaces all post-trial remedies except post-trial motions under Rule 24 and appeal. Any other post-conviction petition seeking relief from a conviction or sentence shall be treated as a proceeding under this rule. Proceedings under this rule shall be governed by the Rules of Criminal Procedure, except that the trial court in its sole discretion may allow the taking of depositions for discovery or for use at trial.

#### **Rule 32.5. Venue.**

Petitions filed under this rule shall be filed in and decided by the court in which the petitioner was convicted. If a petition is filed in another court, it shall be transferred to the court where the conviction occurred.

#### **Rule 32.6. Commencement of proceedings.**

(a) Form, Filing, and Service of Petition. A proceeding under this rule is commenced by filing a petition, verified by the petitioner or the petitioner's attorney, with the clerk of the court. A petition may be filed at any time after entry of judgment and sentence (subject to the provisions of Rule 32.2(c)). The petition should be filed by using or following the form accompanying this rule. If that form is not used or followed, the court shall return the petition to the petitioner to be amended to comply with the form. The petition shall be accompanied by two copies thereof. It shall also be accompanied by the filing fee prescribed by law or rule in civil cases in the circuit court unless the petitioner applies for and is given leave to prosecute the petition *in forma pauperis*, ~~in which event the fee shall be waived.~~ If the petitioner desires to prosecute the petition *in forma pauperis*, he or she shall file the "In Forma Pauperis Declaration" at the end of the form. In all such cases, the petition shall also be accompanied by a certificate of the warden or other appropriate officer of the institution in which the petitioner is confined ~~as to the amount of money or securities on deposit to the petitioner's credit in any account in the institution,~~ stating the amount of money or securities on deposit to the petitioner's credit in any account in the institution for the previous twelve (12) months, which certificate may be considered by the court in

acting upon his the petitioner's application for leave to proceed *in forma pauperis*. If the application to proceed *in forma pauperis* is granted, the filing fee shall be waived. If, upon final disposition of the petition, the court finds that all of the claims for relief are precluded for any of the reasons stated in Rule 32.2, it may assess the filing fee, or any portion thereof, and order the correctional institution having custody of the petitioner to withhold 50% of all moneys the institution then has on deposit for the petitioner, or receives in the future for the petitioner, until the filing fee that has been assessed by the court has been collected and paid in full. The order shall also direct the institution to forward to the clerk of the court in which the petition was filed, at least once every three months until that portion of the filing fee assessed by the court is paid in full, any such moneys collected from the petitioner. (amended March 22, 2002, effective August 1, 2002)

Upon receipt of the petition and the filing fee, or an order granting leave to the petitioner to proceed *in forma pauperis*, the clerk shall file the petition and promptly send a copy to the district attorney (or, in the case of a petition filed in the municipal court, to the municipal prosecutor).

(b) SPECIFICITY. 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.

(c) NOTIFICATION OF APPELLATE COURT. If an appeal of the petitioner's conviction is pending, the clerk shall also promptly send a copy of the petition to the appropriate appellate court, noting in the record the date and manner by which it is sent.

(d) ASSIGNMENT OR JUDGE. The proceeding shall be assigned to the sentencing judge where possible, but for good cause the proceeding may be assigned or transferred to another judge.

#### **Rule 32.7. Additional pleadings; summary disposition; amendments.**

(a) PROSECUTOR'S RESPONSE. Within thirty (30) days after the service of the petition, or within the time otherwise specified by the court, the district attorney (or, in the case of a petition filed in the municipal court, the municipal prosecutor) shall file with the court and send to the petitioner or counsel for the petitioner, if any, 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.

(b) AMENDMENT OF PLEADINGS. Amendments to pleadings may be permitted at any stage of the proceedings prior to the entry of judgment.

(c) APPOINTMENT OF COUNSEL. If the court does not summarily dismiss the petition, and if it appears that the petitioner is indigent or otherwise unable to obtain the assistance of counsel and desires the assistance of counsel, and it further appears that counsel is necessary to assert or protect the rights of the petitioner, the court shall appoint counsel.

(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.

**Rule 32.8. Prehearing conference.**

In order to expedite the proceeding, the court may hold a prehearing conference, at which the petitioner need not be present if he or she is represented by counsel who is present. The conference may be by telephone. Whether held by telephone or in person, the conference shall be stenographically recorded or tape-recorded. At the prehearing conference, the court may order a showing by the petitioner of the materiality of the testimony expected to be presented by any witness subpoenaed by the petitioner, supported by affidavit where appropriate, and, upon petitioner's failure to show the requisite materiality, may order that the subpoena for such witness not be issued or be quashed.

**Rule 32.9. Evidentiary hearing.**

(a) HEARING. Unless the court dismisses the petition, the petitioner shall be entitled to an evidentiary hearing to determine disputed issues of material fact, with the right to subpoena material witnesses on his behalf. The court in its discretion may take evidence by affidavits, written interrogatories, or depositions, in lieu of an evidentiary hearing, in which event the presence of the petitioner is not required, or the court may take some evidence by such means and other evidence in an evidentiary hearing. When facilities are available, the court may in its discretion order that any evidentiary hearing be held at the place of petitioner's confinement, giving at least seven (7) days' notice to the officer in charge of the confinement facility. A verbatim record of the hearing shall be made.

(b) TESTIMONY OF PETITIONER. The petitioner may be called to testify at the hearing by the court or by either party.

(c) DECISION. If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the conviction, sentence, or detention; to any further proceedings, including a new trial; and to any other matters that may be necessary and proper.

(d) FINDINGS OF FACT. The court shall make specific findings of fact relating to each material issue of fact presented.

**Rule 32.10. Appeal.**

(a) WHO MAY APPEAL; COURT TO WHICH APPEAL IS TAKEN. Any party may appeal the decision of a circuit court according to the procedures of the Alabama Rules of Appellate Procedure to the Court of Criminal Appeals upon taking a timely appeal as provided in Rule 4, Alabama Rules of Appellate Procedure. Any party may appeal a decision of a district or municipal court according to existing procedure.

(b) RELEASE OF PETITIONER. The petitioner shall not be released on bond pending appeal by either party. Release of the petitioner on bond pending a retrial after an order requiring retrial has become final, or after the time for filing an appeal from such an order has lapsed, shall be governed by the laws and rules governing release on bond pending an initial trial.