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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-17-0505

State of Alabama

v.

Steven Petric

Appeal from Jefferson Circuit Court
(CC-07-3052.60)

KELLUM, Judge.

The State of Alabama appeals the circuit court's order granting Steven Petric's petition for postconviction relief and setting aside Petric's capital-murder conviction and sentence of death.

In 2009, Petric was convicted of murdering Toni Lim during the course of a rape in the first degree, an offense defined as capital by § 13A-5-40(a)(3), Ala. Code 1975. The jury, by a vote of 10 to 2, recommended that Petric be sentenced to death. The circuit court sentenced Petric to death. On direct appeal, this Court affirmed Petric's capital-murder conviction and death sentence. See Petric v. State, 157 So. 3d 176 (Ala. Crim. App. 2013). The Alabama Supreme Court and the United States Supreme Court denied certiorari review. See Petric v. Alabama, 574 U.S. 1030 (2014), and Ex parte Alabama, (Ms. 1121404, May 23, 2014). This Court issued the certificate of judgment on May 23, 2014. See Rule 41(a)(1), Ala. R. App. P.

In May 2015, Petric filed a petition for postconviction relief pursuant to Rule 32, Ala. R. Crim. P., attacking his capital-murder conviction and death sentence.¹ Petric filed an amended petition in May 2016. An evidentiary hearing was held. In February 2018, the circuit court issued an 118-page

¹Petric had one year from the date this Court issued the certificate of judgment in his direct appeal to file a timely postconviction petition. See Rule 32.2(c), Ala. R. Crim. P. Petric's petition was timely filed.

order granting Petric's petition after finding that Petric had been deprived of the effective assistance of counsel. The court ordered that Petric be given a new trial.² The State then filed a timely notice of appeal to this Court.

On direct appeal, this Court stated the following concerning the facts surrounding the murder of Toni Lim:

"On March 9, 1990, the victim, Toni Lim, was found dead on her bed in the apartment she shared with Martha Milinda Higginbotham. The apartment was located in Homewood, a suburb of Birmingham. Higginbotham discovered Lim's body after returning home from work at around 8:00 p.m. Lim was alone in the apartment when Higginbotham left for work earlier that day. There were no signs of forced entry into the apartment. Higginbotham testified that Lim had previously told her that a man named 'Steven' was going to help Lim fix the brakes on her car. Higginbotham also testified that a man named Steven sometimes gave Lim a ride home from school. However, Higginbotham had never met Steven. Barbara Short testified that in March 1990, she lived with Petric, whom she had married in January 1990 after a brief courtship, in the Birmingham area.

"Lim's mother testified that she had recovered Lim's watches and gold chain from Lim's apartment after her death. However, Lim's mother also testified that she knew that Lim possessed wedding rings and that they were missing from the apartment

²The circuit court also directed that "this matter and all relevant issues related hereto are hereby submitted to the Alabama State Bar for investigation pursuant to the Alabama Rules of Professional Conduct and all other applicable sources." (C. 116.)

and were never recovered. A former property evidence technician for the Homewood Police Department who collected evidence from Lim's apartment after her death testified that he specifically looked for Lim's rings after her death but that he never found them.

"When Lim was found lying on her bed in her apartment, her body was covered with a blanket, and her head was covered with a pillow. Examination of Lim's body revealed that she had suffered a stab wound to the back of her neck and a large cut across her throat. Lim was dressed in only a blouse and a brassiere. The brassiere was unlatched in the front, and only one button was buttoned on the blouse. The other buttons on the blouse were intact but unbuttoned. A T-shirt tied loosely around Lim's neck was soaked with blood. Lim's hands were tied behind her back with pantyhose. An exercise rope was tied tightly around Lim's right wrist, and the rope extended down to her ankles, which were tied together with the rope. The rope was tied in such a way that it would tighten if Lim's legs were straightened. The rope caused abrasions and bruising on certain areas of Lim's skin. All of Lim's fingernails were intact. The autopsy of Lim's body did not reveal any appreciable evidence of trauma to her genitalia. However, the presence of semen was discovered in Lim's vagina and anus. Also, some round bruises were discovered on Lim's right leg. Dr. Gary Simmons, the forensic pathologist who performed the autopsy on Lim, testified that the round bruises could have been caused by fingers grabbing Lim's leg, but he could not be certain what caused these bruises. Dr. Simmons testified that Lim 'died from the sharp force entry, mainly the stab wound to the back of her neck and the incised wound to her throat.' (R. 1123.)

"In 1990 and again in 1998, ABO blood testing and rudimentary DNA testing were performed on items

recovered in and around Lim's body. The results of that testing excluded several individuals as suspects, but the results did not match the DNA of any person of interest. In 2004, additional DNA testing using more modern techniques revealed that the DNA profile from the semen found in Lim's body matched the DNA profile found on some of the cigarette butts that were in Lim's bedroom on the day she was killed.

"Debra Kay Dodd, who performs DNA analyses for the Alabama Department of Forensic Sciences, testified that, in June 2006, she received information from the administrator of the national Combined DNA Index System ('CODIS') that the DNA profile of the semen found in Lim's body matched the DNA profile of Petric, who at the time was in prison in Illinois. After receiving oral reference samples from Petric in August 2006, Dodd tested the samples and generated a DNA profile for Petric. Dodd found that Petric's DNA profile matched the DNA profile of the semen found in Lim's body and the DNA profile found on some of the cigarette butts that were found in Lim's bedroom.

"After Dodd had finished testifying, at the request of defense counsel, the defense and the prosecution agreed to admit into evidence a laboratory report prepared by a DNA expert for the defense. (R. 1279-82, 1296-97.) The report was marked as both a State's exhibit and a defendant's exhibit. (C. 532.) The results of that report did not contradict the results of Dodd's testing. Both Dodd and the expert for the defense concluded that the DNA profile of the semen donor on the vaginal swab of Lim's body matched Petric's DNA profile. (R. 1243-44, 1250-51; C. 537-38.) The defense expert also concluded that Petric's DNA was present in stains on a blanket recovered from the crime scene. (C. 537.) Additionally, the laboratory report prepared by the expert for the defense stated that '[t]he DNA profile obtained from the swab taken from

the right hand fingernail clippings is a mixture' and that 'Steven Petric is included in this mixture.' (C. 538.)

"At trial, the State presented evidence of other bad acts of Petric. Gerald Gear, who was a detective for the Joliet, Illinois, police department in 1994, gave testimony concerning Deborah O'Rourke, a white female who was found murdered in her apartment in Illinois at around 10:00 a.m. on July 6, 1994. The last time that anyone had communicated with O'Rourke was on July 3, 1994. Gear testified that O'Rourke was found lying on her stomach across the bed in her bedroom. The bedroom had been ransacked. O'Rourke was covered with a blanket and there was a pillow on top of her head. Also, a washcloth was lying on O'Rourke's shoulder. O'Rourke's blood had coagulated on another pillow near her head. A T-shirt was tied around O'Rourke's head. O'Rourke's arms were behind her back, and she had markings on her wrists and ankles that indicated that she had been bound with ligatures. There were no signs of forced entry into O'Rourke's apartment. Gear testified that his investigation revealed that O'Rourke was dating two men at the time of her death. One of those men was Petric, who was the maintenance man at O'Rourke's apartment complex. According to Gear, telephone records revealed that a call was made from O'Rourke's residence to Petric's residence at around 5:10 p.m. on July 4, 1994. Another telephone call was made from O'Rourke's residence to the residence of Petric's ex-girlfriend at 12:06 a.m. on July 5, 1994. Both the State and the defense stipulated that Petric used or attempted to use O'Rourke's ATM card on several occasions on July 5, 1994. A wedding ring and a set of keys were missing from O'Rourke's apartment. The keys were never recovered, but the ring was eventually found in Petric's possession.

"Dr. Joseph Sapala performed the autopsy on O'Rourke's body. At the trial in the present case,

Dr. Sapala testified that O'Rourke was found nude on her bed and that her head was covered with blood. Dr. Sapala further testified that O'Rourke had a gag in her mouth and a shirt tied tightly around her neck and head. Dr. Sapala also noted that O'Rourke had bruising around her wrists that could have been caused by being bound with ligatures or handcuffs. According to Dr. Sapala, O'Rourke died from strangulation and stab wounds to her neck.

"DNA testing was performed on certain items that were recovered from O'Rourke's apartment. Those items included the washcloth that was found lying on O'Rourke's shoulder, O'Rourke's bed sheet, and a pillowcase. A stain on the washcloth contained a mixture of blood and semen, and the DNA profile identified on that stain matched Petric's DNA profile. The pillowcase contained a semen stain, and the DNA profile of that stain also matched Petric's DNA profile. The bedsheet contained two semen stains. The DNA profile identified on those two stains matched the DNA profile of the other man O'Rourke was dating at the time of her death.

"In light of the evidence concerning O'Rourke's death and the use of her ATM card, Petric was tried for murder and robbery in Illinois. Petric was convicted of the robbery, but he was acquitted of murder. Petric was not charged with rape in the situation involving O'Rourke.

"Doug Finch, a detective with the Homewood Police Department who reopened the present case in 2004, requested the additional DNA testing on the items that were recovered in and around Lim's body, and he asked that the results of that testing be entered into the CODIS. When the CODIS revealed that the DNA profile of the semen found in Lim's body matched the DNA profile of Petric, Detective Finch traveled to Illinois to collect DNA samples from Petric and to further investigate Petric. During that investigation, Detective Finch viewed

photographs of the O'Rourke crime scene. At trial, Detective Finch was asked to describe the similarities between the O'Rourke crime scene and the Lim crime scene. Detective Finch testified that the personal items in the victims' bedrooms had been ransacked; that the victims' bodies were nude; that ligatures or some type of restraints had been used to restrain the victims; that the victims' heads were covered with a pillow; that there were stab wounds to the back of the victims' necks; that there were incisions or cut marks on the victims' necks; that Petric's semen was present at the scene of both crimes; that the victims' keys and wedding rings were missing; that O'Rourke and Lim were similar in appearance; that there were no signs of forced entry into the victims' apartments; and that the victims lived in second-floor apartments.

"The State also presented evidence of an incident that occurred in Illinois involving Petric and Tina Hillock. At trial, Hillock testified that she dated Petric from October 1993 to June 1994. In June 1994, Hillock told Petric that she did not want to see him anymore. On August 13, 1994, Hillock left her second-floor apartment for the afternoon, and she locked the door to the apartment when she left. Hillock returned to her apartment later that evening. As soon as Hillock entered her apartment, she sensed that something was wrong and grabbed a knife from the kitchen to protect herself. Petric was inside the apartment, and he immediately confronted Hillock and began screaming at her. Petric took the knife away from Hillock and threw it into the kitchen sink. A short time later, Hillock attempted to leave the apartment through the front door, but as soon as she opened the door, Petric grabbed her and threw her onto the couch. Petric told Hillock that 'if he can't have [her] nobody else would.' (R. 1494.) Petric then put his hands around Hillock's throat. Then, in an attempt to prevent Petric from hurting her, Hillock falsely told Petric that she was pregnant. At that time,

according to Hillock, '[Petric] got up off of [her] and he punched the wall and put a hole through the wall.' (R. 1495.) Hillock then made a second attempt to leave the apartment, but again Petric grabbed her and threw her onto the couch. A short time later, in response to a call that had been made by a third party, police officers arrived at Hillock's apartment. After the officers talked to Hillock, they arrested Petric. Hillock then went with the officers to the police station.

"Petric's vehicle was discovered parked about two blocks from Hillock's apartment. A bag containing some of Hillock's undergarments and jewelry was discovered inside Petric's vehicle. Hillock testified that she had not given Petric permission to enter her apartment or to take her personal property."

Petric, 157 So. 3d at 187-190.

Standard of Review

The State appeals the circuit court's order granting Petric's petition for postconviction relief. When this Court reviews a lower court's ruling on a postconviction petition "where there are disputed facts ... and the circuit court resolves those disputed facts, '[t]he standard of review on appeal ... is whether the trial judge abused his discretion when he denied the petition.'" Boyd v. State, 913 So. 2d 1113, 1122 (Ala. Crim. App. 2003), quoting Elliott v. State, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992). See also Mashburn v. State, 148 So. 3d 1094, 1104 (Ala. Crim. App.

2013). "We will reverse a circuit court's findings only if they are 'clearly erroneous.'" Barbour v. State, 903 So. 2d 858, 861 (Ala. Crim. App. 2004).

""[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).... If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. United States v. Yellow Cab Co., 338 U.S. 338, 342, 70 S.Ct. 177, 179, 94 L.Ed. 150 (1949); see also Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 102 S.Ct. 2182, 72 L.Ed.2d 606 (1982).' [Anderson v. City of Bessemer City, N.C.], 470 U.S. [564] at 573-74, 105 S.Ct. [1504] at 1511 [(1985)]."

Morrison v. State, 551 So. 2d 435, 436-37 (Ala. Crim. App. 1989).

As stated above, the circuit court granted Petric relief after finding that Petric had been deprived of the effective assistance of counsel at both the guilt and the penalty phases of his capital-murder trial. When reviewing a claim of ineffective assistance of counsel, this Court applies the

two-pronged test articulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). We examine whether the petitioner has established: (1) that his trial counsel's performance was deficient, and (2) that he was prejudiced by the deficient performance.

"The Strickland Court reasoned that, '[i]n any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable, but they are only guides.' 466 U.S. at 688, 104 S.Ct. 2052. Ultimately, the Supreme Court determined that the actions of Washington's counsel were reasonable and that any prejudice Washington might have suffered was insufficient to set aside the death sentence.

"We note that the Strickland Court recognized that 'both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.' 466 U.S. at 698, 104 S.Ct. 2052."

Ex parte Gissendanner, 288 So. 3d 1011, 1027-28 (Ala. 2019).³

"We recognize that such a 'mix' of legal and factual questions can be difficult to tease apart. As some federal courts of appeals have done, we will

³After the briefs had been filed in this case, Petric submitted a letter citing supplemental authority to support the circuit court's ruling. Petric relied on the newly released Alabama Supreme Court case of Ex parte Gissendanner, 288 So. 3d 1011 (Ala. 2019), arguing that this Court must give great deference to the circuit court's findings.

apply the most appropriate standard of review for the issue raised depending on the extent to which that issue is dominated by fact or by law."

Fortune v. State, 158 A.3d 512, 517 (Me. 2017).

"[W]e apply a mixed standard of review because both the performance and the prejudice prongs of the Strickland test present mixed questions of law and fact. See id. at 698, 104 S.Ct. 2052 ('Ineffectiveness is ... a mixed question of law and fact.');

Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999). We defer to the circuit court's factual findings, but we review de novo the circuit court's legal conclusions. ... Under this standard, the Court conducts an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings.) (citation omitted)."

Sochor v. State, 883 So. 2d 766, 771-72 (Fla. 2004).

"When a claim is based upon a violation of a constitutional right it is our obligation to make an independent constitutional appraisal from the entire record. But this Court is not a finder of facts; we do not judge the credibility of the witnesses nor do we initially weigh the evidence to determine the facts underlying the constitutional claim. It is the function of the trial court to ascertain the circumstances on which the constitutional claim is based. So, in making our independent appraisal, we accept the findings of the trial judge as to what are the underlying facts unless he is clearly in error. We then re-weigh the facts as accepted in order to determine the ultimate mixed question of law and fact, namely, was there a violation of a constitutional right as claimed."

Harris v. State, 303 Md. 685, 697-98, 496 A. 2d 1074, 1080 (1985).

At the evidentiary hearing in this case, all three of Petric's trial attorneys testified -- Charles Salvagio, Edward Tumlin, and Amber Ladner. The circuit court found that the testimony of lead attorney, Charles Salvagio, was not credible:⁴

"[T]he Court finds that Salvagio was not a credible witness. The record demonstrates that material portions of Salvagio's testimony at the Rule 32 hearing was at the very least erroneous, and in some instances debatably perjurous. Salvagio's testimony was repeatedly contradicted by virtually every other witness and evidence presented at the Rule 32 hearing.

"Additionally, Salvagio was hostile to Petric's interests in these proceedings. As one example, Salvagio testified that he refused to speak with postconviction counsel because he does not speak by telephone to unknown people. However, Salvagio later testified that he spoke with the Assistant Attorney General Jon Hayden by telephone. Mr. Hayden informed the Court that he did not know and had not met Salvagio prior to speaking with him by telephone regarding these proceedings.

"Lastly, Salvagio made at least three known attempts to improperly influence the testimony of other witnesses to these proceedings. Salvagio testified that he initiated conversations with Dr. Kimberly Ackerson and Mr. Rick Miller to refresh their memory before they were called to give

⁴The majority of the State's arguments in its brief center on statements made by Salvagio at the evidentiary hearing. However, the circuit court found his testimony not to be credible.

testimony. Postconviction counsel objected to Salvagio's conduct. The Court sustained the objection and ordered no contact between witnesses. Mr. Tumlin testified that Mr. Salvagio contacted him within hours following the no contact order attempting to discuss these proceedings.^[5] The Court finds that Salvagio's testimony and conduct at the Rule 32 hearing render his testimony unreliable in the absence of corroboration from the record or other witnesses."

(C. 46-47.)

"The credibility of witnesses is for the trier of fact, whose finding is conclusive on appeal. This Court cannot pass judgment on the truthfulness or falsity of testimony or on the credibility of witnesses." Hope v. State, 521 So. 2d 1383, 1387 (Ala. Crim. App. 1988). Indeed, it is well settled that, in order to be entitled to relief, a postconviction "petitioner must convince the trial judge of the truth of his allegation and the judge must 'believe' the testimony." Summers v. State, 366 So. 2d 336, 343 (Ala. Crim. App. 1978).

⁵The record shows that Salvagio was found in contempt of court for violating the circuit court's "No Contact Order," i.e., Salvagio discussed the case with several witnesses during the postconviction proceedings before the witnesses testified at the hearing. On appeal, this Court reversed the contempt citation and directed that the circuit judge recuse herself from presiding over the contempt proceedings. Salvagio v. State, 274 So. 3d 310 (Ala. Crim. App. 2018).

Thus, we afford the circuit court's findings great deference on appeal. Ex parte Gissendanner, 288 So. 3d at 1029.

We now review the issues raised by the State in its brief to this Court.

Analysis

The State argues that the circuit court erred when it found that Petric was deprived of the effective assistance of counsel at both the guilt and penalty phases of his capital-murder trial.⁶

"The purpose of ineffectiveness review is not to grade counsel's performance. See Strickland [v. Washington], [466 U.S. 668,] 104 S.Ct. [2052] at 2065 [(1984)]; see also White v. Singletary, 972 F.2d 1218, 1221 (11th Cir. 1992) ('We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.'). We recognize that '[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.' Strickland, 104 S.Ct. at 2067. Different lawyers have different gifts; this fact, as well as differing circumstances from case to case, means the range of what might be a reasonable approach at trial must be broad. To

⁶Because for the reasons stated below we affirm the circuit court's order granting Petric a new trial on the ground that he was denied the effective assistance of counsel at the guilt phase of his capital trial, the remaining issues relating to counsel's performance at the penalty phase of the capital trial, the sentencing hearing, and on appeal are moot and need not be addressed.

state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.' Burger v. Kemp, 483 U.S. 776, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987)."

Chandler v. United States, 218 F.3d 1305, 1313 (11th Cir.

2000) (footnote omitted).

"Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133-34, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' See Michel v. Louisiana, [350 U.S. 91], at 101 [76 S.Ct. 158, 100 L.Ed. 83 (1955)]. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way."

Strickland, 466 U.S. at 689.

"It is therefore only the rare claim of ineffectiveness of counsel that should succeed under the properly deferential standard to be applied in scrutinizing counsel's performance. See Strickland, 466 U.S. at 689-90, 104 S.Ct. at 2065-66; see also Sullivan v. Fairman, 819 F.2d 1382, 1391 (7th Cir. 1987) ('[F]ew petitioners will be able to pass through the "eye of the needle" created by Strickland.' (citation omitted)).

"However, 'the Supreme Court certainly did not intend the Strickland analysis to be a total barrier to relief.' Id. at 1391. Where the deficiencies in counsel's performance are severe and cannot be characterized as the product of strategic judgment, ineffectiveness may be clear. Thus, the courts of appeals are in agreement that failure to conduct any pretrial investigation generally constitutes a clear instance of ineffectiveness. See, e.g., Sullivan, 819 F.2d at 1391-92 (perfunctory attempts to contact witnesses not reasonable); Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986) (counsel's performance fell below competency standard where he interviewed only one witness); Nealy v. Cabana, 764 F.2d 1173, 1177 (5th Cir. 1985) ('[A]t a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.');

Crisp v. Duckworth, 743 F.2d 580, 583 (7th Cir. 1984), cert. denied, 469 U.S. 1226, 105 S.Ct. 1221, 84 L.Ed.2d 361 (1985) ('Though there may be unusual cases when an attorney can make a rational decision that investigation is unnecessary, as a general rule an attorney must investigate a case in order to provide minimally competent professional representation.');

Thomas v. Lockhart, 738 F.2d 304, 308 (8th Cir. 1984) (investigation consisting solely of reviewing prosecutor's file 'fell short of what a reasonably competent attorney would have done');

see also United States v. Debango, 780 F.2d 81, 85 (D.C. Cir. 1986) (suggesting that ineffectiveness

shown by complete failure to investigate but finding no prejudice in case before it).

"Ineffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made. See Strickland, 466 U.S. at 690-91, 104 S.Ct. at 2065-67; see also Debanggo, 780 F.2d at 85 ('The complete failure to investigate potentially corroborating witnesses ... can hardly be considered a tactical decision'); Sullivan, 819 F.2d at 1389; Nealy, 764 F.2d at 1178; Crisp, 743 F.2d at 584."

United States v. Gray, 878 F.2d 702, 711 (3d Cir. 1989).

The State argues that the circuit court erred in finding that Petric's trial counsel was ineffective at the guilt-phase for failing to investigate and prepare a theory of the case.

"The duty to investigate derives from an attorney's basic function, which is 'to make the adversarial testing process work in the particular case.'" Walls v. Bowersox, 151 F.3d 827, 833 (8th Cir. 1998). Counsel "has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688.

"Defense counsel must, 'at a minimum, conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the] client.'" This includes investigating all

reasonable lines of defense, especially 'the defendant's "most important defense."' Counsel's 'failure to consider alternate defenses constitutes deficient performance when the attorney "neither conduct[s] a reasonable investigation nor ma[kes] a showing of strategic reasons for failing to do so."' Once counsel reasonably selects a defense, however, 'it is not deficient performance to fail to pursue alternative defenses.' 'An attorney's action or inaction must be examined according to what was known and reasonable at the time the attorney made his choices and 'ineffective assistance claims based on a duty to investigate must be considered in light of the strength of the government's case.'"

In re Davis, 152 Wash. 2d 647, 721-22, 101 P.3d 1, 41 (2004)

(emphasis in original).

"'Constitutionally effective counsel must develop trial strategy in the true sense -- not what bears a false label of "strategy" -- based on what investigation reveals witnesses will actually testify to, not based on what counsel guesses they might say in the absence of a full investigation.'"

Gissendanner, 288 So. 3d at 1033, quoting Ramonez v. Berghuis, 490 F.3d 482, 489 (6th Cir. 2007).

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."

Strickland v. Washington, 466 U.S. at 691.

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel had a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."

466 U.S. at 690-91.

"'[O]ne of criminal defense counsel's most fundamental obligations is to investigate the underlying facts of a case. This duty is not optional; it is indispensable.' [State v. J.A.L., 262 P. 3d 1 (Utah 2011)]. As our supreme court held in State v. Templin, 805 P.2d 182 (Utah 1990), the failure to adequately investigate a case constitutes deficient performance:

"'If counsel does not adequately investigate the underlying facts of a case, including the availability of prospective defense witnesses, counsel's performance cannot fall within the 'wide range of reasonable professional assistance.' This is because a decision not to investigate cannot be considered a tactical decision. It is only after an adequate inquiry has been made that counsel can make a reasonable decision to call or not to call particular witnesses for tactical reasons.

"Id. at 188 (quoting Strickland, 466 U.S. at 689, 104 S.Ct. 2052); see also Gregg v. State, 2012 UT 32, ¶¶ 23-25, 31-34, 279 P.3d 396; [State v. J.A.L.], 262 P.3d 1."

State v. Rasabout, 299 P.3d 625, 635 (Utah 2013).

As the Alabama Supreme Court noted in Ex parte Gissendanner,

"Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.'

"466 U.S. at 695-96, 104 S.Ct. 2052."

288 So. 3d at 1033.

I.

First, the State asserts that the circuit court's findings are "clearly erroneous" because, it says, the court erroneously found that Petric's trial counsel did not promptly hire an investigator after the circuit court granted Petric's counsel's motion for funds.

The circuit court made the following findings of fact on this claim:

"The Court finds that trial counsel did not promptly begin its investigation into plausible lines of defense. During the evidentiary hearing, the Court heard testimony and received evidence concerning the investigation conducted by Salvagio and Tumlin in advance of Petric's trial. It is undisputed that Ladner joined the defense team at

the start of the trial and was thus not involved in pre-trial investigation.

"Salvagio was appointed to represent Petric in September of 2007. Judge Cole granted trial counsel funds to retain an investigator on November 15, 2007. For more than a year after funds were granted to hire an investigator, trial counsel failed to engage an investigator. Salvagio testified that he eventually hired investigator Rick Miller to assist Petric's defense. Miller testified that he did not become a private investigator until after he retired from law enforcement on January 1, 2009. Mr. Miller testified that Petric's case was not the first case he worked on after he retired, so it would have been after January of 2009 that he was retained."

(C. 47.)

The record of Petric's trial shows that Salvagio was appointed to represent Petric on September 13, 2007.⁷ In November 2007, Salvagio moved for funds in the amount of \$1,500 to secure the services of an investigator. (Trial C. 163.) That motion was granted at a pretrial hearing in November 2007. (Trial R. 91.) In September 2008, an ex parte hearing was held, in part, for approval of additional expenses related to an investigator. At this pretrial hearing, Salvagio stated that their investigator, "Rick Blake," needed

⁷This Court may take judicial notice of its own records in Petric's direct appeal. See Nettles v. State, 731 So. 2d 626 (Ala. Crim. App. 1998).

to travel to Illinois as part of the investigation. (Trial R. 314.) However, at the postconviction hearing Salvagio said that to the best of his recollection there had been no investigator involved in Petric's case other than "Rick Miller." (R. 60.) Also, Petric's counsel submitted a copy of a bill for investigative services from "Rick Miller" for 32.5 hours that he spent investigating Petric's case. (C. 1123.) Miller also testified at the evidentiary hearing that he started working on Petric's case in January 2009 after he retired from law enforcement, that Petric's trial commenced in August 2009, and that he had been hired to investigate the case. He made no reference to any other investigator being involved in the case.

"A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

"If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the

evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. United States v. Yellow Cab Co., 338 U.S. 338, 342, 70 S.Ct. 177, 179, 94 L.Ed. 150 (1949); see also Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 102 S.Ct. 2182, 72 L.Ed.2d 606 (1982).'"

Morrison v. State, 551 So. 2d 435, 436-37 (Ala. Crim. App. 1989), quoting Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573-74 (1985).

Based on the record in this case, we cannot say that the circuit court's findings regarding the investigator were "clearly erroneous." Thus, the State is due no relief on this claim.

II.

Second, the State argues that the circuit court's order was clearly erroneous because, it says, Petric's trial counsel was not ineffective for failing to investigate a murder in Dothan that had occurred six months before Lim's murder. Specifically, it argues that the court erred in finding that Petric's trial counsel was forced to abandon its defense because of his failure to review the Dothan murder file.

The trial record shows that DNA from several individuals was found at the scene of Lim's murder. In opening statements, Petric's counsel stated that another murder had been committed in Dothan in May 1990, six months before Lim's murder, and that the person who committed that murder, Artez Hammonds, had also murdered Lim. Petric's counsel made the following assertions in his opening statement:

"They took this guy's DNA. This was a strong acquaintance of the victim. Okay. Two months -- May 15, 1990, he rapes and murders another women in identical fashion. Identical fashion. Neck cut from here to here (indicating). T-shirt wrapped around the neck. No forced entry. No forced entry. Wedding ring -- engagement ring missing. Cigarette ashes all over the place. Identical.

"Well, you know, you sit there and you say to yourself, that's a good theory, Mr. Salvagio, but what have you got to back it up that somebody else could have done this? Ladies and gentlemen, when we tested, there's other semen at the scene that does not belong to Steve Petric.

"Now, you may be asking -- and they talked about the national DNA data base -- you know, whose is it then? Is it the guy you're saying it is?

"I don't know, because we were not allowed to test it. And that's not their fault. We just were not allowed to do it because of parameters of the Alabama Department of Forensic Sciences. We were not allowed to do it. I asked you during jury selection, if you can prove guilt, why can't you prove innocence with this.

"Ladies and gentlemen, I also told you when we were selecting jurors that you have an obligation as jurors to look at this in another way -- and you do -- to see if anybody else could do this, if it's possible that somebody else could have done it. It is just coincidental that somebody else did it identically and was a prime suspect, a prime suspect."

(Trial R. 886-87.)

When finding that this claim warranted relief, the circuit court made the following findings:

"The Court finds that trial counsel did not conduct an adequate investigation of its theory of the case. Prior to trial, Salvagio understood that the State's case-in-chief would center on Petric's DNA found on the victim's vaginal swab and on evidence of collateral acts pursuant to Alabama Rule of Evidence 404(b). Trial counsel testified that Petric maintained his innocence. Consequently, Salvagio testified that the defense strategy was to argue that Petric had consensual sex with Lim who was later killed by someone else.

"Trial counsel ultimately chose as its theory that Lim was killed by Artez Hammonds. Salvagio testified that the defense team looked for similar murders around the time of Lim's death and found that Hammonds committed a similar murder in Dothan. On May 15, 1990, only two months after Lim's murder, Hammonds murdered Marily Mitchell in Dothan, Alabama. Like Lim, Mitchell was found dead in her apartment where there had been no sign of forced entry. Mitchell bore a physical resemblance to Lim, and was found naked. Like Lim, Mitchell had her wedding rings taken. Mitchell, like Lim, was stabbed in the neck. Like Lim, Mitchell was found with a T-shirt around her neck. Just as Lim,

Mitchell's body appeared to have been staged after death.

"Based on the similarities to the Dothan murder, Hammonds was a suspect in Lim's murder, but charges were never filed against Hammonds. Judge Cole warned Salvagio to ensure that his 'opening is tailored [so] nothing beyond what's going to come in' was raised during the opening statement. Despite that warning, Salvagio argued in his opening statement, without any reasonable expectation of later substantiation, that another crime was 'done in the exact same manner by someone [Lim] was close to' and that this was not a coincidence. Contrary to Salvagio's suggestion in the Rule 32 hearing that his opening statement was vague, trial counsel's entire opening statement outlines a trial strategy of focusing on Hammonds as the actual perpetrator.

"Salvagio testified that he sent Miller to investigate the Dothan murder. Salvagio testified that Miller reported that Det. Robert Sorrells in Dothan would be a helpful defense witness. Based on Miller's conversation with Det. Sorrells, trial counsel planned to call Det. Sorrells during the guilt phase to testify regarding similarities between the Lim murder and the Dothan murder. Because trial counsel failed to investigate adequately, the only witness that trial counsel intended to call to testify regarding the Dothan murder was Det. Sorrells, who acted as the lead investigator at the time that the Dothan murder was solved in 1996, when Hammonds's DNA was matched to the crime scene. However, Det. Sorrells was not involved in the case at the time the murder was committed in 1990. His knowledge of the crime was limited to what he had seen in his review of photographs of the crime scene, notes from the investigation, and conversations with other police personnel. He could not provide firsthand knowledge of the original 1990 investigation. Because trial counsel failed to at least have a conversation with

Det. Sorrells earlier in the case, trial counsel failed to learn about these limitations in Det. Sorrells's knowledge before promising the jury evidence linking Hammonds to Lim's murder.

"The Court finds that Salvagio did not request or review any copies of reports or documents from the Dothan murder prior to Petric's trial. Trial counsel's failure to review the Dothan file cannot be explained away as a strategic decision. In an attempt to explain why he did not request the files from the Dothan Police Department or any agency related to the murder committed by Hammonds before trial, Salvagio testified, 'I cannot subpoena a file I do not know exists,' and 'I didn't know the Dothan file existed.' It is patently unreasonable for an experienced defense attorney to profess ignorance as to whether the Dothan Police Department would have a file on a murder case available for review. It is equally unreasonable for Salvagio to claim that he did not request the files because he was unaware that they contained problematic information. Either Salvagio was aware that the Dothan Police Department had the Dothan murder file or he was not. Both instances are unreasonable under these circumstances.

"Salvagio blamed Det. Sorrells for failing to tell trial counsel what was contained in the file. ('He never said anything about by the way, we've got a DNA sample of Artez Hammonds and we know it's not him up there. He never said that.') Salvagio also testified that he assumed that Miller reviewed the Dothan murder documents, but Salvagio had no basis for making this assumption. Miller credibly testified that he did not review the case file on the Dothan murder. Miller also credibly testified that Salvagio never asked him to retrieve or review the records in the Dothan murder. Although Salvagio testified that he could not recall whether he talked to Det. Sorrells before Petric's trial, the Court finds that the record amply demonstrates that

Salvagio did not talk to him before trial. With respect to the Dothan murder, Judge Cole said at the outset of Petric's trial, 'one thing that I have a big issue with is Salvagio apparently ... hadn't talked to any of these people,' instead relying on the report of his private investigator, Rick Miller. Trial counsel's reason for not speaking to this witness before trial was legally unsound. Salvagio testified that he did not talk to Det. Sorrells as part of the investigation '[b]ecause Salvagio can't testify.' Clearly, Salvagio's inability to testify at Petric's trial is no excuse for neglecting to conduct a thorough investigation of the theory he intended to present at trial.

"The State requested the Dothan murder file upon learning that trial counsel intended to put forth evidence regarding Hammonds. The State obtained these files and provided them to trial counsel the morning of Monday, August 10, after the State rested and just before the defense case. Judge Cole allowed trial counsel a meager few hours to look through the files. Trial counsel did not have time to investigate all of the leads provided in the documents. For example, trial counsel would have learned the names of the officers involved in the initial investigation of the Dothan murder, and would have been able to track down those individuals to have them provide testimony at trial.

"Trial counsel failed to investigate the DNA evidence related to their theory that Hammonds was the actual perpetrator. Trial counsel sought and received funds to perform DNA testing on several items of evidence from the Lim crime scene prior to trial. The testing was performed by Orchid Cellmark, Inc. The testing confirmed the State's match of Petric's DNA to Lim's vaginal swab. It also matched Petric's DNA to multiple stains from the blue blanket wrapped around Lim. The Cellmark testing further matched Petric's DNA to Lim's fingernail clippings, which had been taken after her

death. (The State had not conducted testing of Lim's fingernail clippings.) The Cellmark testing also found a semen stain on the blue blanket that matched an unknown male. Trial counsel failed to have Hammonds's DNA sample compared to the unknown semen stain on the blue blanket. (Trial counsel only submitted the unknown sample to the national databank), even though trial counsel suggested that it could match Hammonds's during opening statements. Because trial counsel had not compared Hammonds's DNA sample to the unknown semen stain on the blue blanket, trial counsel stipulated to the admission of the Cellmark report.

"The State first heard of trial counsel's plan to put forth evidence regarding Hammonds late on the Friday before trial. The State promptly asked the Alabama Department of Forensic Science to compare the Hammonds's DNA sample with the DNA profile that trial counsel had secured from Cellmark of the unknown semen stain. No additional DNA testing was required. The State was informed that Hammonds's DNA did not match the unknown semen stain. Due to trial counsel's failure to have this analysis performed well in advance of trial, trial counsel did not learn of the non-matching test result until the lunch break on Monday August 10, after the close of the State's evidence. Faced with the State's planned rebuttal showing the non-matching DNA testing result, trial counsel chose not to call Det. Sorrells or present any other witnesses.

"Trial counsel's failure to present evidence regarding the Dothan murder at trial was due to trial counsel's failure to adequately investigate the Dothan murder case and Hammonds's potential connection to the Lim murder. Trial counsel failed to interview potential witnesses regarding the Dothan murder and request relevant files regarding the case. Trial counsel did not obtain or review any records related to the Dothan murder nor did trial counsel conduct any interviews related to the

Dothan murder prior to Petric's trial. The Court finds that Salvagio performed deficiently by failing to investigate the Dothan murder adequately. Salvagio admitted it is not a good strategy to make a promise to the jury in opening statement that the attorney is not sure he can satisfy. In this case, Salvagio told the jury they would hear that the victim in this case was killed by a man who committed a similar murder in May of 1990. Salvagio gave that opening statement without speaking to the only witness he planned to call about the Dothan murder and without reviewing any files related to the Dothan murder. Salvagio said trial counsel 'got surprised by the prosecution' when the State obtained the Dothan murder file and discovered that Hammonds did not match the unknown DNA at the Lim murder scene. The Hammonds theory was abandoned as the case proceeded. Trial counsel presented no witnesses to testify regarding the circumstances of the Dothan murder. Trial counsel did not reference Hammonds during closing. The Court finds that Salvagio would not have given that opening statement, would not have stipulated to admission of the Cellmark report, and would not have been 'surprised' by the prosecution had he conducted an adequate investigation, including obtaining the files related to the Dothan murder. Accordingly, Petric was prejudiced by his trial counsel's deficient performance."

(C. 47-53.)

In conclusion, the court stated:

"As shown by the evidence presented at the Rule 32 hearing and as set forth more fully in the findings of fact above, Petric is entitled to post-conviction relief because his trial counsel performed deficiently at trial due to inadequate investigation of the facts and uninformed decision-making, Petric has established by a preponderance of the evidence that trial counsel did

not adequately investigate guilt phase defenses, including its chosen defense strategy of identifying Hammonds as the person who murdered Lim. Trial counsel clearly had a duty to investigate. Counsel is required to 'conduct a substantial investigation into each of several plausible lines of defense.' Strickland, 466 U.S. at 681; [State v.] Smith, 85 So. 3d [1063] at 1070 [(Ala. Crim. App. 2010)] (same); Dill [v. State], 484 So. 2d at [491] 497 [(Ala. Crim. App. 1985)] ('When a lawyer fails to conduct a substantial investigation into any of his client's plausible lines of defense, the lawyer has failed to render effective representation of counsel.... Pretrial investigation, principally because it provides a basis upon which most of the defense case must be rest, is, perhaps, the most critical stage of a lawyer's presentation.') (quoting House v. Balkcom, 725 F.2d 608, 617-18 (11th Cir. 1984); Goodwin [v. Balkcom], 684 F.2d [794] at 805 [(11th Cir. 1982)] (holding that effective counsel must independently investigate all sources of evidence which may be helpful to the defense). The [American Bar Association] Guidelines provide that '[i]nvestigation and planning for both phases must begin immediately upon counsel's entry into the case.... Counsel must promptly obtain the investigative resources necessary to prepare for both phases, including at minimum the assistance of a professional investigator and a mitigation specialist, as well as all professional expertise appropriate to the case.' 2003 ABA Guidelines, 1.1, comments (emphasis added). Trial Counsel cannot delegate away their Sixth Amendment responsibility to conduct an adequate investigation. Stubbs v. Thomas, 590 F. Supp. 94, 100 (S.D.N.Y. 1984) (the right to the effective assistance of counsel 'may not be defeated by delegating duties to someone other than counsel').

"....

"Trial counsel performed deficiently by failing to conduct a substantial investigation into plausible lines of defense and by delegating responsibility to conduct an adequate investigation to an investigator. Trial counsel did not promptly conduct a substantial investigation into plausible lines of defense. Trial counsel did not sufficiently investigate, present evidence, or argue against the Rule 404(b) evidence relating to the [Deborah] O'Rourke murder.

"Mr. Petric also meets the second prong for a claim of ineffective assistance of counsel as he has shown that trial counsel's inadequate investigation prejudiced the outcome of his trial. ... As explained in more detail above, had trial counsel performed an adequate investigation, they would have known that the unidentified DNA on the blue blanket did not match Hammonds. Trial counsel would not have promised the jury in the opening argument that they would hear evidence of an alternate suspect who committed a similar crime in Dothan. They would not have been forced to abandon this incurably flawed theory in the middle of the trial after the State had already rested. Trial counsel would not have stipulated to the admission of the Cellmark report that confirmed that Petric's DNA was found in the victim's vaginal swab and that this DNA was under the victim's fingernails."

(C. 102-104.)

At the postconviction evidentiary hearing, Charles Salvagio testified that he was appointed to represent Petric in September 2007. He said that several attempts had been made to contact him in relation to the postconviction proceedings but that he refused to talk to Petric's attorneys.

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(R. 53.) Salvagio said that he hired an investigator, Rick Miller, to assist in the case. (R. 60.) He and cocounsel looked to see if similar murders had occurred in the Birmingham area around the time of Lim's murder and they found that there was a similar murder, in Dothan, and that Artez Hammonds had been convicted of that murder in 1990. Salvagio said that they sent Miller to Dothan to investigate the Hammonds's case. The following occurred:

"[Postconviction counsel]: Was there a strategic reason, sir, why you didn't endeavor in advance of the trial to get --

"[Salvagio]: No --

"[Postconviction counsel]: -- to get those records relating to the murder that you were alluding to in your opening statement? Was there a strategic reason?

"[Salvagio]: I thought the Dothan detective had it.

"[Postconviction counsel]: On the basis of what did you have that --

"[Salvagio]: Based on what he told us.

"[Postconviction counsel]: Did you subpoena the Dothan records with a document subpoena for trial?

"[Salvagio]: If I recall correctly, we got in touch with the Dothan detective pretty late.

"[Postconviction counsel]: Too late?

"[Salvagio]: Well, it was late.

". . . .

"[Postconviction counsel]: So late that you were surprised by what was discovered by the State when they looked into the murder that you had promised to the jury you were going to talk about in the opening statement.

"[Salvagio]: I was not going to argue that -- that evidence since we didn't have it and they didn't disclose it to us and they knew which direction we were going, that that was not -- I don't know if it's in your transcript or not, but I believe that was a surprise to us. And we asked Judge Cole to continue the case, if I'm correct. If I'm not --

". . . .

"[Postconviction counsel]: Did you bother asking to look at the records before you talked about the case in opening?

"[Salvagio]: We had information from Detective Sorrells with the Dothan Police Department that Artez Hammonds could have possibly done this murder or I would not have said that in opening statement. And the prosecution, last minute, did come up with a file that we didn't know about, that we did not know about and brought it forward saying that it could not be him.

"[Postconviction counsel]: Did you subpoena prior to trial the records from the Dothan Police Department or from any agency that related to the May of 1990 murder in Dothan that you alluded to in your opening statement? Did you serve a subpoena for records?

"[Salvagio]: The Dothan detective was the person that we relied on to come to court and say, yes,

this could have been Artez Hammonds. I cannot subpoena a file I do not know exists."

(R. 113-16.) Salvagio said that he did not subpoena the Dothan police case file because, he said, he did not know that a file existed. The Dothan police case file contained a copy of Hammonds's DNA profile. This DNA did not match the DNA profile found at the scene of Lim's murder. Salvagio said that he did not get the records of the Dothan murder before trial and that he had no "strategic reason" for not getting those records. (R. 113.)

Rick Miller, a private investigator, testified that he started working on Petric's case in January 2009 after he had retired from law enforcement. The following occurred:

"[Postconviction counsel]: And what sort of investigative work did you do with respect to the Hammonds's case?

"[Miller]: Well, ma'am, as I just previously told you, I contacted the sheriff's department, found out that it was a City of Dothan case, not a county case. I followed up on who was the investigator of record and then contacted that investigator, who had retired, and to find out from him what were the circumstances of that case and do they -- are they similar, could it be that Artez Hammonds could have committed this crime. That's what I was trying to determine, could he be a viable suspect.

"[Postconviction counsel]: Did you review any physical case files related to the Hammonds's case at any time?

"[Miller]: No, ma'am.

"[Postconviction counsel]: Did Mr. Salvagio ever ask you to retrieve any of those records?

"[Miller]: No, ma'am.

"[Postconviction counsel]: Did he ever ask you to review any of those records?

"[Miller]: No, ma'am.

"[Postconviction counsel]: At one point was this detective expected to testify in Mr. Petric's trial?

"[Miller]: If my recollection is correct, it seems like the trial was supposed to start, for instance on a Monday.

"[Postconviction counsel]: Correct.

"[Miller]: I'm not for sure, but I believe it was on a Monday that it was supposed to start. This investigator on the case in Dothan, I believe, had requested a subpoena. And it was very short order. And I was asked if I would serve the subpoena in Dothan.

"And so as a result of that, if I'm not mistaken, it seems like I may have served a subpoena on a Friday, a Thursday or Friday and trial was to start on Monday. That is my recollection of it."

(R. 137-38.)

The circuit court's findings are not clearly erroneous. The record shows that counsel was forced to abandon the

defense it set out in opening argument because it failed to examine the Dothan murder case file. Counsel failed to discover a copy of Hammonds's DNA profile that was contained in that file and erroneously asserted in his opening argument that the DNA found at Lim's murder matched the DNA of the Dothan murderer, Hammonds.⁸ Indeed, the direct-appeal record shows that counsel called Det. Robert Sorrells, a police investigator for the City of Dothan, to testify concerning the Dothan murder and Hammonds's conviction for that murder. However, during voir dire the State asserted that it had examined the Dothan file and found that Hammonds's DNA profile did not match any DNA profile found at the scene of Lim's murder. In light of that fact, defense counsel elected not to

⁸As the prosecutor stated at Petric's trial:

"All we did was look at the DNA profile, which is a series of numbers and boxes. That's how they kind of break down the profile to look at its sixteen loci.

"We looked at that -- the one from the blanket that their expert did -- and we looked at the one that [Department of Forensic Sciences] has on a file from this case of Artez Hammonds. And they are just not the same. We didn't test anything. We just compared two files. That's it."

(Trial R. 1678.)

present Det. Sorrells's testimony and, in fact, counsel presented no witnesses in Petric's defense.

Many state and federal courts have discussed the prejudicial effect of making promises in opening statements and then failing to put on evidence in support of those promises.

"The failure to produce evidence promised in opening statement can be an unreasonable and prejudicial decision that denies a defendant effective assistance of counsel. Dunlap v. People, 173 P.3d 1054 (Colo. 2007); see also Ouber v. Guarino, 293 F.3d 19 (1st Cir. 2002); Harris v. Reed, 894 F.2d 871 (7th Cir. 1990); Anderson v. Butler, 858 F.2d 16 (1st Cir. 1988); State v. Moorman, 320 N.C. 387, 358 S.E.2d 502 (1987). The rationale for considering a failure to produce promised evidence as deficient performance is that when counsel primes the jury to hear a different version of events from what he ultimately presents, one may infer that reasonable jurors would think the witness to which counsel referred in his opening statement was unwilling or unable to deliver the testimony he promised. McAleese v. Mazurkiewicz, 1 F.3d 159 (3rd Cir. 1993). In other words, a jury is likely to conclude that counsel could not live up to the claims made in opening statement. Harris, supra. Courts also recognize that the failure to produce promised evidence undermines the credibility of the defense. Moorman, supra; State v. Zimmerman, 823 S.W.2d 220 (Tenn. Crim. App. 1991)."

Conley v. State, 433 S.W.3d 234, 240 (Ark. 2014).

"The rationale for holding such a failure to produce promised evidence ineffective is that when counsel primes the jury to hear a different version of the

events from what he ultimately presents, one may infer that reasonable jurors would think the witnesses to which counsel referred in his opening statement were unwilling or unable to deliver the testimony he promised. See Anderson [v. Butler], 858 F.2d [16] at 18 [(1st Cir. 1988)]."

McAleese v. Mazurkiewicz, 1 F.3d 159, 166-67 (3rd Cir. 1993).

"The course of a trial can affect and alter an original defense strategy, and may lead to reasonable decisions not to call witnesses who were mentioned in the opening statement. See, e.g., Williams v. Bowersox, 340 F.3d 667, 671-72 (8th Cir. 2003); Schlager v. Washington, 113 F.3d 763, 769 (7th Cir. 1997); United States v. McGill, 11 F.3d 223, 227-28 (1st Cir. 1993). In other cases, however, failing to produce evidence promised in the opening statement can be an unreasonable and prejudicial decision which denies a defendant the effective assistance of counsel."

Dunlap v. People, 173 P.3d 1054, 1075 (Colo. 2007). See also Ouber v. Guarino, 293 F.3d 19, 33 (1st Cir. 2002) ("The error here -- failing to present the promised testimony of an important witness -- was not small, but monumental."); United State v. Gonzalez-Maldonado, 115 F.3d 9, 15 (1st Cir. 1997) ("A defendant's opening statement prepares the jury to hear his case. If the defense fails to produce promised expert testimony that is critical to the defense strategy, a danger arises that the jury will presume that the expert is unwilling to testify and the defense is flawed.").

"Two members of this panel have long held the opinion that little is more damaging than to fail to produce important evidence that had been promised in an opening. This would seem particularly so here when the opening was only the day before, and the jurors had been asked on the voir dire as to their acceptance of psychiatric testimony. The promise was dramatic, and the indicated testimony strikingly significant. The first thing that the ultimately disappointed jurors would believe, in the absence of some other explanation, would be that the doctors were unwilling, viz., unable, to live up to their billing. This they would not forget.

"....

"... [W]e cannot but conclude that to promise even a condensed recital of such powerful evidence, and then not produce it, could not be disregarded as harmless. We find it prejudicial as matter of law."

Anderson v. Butler, 858 F.2d 16, 17-19 (1st Cir. 1988).

"The prejudice necessary for a reversal in the instant case came from defense counsel's failure to present any evidence concerning the existence of a person named Joe Robbins following defense counsel's opening statement indicating to the jury that Robbins was another suspect in the case. A similar situation occurred in Anderson v. Butler (1st Cir. 1988), 858 F.2d 16, in which the defense counsel failed to present expert psychiatric testimony as promised in his opening statement.

"....

"... [I]n the instant case, we believe that defense counsel's failure to produce promised evidence concerning the existence of another suspect ... was prejudicial."

People v. Ortiz, 224 Ill. App. 3d 1065, 1072-73, 167 Ill. Dec. 112, 117, 586 N.E.2d 1384, 1389 (1992).

Nonetheless, one of the circuit court's legal holdings that counsel could not delegate his duty to investigate the case to his investigator -- is contrary to prior decisions of this Court. In fact, this Court has on several occasions specifically held otherwise:

""[I]t is neither unprofessional nor unreasonable for a lawyer to use surrogates to investigate and interview potential witnesses rather than doing so personally. See Harris v. Dugger, 874 F.2d 756, 762 & n. 8 (11th Cir. 1989). In fact, we have criticized counsel in other cases for failing to utilize subordinates to conduct pre-trial investigation. See Henderson v. Sargent, 926 F.2d 706, 714 (8th Cir. 1991)."

"Walls v. Bowersox, 151 F.3d 827, 834 n. 4 (8th Cir.1998). See also Callahan v. State, 24 S.W.3d 483, 486 (Tex. Ct. App. 2000) (holding that '[a] defense attorney is not required to investigate the facts of a case personally. Counsel may delegate the investigation to a private investigator'). Finally, when discussing the duty to investigate mitigating evidence in Rompilla [v. Beard], 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005)], Wiggins [v. Smith], 539 U.S. 510 (2003)], and Williams [v. Taylor], 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)], the Supreme Court did not expressly or impliedly hold that counsel must perform the actual investigation. Therefore, we conclude that the appellant's trial attorneys did not render ineffective assistance when they relied on

subordinates to conduct most of the mitigation investigation, communicated with them during the investigation, and made the ultimate decision about what mitigation evidence to present.'

"979 So. 2d at 163. Other courts have noted that it is a reasonable practice for defense counsel in a capital-murder case to hire an investigator. See United States v. Weaver, 882 F.2d 1128, 1138 (7th Cir. 1989) ('If defense counsel is unable to personally complete these tasks, then counsel must seek the aid of others, including experts and investigators, to assist in the preparation and investigation.');

Jones v. United States, (No. 4:11CV00702ERW, November 16, 2011) (E.D. Mo. 2011) (not reported in F. Supp. 2d) (counsel's decision to rely on the investigator's file was not unreasonable); Cator v. Warden, (No. CV010810396, February 25, 2004) (Conn. Super. Ct. 2004) (not reported in A.2d) ('There is nothing in the law that mandates an attorney to individually interview all potential witnesses and he or she may rely upon the services of a properly designated assistant, such as an investigator, to do so.'). Cf. Davis v. State, 928 So. 2d 1089, 1117 (Fla. 2005) ('Trial counsel is not absolutely required to hire an investigator under all circumstances. Trial counsel is only required to conduct a reasonable investigation.').

"In fact, the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003 ed.) ('ABA Guidelines') recognize as appropriate the hiring of an investigator to conduct interviews on behalf of appointed counsel. See ABA Guidelines 10.7 & Commentary."

Washington v. State, 95 So. 3d 26, 41-42 (Ala. Crim. App. 2012).

Nevertheless, "[a]lthough lawyers are not prohibited from employing the services of non-lawyer assistants and delegating functions to them, the lawyer is required to supervise the delegated work and retains complete responsibility therefor." In re Mopsik, 902 So. 2d 991, 995 (La. 2005). "[A]n attorney must supervise work done by lay personnel and a lawyer stands ultimately responsible for work done by his non-lawyer employees." State ex rel. Oklahoma Bar Ass'n v. Mayes, 977 P. 2d 1073, 1082 (Okla. 1999).

The American Bar Association Standards for Criminal Justice were amended in 1993 and now read, in pertinent part:

"Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities."

ABA Standards for Criminal Justice, ch. 4, Defense Function 4-4.1 (3d ed. 1993).

Taken as a whole and giving deference to the circuit court's findings, we cannot say that those findings are clearly erroneous. The State is due no relief on this claim.

III.

The State next argues that the circuit court's findings were clearly erroneous because, it says, Petric's trial counsel was not ineffective for failing to investigate and present evidence that Petric had been acquitted of murdering Deborah O'Rourke.

Specifically, it argues that evidence was presented indicating that Petric had not been convicted of murdering O'Rourke; therefore, the State argues, there was no prejudice.

In his amended petition, Petric asserted that his counsel was ineffective for failing to investigate and present relevant exculpatory evidence regarding his acquittal for the murder in Illinois of O'Rourke. Petric pleaded:

"Petric was twice tried for the murder of Deborah O'Rourke, resulting in a hung jury and an acquittal. The blueprint for successfully defending Petric against those charges had already been drawn up -- trial counsel merely needed to introduce all of the same exculpatory evidence that Petric's Illinois counsel had introduced in the O'Rourke case. Trial counsel's failure to do so falls below any objective standard of reasonableness and constitutes ineffective assistance of counsel in violation of Petric's constitutional rights."

(C. 312.)

Finding that trial counsel was ineffective for failing to investigate the O'Rourke murder and to present the resulting evidence to counter the State's evidence, the circuit court stated:

"Trial counsel failed to investigate and present the evidence that resulted in Petric's acquittal in the O'Rourke case.

"In its case-in-chief, the State presented evidence of a collateral murder to the jury arguing that Petric also killed Deborah O'Rourke, Petric was twice tried for the murder of O'Rourke, resulting in a hung jury and an acquittal. The blueprint for successfully defending Petric against those charges had already been drawn up. When trial counsel learned, early in the case, that the State would be permitted to present evidence related to the O'Rourke murder to the jury, trial counsel merely needed to gather, review, and introduce the same exculpatory evidence that Petric's Illinois counsel had introduced in the O'Rourke case.

"Illinois counsel argued that O'Rourke's boyfriend, James Green, was the one who murdered her. In support of this argument, Illinois counsel marshaled a substantial amount of evidence. First, Green's semen stains were found on O'Rourke's bed sheets. Green claimed that he had not slept with O'Rourke for several weeks prior to the murder, yet Illinois counsel introduced evidence that O'Rourke was an immaculate housekeeper who would not let dirty sheets stay on her bed for several weeks, undermining Green's testimony and linking the stains to near the time of the murder. Further tying Green to the murder was a pubic hair that was found in the T-shirt used as a gag on O'Rourke. This hair had negroid characteristics and could not have come from either Petric or O'Rourke but could belong to Green.

Illinois counsel made this argument during the O'Rourke case.

"Illinois counsel further introduced evidence from the [Illinois] medical examiner, Dr. [Joseph] Sapala, that the marks on O'Rourke's wrists were consistent with her having been handcuffed. Illinois counsel presented evidence that Green, who worked as a corrections officer, had access to handcuffs. Illinois counsel also elicited testimony from Dr. Sapala that, based on the condition of the body and when it was found, O'Rourke could have been killed as late as the evening of July 5. Specifically, the body exhibited signs of rigor mortis at the time of the autopsy on the afternoon of July 6, which Dr. Sapala testified would become complete within twelve to eighteen hours after death, and begin to drop off afterwards. The rigor mortis exhibited by O'Rourke's body was significant enough that the examiners had difficulty getting her fingerprints, indicating that the rigor mortis had not yet subsided. The autopsy report also indicated that rigor mortis was not complete. This evidence indicated that O'Rourke could have been killed on the evening of [July] 5, which Dr. Sapala admitted on cross examination. This would have been after Petric had been found using O'Rourke's ATM [automatic teller machine] card, supporting Illinois counsel's theory that O'Rourke was killed after Petric took her ATM card.

"Illinois counsel further introduced evidence regarding Green's whereabouts on July 5, when O'Rourke could have been killed. Green returned home from a trip to Mississippi on the evening of July 4, whereupon he placed several calls to O'Rourke's apartment. Green suspiciously stayed home from work that day, purportedly due to back pain, even though he had gone to work with severe back pain before. Green had no one who could vouch for his whereabouts on July 5 until 10 p.m. (After O'Rourke's likely time of death), when another girlfriend of his, Pam Hinton, came over. Despite

Green's purported reason for staying home from work, Hinton testified that Green did not seem to be in pain that evening.

"Illinois counsel also presented evidence regarding Green's motive for the murder. Green owed O'Rourke \$1,500 for several months. A friend of O'Rourke's testified that O'Rourke told her the Friday before July 4 that she planned to ask Green for the money one final time, and that she would threaten to go to Green's supervisor if he would not pay. O'Rourke's former husband testified that O'Rourke told him that same weekend, 'don't be surprised if I end up dead.'

"The evidence presented by Illinois counsel also showed that Green had a history of violence against O'Rourke. Green pled guilty in a charge of criminal damage to property in 1991 after he broke one of the windows in O'Rourke's apartment. O'Rourke prepared an incident report at that time stating that Green had intimidated and threatened her several times. She also reported that Green had told her 'it will never be over with us' and that Green would 'get even and get revenge' on O'Rourke.

"Trial counsel in the present case failed to present a significant portion of this evidence. Trial counsel did not present the complete picture of the physical evidence, which intended to implicate Green more than Petric. Trial counsel did not elicit any testimony from Dr. Sapala regarding the time of O'Rourke's death, and therefore failed to establish that O'Rourke could have been killed on July 5 after Mr. Petric had indisputably left her apartment. Trial counsel elicited testimony that a negroid pubic hair was found at the scene, but failed to establish the critical fact that it was found wrapped up in the T-shirt that was used as a gag on O'Rourke, closely tying it to the murder. Trial counsel elicited testimony that O'Rourke's apartment was clean, but failed to draw the

connection that this meant it was unlikely that her bed sheets would have weeks-old stains on them and that Green's semen stains could therefore be dated close to the time of the murder.

"Trial counsel also failed to present evidence regarding Green's motive and opportunity for the murder. Trial counsel elicited testimony from Det. Gear, the lead investigator on the O'Rourke case, that Green's relationship with O'Rourke was 'a rocky relationship at times,' but failed to introduce any evidence regarding Green's past conviction for violence at O'Rourke's apartment, her past statements that Green had threatened and intimidated her and wanted revenge. Trial counsel failed to elicit any testimony whatsoever regarding Green's whereabouts on July 5 at the likely time of the murder, his calls to O'Rourke's apartment the preceding night, or his unsubstantiated and suspect excuse for missing work on the 5th.

"Trial counsel's failure to present this evidence was the result of trial counsel's failure to adequately investigate the O'Rourke murder. At the Rule 32 hearing, Salvagio testified that he did read some, but not all of the Illinois trial transcripts prior to Petric's trial. His testimony is consistent with the trial court. Trial counsel stated -- on the record -- that rather than going through the O'Rourke case transcripts themselves, trial counsel relied on Petric to review the files and then inform them what was relevant. Although Salvagio attempted to backtrack from his testimony that he did not review the entire Illinois transcripts, his subsequent testimony is not credible. Particularly in light of the fact that Salvagio's fee declaration does not include time entries related to transcript review. Salvagio's later testimony that he had read the entire transcript is not credible. Moreover, as noted above, Salvagio represented to the trial court that he had given the Illinois transcripts to Petric to

identify what was pertinent. That suggests that Salvagio did not, in fact, review the entire transcripts.

"At the Rule 32 hearing, Salvagio testified that his review of the Illinois trial transcripts was focused on finding discrepancies between the O'Rourke murder and the Lim murder. However, Salvagio's testimony made clear that trial counsel was aware that Illinois counsel in the O'Rourke matter presented a defense that resulted in Petric's acquittal for the O'Rourke murder. Salvagio's stated reason for not presenting that same defense in this case was that trial counsel wanted to stay away from the O'Rourke case. Salvagio's explanation is implausible. Rather than putting on the defense that succeeded twice before, trial counsel drew the jury's attention to the facts of both the O'Rourke and Lim murders by trying to establish differences between the two murders. Considering the facts and the testimony at the Rule 32 hearing, it is clear that trial counsel's failure to present the O'Rourke defense was the result of insufficient investigation and preparation, unreasonable trial strategy, or both.

"At the Rule 32 hearing, [cocounsel] Tumlin testified that he was aware that Petric had been acquitted of the O'Rourke murder 'because they had a film that showed him in another place at the time that the murder was alleged to have occurred.' In spite of his testimony that he was aware of an alibi for Petric in the Illinois murder, Tumlin nonetheless testified that trial counsel's strategy with respect to the [Rule] 404(b) [, Ala. R. Evid.,] evidence was to show that the crimes were distinguishable. Based on Tumlin's knowledge of this key fact from the Illinois proceedings, trial counsel had no reasonable basis for failing to challenge the [Rule] 404(b) evidence by presenting evidence to the jury to show that Petric did not commit the O'Rourke murder.

"Trial counsel's failure to conduct an adequate investigation with respect to the O'Rourke crimes was also supported by the testimony of [cocounsel] Ladner. At the Rule 32 hearing, Ladner testified that she spoke to Illinois counsel. She recalled that Illinois counsel said that Ladner was the first person representing Petric in this Alabama matter who had contacted him. Because Ladner did not join the defense team until the trial started, that means that trial counsel failed to contact Illinois counsel before trial, despite Judge Cole granting admissions of this [Rule] 404(b) evidence far in advance of trial.

"The Court finds that trial counsel performed deficiently by failing to investigate and present the evidence that previously resulted in Petric's acquittal of the O'Rourke murder. In sum, this evidence provided a plausible defense that Green, not Petric, killed O'Rourke, as evidenced by the resulting acquittal in Petric's Illinois trial. Therefore, Petric was prejudiced by trial counsel's failure to present the same evidence in this case."

(C. 53-58.)

The trial record shows that in November 2007, the State filed notice of its intent to introduce Rule 404(b), Ala. R. Evid., evidence at Petric's trial. (Trial C. 189; 194.) This notice included that the State sought to introduce evidence that Petric had been charged with the rape and murder of Deborah O'Rourke in Illinois. (C. 22.) Extensive pretrial hearings were held on the Rule 404(b), evidence. At the postconviction evidentiary hearing, Amber Ladner testified

that she joined Petric's defense team the Friday before Petric's trial started on Monday. She testified:

"[Postconviction counsel]: Did you at any point during your representation of Mr. Petric have an opportunity to review the trial transcript from that Illinois case?

"[Ladner]: Just because it's been nine years, I don't remember if I read the transcript. I do know that prior to doing the closing arguments I did, like I said, I had all the defense evidence at that point. I know that I looked at all the autopsy pictures from both crimes. I would think that I may have read the transcript.

"I know I talked to the attorney who represented Steven Petric in the two trials in Illinois. I'm wanting to say he's the one who told me he had a brother here in Birmingham that could assist maybe if he was found guilty on the mitigation phase. But my understanding from talking to that attorney, I was the first person that represented Mr. Petric on this case that had ever contacted him.

". . . .

"[Postconviction counsel]: Were you aware of whether or not Mr. Salvagio or Mr. Tumlin attempted to introduce the same evidence that had gotten Mr. Petric acquitted in Illinois?

"[Ladner]: I don't remember them introducing any evidence. I mean, because I don't think they called any witnesses. I do remember during the trial and because I did not have possession of any of the discovery that the defense team had, there was testimony that had occurred during the trials that was something excluded from the Illinois case under -- they had violated Mr. Petric's Fourth Amendment right. And I'm pretty sure, I'm wanting to say, the

objection that all that evidence should have been excluded to begin with. And if it wasn't admissible in his Illinois case, it wouldn't have been admissible here. But the time it came out, the jury heard it, I mean, I was hearing the evidence the same time the jury was hearing the evidence.

"So really it was too late at that point. But none of that should have come into his trial here.

". . . .

"[Postconviction counsel]: You said earlier that Mr. Salvagio and Mr. Tumlin had not contacted the Illinois attorney for Mr. Petric prior to the start of Mr. Petric's 2001 trial, is that correct?

"[Ladner]: Yes. That's what the attorney had told me.

"[Postconviction counsel]: Which attorney?

"[Ladner]: The Illinois attorney.

"[Postconviction counsel]: How did you come to learn that they had not contacted the Illinois attorney?

"[Ladner]: I called him.

"[Postconviction counsel]: And why did you call him?

"[Ladner]: I guess because I'm the kind of person that I am and I'm the attorney that I am that I felt like more should have been done, and I was doing the closing at that point and I wanted to know more information.

"My understanding from the defendant and from the defense team, I don't think they were planning on calling any mitigation witnesses if he was convicted. Because I think the whole theory all along was they were going to win; that it was a

little horrifying to me that the penalty phase hadn't been prepared for prior to the trial. So just curiosity maybe; maybe it's because I wanted to be more prepared."

(R. 276-82.) Salvagio testified that he knew there was a strong possibility that the trial court would allow evidence of the Illinois murder to be introduced at Petric's trial. He said that he looked at the differences between the two murders. Petric's sister, he said, gave counsel a transcript of Petric's Illinois murder trial.

The trial record further shows that six witnesses were called at Petric's trial to testify concerning Petric's conduct in Illinois. (Trial R. 1367-1593.) Four witnesses testified concerning the circumstances of the O'Rourke murder. Graphic evidence was presented about that murder and photographs of that murder were admitted into evidence. Indeed, testimony concerning the O'Rourke murder encompassed a large portion of the transcript. (Trial R. 1367-1483.) Also, police testified in detail as to the evidence that had been collected before Petric was arrested for that murder. In fact, at one point it appeared that Petric was being tried for the O'Rourke murder. In this Court's opinion on direct

appeal, we stated the evidence that had been presented related to the O'Rourke murder:

"Kristen Boster, a former forensic scientist for the Illinois State Police, testified that she analyzed some items related to that crime scene in 1994. Boster testified that she received eight items to analyze. Those items included four stains from items that were recovered from the crime scene and four blood standards from known individuals. The four blood standards were from James Green, Deborah O'Rourke, Dennis O'Rourke, and Petric. The four stains included two semen stains from a bedsheet, a blood and semen stain from a washcloth, and a semen stain from a pillowcase. Boster testified that she compared the DNA profiles of the four individuals to the DNA profiles of the stains. Based on those comparisons, Boster concluded that the DNA profile of the two stains on the bedsheet 'matched James Green and could not have originated from any of the other individuals in the case.' (R. 1474.) Boster further concluded that the DNA profile of the stain from the washcloth 'matched that of Steven Petric and could not have originated from anybody else.' (R. 1474.) Boster also testified that the stain from the pillowcase 'matched Steven Petric and could not have originated from anyone else.' (R. 1474-75.) Boster's testimony was not accompanied by any population-frequency-statistical evidence. Petric did not object to the lack of population-frequency-statistical evidence."

Petric, 157 So. 3d at 222. Defense counsel failed to counter the vast majority of this evidence as detailed by the circuit court in its order: counsel failed to present evidence that at the time of O'Rourke's murder she was dating both James Green and Petric, that Green owed O'Rourke \$1,500 for several months

and she had threatened that she would go to his supervisor if he did not pay her, and that at the time of O'Rourke's murder, there was video evidence that gave Petric an alibi for that murder. Evidence was presented that Petric was acquitted of murdering O'Rourke but was convicted of robbery. As the circuit court noted, counsel failed to present the plethora of evidence that Petric's Illinois counsel presented when that counsel secured Petric's not-guilty verdict for the O'Rourke murder. Thus, the jury was left to conclude that the state's evidence against Petric in the O'Rourke murder was uncontested.

In Rompilla v. Beard, 545 U.S. 374 (2005), the United States Supreme Court noted the importance of reviewing evidence that the State intends to present at trial. The court stated:

"The notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense. As the District Court points out, the American Bar Association Standards for Criminal Justice in circulation at the time of Rompilla's trial describes the obligation in terms no one could misunderstand in the circumstances of a case like this one:

"It is the duty of the lawyer to conduct a prompt investigation of the circumstances

of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.' 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.)."

"[W]e long have referred [to these ABA Standards] as "guides to determining what is reasonable." Wiggins v. Smith, 539 U.S., at 524, 123 S.Ct. 2527 (quoting Strickland v. Washington, 466 U.S., at 688, 104 S.Ct. 2052), and the Commonwealth has come up with no reason to think the quoted standard impertinent here."

Rompilla v. Beard, 545 U.S. at 387-88.

"When representing a criminal client, the obligation to conduct an adequate investigation will often include verifying the status of the client's criminal record, and the failure to do so may support a finding of ineffective assistance of counsel."

United States v. Russell, 221 F.3d 615, 621 (4th Cir. 2000).

People v. Trakhtenberg, 493 Mich. 38, 55, 826 N.W.2d 136, 145

(2012) ("[W]e hold that defense counsel's performance was constitutionally deficient because a sound defense strategy cannot follow an incomplete investigation of the case when the

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decision to forgo further investigation was not supported by reasonable professional judgment.); Yarbrough v. State, 871 So. 2d 1026, 1031 (Fla. D. C. 2004) ("[T]rial counsel did not render assistance meeting an 'objective standard of reasonableness'" because counsel failed to contact a key witness.).

We cannot say that the circuit court's findings are clearly erroneous. Based on the foregoing, the order of the circuit court is affirmed.

AFFIRMED.

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