Rel: January 4, 2019

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

1160762

Ex parte Emanuel Aaron Gissendanner, Jr.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(In re: State of Alabama

v.

Emanuel Aaron Gissendanner, Jr.)

(Dale Circuit Court, CC-01-350.60; Court of Criminal Appeals, CR-09-0998)

BOLIN, Justice.[1]

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[1]Although Justice Bolin was not present at oral argument in this case, he has listened to the audiotape of the oral

This Court granted certiorari in this case to review the Court of Criminal Appeals' opinion reversing in part the Dale Circuit Court's order granting Emanuel Aaron Gissendanner, Jr., a new trial based on ineffective assistance of counsel and a violation of Brady v. Maryland, 373 U.S. 83 (1963).

I. Facts and Procedural History

A. Trial

In 2001, Gissendanner was charged with three counts of capital murder in the death of Margaret Snellgrove: murder during a kidnapping in the first degree, § 13A-5-40(a)(1), Ala. Code 1975; murder during a robbery in the first degree, § 13A-5-40(a)(2), Ala. Code 1975; and murder during a rape, § 13A-5-40(a)(3), Ala. Code 1975. A separate indictment charged Gissendanner with possessing or uttering a forged check drawn on Snellgrove's bank account, in violation of § 13A-9-6, Ala. Code 1975. He was convicted of two counts of capital murder -- murder during the course of a robbery and murder during the course of a kidnapping -- and of possession of a forged instrument. The jury recommended by a vote of 10-2 that he be sentenced to death on the capital-murder convictions. The

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argument.

circuit court then sentenced Gissendanner to death on the capital-murder convictions. He was sentenced, as a habitual offender, to life imprisonment on the forgery conviction. His convictions and sentences were affirmed on direct appeal. Gissendanner v. State, 949 So. 2d 956 (Ala. Crim. App. 2006).

Judge Kenneth Quattlebaum was the trial judge. His sentencing order contained a summary of the findings related to Gissendanner's participation in the crimes; it provided, in part, as follows:

> "On Friday, June 22, 2001, [Gissendanner] intentionally caused the death of Margaret Snellgrove by inflicting severe head and neck injuries to her. The assault occurred at the victim's home. On Saturday, June 23, 200[1], neighbors and relatives became concerned about the victim, as she could not be located. She had missed several appointments on June 22nd and on June 23rd. She was last seen June 21, 2001. The police were contacted and examination of the victim's home revealed that she had been assaulted in her carport. Hair and blood, as well as the victim's broken glasses and an earring were discovered in the carport. The victim's car, a 1998 Oldsmobile Ninety-Eight, was missing. No one witnessed the assault, and there is no evidence of an accomplice in the case. [Gissendanner] had been to the victim's residence previously. He helped witness Reverend David Brown with yard work at her house for about three hours in March or April 2001.
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> "A witness testified that she saw a black guy driving an automobile matching the description of the victim's car at approximately 6:30 a.m. on the

morning of June 22nd.[2] The location where the witness saw the automobile was in close proximity to the victim's home. The witness could not identify the driver as [Gissendanner], but her attention was drawn to the vehicle because her sister-in-law had an automobile that looked the same.

"On the morning of June 22nd, [Gissendanner], driving the victim's vehicle, picked up his best friend, Bernard Campbell, nicknamed 'Nobbie,' and they went to Clio. [Gissendanner] told Nobbie that the car belonged to one of his girlfriends. In Clio [Gissendanner], driving the victim's automobile, picked up three females who knew both [Gissendanner] and Nobbie, and they rode around, drank beer, and smoked weed. [Gissendanner] was wearing a brown pair of Dickey [brand] pants, a red shirt and a white tee shirt. [Gissendanner] told the females that he had bought the car from an 'old white woman.' They all noticed a Bible in the car.[3]

"Queen Esther Morris testified that she saw [Gissendanner] the morning of June 22nd in the victim's car. [Gissendanner] told Morris that he was going fishing.

"Around 1:00 a.m. the morning of June 23rd the victim's automobile was reported abandoned on property owned by Linda Russell. Upon checking the license plate it was confirmed to be the victim's missing automobile.[4] [Gissendanner] testified that the automobile was rented to him by an individual named Buster he saw early Friday morning who was looking to buy some drugs. [Gissendanner] further testified that Buster gave him a check on the victim's account, asked him to cash it and said he would use the proceeds to buy drugs from [Gissendanner].

"Following the discovery of the victim's automobile, law enforcement began a search and investigation in the area for the victim's body. The

car was examined and blood was discovered in the trunk of the car, on the underside of the trunk lid. The blood was later determined to be that of the victim.

"Investigators searched a nearby abandoned trailer in which [Gissendanner] sometimes stayed. In the trailer they found several items belonging to the victim including a cell phone, the victim's purse and some papers taken from the stolen vehicle. Investigators also found some of [Gissendanner's] clothing in the trailer which matched the description of the clothing [Gissendanner] was wearing on Friday morning during his trip to Clio. The victim's bloodstains were found on the clothing.

"On Saturday evening, June 23rd, [Gissendanner] paid his former wife $100.00 to drive him to Montgomery to visit his sister. She did so. [Gissendanner] was there in Montgomery when he was identified as a suspect, and he returned voluntarily to the Ozark Police Department, where he was questioned. He denied any involvement in the death of the victim, but admitted to driving her automobile and cashing the victim's check at the SouthTrust Bank in Ozark.

"The body of Margaret Snellgrove was found with the use of a cadaver dog on June 27, 2001, near the area where the automobile was found abandoned and near the trailer where [Gissendanner's] clothes and the victim's belongings were found. The body was found in a ditch covered with tree limbs.[5] It appeared to have been there for several days and was badly decomposed. An autopsy determined that Margaret Snellgrove died of severe head and neck injuries. When the body was found she was in her panties with her shirt and brassiere pulled up under her arms. Her breasts were exposed.

"[2][Gissendanner] is a black male.

"[3]The victim's niece testified that the victim often carried a Bible.

"[4][Gissendanner] did not deny having and using the victim's automobile.

"[5]A knife was found in the stolen vehicle. The knife appeared to be freshly used for cutting wood. The limbs covering the victim's body had been cut there in the immediate vicinity of the ditch where she was found."

Gissendanner, 949 So. 2d at 959–60.

The trial judge further found the existence of three aggravating circumstances under § 13A-5-49, Ala. Code 1975: (1) that the murder was committed during a kidnapping; (2) that the murder was committed during a robbery; and (3) that the murder was committed while Gissendanner was on probation for five felony convictions (possession of a controlled substance and four second-degree-forgery convictions). The trial judge found no mitigating circumstances as set out in § 13A-5-51, Ala. Code 1975, and that any evidence of additional mitigating circumstances pursuant to § 13A-5-52, Ala. Code 1975, was far outweighed by the aggravating circumstances.

The trial judge concluded:

"The court finds that this conviction is based upon circumstantial evidence. The guilt of the defendant may be proved by circumstantial evidence. The test of the sufficiency of circumstantial evidence is whether the circumstances, as proved, produce a moral conviction, to the exclusion of all reasonable doubt, of the guilt of the accused. The court finds that the state has met the burden of this test in this case. The court recognizes that there should not be a conviction based upon circumstantial evidence unless it excludes every other reasonable hypothesis than that of the guilt of the defendant. The court concludes from the evidence that the circumstances in this case cannot be reconciled with the theory that someone other than [Gissendanner] may have done the act. [Gissendanner] has been proven guilty by that full measure of proof the law requires.

"The court has not considered any statement by the victim's family members concerning the family member's opinions or characterization of the victim or [Gissendanner] or of the crimes or the appropriate sentence.

"The court has considered all of the evidence in the case, and the court has weighed the aggravating circumstances against the mitigating circumstances. After giving full measure and weight to each of the aggravating and mitigating circumstances, and taking into account the recommendation of the jury contained in its advisory verdict, it is the judgment of the court that aggravating circumstances outweigh mitigating circumstances shown by the evidence in this case. The aggravating circumstances speak for themselves and carry great weight in the mind of any reasonable and rational person. It is clear that the murder, the kidnapping, and the robbery that were committed in this case were deliberately and intentionally planned and carried out. [Gissendanner] chose his innocent victim at random to provide him with a joy ride and some cash.

> After killing her and abusing her he disposed of her body in a manner not suitable for an animal and left it to deteriorate and decompose in the open. The evidence illustrates graphically the evil intent of [Gissendanner] and his total disregard for the value of human life."

B. Rule 32 Proceedings

In 2007, Gissendanner timely filed a Rule 32, Ala. R. Crim. P., petition attacking his capital-murder convictions and death sentences. Following an evidentiary hearing, Judge Quattlebaum, who had presided over Gissendanner's trial, issued an order, granting Gissendanner's petition for postconviction relief on the grounds of ineffective assistance of counsel and a violation of Brady v. Maryland and ordering a new trial. In his 70-page order, Judge Quattlebaum found that Gissendanner's defense counsel were deficient in both the guilt phase and the penalty phase of the trial. The judge found that defense counsel failed to investigate and to prepare for trial. The judge also found that the State had violated Brady v. Maryland in failing to disclose handwriting samples to the defense. The following are the findings of Judge Quattlebaum as reflected in his order.

1. Ineffective Assistance of Counsel by Failure to Investigate at the Guilt Phase

Judge Quattlebaum found that counsel Bill Kominos spent, at most, nine hours with Gissendanner in the more than two years between the time Gissendanner turned himself in and his trial. Counsel Joseph Gallo, who was primarily responsible for the penalty phase, spent 7.7 hours with Gissendanner in 4 meetings over the more than 2 years before trial. Defense counsel spent, at most, 3 hours interviewing potential witnesses for the defense, with no interviews taking place until more than 18 months after Gissendanner was arrested. Defense counsel spent no time interviewing the State's witnesses. Fifteen months after Gissendanner's arrest, defense counsel sought funds for an investigator; funds were granted for 30 hours of the investigator's time. The investigator eventually spoke with only 2 potential witnesses and used only 4.75 hours of the 30 hours. Outside a limited meeting with Gissendanner's father, defense counsel did not speak with any of the factual witnesses who later testified at the Rule 32 evidentiary hearing. Although defense counsel knew that the State would be providing expert testimony in the fields of fingerprinting, handwriting analysis, pathology, and DNA evidence, they did not confer with or retain any experts

who could have helped prepare a defense to such testimony and who would have offered their own analysis as part of the defense's case in the guilt phase.[2]

Judge Quattlebaum further found that defense counsel's deficient performance prejudiced Gissendanner's defense. In his order, he cited numerous examples of defense counsel's failure to investigate and call, at trial, alibi witnesses to cast doubt on the State's theory of the case. Judge Quattlebaum also found that, had defense counsel reviewed documents available to them and/or consulted with experts about those documents, they would have been able to cast further doubt on the State's theory by explaining to the jury that none of the considerable amount of physical evidence collected at the victim's house had been linked to Gissendanner by the State. Specifically, the judge explained the lack of investigation in the following areas:

a. Fingerprint Report

[2]Kominos and Gallo testified at the Rule 32 hearing, and their sworn fee declarations pursuant to which they were paid for their representation of Gissendanner were submitted into evidence.

Judge Quattlebaum noted that crime-scene-forensics expert Larry Stewart, head of the United States Secret Service Forensics Laboratory, testified at the Rule 32 hearing that an "inexplicably altered" fingerprint report presented at the original trial was very troubling, because such an unexplained alteration reflects a deviation from standard procedures. Moreover, there was no chain of custody for the item found in the car from which the fingerprint that was the subject of the altered report was lifted. The judge found that defense counsel could have used such testimony at Gissendanner's trial to exclude the "corrected" report. The judge found that, had defense counsel investigated the case through a review of documents and or the retention of a forensics expert, they could have educated the jury about the lack of any fingerprints from the crime scene tying Gissendanner to the victim. This would have cast doubt on the State's theory that Gissendanner was the one who took the victim's car from her carport.

b. Victim's Car

Judge Quattlebaum also noted that, under the State's theory of the case, the victim's body was placed inside the

trunk of her car after she was killed. One of the most important pieces of the State's case was the testimony of Shirley Hyatt that, while she was on her way to garage sales on Friday morning, she had seen an unidentified black man, near the victim's house, driving a white Oldsmobile car with a dark top. This was the only evidence that put Gissendanner in the vicinity of the victim's house. Furthermore, it was the only evidence tending to show that the car was taken by a black man rather than a white man named Buster Carr ((1) witnesses at the Rule 32 hearing who were not interviewed by defense counsel for trial had seen Carr driving the victim's car on Friday, June 22, 2001; (2) Carr had trimmed trees for the victim; (3) Carr had purchased drugs from Gissendanner in the past; and (4) Gissendanner had accepted items in exchange for drugs in the past). Gissendanner admitted driving the victim's car in another part of town after Buster Carr had given it to him in exchange for drugs. Other witnesses, who were not interviewed by defense counsel, saw Gissendanner at times on Friday morning that conflict with Hyatt's testimony that she saw a black man driving the victim's car near the victim's house. The judge also stated that had defense

counsel reviewed Hyatt's June 28, 2001, interview with police, they would have discovered that Hyatt told police that she saw a black man driving a white and black car at 7:25 or 7:30 a.m. At trial, Hyatt said she saw the car at 6:30 or 6:45 a.m. and added that the black male had bushy hair (like Gissendanner). Had defense counsel reviewed this document, they could have cross-examined Hyatt on those discrepancies.

Judge Quattlebaum also noted that defense counsel failed to review certain photographs in their possession. Photographs of the trunk of the victim's car showed no visible blood. The judge found that the photographs could contradict the State's theory that the victim was transported in the trunk of her car after suffering head and neck wounds. Had defense counsel used the photographs and consulted with a forensics expert as part of a basic investigation into the State's case, they could have discredited the State's contention that the victim's body had been placed inside the trunk of the car. Because the State had no other theory about how the victim's body was transported from her house to the pond where her body was found, this would have tended to create a reasonable doubt of Gissendanner's guilt.

c. Knife and Branch Cuttings

Judge Quattlebaum stated that the State's theory of the case, on which Gissendanner was convicted, had him drive the victim to Gunter Pond, drag her body over a barbed wire fence to a ravine near the pond, and then cover her body with branches he cut with a knife he left in the victim's car. The State offered testimony from a policeman that the knife in question had sap on it and "fresh cuts" on the blade that were made when Gissendanner "hacked" the tree branches to cover the body. The judge found that had defense counsel reviewed the documents and physical evidence, consulted with a forensics expert, or reviewed the testimony from the preliminary hearing, they would have discovered substantial evidence to discredit the State's theory that Gissendanner had driven the victim's body to Gunter Pond and covered her body with tree branches, including that no trace evidence collected from the pond area was connected to Gissendanner (hair, soil samples, footprints, fingerprints, tire tracks).

Judge Quattlebaum stated that, at the original trial, the State alleged that Gissendanner had used the knife found in the car to cut all the branches found covering the victim's

body at the pond. The police officer (who was not an expert in forensics) testified at trial that he could identify "fresh scrapes" and sap on the blade of the knife that would have come from cutting the branches. The State then offered into evidence one small branch that had originated from a tree at the ravine, and the police officer told the jury that it was apparent where the knife had hacked the branch before the branch was broken into two pieces. The judge found that, had defense counsel consulted with a forensics expert, they could have discredited this evidence concerning the knife being the instrument that had been used to cut the branches. No lab testing was done to show whether there was any sap on the knife or, if there was, to show that the sap was not consistent with the branch admitted into evidence at trial.

Judge Quattlebaum found that, had defense counsel conferred with anyone or reviewed the physical evidence the State planned to use at trial, they could have been prepared to show the jury that no credible evidence connected the knife Gissendanner admitted to possessing to the scene where the victim's body was found. Moreover, the police officer who testified that the knife had been used to hack the branches

covering the victim's body had previously testified at the preliminary hearing in July 2001 that several trees had actually been "sawed" in half to cover the body. As a result of defense counsel's failure to investigate and to prepare, they failed to recognize the obvious importance of introducing several photographs of the many large branches and trees that covered the victim's body, and the photographs were not introduced into evidence. In fact, several large sections of trees were found on top of the victim's body. This evidence was made especially important because of defense counsel's defense that Buster Carr, a professional tree trimmer, was a suspect.

d. Forgery

Judge Quattlebaum noted that Gissendanner was also charged with felony forgery (for which he received a sentence of life imprisonment) and that the State alleged that Gissendanner had written one of the victim's checks to himself and that he then cashed the check on Saturday morning, June 23, 2001. The State retained a handwriting expert who issued a report and appeared at trial. Although defense counsel knew that the State would be putting a handwriting expert on the

stand, they did nothing to investigate the forgery allegations. The judge found that, had they investigated the facts and consulted an expert, defense counsel could have presented evidence to discredit the State's expert, which could have created reasonable doubt. Knowing that the State would put on an expert to testify that Gissendanner forged the front entries on the check, in a case in which the sole evidence of the forgery count was the check itself, defense counsel nonetheless failed to consult with or retain anyone who could refute the expert's report.

At trial, the State's expert testified that it was 70-90% likely that Gissendanner had written parts of the front of the check in question. The State expert theorized that three different persons wrote on the front of the check. However, Gissendanner's expert at the Rule 32 hearing explained that the State's expert at the original trial could not conclusively make such findings based on the limited handwriting on the check. The Rule 32 handwriting expert opined that the handwriting on the front of the check was probably not Gissendanner's and that there simply was not enough evidence to make it likely that Gissendanner had forged

the front of the check he had endorsed on the back and cashed. The expert at the Rule 32 hearing pointed out that Buster Carr's writing showed "similarities" with the handwriting on the forged check.

e. Bank Teller

Judge Quattlebaum stated that a bank teller testified at Gissendanner's trial that Gissendanner had been to the bank previously to cash checks written to him from the victim. The judge found following the Rule 32 hearing that, had defense counsel interviewed the bank teller and done a basic investigation of the victim's checking account, they would have found proof that, in fact, no other checks had ever been written to Gissendanner from the victim. The bank teller's testimony, which remained uncontradicted, was clearly erroneous and created a fictitious prior relationship between Gissendanner and the victim, which tended to erode reasonable doubt of Gissendanner's guilt. Defense counsel did not interview the bank teller or subpoena the bank records.

f. Abandoned Trailer

Judge Quattlebaum stated that, beginning with its opening statement, the State argued that Gissendanner lived in the

abandoned trailer where some of the victim's possessions were later found. During the trial, the State's witnesses testified regarding the possessions belonging to the victim having been collected from the trailer along with clothes belonging to Gissendanner. The State noted that Gissendanner's clothes were found along with the victim's possessions in the abandoned trailer. The judge noted that defense counsel did not challenge and discredit this testimony, which served to connect Gissendanner and the victim. Those items found in the trailer -- the victim's purse and its contents -- likely had been with the victim at the time of her murder. The judge focused on defense counsel's failure to interview Gissendanner's family and neighbors, who would have been able to create a reasonable doubt in the jurors' minds regarding the State's theory that Gissendanner lived in the abandoned trailer.

The judge also noted that defense counsel failed to review documents available to them that would have undermined the State's assertion that Gissendanner lived in the abandoned trailer. Photographs of the abandoned trailer and reports of the forensic testing on evidence collected from the trailer on

two different dates cast doubt on the State's assertion. Clothing (a grey shirt and khaki pants) and a bedsheet were found in a white bucket in the trailer and were collected on Saturday, June 21, 2001. No witness or forensic evidence connected those clothes and the bedsheet to Gissendanner. Fingerprints were lifted from items in the white bucket, and none of the fingerprints matched Gissendanner's. The judge stated that defense counsel did not investigate those facts, which they could have done with or without expert assistance, and that, thus, they were unprepared and unable to present testimony to rebut the State's theory that Gissendanner was living in the abandoned trailer.

The judge noted that the police retrieved clothing from the front porch of the abandoned trailer on June 26, 2001. A sock found with the clothing contained a small amount of blood. The judge found that defense counsel failed to investigate the unexplained appearance of the clothing found on the porch during a second search five days after the first search.

g. Blood Evidence

Judge Quattlebaum found that a basic investigation would have undercut the State's assertion that Gissendanner's clothing found at the abandoned trailer with the victim's blood on one sock proved his guilt. This evidence was very condemning because the natural inference to be drawn from it was that Gissendanner had had physical contact with the victim. Other than a fingerprint in the car Gissendanner admitted to driving and another inked fingerprint Gissendanner admitted to placing on the check at the bank teller's request, the only physical evidence the State presented tying Gissendanner to the murder was this sock on which, the State alleged, a drop of the victim's blood had been found. Because the drop of blood on the sock was essentially the entirety of the State's physical evidence against Gissendanner, defense counsel were particularly obligated to investigate that sock and to challenge and discredit the State's theories regarding this piece of evidence. The judge found that reasonably effective defense counsel, had they conducted a basic investigation, could have discredited the State's assertion that the sock proved Gissendanner's guilt, creating reasonable doubt in the minds of the jurors.

The judge found that, if defense counsel had consulted with a forensics expert regarding the sock and the location of the victim's blood on the sock, they would have discovered evidence to show that the blood on the sock was in an unlikely place for the only blood evidence from the victim's murder. Also, the judge found that there were chain-of-custody problems with some of the State's physical evidence that went undiscovered because of defense counsel's failure to investigate. The judge also found that there were problems with the chain of custody of the sock that would have tended to create a reasonable doubt as to the reliability of the evidence.

2. State's Brady v. Maryland Violation

Judge Quattlebaum found that the State violated Gissendanner's constitutional rights when it withheld favorable evidence from defense counsel. The judge found that the State violated his discovery order when it gave defense counsel a truncated report from the handwriting expert and failed to provide the defense with more than 30 handwriting exemplars from Gissendanner, Buster Carr, and Buster Carr's wife, Peggy Carr. The judge found that the State's failure to

turn over this exculpatory evidence was particularly significant because the forged check was the main piece of evidence used to convict Gissendanner of forgery and was key evidence in the murder case.

3. Ineffective Assistance of Counsel by Failure to Investigate at the Penalty Phase

Judge Quattlebaum discussed defense counsel's failings at the penalty phase and found their assistance to be constitutionally inadequate. Specifically, the judge found that counsel's failure to interview Gissendanner's friends to determine who would be the best witnesses for presenting mitigation testimony prejudiced Gissendanner. The judge found that there were family and friends who were easily discoverable and who were willing to testify favorably for Gissendanner, including his mother, his sister, and the Gissendanner family's pastor.

4. Conclusion

In conclusion, Judge Quattlebaum found that there was a reasonable probability that, but for defense counsel's errors, the result of the proceeding would have been different. The judge determined that the probability was sufficient to, and,

in fact, did, undermine confidence in Gissendanner's convictions and death sentences.

C. State's Appeal and Application for Rehearing

The State appealed from Judge Quattlebaum's order awarding Gissendanner a new trial.[3] The Court of Criminal Appeals issued an opinion on December 19, 2014, reversing the ruling and directing the court to reinstate Gissendanner's convictions and sentences. On October 23, 2015, on application for rehearing, the Court of Criminal Appeals withdrew its original opinion and substituted another. State v. Gissendanner, [Ms. CR-09-0998, October 23, 2015] ___ So. 3d ___ (Ala. Crim. App. 2015). Judge Welch authored the opinion, in which Judge Kellum concurred. Retired Associate Justice Champ Lyons, Jr., was appointed as a special judge; he concurred specially. Judge Burke dissented with a writing, which Judge Joiner joined. Judge Joiner dissented with a writing, which Judge Burke joined. Judge Windom recused herself, precipitating the appointment of retired Justice Lyons as a special judge.

[3]See Rule 32.10(a), Ala. R. Crim. P.

D. Court of Criminal Appeals' Opinion on Application for Rehearing

The Court of Criminal Appeals' opinion, citing authority from other jurisdictions, determined that "'"both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact,"'" ___ So. 3d at ___ (quoting State v. Pitsch, 124 Wis. 2d 628, 634, 369 N.W.2d 711, 714 (1985), quoting in turn Strickland v. Washington, 466 U.S. 668, 698 (1986)), and that the court would not "'reverse the circuit court's findings of fact, that is, the underlying findings of what happened, unless they are clearly erroneous.'" ___ So. 3d at ___ (quoting Pitsch, 124 Wis. 2d at 634, 369 N.W.2d at 714). It also determined that, insofar as the questions of whether counsel's behavior was deficient and whether that deficient behavior prejudiced the defendant are questions of law, the circuit court's decision is not entitled to deference. ___ So. 3d at ___.

With regard to the Brady v. Maryland violation, the Court of Criminal Appeals held: (1) that Gissendanner did not meet his burden of proving that the State failed to disclose exculpatory evidence in the form of handwriting exemplars when defense counsel were aware of the handwriting exemplars at

trial, (2) that the State's handwriting expert was questioned about the handwriting exemplars, (3) that defense counsel stipulated to the authenticity of the exemplars, and (4) that defense counsel received the handwriting expert's shortened report.

The Court of Criminal Appeals determined that the circuit court erroneously concluded that defense counsel were "per se" ineffective based on the amount of time documented on their attorney-fee declarations for pretrial work. The court declined to find ineffective assistance of counsel based on time sheets alone.

The Court of Criminal Appeals determined that the circuit court erred in concluding that defense counsel were ineffective for failing to secure the services of a forensic expert. The court found that at the Rule 32 hearing Gissendanner had failed to ask defense counsel why they failed to conduct certain tests. Moreover, the court concluded that defense counsel vigorously cross-examined the State's witnesses at the original trial about the lack of forensic evidence connecting Gissendanner to the murder.

The Court of Criminal Appeals held that defense counsel were not ineffective in failing to present alibi evidence when the alibi evidence of Gissendanner's brother and Gissendanner's mother would have contradicted Gissendanner's testimony. The court held that Gissendanner failed to prove that he was prejudiced by defense counsel's failure to call the pastor whose church Gissendanner's family attended because part of the pastor's testimony would have been hearsay and was cumulative of Shirley Hyatt's identification testimony.

The Court of Criminal Appeals concluded:

> "[T]he circuit court erred in granting Gissendanner relief on claims of ineffective assistance of counsel that had allegedly occurred at the guilt phase of the trial. Because the circuit court granted the petition for relief as to the guilt-phase claims, the circuit court, at that time, did not address Gissendanner's penalty-phase claims of ineffective assistance of counsel. However, because this Court now finds that the circuit court erred in granting relief as to the guilt-phase claims, this cause must be remanded to the circuit court for the limited purpose of addressing Gissendanner's penalty-phase claims of ineffective assistance of counsel it has not already ruled on. As to those claims, the circuit court on remand is directed to make specific, written findings of fact based on the existing record, including the evidence that was presented at the August 2009 evidentiary hearing. The case shall not be reopened for an additional hearing or for the submission of new evidence or arguments. The circuit court shall take all necessary action to see that the circuit clerk makes

> due return to this Court at the earliest possible time and within 90 days of the release of this opinion."

State v. Gissendanner, ___ So. 3d at ___.

1. Judge Burke's Dissenting Opinion

In his dissent, Judge Burke noted that the judge who had presided over Gissendanner's trial also heard the Rule 32 petition, and he stated that the majority was reweighing the evidence. Judge Burke also noted that by getting a new trial Gissendanner was not being "set free" and that this case "[was] not about the death penalty," but was about making sure all defendants in our system of justice receive a fair trial.

2. Judge Joiner's Dissenting Opinion

Judge Joiner wrote a separate dissent, stating:

> "The main opinion correctly explains that when reviewing claims of ineffective assistance of counsel 'the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.' Strickland v. Washington, 466 U.S. 668, 698 (1984). When the same judge presides over both the original trial and the postconviction proceedings -- as is the case here -- that judge may either grant or deny postconviction relief on an ineffective-assistance-of-counsel claim based on that judge's 'own observations' and 'personal knowledge' of trial counsel's actions. See, e.g., Boyd v. State, 913 So. 2d 1113, 1132 (Ala. Crim. App. 2003)('Moreover, the judge presiding over the Rule 32 proceedings also presided over Boyd's trial and dismissed this claim based on his own

observations and his personal knowledge that Boyd's counsel were prepared and did mount a reasonable defense on Boyd's behalf.')(citing Ex parte Hill, 591 So. 2d 462, 463 (Ala. 1991), and Sheats v. State, 556 So. 2d 1094, 1095 (Ala. Crim. App. 1989)). Additionally, when the same judge presides over both the original trial and the postconviction proceedings and finds that, under the second prong of Strickland, trial counsel's errors 'resulted in prejudice to [the petitioner], we afford [that] finding considerable weight.' State v. Gamble, 63 So. 3d 707, 721 (Ala. Crim. App. 2010)(emphasis added)(applying the 'considerable weight' standard and affirming the circuit court's order granting Gamble's postconviction petition based on ineffective assistance of counsel and citing Francis v. State, 529 So. 2d 670, 673 n. 9 (Fla. 1988)('Postconviction relief motions are not abstract exercises to be conducted in a vacuum, and this finding is entitled to considerable weight.' (emphasis added))). See also Washington v. State, 95 So. 3d 26, 53 (Ala. Crim. App. 2012)(applying the 'considerable weight' standard and affirming the circuit court's order denying Washington's postconviction claim of ineffective assistance of counsel).

"The main opinion contends that applying the 'considerable-weight' standard used in Gamble and Washington to a circuit court's determination that a petitioner suffered prejudice as a result of counsel's deficient performance during the guilt phase of a capital-murder trial reads those cases 'too broad[ly].' ___ So. 3d at ___. I do not read those cases, however, as limiting the 'considerable-weight' standard to only those instances in which the circuit court finds prejudice during the penalty phase of trial.

"In Gamble, this Court based its 'considerable-weight' standard on the Florida Supreme Court's decision in Francis v. State, supra, in which the

> Florida Supreme Court, although addressing 'prejudice' in the context of sentencing, noted, rather broadly, that
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> > "'[t]he judge who heard this motion presided at Francis' third trial. Who, better than he, could determine whether failure to introduce this evidence prejudiced Francis sufficiently to meet the Strickland v. Washington test? Post-conviction relief motions are not abstract exercises to be conducted in a vacuum, and this finding is entitled to considerable weight.'
>
> "529 So. 2d at 673 n. 9. There is no language in Gamble, Washington, or Francis that limits the 'considerable-weight' standard to only the penalty phase of a capital-murder trial. Application of the 'considerable-weight' standard in cases where the circuit court grants postconviction relief for guilt-phase ineffective assistance of counsel is consistent with Gamble, Washington, and Francis."

State v. Gissendanner, ___ So. 3d at ___.

Judge Joiner opined that the main opinion mischaracterized Judge Quattlebaum's order, in that Judge Quattlebaum never found "per se" ineffective assistance of counsel based on the number of hours defense counsel spent in preparation for Gissendanner's trial. Rather, the discussion of the few hours set out in the fee declarations was in connection with defense counsel's failure to interview potential witnesses and to review documents.

Judge Joiner also noted that the main opinion mischaracterized part of Gissendanner's trial testimony. He went on to state that, although the main opinion pointed to discrepancies between Gissendanner's recollection of events and potential alibi witnesses' recollection of events, Judge Joiner was not persuaded to conclude, as did the main opinion, that those discrepancies rendered moot defense counsel's duty to investigate those alibi witnesses. Judge Joiner also discussed how he believed the main opinion, somewhat illogically, concluded that, if defense counsel had spoken to those witnesses, defense counsel could have made "strategic decisions" not to present their testimony because, the main opinion contended, their testimony and Gissendanner's testimony would conflict in some aspects. Unlike the main opinion, Judge Joiner opined that he could not fathom any reasonable, strategic decision defense counsel could have made both to forgo their investigation into the only plausible line of defense and to rely solely on Gissendanner to convey his alibi defense, subjecting Gissendanner to cross-examination in which he was forced to admit that he was both a drug dealer

and a five-time convicted felon--a concession that undermined his credibility and, in turn, undermined his alibi defense.

E. On Return to Remand

Judge Quattlebaum issued his Rule 32 order in 2013; the Court of Criminal Appeals issued its opinion remanding the case with directions in October 2015. Judge Quattlebaum retired in 2016, and another circuit judge addressed the Court of Criminal Appeals' remand order. The circuit court's order on remand states, in part:

> "The Court finds that the claim that trial counsel was ineffective in the penalty stage for failing to present a complete picture of mitigation during the penalty stage is without merit and is refuted by the record at the guilt phase and sentencing phase of the trial.
>
> "The Court finds that the claim that trial counsel was ineffective for fail[ing] to properly prepare and present witnesses during the penalty phase is without merit and is refuted by the record.
>
> "The Court has considered all of the claims of ineffective counsel and finds that they are without merit. As to such claims the Court finds as follows:
>
> "The Court finds from the record and the testimony at the August 2009 evidentiary hearing that the conduct of attorneys [Bill] Kominos and [Joseph] Gallo was not such as to undermine the proper functioning of the adversarial process so that the trial or appeal of this cause could not be relied upon to produce a just result. The Court finds that counsel's assistance was reasonable and

> effective considering all of the circumstances of the case. The Court further finds that the decisions made by counsel concerning the penalty phase of this case and their strategy was the result of reasonable professional judgment."

In his brief on return to remand to the Court of Criminal Appeals, Gissendanner argued that the circuit court did not comply with the remand instructions in that the circuit court failed to make specific findings of fact on each penalty-phase ineffective-assistance claim that had not previously been addressed in Judge Quattlebaum's original order granting him postconviction relief. However, in the main opinion issued on return to remand, State v. Gissendanner, [Ms. CR-09-0998, February 10, 2017] ___ So. 3d ___ (Ala. Crim. App. 2017), the Court of Criminal Appeals stated that Gissendanner did not request that it remand his case again for the circuit court to fully comply with the instructions in its original opinion. Instead, Gissendanner requested that the Court of Criminal Appeals reverse the circuit court's order on remand determining that the claims of ineffective of assistance of counsel at the penalty phase were without merit. The Court of Criminal Appeals stated that not every case warrants a second remand when a lower court on remand fails to fully comply with

a reviewing court's instructions. The Court of Criminal Appeals stated that, because its review of the issues addressed on remand was de novo and because Gissendanner's postconviction petition had been pending since 2007, a second remand would be a waste of time and judicial resources.

The Court of Criminal Appeals affirmed the circuit court's order on remand, holding that Gissendanner's claims of ineffective assistance of counsel at the penalty phase did not entitle him to postconviction relief. Based on its earlier opinion on rehearing, the court reversed that part of the circuit court's order holding that Gissendanner was entitled to relief on his claims that counsel were ineffective at the guilt phase of the trial and directed the circuit court to reinstate Gissendanner's convictions and sentences.

F. Certiorari Review

This Court granted certiorari review on all six grounds set out in Gissendanner's petition: (1) Whether the opinion of the Court of Criminal Appeals conflicts with this Court's precedent by "disregard[ing] completely a trial court's findings on disputed facts made after a Rule 32 hearing, and instead conduct[ing] a de novo review of a cold record to make

its own conflicting factual findings?"; (2) whether the opinion conflicts with precedent by allegedly failing "to give considerable weight to the factual findings and determinations of credibility made in the Rule 32 proceeding by the same trial court judge who oversaw all earlier aspects of a capital-murder trial?"; (3) whether the opinion conflicts with this Court's precedent by "disregard[ing] the actual contents of the trial court's order on a Rule 32 petition, asserting that the circuit court made certain findings that ... it did not make?"; (4) whether the opinion conflicts with prior decisions in allegedly ignoring Judge Quattlebaum's order and in finding no prejudicial ineffective assistance of counsel in the penalty phase of Gissendanner's trial; (5) whether the opinion conflicts with United States Supreme Court precedent by "revers[ing] the trial court to hold that even when trial counsel knows that the State's entirely circumstantial evidence case is to be presented through four expert witnesses, it is not ineffective assistance of counsel to fail to consult with <u>any</u> experts in preparing for the guilt phase of a capital murder case?"; and (6) whether the opinion conflicts with United States Supreme Court precedent "in

reversing the trial court's Brady determination that handwriting samples were withheld by the State, and by then neglecting to consider whether (if trial counsel did have access to the evidence in question) it was prejudicial ineffective assistance for trial counsel to not use such evidence?"

II. Standard of Review

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court set out the test for determining when counsel's performance is so inadequate that a defendant's Sixth Amendment right to counsel is violated. Against counsel's advice, David Washington pleaded guilty to three capital-murder charges and additional charges. During the plea colloquy, Washington told the trial judge that he had no significant prior criminal history and that, at the time of his crime spree, he was under extreme stress caused by his inability to support his family. He stated that he accepted responsibility for his crimes. The trial judge stated that he had a "great deal of respect for people who are willing to step forward and admit their responsibility" but that he was making no promises regarding sentencing. 466 U.S. at 688-89.

Trial counsel advised Washington to invoke his right under Florida law to an advisory jury at his capital-sentencing hearing. Washington rejected that advice and chose to be sentenced by the trial judge without a recommendation from an advisory jury.

Trial counsel did not present any evidence during the sentencing hearing and instead relied primarily on the trial judge's favorable remarks at the plea colloquy. The sentencing judge found numerous aggravating circumstances and no mitigating circumstances, and Washington was sentenced to death. Subsequently, Washington claimed that trial counsel's efforts amounted to ineffective assistance of counsel. He challenged six areas of counsel's performance: (1) failure to move for a continuance to prepare for sentencing; (2) failure to request a psychiatric report; (3) failure to investigate and present character evidence; (4) failure to present meaningful arguments to the sentencing judge; (5) failure to investigate the medical examiners' reports; and (6) failure to cross-examine the medical experts called by the state at the sentencing hearing. The state court and federal courts reviewed Washington's claims. The United States Supreme Court

granted certiorari review "to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel." 466 U.S. at 684.

In its analysis, the Supreme Court defined a fair trial as one in which "evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding" and stated that "[t]he right to counsel plays a crucial role." 466 U.S. at 685. The Supreme Court recognized that a criminal defendant's right to counsel is the right to effective assistance of counsel.

The Strickland Court established the benchmark for judging any claim of ineffectiveness as "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U.S. at 686. Although Strickland involved a sentencing hearing, the Supreme Court acknowledged the principle that the penalty phase of a capital trial is sufficiently like a trial in its adversarial format that counsel's role is comparable to counsel's role at the guilt phase, which is to ensure that the adversarial-testing

process works to produce a just result under the standards governing decisions. 466 U.S. at 686-87.

The Supreme Court then set what has become known as the Strickland test for judging whether counsel rendered ineffective assistance:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."

466 U.S. at 687.

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. 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. Until the release of the Court of Criminal Appeals' opinion on return to remand in the present case, it was well settled that this Court and the Court of Criminal Appeals reviewed postconviction ineffective-assistance-of-counsel claims filed pursuant to Rule 32 to see if the trial court exceeded its discretion when the facts were disputed. See Ex parte Harris, 947 So. 2d 1139, 1143 (Ala. 2005)("[W]here the facts in a postconviction proceeding are disputed and the circuit court has resolved those disputed facts, '[t]he standard of review on appeal in a postconviction proceeding is whether the trial judge [exceeded] his discretion when he denied the petition. Ex parte Heaton, 542 So. 2d 931 (Ala. 1989).' Elliott v. State, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992)."); Hunt v. State, 940 So. 2d

1041, 1049 (Ala. Crim. App. 2005)(noting that, in a postconviction proceeding under Rule 32, "[t]he standard of review this Court uses in evaluating the rulings made by the trial court is whether the trial court [exceeded] its discretion"); and Boyd v. State, 913 So. 2d 1113, 1121 (Ala. Crim. App. 2003)(holding that, when 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 circuit judge exceeded his discretion in granting or denying the petition).[4]

"[W]hen the facts are undisputed and an appellate court is presented with pure questions of law, that court's review in a Rule 32 proceeding is de novo." Ex parte White, 792 So.

[4]Subsequent to the opinion in Gissendanner issued in 2015 on application for rehearing, the Court of Criminal Appeals has applied the exceeds-its-discretion standard to ineffective-assistance-of-counsel claims. See, e.g., Woodward v. State, [Ms. CR-15-0748, April 27, 2018] ___ So. 3d ___ (Ala. Crim. App. 2018)(applying the exceeds-its-discretion standard of review to disputed facts in a Rule 32 postconviction evidentiary hearing arising out of failure to make a Batson challenge in a capital-murder conviction); Acklin v. State, [Ms. CR-14-1011, Dec. 15, 2017] ___ So. 3d ___ (Ala. Crim. App. 2017)(applying the exceeds-its-discretion standard to disputed facts following a Rule 32 evidentiary hearing when the defendant alleged ineffective assistance of counsel).

2d 1097, 1098 (Ala. 2001). "'[W]e may affirm a circuit court's ruling on a postconviction petition if it is correct for any reason.'" Washington v. State, 95 So. 3d 26, 38 (Ala. Crim. App. 2012)(quoting Smith v. State, 122 So. 3d 224, 227 (Ala. Crim. App. 2011)).

Citing caselaw from other jurisdictions, the Court of Criminal Appeals applied a de novo standard of review despite the presentation of disputed facts at the Rule 32 hearing.[5] It is clear from the record that the circuit court heard conflicting testimony from numerous witnesses, including defense counsel, regarding counsel's investigation and their preparation for trial. Accordingly, the Court of Criminal Appeals erred in applying a de novo standard of review.

We note that the Court of Criminal Appeals also deviated from precedent in failing to give Judge Quattlebaum's findings of prejudicial ineffective assistance of counsel "considerable weight," since he presided over both Gissendanner's original trial and the Rule 32 postconviction proceedings. See, e.g.,

[5]In its brief, the State acknowledges that "[t]he application of de novo review simply because the claims concern ineffective assistance of counsel is a deviation from Alabama precedent." State's brief, p. 38.

Marshall v. State, 182 So. 3d 573, 607 (Ala. Crim. App. 2014)(noting that, when the same judge presided over the defendant's capital-murder trial and over his postconviction-relief proceedings, "[w]e afford the experienced judge's ruling considerable weight"); Washington v. State, 95 So. 3d at 53 ("We afford the experienced judge's ruling 'considerable weight'" when the same judge presided over the defendant's capital-murder trial and his postconviction proceeding); and State v. Gamble, 63 So. 3d 707 (Ala. Crim. App. 2010)(giving considerable weight to the circuit court's order granting the defendant's postconviction petition based on ineffective assistance of counsel); see also Boyd v. State, 913 So. 2d 1113, 1132 (Ala. Crim. App. 2003)("Moreover, the judge presiding over the Rule 32 proceedings also presided over [the defendant's] trial and dismissed this claim based on his own observations and his personal knowledge that [the defendant's] counsel were prepared and did mount a reasonable defense on [the defendant's] behalf.").

The Court of Criminal Appeals held that the deferential standard does not apply because the prior cases involving that standard concerned postconviction claims of ineffective

assistance of counsel during the penalty phase of a capital-murder trial, alleging counsel's failure to present additional mitigation evidence. The Court of Criminal Appeals contends that applying the considerable-weight standard to a circuit court's determination that a petitioner was prejudiced as a result of counsel's deficient performance during the guilt phase of a capital-murder trial reads Gamble, 63 So. 3d 707, and Washington, 95 So. 3d 26, too broadly. However, nothing in the prior cases limits the considerable-weight standard to only the penalty phase of a capital-murder trial. Moreover, Strickland's requirement that a defendant is entitled to constitutionally adequate counsel does not apply differently to different phases of trial. As the Florida Supreme Court explained in Francis v. State, 529 So. 2d 670, 673 n. 9 (Fla. 1988):

> "The judge who heard this motion presided at Francis' third trial. Who, better than he, could determine whether failure to introduce this evidence prejudiced Francis sufficiently to meet the Strickland v. Washington test? Postconviction relief motions are not abstract exercises to be conducted in a vacuum, and this finding is entitled to considerable weight."

We note that the Court of Criminal Appeals relied on Francis in discussing the considerable-weight standard in Gamble, supra.[6]

As Judge Burke eloquently explained in his dissent to the Court of Criminal Appeals' opinion on application for rehearing:

> "Circuit Judge Kenneth Quattlebaum presided over Gissendanner's capital-murder trial. He heard the testimony of each and every witness as they took the oath and were questioned by the prosecutor and defense counsel. He ruled on motions and objections by the parties and considered evidence as it was admitted. He observed the jury as it heard the facts of this case during the trial. He had the opportunity to see the quality of the representation of Gissendanner by his attorneys, as well as the actions of the prosecutors. Lastly, after weighing the aggravating circumstances and the mitigating circumstances, he made the difficult determination to pronounce a sentence of death upon Gissendanner in accordance with the jury's recommendation. In short, Judge Quattlebaum personally observed every part of Gissendanner's journey through the substantive portions of Alabama's judicial system.

[6]The Arkansas Supreme Court, in Sheppard v. State, 255 Ark. 40, 498 S.W.2d 668 (1973), held that, when a trial judge in a proceeding on petition for postconviction relief on the ground that the petitioner was denied effective assistance of counsel at his original trial was the same judge who presided over the original trial, the appellate court would apply more than usual weight to that judge's findings.

"Now, that same trial judge has held a lengthy hearing on Gissendanner's Rule 32 petition and has entered an order granting him a new trial. Let me say that again: The very judge who spent immeasurable days overseeing every part of the trial and the hearing sentencing Gissendanner to death found that the first trial was not fair.

"Now the majority reverses the judgment of that trial judge and attempts to do the job of the trial judge -- reweighing the evidence themselves. I am quite unsettled by the majority's willingness to so easily cast aside the decision of the one and only person standing on this Earth whose solemn duty it was to ensure that Gissendanner received a fair trial. Judge Joiner has well covered the relevant law in this matter in his dissent. I will not reassert any of that here. My purpose in writing is to address the fact that unfortunate and harmful precedent is bound to spring out of the opinion of the majority.

"No one, including myself or the trial judge, is asserting that Gissendanner's conviction and sentence be reversed and that he be set free. This case is not about the death penalty. I have consistently voted to uphold the constitutionality of Alabama's death-penalty statute and its method of execution. This case is about making sure that defendants receive fair trials before a court decides whether to impose the death penalty. The remedy, as ordered by the trial court, is for Gissendanner to have a new trial, i.e., a fair trial. Moses' instructions to the Israelites best set out the standard judges ought to use when exercising their duties. 'Do not pervert justice; do not show partiality to the poor or favoritism to the great, but judge your neighbor fairly.' (Leviticus 19:15) The record in this case certainly demonstrates that Judge Quattlebaum acted earnestly in his desire to do justice in this matter.

> "Having served as a trial judge prior to serving on this Court, I must say that there is a very good reason that appellate courts have always afforded great discretion to the decision of a trial judge. Although we have before us the cold written record of the trial, the trial judge actually sees and hears every witness, reviews each and every piece of evidence admitted for consideration by the citizen members of the jury, and hears the arguments of the attorneys. Context, tone, emotion, facial expressions, deception, hesitation, and many other components of testimony and argument witnessed by the trial judge are simply not visible or understandable to the reader of a written record on appeal."

Gissendanner, ___ So. 3d at ___.

In light of the correct standard of review and giving considerable weight to Judge Quattlebaum's finding of prejudicial ineffective assistance of counsel, we now turn to our review of the Court of Criminal Appeals' judgment.

III. Discussion

At the outset of our review, it is important to discuss the duty to investigate. In Broadnax v. State, 130 So. 3d 1232 (Ala. Crim. App. 2013), the defendant was convicted of murder and later sought postconviction relief, claiming that his trial attorneys were ineffective for not adequately investigating and presenting the alibi that he was at a work-

release facility during the time of the murders. He argued that a proper and adequate investigation would have resulted in the discovery of witnesses who had seen him at the facility. The Court of Criminal Appeals discussed defense counsel's duty to investigate, stating:

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

"Jones v. State, 753 So. 2d 1174, 1191 (Ala. Crim. App. 1999).

> "'[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 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. 668, 690-91, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

"'The reasonableness of the investigation involves "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further."' St. Aubin v. Quarterman, 470 F.3d 1096, 1101 (5th Cir. 2006)(quoting Wiggins v. Smith, 539 U.S. 510, 527, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)). '[B]efore we can assess the reasonableness of counsel's investigatory efforts, we must first determine the nature and extent of the investigation that took place....' Lewis v. Horn, 581 F.3d 92, 115 (3d Cir. 2009). Thus, '[a]lthough [the] claim is that his trial counsel should have done something more, we [must] first look at what the lawyer did in fact.' Chandler v. United States, 218 F.3d 1305, 1320 (11th Cir. 2000). Finally:

> "'The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on

> informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. See United States v. Decoster, [199 U.S. App. D.C. 359,] 372-373, 624 F.2d [196,] 209-210 [(D.C. 1976)].'

"Strickland, 466 U.S. at 691, 104 S.Ct. 2052."

Broadnax, 130 So. 3d at 1247-48.

In the present case, as articulated and explained in Judge Joiner's well written dissent to the Court of Criminal Appeals' opinion on application for rehearing, Judge Quattlebaum did not exceed his discretion when he granted Gissendanner's request for a new trial based on ineffective

assistance of counsel. Although "the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up," Rompilla v. Beard, 545 U.S. 374, 383 (2005), Judge Quattlebaum found that defense counsel "neglected their investigative duties and failed to interview potential witnesses, family members, or the State's witnesses such that defense counsel's representation was constitutionally inadequate, and that their decisions were not tactical or reflective of reasonable trial strategy."

The most plausible defense Gissendanner had to the murder charges was an alibi defense. Indeed, defense counsel argued in opening statements that Gissendanner had an alibi. However, defense counsel's inadequate pretrial investigation resulted in a lack of information and an inability to present an adequate alibi defense. Defense counsel's time sheets indicate to whom counsel spoke and what actions they took preparing for trial.[7] Kominos testified at the Rule 32

[7]We agree with Judge Joiner that the Court of Criminal Appeals' opinion mischaracterized Judge Quattlebaum's order in concluding that he found "per se" ineffective assistance of counsel based on the hours spent preparing for trial. Instead, Judge Quattlebaum made findings of deficient pretrial investigation based not only on the attorney-fee time sheets, but also on defense counsel's testimony, testimony from the

hearing that an alibi witness is generally helpful but that it depended on who the witness is, that witness's credibility, and whether there were other circumstances that could corroborate the alibi. He further testified that he obtained a continuance to interview certain witnesses and to independently test certain evidence but that he did not do so. Defense counsel, other than a limited meeting with Gissendanner's father, did not speak with any of the factual witnesses who provided testimony at the Rule 32 hearing, even though each was available and even though two of them were disclosed as State witnesses before the trial commenced. Defense counsel's actions cannot be justified as a valid strategic decision because it was unreasonable under professional norms not to investigate key witnesses.

> "'[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; [but] 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 has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'"

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investigator hired 15 months after Gissendanner was arrested, and testimony from potential witnesses.

Gaines v. Commissioner of Correction, 306 Conn. 664, 680, 51 A.3d 948, 960 (2012)(quoting Strickland, 466 U.S. at 690-91).

> "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."

Ramonez v. Berghuis, 490 F.3d 482, 489 (6th Cir. 2007). Here, counsel's defense strategy was not based on a thorough pretrial investigation or supported by a reasonable professional judgment.

In finding defense counsel's representation to be professionally deficient and prejudicial, Judge Quattlebaum, in his order, discusses the impact of the information not known to defense counsel because of the lack of investigation. Where "a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Strickland, 466 U.S. at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. Under this standard, "a defendant need not show that counsel's deficient

conduct more likely than not altered the outcome in the case. ... The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." 466 U.S. at 693–94; see also United States v. Dominquez Benitez, 542 U.S. 74, 83 n. 9 (2004)("The reasonable-probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different.").

In determining whether there exists a reasonable probability that the outcome of the trial would have been different had counsel's performance not been deficient, this Court must consider the totality of the evidence adduced at trial. Strickland, 466 U.S. at 695.

> "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. It is clear from the findings in Judge Quattlebaum's order that defense counsel's deficiencies would

have altered the entire evidentiary picture for the jury. As Judge Quattlebaum summarized:

> "Because defense counsel failed to investigate, they failed to discover and call at trial alibi witnesses to support their strategy of an alibi defense. Witnesses who would have easily been discovered could have testified that they saw Gissendanner in Johntown on Friday morning during a period of time in which the crime was shown by the State's evidence to have been committed. There was also evidence that could and should have been discovered through a basic investigation that would have demonstrated to the jury the lack of any physical evidence tying Gissendanner to the crime scene."

"'[T]here is nothing as dangerous as a poorly investigated alibi. An attorney who is not thoroughly prepared does a disservice to his client and runs the risk of having his client convicted even [when] the prosecution's case is weak.'" Henry v. Poole, 409 F.3d 48, 65 (2d Cir. 2005) (quoting 2 G. Schultz, Proving Criminal Defenses ¶ 6.08 (1991)).

Likewise, defense counsel's failure to investigate the forgery claim resulted in prejudicial ineffective assistance of counsel. Gissendanner was charged with possessing or uttering a forged instrument under § 13A-9-6, Ala. Code 1975. The bank teller and the State's handwriting expert apparently

were on the State's witness list for the original trial. Defense counsel failed to interview either of those witnesses.

With regard to the bank teller, the allegedly forged check was admitted into evidence during her testimony. As Judge Quattlebaum pointed out in the Rule 32 order, the bank teller's testimony indicated that Gissendanner had been in the bank previously to cash checks written to him by the victim. The allegedly forged check was admitted into evidence through the bank teller. Defense counsel did not cross-examine the teller. Had defense counsel spoken with the teller before trial and subpoenaed bank records to challenge the State's evidence that the victim had written checks to Gissendanner in the past, defense counsel could have refuted the bank teller's testimony that Gissendanner had cashed checks from the victim in the past.

Likewise, defense counsel knew that the State was presenting testimony from a handwriting expert. Defense counsel did not interview the State's handwriting expert before trial. The State elicited testimony from the handwriting expert regarding his qualifications. He testified that he had examined handwriting exemplars from the victim,

Gissendanner, Buster Carr, and Peggy Carr. None of the handwriting exemplars was admitted into evidence by the State. The expert opined that he was 90 to 95 percent certain that Gissendanner had written the phrase "concrete work" in the "for" line on the victim's check. The expert was 70 to 75 percent sure that Gissendanner had written the numerical amount of the check. However, the expert's opinion was inconclusive as to who had written the remaining parts of the front of the check and who had endorsed the check on the back. On cross-examination, defense counsel used an exemplar of Gissendanner's handwriting to ask the handwriting expert how his conclusion as to who signed the victim's name on the check was inconclusive where Gissendanner had misspelled "Margaret" on his exemplar. Defense counsel did not admit Gissendanner's exemplar into evidence.

At the Rule 32 hearing, defense counsel stated that he did not contact a handwriting expert because he was of the opinion that handwriting expertise was "voodoo." He also testified that the "jury should make a determination and not listen to what some so-called expert regarding handwriting has to say."

Although how to address the testimony of an expert witness can be a strategic decision, such strategic choices can be made only after a thorough investigation of the law and the facts. "Strategic justification cannot be extended to the failure to investigate." King v. State, 810 P.2d 119, 123 (Wyo. 1991).

> "As Strickland explains, the range of reasonable professional judgments is wide and courts must take care to avoid illegitimate second-guessing of counsel's strategic decisions from the superior vantage point of hindsight. 466 U.S. at 689, 104 S.Ct. at 2065. 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 Debango, 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 Court of Criminal Appeals applied the wrong standard of review to the disputed facts and failed to give considerable weight to the finding of prejudicial ineffective

assistance of counsel by Judge Quattlebaum, the original trial judge who also presided over the Rule 32 proceedings. Judge Quattlebaum did not exceed his discretion in ordering a new trial based on defense counsel's prejudicially ineffective pretrial investigation. The United States Court of Appeals for the Eleventh Circuit has explained: "Pretrial investigation, principally because it provides a basis upon which most of the defense case must rest, is, perhaps, the most critical stage of a lawyer's preparation." House v. Balkcom, 725 F.2d 608, 618 (11th Cir. 1984).

Accordingly, we reverse the judgment of the Court of Criminal Appeals to the extent it reverses Judge Quattlebaum's order granting Gissendanner's petition for postconviction relief, and we direct that court to take the necessary action to reinstate Judge Quattlebaum's order granting Gissendanner a new trial. In light of our holding, we pretermit discussion of the remaining issues raised in Gissendanner's petition.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Stuart, C.J., and Parker, Main, and Sellers, JJ., concur.

Bryan, J., concurs in the result.

Shaw and Mendheim, JJ., dissent.

Wise, J., recuses herself.