Rel: 02/10/2017

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2016-2017

CR-09-0998

State of Alabama

v.

Emanuel Aaron Gissendanner, Jr.

Appeal from Dale Circuit Court
(CC-01-350.60)

On Return to Remand

WELCH, Judge.

The State initially appealed from the order of Dale Circuit Court granting the request of Emanuel Aaron Gissendanner, Jr., for Rule 32, Ala. R. Crim. P.,

postconviction relief; in that order, the circuit court set aside Gissendanner's capital-murder convictions and sentences of death. This Court remanded the case to the circuit court, requiring the circuit court to consider certain issues it had not considered because it had granted postconviction relief on another basis. See State v. Gissendanner, [Ms. CR-09-0998, October 23, 2015] ___ So. 3d ___ (Ala. Crim. App. 2015). As set forth in more detail below, this case is now before this Court on return to remand.

In 2003, Gissendanner was convicted of murdering Margaret Snellgrove during the course of a kidnapping and during the course of a robbery and of possessing or uttering a forged instrument. He was sentenced to death. Gissendanner's capital-murder convictions and sentences of death were affirmed on direct appeal. See Gissendanner v. State, 949 So. 2d 956 (Ala. Crim. App. 2006).

In August 2007, Gissendanner filed a timely postconviction petition pursuant to Rule 32, Ala. R. Crim. P., attacking his capital-murder conviction and sentences. In March 2010, the circuit court found that Gissendanner had been denied his constitutional right to the effective assistance of

counsel during the guilt phase of his capital-murder trial and granted Gissendanner postconviction relief. The State appealed that ruling. See Rule 32.10(a), Ala. R. Crim. P.

In December 2014, this Court reversed the circuit court's ruling and directed that court to reinstate Gissendanner's capital-murder convictions and sentences of death. On application for rehearing, however, this Court withdrew its original opinion, determined that the circuit court had erred in ruling that counsel were ineffective at the guilt phase of Gissendanner's trial, and remanded the case to the circuit court with directions to make specific findings of fact on certain claims that Gissendanner had raised concerning the penalty phase of his trial that had not been specifically addressed in the circuit court's order granting postconviction relief. See State v. Gissendanner, ___ So. 3d at ___.

This case is now before this Court on return to remand. Gissendanner requested, and was granted, leave to file a brief on return to remand. We now address these issues raised in that brief.

Standard of Review

Gissendanner's capital-murder trial was presided over by, and his Rule 32 was originally assigned to, Judge Kenneth Wesley Quattlebaum; however, Judge Quattlebaum retired from the bench in March 2015 while this case was pending on application for rehearing, and the case was reassigned to Judge Kimberly Clark. Thus, when this Court remanded the case to the lower court, the judge who had presided over Gissendanner's capital-murder trial and the proceedings on Gissendanner's Rule 32 petition could not consider the issues on remand. In fact, in our previous opinion remanding this case, this Court directed Judge Clark to base her decision on the existing record. ___ So. 3d at ___. In Ex parte Hinton, 172 So. 3d 348 (Ala. 2012), the Alabama Supreme Court stated that when a lower court bases a decision on certain claims on a "cold ... record" the lower court is in no better position than a reviewing court and, thus, that the appellate court will review those claims using the de novo standard of review. 172 So. 3d at 353. "The de novo standard gives no deference to the lower court's findings." State v. Gamble, 63 So. 3d 707, 711 (Ala. Crim. App. 2010).

In considering a claim of ineffective assistance of counsel, we apply the standard announced by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). The petitioner must establish: (1) that counsel's performance was deficient, and (2) that the petitioner was prejudiced by counsel's deficient performance.

> "'The test for ineffectiveness is not whether counsel could have done more; perfection is not required. E.g., Atkins v. Singletary, 965 F.2d 952, 960 (11th Cir. 1992) ("Trial counsel did enough. A lawyer can almost always do something more in every case. But the Constitution requires a good deal less than maximum performance."). Nor is the test whether the best criminal defense attorneys might have done more. Instead, the test is whether some reasonable attorney could have acted, in the circumstances, as these two did -- whether what they did was within the "wide range of reasonable professional assistance," Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984); White v. Singletary, 972 F.2d 1218, 1220 (11th Cir. 1992).'"

Ray v. State, 80 So. 3d 965, 981-82 (Ala. Crim. App. 2011), quoting Waters v. Thomas, 46 F.3d 1506, 1518 (11th Cir. 1995).

The Ray Court further explained:

> "'"[F]ailure to investigate possible mitigating factors and failure to present mitigating evidence at sentencing can constitute ineffective assistance of

counsel under the Sixth Amendment." Coleman [v. Mitchell], 244 F.3d [533] at 545 [(6th Cir. 2001)]; see also Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005); Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). Our circuit's precedent has distinguished between counsel's complete failure to conduct a mitigation investigation, where we are likely to find deficient performance, and counsel's failure to conduct an adequate investigation, where the presumption of reasonable performance is more difficult to overcome.

> "'"[T]he cases where this court has granted the writ for failure of counsel to investigate potential mitigating evidence have been limited to those situations in which defense counsel have totally failed to conduct such an investigation. In contrast, if a habeas claim does not involve a failure to investigate but, rather, petitioner's dissatisfaction with the degree of his attorney's investigation, the presumption of reasonableness imposed by Strickland will be hard to overcome."

"'Campbell v. Coyle, 260 F.3d 531, 552 (6th Cir. 2001) (quotation omitted) ...; see also Moore v. Parker, 425 F.3d 250, 255 (6th Cir. 2005). In the present case, defense counsel did not completely fail to conduct an investigation for mitigating evidence. Counsel spoke with [the defendant's] parents prior to [the] penalty

> phase of trial (although there is some question as to how much time counsel spent preparing [the defendant's] parents to testify), and presented his parents' testimony at the sentencing hearing. Defense counsel also asked the probation department to conduct a presentence investigation and a psychiatric evaluation. While these investigatory efforts fall far short of an exhaustive search, they do not qualify as a complete failure to investigate. See Martin v. Mitchell, 280 F.3d 594, 613 (6th Cir. 2002) (finding that defense counsel did not completely fail to investigate where there was "limited contact between defense counsel and family members," "counsel requested a presentence report," and counsel "elicited the testimony of [petitioner's] mother and grandmother"). Because [the defendant's] attorneys did not entirely abdicate their duty to investigate for mitigating evidence, we must closely evaluate whether they exhibited specific deficiencies that were unreasonable under prevailing professional standards. See Dickerson v. Bagley, 453 F.3d 690, 701 (6th Cir. 2006).'

"Beuke v. Houk, 537 F.3d 618, 643 (6th Cir. 2008). '[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying heavy measure of deference to counsel's judgments.' Wiggins, 539 U.S. at 521-22, 123 S.Ct. 2527. 'A defense attorney is not required to investigate all leads....' Bolender v. Singletary, 16 F.3d 1547, 1557 (11th Cir. 1994). 'A lawyer can almost always do something more in every case. But the Constitution requires a good deal less than maximum performance.' Atkins v. Singletary, 965 F.2d 952, 960 (11th Cir. 1992). 'The attorney's decision not to investigate must not be evaluated with the benefit of hindsight, but accorded a strong

> presumption of reasonableness.' Mitchell v. Kemp, 762 F.2d 886, 889 (11th Cir. 1985)."

80 So. 3d at 983-84. With these principles in mind, we review the claims raised by Gissendanner in his brief on return to remand.

I.

Gissendanner argues that the circuit court failed to comply with this Court's remand instructions because, he says, the court failed to make specific findings of fact on each penalty-phase ineffective-assistance claim that had not been previously addressed in the court's original order granting postconviction relief. However, Gissendanner does not request that this Court remand this case so that the circuit court may fully comply with this Court's instructions. Instead, Gissendanner requests that we reverse the circuit court's order on remand determining that those claims of ineffective of assistance of counsel were without merit. (Gissendanner's brief on return to remand, p. 40.)

This Court gave the following instructions to the circuit court when remanding this case:

> "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 any additional hearing or for the submission of new evidence or arguments."

Gissendanner, ___ So. 3d at ____.

The circuit court's order in response to this Court's 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."

(Remand, C.R. 2-3.)

"The trial court's duty [on remand] is to comply with the mandate 'according to its true intent and meaning,' as determined by the directions given by the reviewing court. Ex parte Alabama Power Co., 431 So. 2d 151 (Ala. 1983).'" Ex parte King, 821 So. 2d 205, 208 (Ala. 2001), quoting Gray v. Reynolds, 553 So. 2d 79, 81 (Ala. 1989).

Nonetheless, not every case warrants a second remand when a lower court has failed to fully comply with a reviewing Court's instructions. As this Court has stated:

> "The general rule is as follows:
>
> > "'On remand, the issues decided by the appellate court become law of the case and the trial court's duty is to comply with the appellate mandate "according to its true intent and meaning, as determined by the directions given by the reviewing court." Ex parte Alabama Power Co., 431 So. 2d 151 (Ala. 1983) (emphasis added [in Walker]). When the mandate is not clear, the opinion of the court should be consulted. See Cherokee Nation v.

> Oklahoma, 461 F.2d 674 (10th Cir.), cert. denied, 409 U.S. 1039, 93 S.Ct. 521, 34 L.Ed.2d 489 (1972).'
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> "Walker v. Carolina Mills Lumber Co., 441 So. 2d 980, 982 (Ala. Civ. App. 1983). In this case, the trial court clearly has not strictly complied with the remand directions issued by this Court. However, the trial court has taken the action required to obtain the information that we deemed necessary in the remand order and has done so in such a manner that it is readily reviewable by this Court. ... [W]e conclude that the trial court has made every reasonable effort to comply with the spirit and intent of the Court's remand order."

Franks v. State, 651 So. 2d 1114, 1117 (Ala. Crim. App. 1994). Cf. Ex parte Waldrop, 859 So. 2d 1181, 1191-92 (Ala. 2002) ("A remand to the trial court is not an option in this case, however, because the trial judge, Judge Dale Segrest, is no longer on the bench. Instead, the case would be assigned to a circuit judge who is unfamiliar with the case and who cannot possibly supply Judge Segrest's 'specific reasons for giving the jury's recommendation the consideration [Judge Segrest] gave it.' [Ex parte Taylor,] 808 So. 2d [1215] at 1219 [(Ala. 2001)]. Because a remand is not possible, and in order to ensure that the death penalty in this case was not imposed in an arbitrary and capricious manner, this Court must perform its own review of the propriety of the death sentence and

determine whether the aggravating circumstances outweigh the mitigating circumstances.").

Although it is true that, on remand, the circuit court did not strictly comply with this Court's instructions, the circuit court did issue a ruling on the claims Gissendanner asserted had originally not been considered by the circuit court. This Court's intent, in large part, in remanding this case was to obtain a final ruling from the circuit court on certain penalty-phase claims that, Gissendanner argued, had not been addressed by the circuit court, especially given that this Court had determined that the circuit court had erred in ruling that Gissendanner had been deprived of the effective assistance of counsel in the guilt phase. Also, as previously stated, the circuit judge who presided over Gissendanner's trial and disposed of the original postconviction petition has since retired.

Because our review of the issues addressed on remand is de novo and because Gissendanner's postconviction petition has been pending since 2007, we believe that to remand this case a second time would be a waste of time and valuable judicial resources. Accordingly, we address the claims that

Gissendanner raises in his brief on return to remand without further delay.

II.

Gissendanner first argues that the circuit court erred in denying his claim that his counsel were ineffective in the penalty phase of his capital-murder trial because, he says, counsel failed to interview Gissendanner's family members.[1] Specifically, he argues that counsel were ineffective for failing to interview and present the testimony of Gissendanner's two daughters.

The circuit court found that this issue was without merit, that it was refuted by the record, and that Gissendanner had failed to prove prejudice.

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[1]Gissendanner claimed in his postconviction petition that his counsel were ineffective for failing to interview family members and friends. The only friend identified in this section of his postconviction petition who testified at the postconviction hearing was Charles Brooks. However, Gissendanner raises no issue concerning Brooks in his brief on return to remand; therefore, he has abandoned this claim. See Broadnax v. State, 130 So. 3d 1232, 1268 (Ala. Crim. App. 2013)("[The appellant] also raised numerous additional claims. However, he does not pursue in his brief on appeal any of those other claims raised in his petition. Therefore, those claims are deemed abandoned and will not be considered by this Court.").

Gissendanner argues on appeal that his daughters could have humanized him and could have testified about their experiences with their father and his good qualities. The daughters testified at the Rule 32 postconviction hearing. However, at the time of Gissendanner's trial, his daughters were 8 years old and 7 years old.

At the postconviction hearing, his then 14-year-old daughter testified that she was 6 years old when her father was arrested in 2001, that her father taught her how to ride a bike, that they used to play video games together, that after he was arrested he wrote her every week, that she and her sister visited her father every month while he was in prison, and that she was sad when her father was arrested. The other daughter testified that she was 13 years old at the time of the postconviction hearing, that she was 5 years old when her father was arrested, that her father taught her how to ride a bide, that she and her sister used to play video games together, that her father frequently wrote letters to her and her sister after he was arrested, that they used to visit their father in prison once or twice a month, that she

was sad when her father was arrested, and that her father is a great father.

As we previously stated in our original opinion, at Gissendanner's trial, Kim Gissendanner ("Kim"), Gissendanner's former wife, and Emanuel Gissendanner, Sr. ("Gissendanner Sr."), Gissendanner's father, testified that Gissendanner loved his children and that he maintained contact with them while he was incarcerated. Kim testified that after she and Gissendanner divorced Gissendanner stayed in contact with his daughters and would take them places, that he communicated with his daughters by writing them from prison, and that he loved his daughters. Gissendanner Sr. testified that Gissendanner received an athletic scholarship from a school in the Midwest but chose to stay in Alabama to support his family when he learned his girlfriend was pregnant. Gissendanner Sr. said that Gissendanner would frequently bring his children to his house and that Gissendanner was good with his children and was constantly teaching them.

Gissendanner's daughters' testimony would have been, in large part, cumulative to testimony that had been presented at the penalty phase of Gissendanner's trial. As this Court has

previously noted: "'This Court has ... refused to allow the omission of cumulative testimony to amount to ineffective assistance of counsel.'" Daniel v. State, 86 So. 3d 405, 430 (Ala. Crim. App. 2011), quoting United States v. Harris, 408 F.3d 186, 191 (5th Cir. 2005). Accordingly, Gissendanner failed to establish prejudice as a result of counsel's failure to call Gissendanner's young daughters to testify at his penalty-phase hearing; therefore, he is due no relief on this claim.

Moreover, Gissendanner was represented at trial by attorneys Bill Kominos and Joseph Gallo, both of whom testified at the postconviction hearing. Kominos was asked no questions regarding his preparation for the penalty phase; Gallo was asked a few questions about his preparation for the penalty phase. Neither Kominos nor Gallo was asked any questions concerning Gissendanner's daughters or specifically why they had failed, or had chosen not to, present the daughters' testimony at the penalty phase.

> "[T]he presumption that counsel performed effectively '"is like the 'presumption of innocence' in a criminal trial,"' and the petitioner bears the burden of disproving that presumption. Hunt v. State, 940 So. 2d 1041, 1059 (Ala. Crim. App. 2005) (quoting Chandler v. United States, 218 F.3d 1305,

1314 n. 15 (11th Cir. 2000) (en banc)). 'Never does the government acquire the burden to show competence, even when some evidence to the contrary might be offered by the petitioner.' Id. '"'An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption [of effective representation]. Therefore, "where the record is incomplete or unclear about [counsel]'s actions, [a court] will presume that he did what he should have done, and that he exercised reasonable professional judgment."'"' Hunt, 940 So. 2d at 1070-71 (quoting Grayson v. Thompson, 257 F.3d 1194, 1218 (11th Cir. 2001), quoting in turn Chandler, 218 F.3d at 1314 n. 15, quoting in turn Williams v. Head, 185 F.3d 1223, 1228 (11th Cir. 1999)). Thus, to overcome the strong presumption of effectiveness, a Rule 32 petitioner must, at his evidentiary hearing, question trial counsel regarding his or her actions and reasoning. See, e.g., Broadnax v. State, 130 So. 3d 1232, 1255-56 (Ala. Crim. App. 2013) (recognizing that '[i]t is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions, or inactions, of counsel that occurred outside the record[, and holding that] circuit court correctly found that Broadnax, by failing to question his attorneys about this specific claim, failed to overcome the presumption that counsel acted reasonably'); Whitson v. State, 109 So. 3d 665, 676 (Ala. Crim. App. 2012) (holding that a petitioner failed to meet his burden of overcoming the presumption that counsel were effective because the petitioner failed to question appellate counsel regarding their reasoning); Brooks v. State, 929 So. 2d 491, 497 (Ala. Crim. App. 2005) (holding that a petitioner failed to meet his burden of overcoming the presumption that counsel were effective because the petitioner failed to question trial counsel regarding their reasoning); McGahee v. State, 885 So. 2d 191, 221-22 (Ala. Crim. App. 2003) ('[C]ounsel at the Rule 32 hearing did not ask trial

> counsel any questions about his reasons for not calling the additional witnesses to testify. Because he has failed to present any evidence about counsel's decisions, we view trial counsel's actions as strategic decisions, which are virtually unassailable."); Williams v. Head, 185 F.3d at 1228; Adams v. Wainwright, 709 F.2d 1443, 1445-46 (11th Cir. 1983) ("[The petitioner] did not call trial counsel to testify ... [; therefore,] there is no basis in this record for finding that counsel did not sufficiently investigate [the petitioner's] background."); Callahan v. Campbell, 427 F.3d 897, 933 (11th Cir. 2005) ("Because [trial counsel] passed away before the Rule 32 hearing, we have no evidence of what he did to prepare for the penalty phase of [the petitioner's] trial. In a situation like this, we will presume the attorney "did what he should have done, and that he exercised reasonable professional judgment."")."

Stallworth v. State, 171 So. 3d 53, 92-93 (Ala. Crim. App. 2013) (opinion on return to remand).

In Burt v. Titlow, ___ U.S. ___, 134 S.Ct. 10 (2013), the United States Supreme Court reemphasized the importance of a petitioner's establishing a record when attempting to prove a claim of ineffective assistance of counsel. The Supreme Court, in reversing the lower court's ruling that the petitioner had proven that his counsel had been ineffective, stated:

> "Even more troubling is the Sixth Circuit's conclusion that [attorney Frederick] Toca was ineffective because the 'record in this case contains no evidence that' he gave constitutionally

> adequate advice on whether to withdraw the guilty plea. [Titlow v. Burt,] 680 F.3d, [577] at 590 [(6th Cir. 2012)]. We have said that counsel should be 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment,' Strickland [v. Washington], 466 U.S., [668] at 690, 104 S.Ct. 2052 [(1984)], and that the burden to 'show that counsel's performance was deficient' rests squarely on the defendant, id., at 687, 104 S.Ct. 2052. The Sixth Circuit turned that presumption of effectiveness on its head. It should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.' Id., at 689, 104 S.Ct. 2052. As Chief Judge [Alice M.] Batchelder correctly explained in her dissent, '[w]ithout evidence that Toca gave incorrect advice or evidence that he failed to give material advice, Titlow cannot establish that his performance was deficient.' 680 F.3d, at 595."

___ U.S. at ___, 134 S.Ct. at 17.

Here, because there is no evidence as to why counsel failed to call Gissendanner's daughters to testify at the penalty phase, precedent dictates that we must presume that counsel's actions were within the range of reasonable professional assistance and were reasonable and effective. See Burt v. Titlow.

> "'Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy.' People v. Rockey, 237 Mich. App. 74, 76, 601 N.W.2d 887, 890 (1999) (citing People v. Mitchell, 454 Mich. 145, 163, 560

> N.W.2d 600 (1997)). '[A] trial counsel's choice of whether to call witnesses is generally accorded a presumption of deliberate trial strategy and cannot be subject to second-guessing in a claim of ineffective assistance of counsel.' Saylor v. Commonwealth, 357 S.W.3d 567, 571 (Ky. Ct. App. 2012)."

Stallworth v. State, 171 So. 3d 53, 73 (Ala. Crim. App. 2013). For the foregoing reasons, Gissendanner is due no relief on this claim.

In this section of Gissendanner's brief he also argues that the United States Supreme Court's recent decision in Hurst v. Florida, ___ U.S. ___, 136 S.Ct. 616 (2016), "calls into question the viability of Alabama's death penalty sentencing scheme, and Mr. Gissendanner's penalty phase verdict of death can and should be set aside ... in light of the Hurst ruling." (Gissendanner's brief on return to remand, p. 14.) The Hurst Court held that the "Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." ___ U.S. at ___, 136 S.Ct. at 619.

First, this Court recently held that Hurst does not apply to cases on collateral review. In Reeves v. State, [Ms. CR-13-1504, June 10, 2016] ___ So. 3d ___ (Ala. Crim. App. 2016),

this Court stated:

> "The United States Supreme Court's opinion in Hurst [v. Florida, 577 U.S. ___, 136 S.Ct. 616 (2016),] was based solely on its previous opinion in Ring [v. Arizona, 536 U.S. 584 (2002)], an opinion the United States Supreme Court held did not apply retroactively on collateral review to cases that were already final when the decision was announced. See Schriro v. Summerlin, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004). Because Ring does not apply retroactively on collateral review, it follows that Hurst also does not apply retroactively on collateral review. Rather, Hurst applies only to cases not yet final when that opinion was released, such as Johnson [v. Alabama, ___ U.S. ___, 136 S.Ct. 1837 (2016)], a case that was still on direct appeal (specifically, pending certiorari review in the United States Supreme Court) when Hurst was released. Reeves's case, however, was final in 2001, 15 years before the opinion in Hurst was released. Therefore, Hurst is not applicable here."

___ So. 3d at ___.[2] Gissendanner's direct appeal was final in

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[2]A Florida appeals court in State v. Perry, 192 So. 3d 70 (Fla. Dist. Ct. App. 2016), recently considered a petition for a writ of prohibition filed by the State of Florida regarding the consequences of the United States Supreme Court's holding in Hurst on pending capital-murder prosecutions. In regard to whether Hurst was to be applied retroactively, the Perry court stated:

> "[W]e note that Hurst is an extension of Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.E.2d 556 (2002), and Ring was based on Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Apprendi has been held to establish a rule of procedure. See McCoy v. United States, 266 F.3d 1245, 1258 (11th Cir. 2001); United States v.

2006. Thus, the holding in Hurst would have no application to Gissendanner's case. See Reeves v. State.

Second, even if Hurst applied to Gissendanner's case, Gissendanner would not be entitled to relief based on this Court's decision in State v. Billups, [Ms. CR-15-0619, June 17, 2016] ___ So. 3d ___ (Ala. Crim. App. 2016). In Billups, this Court considered a petition for a writ of mandamus filed by the State against a circuit judge who had issued several orders holding that the United States Supreme Court's decision in Hurst rendered Alabama's death-penalty statute unconstitutional. In issuing the writ, this Court stated:

> Sanders, 247 F.3d 139, 147 (4th Cir. 2001). Likewise, Ring has been classified as a procedural rule rather than a substantive one. See Schriro v. Summerlin, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004). Logically, it follows that Hurst's holding is also procedural rather than substantive."

192 So. 3d at 75-76. Typically, a substantive rule is applied retroactively and a procedural rule is applied prospectively. See Schriro v. Summerlin, 542 U.S. 348 (2004).

In conclusion, the Perry court certified the following questions to the Florida Supreme Court: "(1) Did Hurst v. Florida, ___ U.S. ___, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), declare Florida's death penalty unconstitutional? (2) If not, does Chapter 2016-13, Laws of Florida, apply to pending prosecutions for capital offenses that occurred prior to its effective date?" Perry, 192 So. 3d at 76.

> "Alabama's capital-sentencing scheme, unlike the schemes held unconstitutional in Ring [v. Arizona, 536 U.S. 584 (2002),] and Hurst [v. Florida, ___ U.S. ___, 136 S.Ct. 616 (2016)], does not 'allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty.' Hurst, ___ U.S. at ___, 136 S.Ct. At 624; accord Ring, 536 U.S. at 609, 122 S.Ct. 2428. Because in Alabama it is the jury, not the trial court, that makes the critical finding necessary for imposition of the death penalty, Alabama's capital-sentencing scheme is constitutional under Apprendi [v. New Jersey, 530 U.S. 466 (2000)], Ring, and Hurst."

___ So. 3d at ___. The decision in Hurst does not invalidate Gissendanner's capital-murder convictions, and he is due no relief on this claim.

III.

Gissendanner next argues that the circuit court erred in denying his claim that his counsel were ineffective for failing to conduct a reasonable investigation in preparing for the penalty phase of his trial.

In this Court's opinion remanding this case, we addressed Gissendanner's claim that his counsel were ineffective for failing to present the testimony of Rebecca Gissendanner, Gissendanner's mother; Olympia Gissendanner, Gissendanner's sister, and David Brown, a pastor who was acquainted with

Gissendanner through a prison ministry. We also detailed the testimony of the seven witness who had testified at the penalty phase of Gissendanner's trial and held that, in evaluating counsel's performance, the circuit court erred by failing to consider the testimony counsel had presented. In conclusion, we stated:

> "'[W]hen, as here, counsel has presented a meaningful concept of mitigation, the existence of alternate or additional mitigation theories does not establish ineffective assistance.' State v. Combs, 100 Ohio App.3d 90, 105, 652 N.E.2d 205, 214 (1994). 'Most capital appeals include an allegation that additional witnesses could have been called. However, the standard of review on appeal is deficient performance plus prejudice.' Malone v. State, 168 P.3d 185, 234-35 (Okla. Crim. App. 2007)."

Gissendanner, ___ So. 3d at ___. Clearly, Gissendanner could establish no prejudice in regard to this claim; therefore, he failed to satisfy the Strickland test.

IV.

Gissendanner next argues that the circuit court erred in finding that his counsel were not ineffective for failing to interview and prepare the two family members who testified at the penalty phase of his capital-murder trial. First, he argues that counsel were ineffective for failing to prepare

Kim because, he says, she appeared "flustered" when asked whether she was requesting that the jury not sentence Gissendanner to death. He also argues that counsel were ineffective for failing to prepare Gissendanner Sr. because, he says, Gissendanner Sr. could have provided more mitigation evidence. The circuit court found that this claim was without merit and that it was refuted by the record.

Kim testified at the postconviction hearing that she had been married to Gissendanner for five years, from 1994 to 1999, and that they have two daughters. She testified that in the two years after Gissendanner's arrest she was not contacted by his counsel, that one of his attorneys called her the day before she was to testify and asked her to testify on Gissendanner's behalf the next day, that the attorney asked her to write some things down about what she wanted to say and to bring them to court, that his attorneys failed to inform her that Gissendanner had already been convicted when she testified, and that when she was asked by Gissendanner's attorney about Gissendanner's sentence she was surprised and unprepared to answer that question.

As stated in this Court's opinion remanding this case,

Kim did, in fact, urge the jury to spare Gissendanner's life; thus, her alleged befuddlement in answering counsel's question about Gissendanner's sentence did not prevent her from testifying as to what sentence she believed Gissendanner should receive. Gissendanner suffered no prejudice as a result of counsel's actions; thus, he failed to satisfy the Strickland test. Gissendanner is due no relief on this claim.

Moreover, the record shows that, at the postconviction hearing, Gissendanner's attorneys were asked no questions concerning their preparation regarding Kim's testimony. The record is entirely silent as to counsel's actions in regard to this claim. As we stated in our previous opinion, we cannot presume that counsel is ineffective on a silent record. Gissendanner, ___ So. 3d at ___. "'If the record is silent as to the reasoning behind counsel's actions, the presumption of effectiveness is sufficient to deny relief on [an] ineffective assistance of counsel claim.'" Davis v. State, 9 So. 3d 539, 546 (Ala. Crim. App. 2008), quoting Howard v. State, 239 S.W.3d 359, 367 (Tex. Crim. App. 2007).

In regard to Gissendanner Sr.'s testimony, Gissendanner argues that his father could have testified in more detail

about Gissendanner's relationship with his two daughters and the fact that Gissendanner taught Sunday school when he was young.

At the postconviction hearing, Gissendanner Sr. testified; however, the bulk of his testimony was directed to the events that occurred immediately after Snellgrove's murder. (R. 211-54.) Gissendanner Sr. offered very little testimony in regard to mitigation. (R. 255-58.) Gissendanner Sr. testified that Gissendanner made good grades when he was in school, that Gissendanner taught Sunday School at an early age, that he never saw Gissendanner display any violence, that Gissendanner was good with his daughters and is a good father, that Gissendanner frequently played sports with his daughters, that Gissendanner taught his daughters how to read, that Gissendanner was good around children, that Gissendanner is loved by his family, that Gissendanner is missed by his family, and that he visits Gissendanner in prison.

In our opinion remanding this case, we stated the following concerning Gissendanner Sr.'s testimony at the penalty phase of Gissendanner's trial:

> "[Gissendanner Sr.] testified that he is Gissendanner's father and is the father of six

> children, that he was a veteran and was injured in the Gulf War, that after leaving the military he worked at Ozark Veterinary Clinic for 30 years, that at one point Gissendanner worked with him at the clinic but had to leave when he got sick, that Gissendanner was offered an athletic scholarship to a college in the Midwest but that he did not take the scholarship because his girlfriend had gotten pregnant and he elected to stay and have a family, that he had no problems with Gissendanner when he was growing up, that Gissendanner was not a violent person, and that Gissendanner was a loving father to his two daughters, and that he was a respectful son. He begged the jury to show mercy and spare his son's life."

Gissendanner, ___ So. 3d at ___.

At the postconviction hearing, Gissendanner offered very little new mitigation evidence that Gissendanner Sr. could have but did not provide at the penalty phase. As stated, the bulk of Gissendanner Sr.'s testimony at the postconviction hearing was directed to issues regarding the guilt phase of the trial. Gissendanner clearly failed to prove any prejudice in regard to this claim; therefore, he failed to satisfy the Strickland test and is due no relief.

Furthermore, counsel were asked no questions concerning their preparation of Gissendanner Sr. before he testified at the penalty phase of the trial. In fact, during cross-examination Kominos testified that he had frequently spoken

with Gissendanner Sr. because he would often stop by Kominos's office. (R. 73.) Again, because the record is silent we must presume that counsel's actions were reasonable.

V.

Gissendanner next argues that the circuit court erred in failing to find that counsel were ineffective in presenting the testimony of Dr. Kathy Ronan, a mitigation expert, and in presenting Kim's testimony. First, Gissendanner argues that Dr. Ronan's testimony painted Gissendanner in a bad light -- specifically, that he had made bad grades in school and had an undiagnosed learning disorder, that he had anxiety issues, that he suffered from depression and an inability to express emotions, and that he had a personality disorder.

As we previously stated in our opinion, Dr. Ronan's penalty-phase testimony consisted of the following:

> "Dr. Ronan testified that she evaluated Gissendanner and that she performed intelligence and personality tests on Gissendanner. Dr. Ronan testified that based on her evaluation and examination of Gissendanner's personal history, it was her opinion that Gissendanner has a learning disorder, that he reads at a fifth grade level, that he had a long history of substance abuse, that he was mildly depressed, that he had heart problems or enlargement of one of the ventricles of his heart, which caused dizziness and is associated with anxiety, and that he had no history of violent

behavior."

Gissendanner, ___ So. 3d at ___.

Those aspects of Dr. Ronan's testimony that are alleged to have put Gissendanner in a bad light are classic examples of factors that are brought out in an effort to explain a defendant's deviation from behavior society ordinarily experts from its citizens. Such evidence is classic mitigation evidence. See § § 13A-5-51 and 13A-5-52, Ala. Code 1975. "[C]ounsel's method of presenting mitigation [is] clearly trial strategy." Hertz v. State, 941 So. 2d 1031, 1044 (Fla. 2006). Gissendanner's counsel were not ineffective in their presentation of Dr. Ronan's testimony.

Moreover, as the State asserts, Kominos was asked no questions at the postconviction hearing about Dr. Ronan's testimony. The following occurred during Gallo's testimony at the postconviction hearing:

> "[Postconviction counsel]: But you understand that there is a list of factors that the Courts have identified and said these are actual mitigating factors. For example, if somebody is mentally retarded, that may be a mitigating facto; is that right?
>
> "[Gallo]: Absolutely.
>
> "[Postconviction counsel]: And you understood there

> were -- for example if someone suffered an abusive childhood, that that could be a mitigating factor in a death case. You understood that?
>
> "[Gallo]: Yes, sir.
>
> "[Postconviction counsel]: And these issues that you asked Ms. Ronan to address, and she didn't find that Mr. Gissendanner, Jr., had suffered a bad childhood or was mentally retarded, for example?
>
> "[Gallo]: For example, correct.
>
> "[Postconviction counsel]: And knowing that, though, you made a decision to put her on and present evidence?
>
> "[Gallo]: I don't recall what her testimony was. There are also a lot of other nonstatutory mitigating factors that you can bring into a trial of the mitigating phase. Without looking at the record, without researching my -- looking at my file, referring to it, I don't know how to answer your question.
>
> "[Postconviction counsel]: Did you consider not putting her on in the mitigation phase after receiving her report?
>
> "[Gallo]: I don't believe so."

(R. 99-100.) On cross-examination, Gallo testified that he had completed numerous hours of continuing legal education devoted to capital litigation before Gissendanner's trial and that he used many capital-litigation handouts and materials in his preparation for Gissendanner's penalty phase. (R. 105.)

"'The defense decision to call or not call a mitigation

witness is a matter of trial strategy. ... Likewise, the scope of questioning is generally a matter left to the discretion of defense counsel.'" Walker v. State, 194 So. 3d 253, 292 (Ala. Crim. App. 2015), quoting State v. Elmore, 111 Ohio St. 3d 515, 532, 857 N.Ed.2d 547, 566-67 (2006). Clearly, counsel made a strategic decision to present Dr. Ronan's testimony, and their method of presenting Dr. Ronan's testimony did not constitute ineffective assistance of counsel. Gissendanner is due no relief on this claim.

Gissendanner next argues that counsel were ineffective in failing to prepare Kim and that, because of her lack of preparation, she testified about fights between herself and Gissendanner, which, he says, implied that Gissendanner beat his wife. He further argues that Kim could have testified about Gissendanner's previous forgery convictions. Kim testified at the postconviction hearing that Gissendanner forged checks from her checking account but that he did so after they were divorced and after they had argued about how to split their tax refund.

As the State correctly argues in its brief, counsel did elicit testimony from Kim that Gissendanner was never cruel to

her or their children. The following occurred at the penalty phase during Kim's testimony:

> "[Defense counsel]: And I believe while you were married you and [Gissendanner] probably got in a couple of spats together; is that a fair statement?
>
> "[Kim Gissendanner]: Yes, sir.
>
> "[Defense counsel]: You probably hit him a time or two and he hit you a time or two, is that a fair statement?
>
> "[Kim Gissendanner]: Yes, sir.
>
> "[Defense counsel]: Did he ever do anything cruel to you or your children?
>
> "[Kim Gissendanner]: No, sir."

(Trial R. 1622-23.) Also, as the State argues in its brief, Gissendanner testified in his defense at the guilt phase and explained the circumstances surrounding his forgery convictions: "[T]hat's between me and my wife where when we had got divorced, you know, and the money we had in the account, I took mine out and she thought it was hers, you know. So to keep a lot trouble down I just went ahead and plead[ed] guilty to those charges." (Trial R. 1446.) Clearly, Gissendanner failed to establish how he was prejudiced in regard to this claim; therefore, he failed to satisfy the Strickland test and is due no relief.

Accordingly, we affirm the circuit court's order on remand holding that Gissendanner's claims of ineffective assistance of counsel at the penalty phase of his trial do not entitle Gissendanner to relief. For the reasons expressed in our previous opinion remanding this case, we now reverse the circuit court's original order granting Gissendanner's petition for postconviction relief, and we direct that court to reinstate Gissendanner's capital-murder convictions and his sentences of death.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Kellum, J., concurs; Lyons, Special Judge, concurs;[3] Burke, J., dissents, with opinion; Joiner, J., dissents, with opinion; Windom, P.J., recuses herself.

[3]Retired Associate Justice Champ Lyons, Jr., was appointed on October 3, 2014, to be a Special Judge in regard to this appeal. See § 12-3-17, Ala. Code 1975.

BURKE, Judge, dissenting.

Like my colleague, Judge Joiner, I am deeply concerned with the precedent that this Court has established in its previous opinion on rehearing in this case and in its present opinion on return to remand. My dissent in State v. Gissendanner, [Ms. CR-09-0998, Oct. 23, 2015] ___ So. 3d ___, ___ (Ala. Crim. App. 2015), thoroughly stated my thoughts on the issue, and I hereby reincorporate it.

JOINER, Judge, dissenting.

On March 30, 2010, the circuit judge who both presided over the capital-murder trial of Emanuel Aaron Gissendanner Jr., and sentenced Gissendanner to death entered an order granting Gissendanner's Rule 32, Ala. R. Crim. P., petition for postconviction relief. In that order, the circuit court found, among other things, that Gissendanner's trial counsel were ineffective during the guilt phase of his capital-murder trial. As a result, the circuit court set aside Gissendanner's capital-murder convictions and death sentences

and ordered that Gissendanner receive a new trial. (C. 1185.) Today, nearly seven years later, this Court now directs the circuit court to "reinstate Gissendanner's capital-murder convictions and his sentences of death." ___ So. 3d at ___. Throughout this nearly seven-year journey, I have opposed this Court's various decisions--that is, I dissented from this Court's decision to reverse on original submission, which decision was subsequently withdrawn on application for rehearing, and I dissented from this Court's decision on application for rehearing remanding the case. Today, I dissent from this Court's decision on return to remand.

Although I recognize that the tenor of my writing in this case may seem to be either harsh or heavy-handed, I, as Judge Burke explained in his dissenting opinion on application for rehearing, do not write in such a manner to show "any disrespect for my fellow judges on this Court"; rather, I do so to show the "measure of my genuine concern about this case" and to demonstrate the level of uneasiness I feel about the precedent this Court established in its opinion on application for rehearing and continues to perpetuate, today, in its opinion on return to remand. See State v. Gissendanner, [Ms.

CR-09-0998, Oct. 23, 2015] ___ So. 3d ___, ___ (Ala. Crim. App. 2015) (Burke, J., dissenting).

Although this Court seems convinced that Gissendanner is guilty of capital murder and is deserving of the death penalty, "[t]his case is not about the death penalty"; rather, it is "about making sure that defendants receive fair trials." Gissendanner, ___ So. 3d at ___ (Burke, J., dissenting). When reading this Court's decisions on application for rehearing and on return to remand, it appears to me that this Court is not concerned with protecting constitutional safeguards--such as ensuring that a defendant receive effective counsel--rather, this Court has done everything in its power to ensure that Gissendanner's convictions and death sentence be reinstated when justice, fairness, and our caselaw dictate otherwise.

For example, in its opinion on application for rehearing, this Court addressed the circuit court's decision that Gissendanner's trial counsel were ineffective during the guilt phase of his trial when his counsel "failed to interview witnesses, family, and friends who could have provided information essential to an adequate defense of

[Gissendanner]." (C. 43.) This Court, in that opinion, rejected the circuit court's decision by first claiming that the circuit court had found that Gissendanner's trial counsel were "per se ineffective"--it did not. Second, this Court disregarded the circuit court's conclusion that Gissendanner was prejudiced by his trial counsel's failure to investigate and interview potential alibi witnesses.

As explained more thoroughly in my dissenting opinion on application for rehearing, this Court, in rejecting the circuit court's judgment, failed to recognize two things: First, under the "deficient performance" prong of Strickland,[4] the circuit court made certain factual conclusions based on disputed evidence; and, second, under the "prejudice" prong of Strickland, this Court decided that it would disregard the judgment of the circuit judge who presided over Gissendanner's capital-murder trial, sentenced him to death, and presided over his postconviction proceedings.

In other words, this Court's decision on application for rehearing holds (1) that this Court may summarily disregard a circuit court's factual conclusions when those conclusions are

[4]Strickland v. Washington, 466 U.S. 668 (1984).

based on disputed evidence and (2) that this Court is in a better position than the circuit court to determine the prejudicial effect (if any) that trial counsel's deficient performance had on the outcome of a proceeding.

Although a majority of this Court thinks otherwise, I am not convinced that this Court is better suited than a circuit court to determine the full extent of the prejudice that results from trial counsel's deficient performance, especially when that determination is made by the only person who both "personally observed every part of [a defendant's] journey through the substantive portions of Alabama's judicial system," Gissendanner, ___ So. 3d at ___ (Burke, J., dissenting), and who also sentenced that defendant to death.

This Court's decision today, by contrast, does not disregard the conclusions of a circuit court; instead, it affirms the conclusions of the circuit court. But it does so without requiring the circuit court to explain how it reached those conclusions. In doing so, this Court disregards both the plain language of Rule 32.9(d), Ala. R. Crim. P., and numerous cases that interpret that rule.

Rule 32.9(d) requires that, after a circuit court

conducts an evidentiary hearing on claims raised in a Rule 32 petition (as is the case here), "[t]he court shall make specific findings of fact relating to each material issue of fact presented." (Emphasis added.) Traditionally, both the Alabama Supreme Court and this Court have interpreted Rule 32.9(d) as requiring the circuit court to make specific, written findings of fact in an order denying a Rule 32 petition because such findings are "'essential to afford the appellant due process.'" Ex parte Grau, 791 So. 2d 345, 347 (Ala. 2000) (quoting Owens v. State, 666 So. 2d 31, 32 (Ala. Crim. App. 1994)). See also Hinton v. State, 172 So. 3d 355, 360 (Ala. Crim. App. 2013) (opinion after remand by the United States Supreme Court); Ex parte McCall, 30 So. 3d 400 (Ala. 2008); Getz v. State, 984 So. 2d 1221 (Ala. Crim. App. 2006); Tarver v. State, 940 So. 2d 312 (Ala. Crim. App. 2004); Crum v. State, 911 So. 2d 34 (Ala. Crim. App. 2004); Seay v. State, 881 So. 2d 1065 (Ala. Crim. App. 2003); C.L.L. v. State, 793 So. 2d 866 (Ala. Crim. App. 2000); Wilson v. State, 641 So. 2d 1260 (Ala. Crim. App. 1993); Mayes v. State, 641 So. 2d 1255 (Ala. Crim. App. 1993); and Saffold v. State, 563 So. 2d 1074 (Ala. Crim. App. 1990). Usually, when a circuit court fails

to comply with Rule 32.9(d), this Court remands the case to the circuit court for that court to comply with that rule. In the opinion issued today, however, this Court holds that a circuit court's failure to comply with Rule 32.9(d) neither requires remand nor presents a due-process problem. In other words, as of today, this Court treats Rule 32.9(d) as merely a suggestion.

Here, Gissendanner, in his brief on return to remand, correctly argues that the circuit court did not comply with either Rule 32.9(d) or this Court's remand instructions. Although this Court's opinion recognizes that the circuit court's order on remand does "not strictly comply with this Court's [remand] instructions," ___ So. 3d at ___, and thus does not "strictly comply" with Rule 32.9(d), this Court has decided to circumvent our well-settled practice that would require remanding this case to the circuit court and provides three reasons for so doing. Each of those reasons is suspect, at best.

First, this Court blames Gissendanner. That is, this Court finds that there is no need to remand this case to the circuit court for that court to make specific findings of fact

with regard to Gissendanner's claims because "Gissendanner does not request that this Court remand this case so that the circuit court may fully comply with this Court's [remand] instructions." ___ So. 3d at ___. This may seem like a plausible reason to not remand this matter again. Our courts, however, have never required a Rule 32 petitioner to specifically ask this Court to make the circuit court comply with Rule 32.9(d); rather, we have viewed a circuit court's failure to comply with Rule 32.9(d) as a barrier to meaningful appellate review. See, e.g., Ex parte Hinton, 172 So. 3d 332, 337 (Ala. 2008) ("[I]t would be premature for this Court to examine this issue without the trial court's first making specific findings. See Ex parte Grau, 791 So. 2d 345, 346-47 (Ala. 2000) (holding that it would be 'premature' to examine a claim of ineffective assistance of counsel where the trial court failed to make specific findings of facts under Rule 32.9(d), Ala. R. Crim. P.).").

Second, this Court, after quoting the circuit court's perfunctory order, declares that, although the order does not "strictly comply" with Rule 32.9(d), the order nonetheless satisfies Rule 32.9(d) because the circuit court issued a

"ruling." An order that does not "strictly comply" with Rule 32.9(d) neither satisfies the requirements of Rule 32.9(d) nor the principles of due process--especially in a case where the petitioner has been sentenced to death. Here, the circuit court's order denying Gissendanner's penalty-phase claims consists of rote legal standards applicable to ineffective-assistance-of-counsel claims and general conclusions that Gissendanner's trial counsel were not ineffective without making any true factual determinations. This Court has previously found such orders to be inadequate. See, e.g., Adkins v. State, 930 So. 2d 524, 530 (Ala. Crim. App. 2001) ("The trial court has failed to comply with our directions; it has not made specific findings of fact concerning each material allegation of ineffective assistance of counsel raised in Adkins's postconviction petition. The return to remand merely contains general conclusions; it does not refer to any factual determinations."). See also Ex parte Grau, supra; Getz v. State, 984 So. 2d 1221, 1222 (Ala. Crim. App. 2006); and Wiggins v. State, 987 So. 2d 1153, 1155 (Ala. Crim. App. 2006).

Finally, this Court explains that remanding this case to

the circuit court for a second time to require that court to comply with Rule 32.9(d) "would be a waste of time and valuable judicial resources." ___ So. 3d at ___. Although I share the Court's concern over wasting "time and valuable judicial resources," this concern should not unreasonably factor into our decision-making process when the death penalty has been imposed, particularly when a remand could be completed in a matter of weeks or, at most, months.

As Judge Burke reminded us in his dissenting opinion on application for rehearing:

> "[L]et us not forget that the death sentence has been imposed in this case. As the United States Supreme Court has espoused for more than four decades, 'death is different.' A death sentence, once carried out, is not modifiable or revokable in this life, absent the divine hand of The Creator."

Gissendanner, ___ So. 3d at ___ (Burke, J., dissenting).

Because this Court holds today that Rule 32.9(d), Ala. R. Crim. P., is simply a suggestion--a holding that effectively amends Rule 32.9(d) and is in conflict with numerous cases--I must dissent.