REL: October 16, 2020

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2020-2021

CR-19-0652

State of Alabama

v.

M.D.D.

Appeal from Blount Circuit Court
(CC-10-112.60; CC-10-112.80)

WINDOM, Presiding Judge.

The State of Alabama appeals the circuit court's order granting M.D.D.'s Rule 32, Ala. R. Crim. P., petition for postconviction relief and setting aside M.D.D.'s conviction for first-degree sodomy and the resulting sentence.

On August 18, 2011, M.D.D. was convicted of first-degree sodomy, see § 13A-6-63, Ala. Code 1975. The circuit court sentenced M.D.D. to 55 years in prison and ordered him to pay a $50,000 fine, $5,000 to the crime victims compensation fund, and court costs. This Court affirmed M.D.D.'s conviction and sentence in an unpublished memorandum issued on August 10, 2012. M.D.D. v. State (CR-11-0100, August 10, 2012), 152 So. 3d 456 (Ala. Crim. App. 2012) (table). The certificate of judgment was issued on August 29, 2012. In that unpublished memorandum, we summarized the facts supporting M.D.D.'s conviction as follows:

> "On February 19, 2010, 11-year-old E.D. told her sixth grade teacher that M.D.D. -- her father -- was abusing her. E.D. handed her teacher three note cards which had a bulleted list of words including 'trickery' and 'something about naked pictures on a computer.' (R. 64.) E.D.'s teacher reported the suspected abuse to the school principal. Once the school was aware of the allegations, the administration contacted the Blount County Sheriff's Department.
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> "Sue Ashworth was the investigator assigned to E.D.'s case. Ashworth went to E.D.'s school and conducted initial interviews with E.D. and E.D.'s teacher. After the initial interviews, Ashworth returned to the sheriff's department and procured a search warrant for E.D.'s home. Ashworth's search was directed at locating 'naked pictures' of E.D. During the search of the house, Ashworth seized three computers, assorted hard drives and computer-

storage devices, compact discs, a video camera, disposable cameras, and a digital camera. The computers and camera equipment were sent to the Alabama Bureau of Investigation, where they were inspected by a forensic technology examiner. The inspection revealed images of child pornography on the laptop computer used primarily by M.D.D.

"E.D., who was 14 at the time of trial, testified against M.D.D. E.D. told the jury that M.D.D. would 'take [her] clothes off [her] and [M.D.D.] would take his clothes off' and then M.D.D. would 'put his front part in [her] butt.' (R. 138.) E.D. stated that M.D.D. would show her 'naked pictures' on the computer which depicted men having anal sex with children in order to 'make [E.D.] think it was normal' for that activity to take place between them. (R. 140.) E.D. also claimed that M.D.D. would take naked pictures of her, but that '[M.D.D.] erased them.' (R. 144.) E.D. testified that her mother was initially supportive, but later 'she tried to get me to change my story and she was not as supportive then.' (R. 155.)

"E.D.'s pediatrician, Dr. Lisa Joines, testified about E.D.'s mental and physical signs of abuse. Dr. Joines stated that on the day she examined E.D., E.D. was unusually 'withdrawn and quiet' and that E.D. was 'very tearful' during the examination. (R. 74.) During her initial interview, E.D. told Dr. Joines that M.D.D. would put his penis inside of her. When Dr. Joines asked E.D. how long the abuse had occurred, E.D. responded that '[the abuse] had been going on for years.' (R. 76.)

"Dr. Joines then conducted a physical examination that revealed no abnormalities in E.D.'s vaginal area but 'thickening and abrasions' in E.D.'s rectal area. Dr. Joines testified that these abrasions and thickening were unusual, and 'unless one is being treated for chronic constipation or some kind of rectal or anal abnormality, you should

> see completely smooth areas with a little ridging of the skin.' (R. 82.) Dr. Joines testified that other than chronic constipation, these abnormalities could be explained by 'any kind of penetration or any kind of object.' (R. 83.) Dr. Joines further testified that there was no indication that E.D. had herpes or any other sexually transmitted disease.
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> "M.D.D.'s defense consisted of witnesses whose testimony cast doubt on E.D.'s credibility. Carla Roberts was a family friend who testified that she met with E.D. shortly after E.D. was removed from her family home and placed in foster care. Roberts testified that E.D. said that 'if she knew all of this would have come of this, she would not have said anything' about M.D.D.'s abuse. (R. 230.)
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> "E.D.'s mother also testified in M.D.D.'s defense. E.D.'s mother stated that she was 'shocked' and did not know what to think when she was contacted about E.D.'s abuse by the Department of Human Resources. (R. 239.) At first E.D.'s mother believed her daughter, but a few days after M.D.D. was removed from the home, she testified that E.D. told her '[i]f I had known that my daddy would have to leave, I would have never told this lie.' (R. 246.) E.D.'s mother testified that E.D. suffered from frequent constipation, even though neither of them had mentioned that condition to Dr. Joines. E.D.'s mother also stated that both she and M.D.D. have genital herpes."

On July 3, 2013, M.D.D. filed a petition for postconviction relief pursuant to Rule 32, Ala. R. Crim. P. In his petition, M.D.D. argued that the indictment and the search warrant were defective and that trial counsel had been ineffective. The State responded, alleging that M.D.D. could

have raised the issue of ineffective assistance of counsel on direct appeal but did not. See Rule 32.2(a)(5), Ala. R. Crim. P.

On April 21, 2014, M.D.D. moved to amend his petition, alleging two additional claims of ineffective assistance of counsel. The State responded that the amendment was precluded by Rule 32.2(c), Ala. R. Crim. P., because it was filed more than one year after the certificate of judgment was issued. On May 7, 2014, the circuit court denied M.D.D.'s motion to amend, finding it time-barred as pleaded by the State. On May 19, 2014, the circuit court dismissed M.D.D.'s Rule 32 petition, finding that the claims of ineffective assistance of counsel were preluded because M.D.D. could have raised his claims in a motion for a new trial and on direct appeal, but did not, and had failed to raise the claims as soon as practicable. See Rules 32.2(a)(3), 32.2(a)(5), and 32.2(d), Ala. R. Crim. P.

M.D.D. appealed the circuit court's dismissal of his petition. On appeal, this Court determined that the circuit court had abused its discretion by refusing to consider M.D.D.'s amended petition and, by an order dated January 30,

2015, reversed the circuit court's judgment. M.D.D. v. State, (CR-13-1336).

After this Court reversed the circuit court's judgment and the matter was remanded to the circuit court, M.D.D. was appointed counsel. M.D.D., through his appointed counsel, filed a second amended petition, in which he added claims that trial counsel was ineffective and a claim that the State had violated Brady v. Maryland, 373 U.S. 83 (1963).

On December 6, 2019, the circuit court conducted an evidentiary hearing. M.D.D.'s trial counsel did not testify at the hearing. Following the hearing, the circuit court issued an order granting M.D.D.'s petition. The circuit court granted relief on a claim raised in M.D.D.'s initial Rule 32 petition -- that trial counsel was ineffective for failing to call Dr. Earl Stradtman to testify at trial regarding his physical examination of E.D. The circuit court also granted relief on a claim raised in M.D.D.'s second amended petition -- that trial counsel was ineffective for failing to call as witnesses individuals who had been involved in a May 2009 investigation of an allegation of abuse involving M.D.D. and E.D. The circuit court concluded that, had these witnesses

testified, there is a reasonable probability that the result of the trial would have been different.[1]

The State appeals the circuit court's order granting M.D.D.'s petition for postconviction relief. When this Court reviews a lower court's ruling on a postconviction petition "where there are disputed facts ... and the circuit court resolves those disputed facts, '[t]he standard of review on appeal ... is whether the trial judge abused his discretion when he denied the petition.'" Boyd v. State, 913 So. 2d 1113, 1122 (Ala. Crim. App. 2003) (quoting Elliott v. State, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992)). See also Mashburn v. State, 148 So. 3d 1094, 1104 (Ala. Crim. App. 2013). "We will reverse a circuit court's findings only if they are 'clearly erroneous.'" Barbour v. State, 903 So. 2d 858, 861 (Ala. Crim. App. 2004).

> "'"[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746 (1948) .... If the [trial] court's account of the evidence is plausible in light of the record viewed in its

[1]The circuit court denied relief on other claims raised in M.D.D.'s petition and argued at the hearing.

> entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. United States v. Yellow Cab Co., 338 U.S. 338, 342, 70 S. Ct. 177, 179, 94 L. Ed. 150 (1949); see also Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 102 S. Ct. 2182, 72 L. Ed. 2d 606 (1982).' [Anderson v. City of Bessemer City, N.C.], 470 U.S. [564] at 573-74, 105 S. Ct. [1504] at 1511 [(1985)]."

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

As stated above, the circuit court granted M.D.D. relief after concluding that M.D.D. had been deprived of the effective assistance of counsel. When reviewing a claim of ineffective assistance of counsel, this Court applies the two-pronged test articulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). We examine whether the petitioner has established: (1) that trial counsel's performance was deficient, and (2) that the petitioner was prejudiced by that deficient performance.

In Bui v. State, 717 So. 2d 6 (Ala. Crim. App. 1997), this Court described the standards of review applicable to a Strickland claim:

"'The performance component outlined in Strickland is an objective one: that is, whether counsel's assistance, judged under "prevailing professional norms," was "reasonable considering all the circumstances."' Daniels v. State, 650 So. 2d 544, 552 (Ala. Cr. App. 1994), cert. denied, 488 U.S. 1051, 109 S. Ct. 884, 102 L. Ed. 2d 1007 (1989), quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065. 'A court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.' Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

"The claimant alleging ineffective assistance of counsel has the burden of showing that counsel's assistance was ineffective. Ex parte Baldwin, 456 So. 2d 129 (Ala. 1984), aff'd, 472 U.S. 372, 105 S. Ct. 2727, 86 L. Ed. 2d 300 (1985). 'Once a petitioner has identified the specific acts or omissions that he alleges were not the result of reasonable professional judgment on counsel's part, the court must determine whether those acts or omissions fall "outside the wide range of professionally competent assistance." [Strickland,] 466 U.S. at 690, 104 S. Ct. at 2066.' Daniels, 650 So. 2d at 552. When reviewing a claim of ineffective assistance of counsel, this court indulges a strong presumption that counsel's conduct was appropriate and reasonable. Hallford v. State, 629 So. 2d 6 (Ala. Cr. App. 1992), cert. denied, 511 U.S. 1100, 114 S. Ct. 1870, 128 L. Ed. 2d 491 (1994); Luke v. State, 484 So. 2d 531 (Ala. Cr. App. 1985). 'This court must avoid using "hindsight" to evaluate the performance of counsel. We must evaluate all the circumstances surrounding the case at the time of counsel's actions before determining whether counsel rendered ineffective assistance.' Hallford, 629 So. 2d at 9. See also, e.g., Cartwright v. State, 645 So. 2d 326 (Ala. Cr. App. 1994).

> "'Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.'

"Strickland, 466 U.S. at 689, 104 S. Ct. at 2065 (citations omitted). See Ex parte Lawley, 512 So. 2d 1370, 1372 (Ala. 1987).

> "'Even if an attorney's performance is determined to be deficient, the petitioner is not entitled to relief unless he establishes that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability

> sufficient to undermine confidence in the outcome." [Strickland,] 466 U.S. at 694, 104 S.Ct. at 2068.'
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> "Daniels, 650 So. 2d at 552."

Bui, 717 So. 2d at 12-13.

The Alabama Supreme Court has noted "that the Strickland Court recognized that 'both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.' 466 U.S. at 698, 104 S. Ct. 2052." Ex parte Gissendanner, 288 So. 3d 1011, 1027-28 (Ala. 2019). In State v. Petric, [Ms. CR-17-0505, Aug. 14, 2020] ___ So. 3d ___ (Ala. Crim. App. 2020), this Court stated:

> "'We recognize that such a "mix" of legal and factual questions can be difficult to tease apart. As some federal courts of appeals have done, we will apply the most appropriate standard of review for the issue raised depending on the extent to which that issue is dominated by fact or by law.'
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> "Fortune v. State, 158 A.3d 512, 517 (Me. 2017).
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> "'[W]e apply a mixed standard of review because both the performance and the prejudice prongs of the Strickland test present mixed questions of law and fact. See id. at 698, 104 S.Ct. 2052 ("Ineffectiveness is ... a mixed question of law and fact."); Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999). We defer to the circuit court's factual findings, but

> we review de novo the circuit court's legal conclusions. ... "... Under this standard, the Court conducts an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings.") (citation omitted).'

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

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

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

"....

"'The credibility of witnesses is for the trier of fact, whose finding is conclusive on appeal. This Court cannot pass judgment on the truthfulness or falsity of testimony or on the credibility of witnesses.' Hope v. State, 521 So. 2d 1383, 1387

> (Ala. Crim. App. 1988). Indeed, it is well settled that, in order to be entitled to relief, a postconviction 'petitioner must convince the trial judge of the truth of his allegation and the judge must "believe" the testimony.' Summers v. State, 366 So. 2d 336, 343 (Ala. Crim. App. 1978). Thus, we afford the circuit court's findings great deference on appeal. Ex parte Gissendanner, 288 So. 3d at 1029."

Petric, ___ So. 3d at ___.

Finally, because M.D.D. was granted an evidentiary hearing, he, as the petitioner, bore the sole burden of proving his claims by a preponderance of the evidence. See Rule 32.3, Ala. R. Crim. P.

With these principles in mind, this Court will review the issues raised by the State in its brief to this Court.

I.

The State argues that the circuit court erred when it found trial counsel ineffective for failing to call Dr. Stradtman to testify at trial. Specifically, the State asserts that M.D.D. failed to "present any actual evidence during the hearing on his petition that trial counsel's representation was unreasonable under prevailing professional norms or that trial counsel's action was not sound strategy." (State's brief, at 17.) This Court agrees.

During the investigation of E.D.'s allegations in 2010, the Alabama Department of Human Resources ("DHR") recommended that E.D. be examined by Dr. Stradtman, a pediatric gynecologist. E.D.'s family, though, wanted her to be examined first by her pediatrician, Dr. Joines. Thus, E.D. was examined by her pediatrician and then underwent another examination by Dr. Stradtman a few weeks later.

At the evidentiary hearing, M.D.D. testified that trial counsel told him that Dr. Stradtman would not testify at trial. Dr. Stradtman testified at the hearing, however, that he was not contacted by M.D.D.'s trial counsel nor was he subpoenaed to appear at trial. Dr. Stradtman testified that he examined E.D. in March 2010 and that "there was no evidence of blunt force injury to the anal area, and also there was no injury to the ... hymen area." (R. 21.) However, Dr. Stradtman testified that he could not draw a conclusion as to whether E.D. had been sexually abused. Dr. Stradtman testified that the anal area heals rather quickly and that an injury could occur to the area but heal before an individual underwent a physical examination. Dr. Stradtman further acknowledged that it was possible that a physician could

observe abrasions or other injuries to the anus that would not be apparent two or three weeks later because the injuries had healed.

Dr. Stradtman testified that E.D. was negative for antibodies for the Type 2 herpes simplex virus, which is associated with genital herpes. Dr. Stradtman added:

> "That information does not necessarily conclude that there has been an active infection. It simply goes to if someone had been exposed to either the Type 1 or Type 2 herpes virus, and the body responded by making an antibody. That antibody could have been measured if it has been recently passed."

(R. 22.) Dr. Stradtman clarified that a negative indication for the antibody does not necessarily show that the individual was not exposed to the virus and also stated that an individual could have been exposed to the virus without contracting it.

Following Dr. Stradtman's testimony, the State argued that, although Dr. Stradtman did not see any injury to E.D.'s anal area during his examination a couple of weeks after Dr. Joines had examined E.D., Dr. Stradtman testified that the discrepancy would not be unusual. The State argued that Dr. Stradtman's testimony was consistent with Dr. Joines's

testimony and that trial counsel was able to elicit the same testimony through Dr. Joines.

In holding that this claim warranted relief, the circuit court made the following findings:

> "On or about February 23, 2010, the victim was seen by her pediatrician, Dr. Lisa Joines. Dr. Joines testified at trial that she observed abrasions in the anal area. Dr. Joines testified that it would be unusual for the abrasions not to be healed within two weeks. On or about March 4, 2010, the victim was treated/examined by Dr. Earl Stradtman, Jr. for suspected sexual abuse. The victim's medical records from the examination by Dr. Stradtman were admitted as Defendant's Exhibit 1 to the hearing.
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> "The results of Dr. Stradtman's physical examination of the victim were favorable to the defendant. Dr. Stradtman was not subpoenaed to appear at trial by trial counsel, and he did not appear at the trial. The medical records from Dr. Stradtman's examination were not allowed to be admitted into evidence during the trial. When questioned during the hearing about Dr. Stradtman not testifying at trial, the defendant testified that trial counsel told him that Dr. Stradtman would not come.
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> "Dr. Stradtman did testify at the hearing. Dr. Stradtman gave testimony which was similar to the testimony Dr. Joines gave at the trial, and he gave testimony which was different from Dr. Joines. Dr. Stradtman testified that he did not observe any abrasions or injury in the anal area. Dr. Stradtman's testimony presented reasons for the differences and he explained what could and could not be concluded from his report and testimony.

(C. 26.)

In conclusion, the circuit court stated:

> "In reviewing the first prong of the test -- whether trial counsel's representation fell below an objective standard of reasonableness -- the Court finds that trial counsel's failure to subpoena and call Dr. Stradtman ... was not objectively reasonable and was deficient.
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> "....
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> "It is difficult for the Court to find that there would have been any detrimental effect of Dr. Stradtman testifying at the trial. Dr. Stradtman's testimony would have revealed that he could not make or reach a conclusion as to whether the victim had or had not been sexually abused within the anus or vaginal areas. Additionally, Dr. Stradtman could have given testimony that the victim did not have a STD which the defendant had.
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> "....
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> "The Court can find no objectively reasonable argument as to how the decision not to ... call ... Dr. Stradtman ... could be considered sound trial strategy. And the Court does find that there is a reasonable probability that had trial counsel called ... th[is] witness[] the result would have been different. Therefore, trial counsel's decision to not ... call th[is] witness[] was deficient and such deficient performance so prejudiced the defendant that he was deprived of a fair trial."

(C. 31-32, 34.)

As noted above, trial counsel did not testify at the evidentiary hearing. In Broadnax v. State, 130 So. 3d 1232 (Ala. Crim. App. 2013), this Court stated:

> "It 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. Indeed, 'trial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective.' Rylander v. State, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003). This is so because it is presumed that counsel acted reasonably:
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> > "'The presumption impacts on the burden of proof and continues throughout the case, not dropping out just because some conflicting evidence is introduced. "Counsel's competence ... is presumed, and the [petitioner] must rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2574, 2588, 91 L. Ed. 2d 305 (1986) (emphasis added) (citations omitted). An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption. Therefore, "where the record is incomplete or unclear about [counsel]'s actions, we will presume that he did what he should have done, and that he exercised reasonable professional judgment." Williams [v. Head ,] 185 F.3d [1223,] 1228 [(11th Cir. 1999)]; see also Waters [v. Thomas,] 46 F.3d [1506,] 1516 [(11th Cir. 1995)] (en banc) (noting that

> even though testimony at habeas evidentiary hearing was ambiguous, acts at trial indicate that counsel exercised sound professional judgment).'
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> "Chandler v. United States, 218 F.3d 1305, 1314 n.15 (11th Cir. 2000). '"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."' Dunaway v. State, 198 So. 3d 530, 547 (Ala. Crim. App. 2009) (quoting Howard v. State, 239 S.W.3d 359, 367 (Tex. App. 2007))."

130 So. 3d at 1255-56.

Subsequently, in Stallworth v. State, 171 So. 3d 53 (Ala. Crim. App. 2013) (opinion on return to remand), this Court explained:

> "Further, the 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."')."

171 So. 3d at 92-93. See also Reeves v. State, 226 So. 3d 711 (Ala. Crim. App. 2016) (holding that Rule 32 petitioner had failed to prove his claims of ineffective assistance of trial and appellate counsel because he did not call his trial or appellate counsel to testify at the Rule 32 evidentiary hearing); and Clark v. State, 196 So. 3d 285, 312 (Ala. Crim. App. 2015) (holding that Rule 32 petitioner had failed to prove that his appellate counsel was ineffective for not raising issues on appeal where the petitioner did not call his appellate counsel to testify at the Rule 32 evidentiary hearing regarding counsel's reasons for not raising those issues).

It is well settled that "[w]hether to call a certain witness is generally a matter of trial strategy." Falkner v. State, 462 So. 2d 1040, 1041 (Ala. Crim. App. 1984).

> "'"The decision not to call a particular witness is usually a tactical decision not constituting ineffective assistance of counsel. Goodman v. State, 387 So. 2d 862 (Ala. Crim. App.), cert. denied, Ex parte Goodman, 387 So. 2d 864 (Ala. 1980). 'Defense counsel's failure to call certain

> witnesses is not sufficient grounds for a Sixth Amendment claim.' United States v. Hughes, 635 F.2d 449, 453 (5th Cir. 1981). 'This Court will not second-guess tactical decisions of counsel in deciding whether to call certain witnesses.' United States v. Long, 674 F.2d 848, 855 (11th Cir. 1982)." Oliver v. State, 435 So. 2d 207, 208-09 (Ala. Crim. App. 1983).'"

Franklin v. State, 644 So. 2d 35, 39 (Ala. Crim. App. 1994) (quoting Falkner v. State, 462 So. 2d at 1041-42).

According to Rule 32 counsel, a couple of days before the hearing he had subpoenaed trial counsel and had attempted to have trial counsel served with the subpoena to attend the evidentiary hearing. The record does not indicate that trial counsel was ever served with the subpoena. In this case, the failure to have trial counsel testify is fatal to M.D.D.'s claims of ineffective assistance of counsel. Because trial counsel did not testify, the record is silent as to the reasons counsel did not call Dr. Stradtman to testify at trial. M.D.D. testified that trial counsel told him that Dr. Stradtman would not testify at trial; however, Dr. Stradtman testified that he had not been contacted. As noted above, where "'"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."'" Broadnax, 130 So. 3d at 1256 (citations omitted).

Further, the circuit court found that it could find "no objectively reasonable argument as to how the decision not to ... call ... Dr. Stradtman ... could be considered sound trial strategy." (C. 34.) Although Dr. Stradtman's report was not admitted into evidence at trial, trial counsel was able to present to the jury evidence indicating that E.D.'s mother had reviewed Dr. Stradtman's report and that, upon doing so, she no longer believed E.D.'s allegations of abuse. In other words, trial counsel was able to present to the jury, albeit indirectly, that Dr. Stradtman's report did not indicate sexual abuse without also subjecting the jury to Dr. Stradtman's attendant testimony that his findings could not rule out sexual abuse. This is a sound, strategic reason for not calling Dr. Stradtman to testify. See Gordon v. United States, 518 F.3d 1291, 1302 (11th Cir. 2008) (holding that claims of ineffective assistance of counsel may be dismissed where reviewing court can conceive of a reasonable motivation for trial counsel's actions).

Morever, even if this Court were to second-guess the strategic decision of M.D.D.'s trial counsel not to call Dr. Stradtman as a witness, this Court agrees with the State that M.D.D. has failed to show that the outcome of his trial probably would have been different but for his counsel's alleged ineffectiveness.

This Court has examined the record filed with this Court on direct appeal.[2] The record shows that essentially the same testimony and information provided by Dr. Stradtman at the evidentiary hearing was presented to the jury at trial. Dr. Joines, E.D.'s pediatrician, testified that she examined E.D. on February 23, 2010. E.D. told her that she had been sexually abused for years and that she did not know how old she was when it first started. During the examination, Dr. Joines noticed some thickened areas and a small abrasion in E.D.'s rectal area. Dr. Joines testified that "[u]nless one is being treated for chronic constipation or some kind of rectal or anal abnormality, you should see completely smooth areas with a little ridging of the skin. There should not be

[2]This Court may take judicial notice of its records in prior appeals. See Nettles v. State, 731 So. 2d 626, 629 (Ala. Crim. App. 1998).

any sloughing of the skin or any cuts or any kind of lesions." (Direct Appeal, R. 82.) Dr. Joines testified that the abnormalities could be caused by chronic constipation and any kind of foreign object but that the abnormalities were also consistent with sexual abuse. When asked if the abrasions could be seen two weeks later if there had been no further injury, Dr. Joines testified that the abrasions would have healed and that she would not be surprised if they could not be seen at another examination conducted two weeks later. With respect to the herpes virus, Dr. Joines testified that "[y]ou can have sex with somebody multiple times over multiple years and if they didn't have any active lesions, then the chances of contracting herpes would be very slim." (Trial R. 99.) Dr. Joines did not see lesions on E.D. to indicate that she had genital herpes.

During his opening statement to the jury, trial counsel stated:

> "One of the names that they failed to put on the movie screen is that another physician did a pelvic examination of this young child and found no lesions or nothing to indicate that she had ever been sexually assaulted. I have no idea why the State of Alabama would not want you to know that. This is supposed to be a search for justice and a search for the truth. ... When you don't tell the Jury about

> a report that there was no physical evidence of anything at all whatsoever -- why would she do that?"

(Trial R. 57-58.)

E.D.'s mother testified at trial that the DHR wanted her to take E.D. to the "DHR doctor," Dr. Stradtman, but that she did not want to wait two weeks until that appointment. She testified, "I had to know if something had happened." (Trial R. 241.) She also testified that M.D.D. wanted her to take E.D. to E.D.'s pediatrician because, he said, the State's physician would lie. E.D.'s mother testified that, after she had received and reviewed Dr. Stradtman's report, she did not believe that M.D.D. had sexually abused E.D. She was not allowed to testify regarding the contents of the report; however, she testified that both she and M.D.D. have genital herpes and that E.D.'s test "came back negative." (Trial R. 261.)

> "'"This Court has previously refused to allow the omission of cumulative testimony to amount to ineffective assistance of counsel."' State v. Gissendanner, [288 So. 3d 923, 951] (Ala. Crim. App. 2015) (quoting United States v. Harris, 408 F.3d 186, 191 (5th Cir. 2005)). '[A] petitioner cannot satisfy the prejudice prong of the Strickland test with evidence that is merely cumulative of evidence already presented at trial.' Benjamin v. State, 156 So. 3d 424, 453 (Ala. Crim. App. 2013) (quoting

> Devier v. Zant, 3 F.3d 1445, 1452 (11th Cir. 1993)). Evidence is cumulative '"even where the ... evidence is more elaborate than the trial testimony."' Saunders v. State, 249 So. 3d 1153, 1171 (Ala. Crim. App. 2016) (quoting State v. Bright, 200 So. 3d 710, 737 (Fla. 2016))."

Woodward v. State, 276 So. 3d 713, 771 (Ala. Crim. App. 2018).

Regardless of whether it was unsound trial strategy not to call Dr. Stradtman to testify, the information to which Dr. Stradtman testified at the evidentiary hearing was known to the jury at trial. It is doubtful that his cumulative testimony would have changed the result of the trial. Id. Therefore, M.D.D. failed to prove that he was prejudiced by counsel's failure to present Dr. Stradtman's testimony at trial. See Rule 32.3, Ala. R. Crim. P. The circuit court erred in finding that M.D.D. was entitled to relief on this claim.

II.

The State contends that the circuit court erred when it found that trial counsel was ineffective for failing to question and/or call witnesses regarding a prior DHR investigation in 2009. This Court agrees.

The record indicates that in 2009 an individual reported to DHR that E.D. and her brother were being sexually abused.

A DHR employee, Janet Salas, interviewed the children and their parents and on May 9, 2009, issued a report. In that report, Salas indicated that the children had denied the allegations. The report also contained purported statements from E.D. denying that she had been touched, denying that she had ever told anyone that she had been touched, and stating that, if anyone said she had made such allegations, then that person would be lying. Finding no basis to pursue the matter further, DHR considered the allegation "unfounded" and closed the case.

Trial counsel subpoenaed DHR records regarding E.D. and M.D.D. before trial. After an in camera review by the trial court, various records were provided to trial counsel; however, the DHR report from the 2009 investigation was not produced to the trial court or to trial counsel. Following M.D.D.'s conviction, a presentence investigation was conducted and a presentence investigation ("PSI") report was issued. In that PSI, probation officer Reydonna Richardson provided details of the offense, which she had obtained from various sources, including a Blount County incident/offense report. The PSI stated that Investigator Sue Ashworth had received

information that E.D. had previously reported to someone that her father had been abusing her. Inv. Ashworth spoke to the informant and then telephoned DHR caseworker Brad Sims. Sims told Inv. Ashworth that in May 2009 there had been a complaint alleging that E.D. and her brother had been abused but that the case was closed following the children's denials of abuse. When the trial court asked the parties at the sentencing hearing if they had seen the PSI report, trial counsel stated: "Yes, Judge, we have seen it." (Trial R. 363.)

Following the trial court's imposition of sentence, the trial court heard arguments pertaining to M.D.D.'s motion for a new trial. When the trial court asked trial counsel if he had anything he wanted to add to the motion that had been filed, trial counsel stated:

> "I appreciate the indulgence of the Court. In the thirty years that I have been a criminal defense attorney, I have seen a lot of hard cases, but I have never seen a case that has so confused myself as an individual. Judge, we have had information that has been given to us that the Department of Human Resources -- that this young woman has made this allegation since 2004. And that almost on an annual basis, the allegations were reviewed and were found to be unfounded. We have no information in the form of discovery that told us this. I believe, Your Honor, if the same group of people who have helped convict my client by doing ... their civic responsibility or their legal responsibility had

> been a little bit more open with that, I think it would have given the Jury something else to think about because it would have meant that in the past this beautiful, beautiful child was found not to be credible by the same people that initiated these proceedings. Let me say this, I do not think that [the prosecutor] had anything to do with this. I think this was in all likelihood just an oversight on the part of the Department of Human Resources. I have never known my friends at the Department of Human Resources to be anything but candid with me. We would like to see those records to see if in fact that is true. I will proffer to the Court that we have been given that information."

(Trial R. 373.)

The prosecutor responded:

> "Your Honor, first of all, we would object to any type of argument to what appears to be a Brady violation on behalf of the State and those people which would be under the control of the State in this case, as the defendant has indicated to the Department of Human Resources. There has been no evidence of what he purports as to where he got the information that we would have had that information of the Department of Human Resources would have had that information. Therefore, the State objects to that."

(Trial R. 373-74.) The trial court denied the motion for a new trial.

The 2009 DHR report was finally disclosed to M.D.D. while he was preparing for trial on a charge of possession of child pornography. At the evidentiary hearing, M.D.D. testified that he first became aware of the possibility of the existence

of a DHR report for the 2009 investigation when he saw the PSI report in 2013; M.D.D. testified that he had not seen the PSI report until that time. M.D.D. became aware that a DHR report existed when it was provided to him in 2016. He testified that

> "[t]he pre-sentence report mentioned a previous investigation. I had received everything I thought from [trial counsel]'s office on my trial or concerning my trial. The presentence report mentioned several case numbers and dates. I just kept insisting and [new counsel] kept asking and they kept denying. DHR kept denying that anything existed until the last subpoena that he sent where he got specific about something that was in it. Then they sent it to him. I don't know if there was an in-camera inspection held on that or not. That's when I received it."

(R. 70.) M.D.D. denied that he had seen anything in discovery before trial that referenced the 2009 investigation. M.D.D. testified that he was not aware of the 2009 investigation and that he knew only that "[E.D.] had stated that they had talked to a bunch of kids at school." (R. 78.) When asked if he remembered contacting DHR in 2009 as it had requested, M.D.D. stated that he did not recall contacting them or making any statements to investigators. M.D.D. claimed that he never received a letter from DHR stating that it was closing the investigation.

After presenting all the evidence at the hearing, Rule 32 counsel argued:

> "As I view this, either [M.D.D.] is due relief under Brady or he is due relief under ineffective assistance of counsel. Either [trial counsel] did not provide effective assistance of counsel in following up on Brad Sims testifying -- eliciting testimony from Brad Sims and perhaps from Sue Ashworth about the '09 investigation, or he is due relief under Brady for not having that provided to him. Judge, it's very clear -- I wasn't there, but I realize [trial counsel] -- we don't know exactly what [trial counsel] thought. I will acknowledge that the discovery that the State provided, there is in the incident report that probably [probation officer] Richardson read, but we don't know for sure where Ms. Richardson got her information -- there is talk of an investigation in '09. I don't know if that is what triggered [trial counsel] to act, but before this trial started -- the actual trial -- he subpoenaed DHR, and he asked for anything regarding [M.D.D.], [M.D.D.'s son], [M.D.D.'s wife], or [E.D.] That is in the record in a subpoena request form that was filed August 16, 2011. On that same day, the Department of Human Resources responded acknowledging they had received a request from [M.D.D.] ...
>
> "...
>
> "The Department of Human Resources provided -- and the State of Alabama in turn provided to defense counsel the [report] that they did based on the 2010 allegation in February 2010. I don't know how DHR maintains their records, but clearly they were able to produce those documents to the State and then [M.D.D.] got them. It is inexplicable to me, Your Honor, that they did not produce the 2009 [report], either in initial discovery or in response to [trial counsel's] subpoena where they acknowledged that he

asked for anything and all. [M.D.D.] has testified that he wasn't aware and he did not review with [trial counsel] the statements in that report. I believe his testimony was that he became aware of this at the sentencing hearing when Ms. Richardson produced this in her report. I do wonder if it hadn't come to the attention then if we would have ever found it. [Other counsel] has been very diligent in pursuing this matter in the other pending case, and ultimately some five years later, the Department produces that report, Judge. The report is now in evidence and there are several things in there, Your Honor, that are absolutely exculpatory. Of course, there is the report about [E.D.] denying it and the boy denying it, but also, Judge, there are findings about [M.D.D.] -- his strength as a caregiver -- there are probably fifteen or twenty items on Page 8 of that [report] that a DHR professional, apparently who had made an evaluation of [M.D.D.], who seemed to think he is great and includes in their conclusions no abuse occurred, and we need to close this thing out. I could not imagine more exculpatory evidence in a matter like this, Your Honor. The defense counsel at times did clearly make a request that it be included. Judge, in his closing argument -- I'm sorry, in his argument before you on his Motion for New Trial, I think if you read this in context, it follows up to what we talked about earlier after he said 2004. And that almost on an annual basis, the allegation was reviewed and [was] found to be unfounded. And this is in there, 'We have no information in the form of discovery that told us this.' So [trial counsel] must have looked at the discovery and he has asked DHR to produce anything else. They responded in not producing that. I view that as him commenting on what he doesn't have. [Trial counsel] never raised that on appeal because he didn't know about it. The 2009 [report] wasn't discovered by defense counsel for this defendant at any point prior to 2016. And I don't think there is any evidence that anybody with the defense team knew

about that [report]. Everything that is in the exhibits, Your Honor, clearly back in -- what the Department of Human Resources did produce in response to that which is now in evidence was where they communicated to the District Attorney's Office at that time, at least that they were doing an investigation. There is also a note that they communicated that to Sue Ashworth. You would think that perhaps Sue maintained some sort of records. I realize the State of Alabama DA's Office may not have maintained that record at that time because it was exculpatory. DHR clearly maintained the record because they had it and ultimately produced it later.

"....

"Judge, we all understand that the Department of Human Resources is an arm of the State. I'm not suggesting that anybody did it on purpose, but it was clearly a record that was exculpatory. They found it and it was produced. I think he is entitled to a new trial. I don't know what the results of that trial would be, but I think he is clearly entitled to it. I thought [trial counsel] did a really good job of cross-examining [E.D.] as good as he could. He asked her about possible inconsistent statements she made to either a family friend that is in the record or to the mother. There is no way [trial counsel] would not have asked about the specifics of that 2009 investigation had he had the report. And if he had it or knew about it -- I think it was [trial counsel] didn't know. He clearly expressed his frustration at the Motion for New Trial. I think that would have been important information. This can't be overlooked, Judge. [M.D.D.] was convicted of sodomizing a child under the age of twelve. This child, [E.D.], turned twelve on July 3, 2009. So any abuse that would have occurred, for example, in February of 2010 would not have supported a conviction for what he was convicted of. For the Jury to find that he

committed the crime as alleged, they had to find beyond a reasonable doubt that this man in fact sexually abused the girl prior to July of '09. Well, in May of '09, she said 'He has never abused me.' So the State would have to prove that between -- if the Jury believed the May '09 statement that she made -- sometime in June or the first couple of days in July that he abused her -- for him to be convicted of abusing a child under the age of twelve. I was surprised that [trial counsel] did not try to limit or try to figure out what dates he was defending. ... Certainly, the bulk of the testimony was around the February 2010 time frame and the doctor's examinations were whether or not they could figure out if something happened then. But if the Jury believed he did it then, that would not have supported the conviction of under the age of twelve. It's in the record that her birthday is July 3, 1997. I think that is incredibly important because I think there is a really good chance that the State's theory if we tried the case again might be -- I don't know what they will do with it. If the girl clearly told multiple people in that investigation in '09 that it didn't happen and it never happened, and the brother said it never happened. Then the theory if it started up after that, then we are in a very narrow time frame for an under-twelve conviction. I know that [M.D.D.] has pleaded that [trial counsel] was ineffective and failed to raise a Brady violation, but I don't know how he was supposed to raise a Brady violation when he is not aware of it at any time in [trial counsel's] involvement in this case and was not aware of the existence. He had done all the due diligence that I think could be expected from him. Judge, I think he would be entitled to relief under Brady even if [trial counsel] hadn't filed that subpoena. But the fact that he did it shows that he is looking for it and DHR's response acknowledges that he is looking for it and he didn't get it. ... I'm a big believer and I know the Court is a big believer in full discovery. It is undisputedly

> exculpatory. Judge, I think that is basically it. There is no way [trial counsel] wouldn't have argued it if he knew about it. I think that [M.D.D.] testimony -- I think there is a difference in a lay-person that asks about an investigation versus somebody called me and I did this -- to the extent of how DHR functions and what they make paperwork of -- occasionally the police may be advised or they walk away and there is no report. I don't think that based on anything [M.D.D.] said -- he should have known or anybody should have known that there was a report. Clearly, even if [M.D.D.] had talked to [trial counsel] about that, [trial counsel] tried to get it and it wasn't produced. And Judge, the use would be to impeach [E.D.] At some point, Judge, she testified -- I believe she said, 'I've never told anyone that he didn't do it because he did do it.' I think that was in response to one of [trial counsel's] direct questions. The next question would have been -- I think clearly Janet Salas reports, 'I questioned the girl and she said it didn't happen.' I don't know how [E.D.] would have responded to that, but it would have been good to show not only her denial of that it didn't happen, but she is also saying 'I never told anybody it didn't happen.' And there would be the DHR worker saying, 'Well, she did tell me that at least once.' Judge, for those reasons, I feel like [M.D.D.] is entitled to a new trial."

(R. 116-127.)

The State argued that no Brady violation occurred because M.D.D. was aware that there had been a prior investigation and that the investigation had been closed. The State argued: "This is not something that was known to the prosecution that

was unknown to him. And if it was known to him, then it is not Brady material." (R. 147.) Rule 32 counsel responded:

> "As the Court seemed to be hitting on already, there is so much more in [the report] than that. We didn't know that Salas talked to them -- that it was actually her. I know there is a reference to school officials were talked to that had to do with the child's demeanor and how the child was doing in school. [Trial counsel] could have certainly used all of that because they talked about how the child was both before and after she had reported the incident. As far as the strategic reasons, Judge, when we get to that narrow window, it is inconceivable to me that [trial counsel] would have said, 'You know I have a couple of DHR people who have said all these great things,' and then completely dismiss that it's possible that [M.D.D.] did it prior to '09. The State has to prove that he did it before July 7th or July 3rd, that [trial counsel] wouldn't have said, 'You know what, I've got it down to that window, and there is no specific allegation like the report came in as kind of circumstantial evidence that maybe it happened on these days and maybe this day because the child was in fact not in school.' That's it, Judge. If he knows about all this, he is going to go for that because it's going to be awfully hard for the State to prove that. Then they have got to say, 'Okay, she told all these people and they believed her, but you have to believe now that it happened to her or that it happened in February of 2010,' at which time she wouldn't have been twelve, so there would have been a different range of punishment."

(R. 159-61.)

Although Rule 32 counsel pressed the circuit court to find that the State had violated Brady v. Maryland by

suppressing the report of the 2009 investigation, the circuit court instead found trial counsel ineffective because he should have challenged the State's evidence at trial with the findings from that 2009 investigation:

> "At least two different items of discovery were produced to the defendant which indicated that there had been an investigation by DHR of abuse against the victim on or about May 9, 2009. The abuse was alleged to have been committed by the defendant. The discovery information which was produced showing the following:
>
> > "(1) that the victim and her brother [J.] were interviewed at school;
> >
> > "(2) that DHR worker Janet Salas interviewed the children;
> >
> > "(3) that DHR worker Brad Sims was aware of the May 9, 2009, investigation;
> >
> > "(4) that Blount County Sheriff officer, Investigator Sue Ashworth was aware of the May 9, 2009, investigation;
> >
> > "(5) that the victim denied she had been touched, denied that she had told anyone that she had been touched and that if someone said she said such, the person made it up;
> >
> > "(6) that the brother [J.] denied he had been abused and that he would know if the victim had been being abused;
> >
> > "(7) that the DHR report found the abuse allegation to be not indicated, and

> "(8) that there was some form of a physical or written report created within and/or by DHR.
>
> "The two items of discovery material which showed or revealed that noted above were the Incident/Offense ('I/O') report and the DHR [Child Abuse and Neglect ("CAN")] report from the February 19, 2010, investigation made by DHR.
>
> "There had been discovery requests made and subpoenas issued through which the DHR CAN report of the May 9, 2009, investigation should have been produced. However, no DHR CAN report regarding the May 9, 2009, investigation was produced prior to trial. The DHR CAN report regarding the May 9, 2009, investigation was produced to defendant's legal counsel (different from trial counsel) on or about June 3, 2016 in case CC-11-331, which is a related case pending against the defendant. The DHR CAN report which was produced on or about June 3, 2016, contained redactions. The redacted CAN report regarding the May 9, 2009, investigation was admitted as Defendant's Exhibit 3 to the hearing.
>
> "It is clear that the things listed or mentioned in the discovery items that were produced to the defendant are consistent with information contained in the May 9, 2009, DHR CAN report. It is also clear that there is additional information contained in the May 9, 2009, DHR CAN report which the discovery items produced to the defendant did not reveal. These include the circumstances surrounding the reporting of the suspected abuse and the reporter, school staff having no concerns about the victim, the victim's mother being cooperative and being interviewed, the defendant being cooperative and being interviewed, and both parents being given 'Strength' in every category within the 'Protective Capacities' section of the report.

"Trial counsel for defendant did not call DHR worker Janet Salas, DHR worker Brad Sims, or the victim's brother to testify. Investigator Sue Ashworth did testify at trial and was asked the following:

"Q. In your capacity as the investigator, have you been involved in a case involving [M.D.D.] and [E.D.]?

"A. Yes.

"Q. Could you tell me what brought about your becoming involved in that case?

"In answering the question, Inv. Ashworth only talked about the February 2010 investigation; she did not mention or include anything about the investigation from May of 2009.

"Additionally, the victim testified and was asked by trial counsel '[h]ave you ever told anyone else that your father did not do this to you.' After victim answered 'no, because he did this to me,' trial counsel did not follow up and ask any questions of the victim about the May 9, 2009, interview/investigation at school."

(C. 26-28.)

In conclusion, the circuit court stated:

"The defendant has further alleged that he was denied effective assistance of counsel regarding ... the failure of trial counsel to question witnesses and/or call witnesses regarding the May 9, 2009 DHR investigation.

"....

> "In reviewing the first prong of the test -- whether trial counsel's representation fell below an objective standard of reasonableness -- the Court finds that trial counsel's ... failure to question the victim about the statement she gave in May 9, 2009, denying any abuse, the failure to question Inv. Ashworth about the May 9, 2009, investigation, and the failure to call as witnesses DHR workers Janet Salas and Brad Sims was not objectively reasonable and was deficient.
>
> "After the victim denied that she told anyone that the defendant did not sexually abuse her, it would have been reasonable to question her about the statement she gave during the May 9, 2009, investigation. The victim should have been asked about her prior statement. In a case wherein there is no scientific and/or physical evidence of abuse[3] and the only evidence of the crime alleged is the statement from the victim, impeachment is certainly an appropriate method of defense, and perhaps the only method or manner of defense. At a minimum, questioning and calling Inv. Ashworth and DHR worker Janet Salas about the May 2009 investigation would have shown the victim's statement was at best false and a misstatement. Such questioning would have also revealed the finding of 'not indicated' by DHR. The Court finds that there was no reason for trial counsel not to question and/or call witnesses regarding the May 2009 investigation.
>
> "....
>
> "In reviewing the second prong of the test -- whether there is reasonable probability that the result would have been different and thus that the defendant was prejudiced -- the Court find that such

[3]Contrary to the circuit court's finding, Dr. Joines testified at trial that she observed thickening and abrasions in E.D.'s rectal area.

exits. And that such probability undermines the confidence in the outcome. As stated above, Inv. Ashworth did testify at trial but trial counsel did not question her about the May 2009 DHR investigation. Discovery provided to the defendant showed that Investigator Ashworth knew about the May 2009 investigation. The extent of what Inv. Ashworth knew about the May 2009 investigation was not known by trial counsel at the time of trial, and was not known at the time of the hearing. However, trial counsel did know of the May 2009 investigation, the denial of abuse made by the victim and the finding of not indicated by DHR. Further, the May 2009 DHR investigation was initiated by Inv. Ashworth, as she was the 'reporter' to DHR. There is a reasonable probability that actually having the May 2009 DHR CAN report, as opposed to just knowing of it, would have made a difference in the outcome.

"Inv. Ashworth should have been asked if she was aware of the May 2009 investigation, if she was aware that other people believed she knew about it, and whether she was aware of the victim's statement and DHR's findings/determinations. DHR workers Janet Salas and Brad Sims were involved in the May 2009 DHR investigation, and Ms. Salas is the person who interviewed the victim and her brother, and the person to whom the victim made her statement denying any abuse allegations in May of 2009. They should have been called and questioned about the May 2009 investigation and report, and the May 2009 DHR CAN should have been produced in an unre[d]acted form prior to trial.

"The testimony from a sheriff's investigator and a DHR worker, who have no connection to and are arguably adverse to a defendant, that a victim denied any abuse is far more powerful to a jury than such testimony from someone connected to and aligned with a defendant. Additionally, in this case the victim's denial came less than two months of her

> turning twelve. The defendant is charged with committing acts against the victim before she turned twelve.
>
> "Also, the victim apparently felt comfortable to tell of abuse when interviewed at school in February of 2010. Therefore, the question arises as to why she did not feel safe or comfortable enough to tell of abuse in May 2009 when she was interviewed at school? The jury would have to believe that victim told the truth in February of 2010, and that she did not tell the truth in May of 2009.
>
> "This Court can find no objectively reasonable argument as to how the decision to not question and/or call Inv. Ashworth, DHR workers Salas and Sims, Dr. Stradtman and the victim, about the May 2009 investigation and the DHR CAN report, could be considered sound trial strategy. And the Court does find that there is a reasonably probability that had trial counsel called and/or questioned these witnesses the result would have been different. Therefore, trial counsel's decision to not question and/or call these witnesses was deficient and such deficient performance so prejudiced the defendant that he was deprived of a fair trial."

(C. 30-34.) (Footnote omitted.)

In light of the evidence actually presented at the hearing, this Court holds that many of the circuit court's findings are based on speculation. As Rule 32 counsel admitted in his argument at the hearing, it is unknown whether trial counsel knew of the existence of the report of the 2009 investigation. This is because, again, trial counsel did not testify at the hearing. Similarly, the circuit court

acknowledged in its order that "[t]he extent of what Inv. Ashworth knew about the May 2009 investigation was not known by trial counsel at the time of trial, and was not known at the time of the hearing." (C. 32.) Of course, Inv. Ashworth was not called to testify at the hearing. It is likewise unknown what was known or recalled by Salas -- who interviewed E.D. and her brother in 2009 -- because she was not called to testify at the hearing, either. The importance of presenting witnesses at the hearing is underscored by the testimony of Brad Sims. Sims was called to testify at the hearing; however, he had no independent recollection of the 2009 investigation.

Further, given that neither Inv. Ashworth nor Salas testified at the hearing, the substance of what they would have testified to at trial and whether that testimony would have changed the outcome is wholly speculative. This Court also fails to see how trial counsel should have asked the victim about a specific statement from a report that he never saw. Again, assuming that trial counsel was aware that the victim had previously denied being sexually abused in 2009, trial counsel did not have a particular statement to use for

purposes of impeachment after the victim denied at trial that she had ever recanted or denied the allegations.

As previously stated:

> "'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). Other than the assertion that counsel was provided with the incident/offense report and the 2010 DHR report that referenced the prior investigation, the record is devoid of any evidence regarding whether trial counsel knew of the prior investigation and, if he did, what his strategy was in this regard. To hold that trial counsel was ineffective based on the asserted ground would call for us to speculate, which this Court will not do.

This Court holds that M.D.D. did not prove that trial counsel was deficient in failing to call Sims or Salas to testify at trial and in not questioning Inv. Ashworth or the

victim about the 2009 investigation. See Rule 32.3, Ala. R. Crim. P. Because M.D.D. failed to prove that his trial counsel was deficient, the circuit court erred in granting relief on this claim.[4]

Accordingly, the judgment of the circuit court is reversed and this cause remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

McCool, J., concurs. Minor, J., concurs specially, with opinion. Kellum and Cole, JJ., dissent.

[4]In his brief on appeal, M.D.D. asserts that the circuit court's granting of his Rule 32 petition should be affirmed because, he says, the State violated Brady v. Maryland by suppressing the report of the 2009 investigation. This Court notes, however, that the circuit court did not find such a violation.

MINOR, Judge, concurring specially.

I concur in the Court's decision reversing the Blount Circuit Court's judgment granting M.D.D.'s Rule 32, Ala. R. Crim. P., petition for postconviction relief and setting aside M.D.D.'s conviction for first-degree sodomy and the resulting sentence. I write separately to address the procedural posture of M.D.D.'s claim that the State violated Brady v. Maryland, 373 U.S. 83 (1963).

As this Court notes, the circuit court did not rule in M.D.D.'s favor on his claim alleging that the State violated Brady. ___ So. 3d at ___ n.4. But it also does not appear that the circuit court denied M.D.D.'s claim based on Brady. Indeed, because the circuit court granted M.D.D. relief on a different claim, it did not have to address all the remaining claims in M.D.D.'s petition (although it did address some of them).

When a circuit court grants a Rule 32 petitioner postconviction relief, the circuit court must "enter an appropriate order with respect to the conviction, sentence, or detention." Rule 32.9(c), Ala. R. Crim. P. (emphasis added). A circuit court's order is "appropriate" when the circuit

court makes "specific findings of fact relating to each material issue of fact presented." Rule 32.9(d), Ala. R. Crim. P. (emphasis added). In other words, when a circuit court grants a petition for postconviction relief, the circuit court's order is final if the order addresses "each material" issue necessary to grant the petitioner relief. The circuit court does not have to address issues immaterial to its judgment.

This Court, discussing the test for determining the finality of an order that would support an appeal, has explained:

> "'A final judgment, decision or order which will support an appeal, is one which puts an end to the proceedings between the parties to a cause in that court, and leaves nothing further to be done.' Sparks v. State, 40 Ala. App. 551, 554, 119 So. 2d 596, 599 (1959), cert. denied, 270 Ala. 488, 119 So. 2d 600 (1960). In Griffith v. State, 36 Ala. App.638, 639, 61 So. 2d 870, 871 (1952), the court adopted the following test of the finality of a judgment, as it was stated in 4 C.J.S., Appeal and Error, § 94:
>
> > "'The test of finality of a judgment or decree to support an appeal is not whether the cause remains in fieri awaiting further proceedings in such court to entitle the parties to their acquired rights, but whether such judgment or decree ascertains and declares such rights embracing the substantial merits of the controversy and

> material issues litigated or necessarily involved in the litigation. [Footnotes omitted.]'"

Coleman v. State, 539 So. 2d 454, 455-56 (Ala. Crim. App. 1988) (emphasis added).

The circuit court's order in this case "put[] an end to the proceedings," left nothing further to be done by the circuit court, and addressed every material issue necessary to the claim on which the court granted relief. The granting of relief rendered moot all claims the circuit court did not deny. But this Court's reversal of the circuit court's judgment means the unaddressed claims are no longer moot, and they now await disposition. See, e.g., State v. Gissendanner, 288 So. 3d 923, 966 (Ala. Crim. App. 2015) ("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."), rev'd on other grounds, 288 So. 3d 1011 (Ala. 2019); cf. Hilb, Rogal & Hamilton Co. v. Beiersdoerfer, 989 So. 2d 1045, 1055 (Ala. 2007) ("The effect of that order was to vacate the judgment entered on the jury verdict awarding damages to Beiersdoerfer. At that point, having attained the new trial sought in the postjudgment motion, all other relief requested in the alternative by the HRH corporations became moot, including their motion for a remittitur. Because the order granting the motion for a new trial rendered the motion for a remittitur moot, it therefore was no longer pending and was not subject to Rule 59.1[, Ala. R. Civ. P.]").