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# Alabama Court of Criminal Appeals

OCTOBER TERM, 2020-2021

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CR-19-0703

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Courtney Larrell Lockhart

v.

State of Alabama

Appeal from Lee Circuit Court  
(CC-08-197.60)

On Application for Rehearing

WINDOM, Presiding Judge.

This Court's opinion issued on April 23, 2021, is withdrawn, and the following opinion is substituted therefor.

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Courtney Larrell Lockhart appeals the denial of his petition for postconviction relief filed pursuant to Rule 32, Ala. R. Crim. P., in which he attacked his November 2010 conviction for capital murder in the death of Lauren Burk. See § 13A-5-40(a)(2), Ala. Code 1975. By a vote of 12-0, the jury recommended that Lockhart be sentenced to life in prison without the possibility of parole. The trial court did not follow the jury's recommendation and sentenced Lockhart to death. On August 30, 2013, this Court affirmed Lockhart's conviction and sentence. Lockhart v. State, 163 So. 3d 1088 (Ala. Crim. App. 2013). The certificate of judgment was issued on September 26, 2014. On April 20, 2015, the Supreme Court of the United States denied Lockhart's petition for writ of certiorari.

On September 18, 2015, Lockhart filed this, his first, Rule 32 petition, in which he asserted various claims of ineffective assistance of counsel. (C. 16-102.) Lockhart filed an amended petition on May 2, 2016, (C. 148-254), and the State responded to that petition in a motion to dismiss filed on September 30, 2016. (C. 291-366.) On October 2, 2017, Lockhart added allegations to several of the claims asserted in his amended petition. (C. 450-57.) The State filed a response to the new

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allegations on November 15, 2017. (C. 498-505.) The circuit court conducted evidentiary hearings in December 2018 and February 2019. Lockhart and the State filed post-hearing briefs on May 15, 2019, and July 15, 2019, respectively. (C. 551-99, 610-73.) On April 3, 2020, the circuit court issued an order denying relief. (C. 676-706.)

This Court's opinion on direct appeal set out the following facts surrounding Lockhart's conviction:

"On March 4, 2008, [a] passersby discovered Lauren Burk, a student at Auburn University, in distress on Highway 147 in Lee County. Burk was naked and had numerous abrasions on her body. She was also suffering from a single gunshot wound to her upper body. Shortly after Burk was discovered, she died from the gunshot wound.

"On March 7, 2008, after being arrested by police officers in Phenix City, Lockhart was interviewed by law-enforcement officers from multiple agencies, including the Phenix City Police Department, the Auburn Police Department, and the Alabama Bureau of Investigations. After waiving his Miranda rights, Lockhart gave the law-enforcement officers a detailed oral confession that was recorded on video and shown to the jury at trial. Lockhart also gave the law-enforcement officers a signed, handwritten statement, which stated:

" 'On Tuesday of March – I am not sure of the date, but I was in Auburn, Alabama, and I was on [Auburn University] campus and I rode around the Auburn/Opelika area all day, and that night, I saw

my victim, Lauren, and I ran up to her while she was getting in the car and I pushed her in the car and told her to give me her money. And I got in the car with her and just talked to her. Then I drove her car off with her in it and was just riding, and I told her to take off her clothes and we kept riding. We were talking about how my life was over and how she could help me get a job and then after riding for about 30 minutes, we headed back to [Auburn University] campus, and on the way back we were still talking about my situation and how she could help me, and I was telling her that she couldn't help and that this was the end for me. And the gun went off, and she jumped out of the car. And I went to turn around, and at the turnaround point, there was already another truck turning around, so I just went straight to campus, but I stopped and filled her car up with gas. On the way to campus, I hear people standing on the street saying somebody's car is leaking gas, and I let the windows up and headed straight for campus. Set the car on fire. Left. Went to fuel my car up. Then went back to campus to make sure the car was burning. Saw that it was. Then headed to Atlanta. In addition to all of this, I threw her debit card out of the window on I-85 South, and I left her car keys in the car, in the ignition, and I also left her phone in the car.'

"(C. 986–87; R. 3891–94.)

"On March 9, 2008, Lockhart was again interviewed by officers with the Auburn Police Department. Again, Lockhart was advised of his Miranda rights, and he waived those rights. After waiving his Miranda rights, Lockhart gave the

law-enforcement officers another statement. In that statement, Lockhart gave more detail about what transpired before he approached Burk on the evening she died:

" My name is Courtney Larrell Lockhart, and I am 23 years old. I have read my rights and I understand them. This is a true and voluntary statement. I have been working for War Grading for a year this coming April. I was working at a job site on North Dean Road in Auburn. I have worked at that site for about a month. It's between the Vet's office and a graphics place. Some days I drive back and forth myself and some days we meet at the office in Smith's, and I'll drive the truck. This past Monday I spent the night in the parking lot of the hospital in Opelika. I didn't think I had enough gas and I thought I was working the next day, anyway. It started raining that night and I knew we would not work the next day. About midmorning or noon, I went riding around. I stopped at a gas station catty-cornered from Golden Corral. I stayed in the Opelika/Auburn area and on campus. I drove back to the hospital parking lot while it was still daylight. I stayed there until dusk. I went riding around again. I ended up back on campus. Everybody was out running earlier, and when I got back, only a couple were running. I rode around campus and stopped in a parking lot. It was on top of the hill. Straight in front was a fence. Facing the fence on the right was some stairs going down the hill. I backed in at the fence so nobody couldn't see my tag. I could observe everything in front of me. I stayed there about two minutes. I moved to another spot. I saw a black female police officer drove by in a black and

white. She parked and I moved because I was just sitting in the car. She did see me. I left also because I saw you had to have a parking permit to park there. I drove around, but I didn't leave campus. This was when it was still daylight. I rode back by to see if the police officer was still there. The police officer was gone, and this was when it was still daylight. I then drove back to the hospital and parked. It was daylight when I parked. I sat there two or three hours before it got dusk. I parked where I could see the helopad in my rearview mirror. Right when it got dusk, I left and rode around to campus. Everybody was outside. I rode around campus for about an hour. I parked in the same parking lot as before and was talking on the phone. I parked there for awhile. I see Lauren getting into her car. She's already got her door open. She is doing it so slow. I get out of my car and walked over to her, behind her. When I saw Lauren, I hung up the phone, grabbed my gun, and came up behind her. I told her to get "the fuck in the car." I asked her how much money do you have. She didn't say anything. She was still screaming. I was sitting in the driver's seat, and she was in the passenger's seat. I was just sitting there, and she finally calmed herself down.'

"(C. 994–97; R. 3934–40.)

"When Lockhart was arrested, an iPod portable media device belonging to Burk was in his possession. (R. 3802–03, 3841.) When police officers searched Lockhart's car after his arrest, they discovered three spent .38-special shell casings and a green T-shirt inside the car. (R. 3764–65, 3768.) Law-enforcement officers also discovered a fired lead bullet in

the burned remains of Burk's vehicle. (R. 3620, 3626–27, 3634.) When Lockhart was interviewed by the police shortly after he was arrested, he informed the police officers that he had thrown a handgun out of his car window as he passed by the Publix supermarket on Summerville Road in Phenix City. (R. 3872–77.) Police officers searched the area around that Publix supermarket and recovered a handgun. (R. 3814–30.) Katherine Richert, a forensic scientist specializing in firearms and toolmarks examination for the Alabama Department of Forensic Sciences, testified that the handgun recovered from the area around the Publix supermarket had fired the bullet found in Burk's car and the shell casings found in Lockhart's car. (R. 4040–41, 4048.) Richert also testified that that gun functioned properly and that it required approximately five pounds of pressure to pull the trigger to the rear when the hammer was cocked. (R. 4042–45.) She further testified that the gun required approximately 12 pounds of pressure to pull the trigger to the rear when the hammer was not cocked. (R. 4045.) Kristin Maturi, a forensic DNA analyst with the Alabama Department of Forensic Sciences, testified that Burk's DNA profile and Lockhart's DNA profile matched DNA profiles obtained from the green T-shirt that was found inside Lockhart's car after he was arrested. (R. 4106–10.)

"Dr. John Daniels, a former medical examiner for the State of Alabama, performed the autopsy on Burk's body. Dr. Daniels testified that the cause of Burk's death was a single gunshot that entered her upper left back and exited through her right upper arm. (R. 3501.) Dr. Daniels testified that, based on the entrance wound, the muzzle of the firearm was a few inches away from Burk's skin when the fatal shot was fired. (R. 3507–08.)

"At trial, it was undisputed that Lockhart caused Burk's death. However, the defense contended that Lockhart did not

intend to cause Burk's death. Specifically, the defense argued that Lockhart accidentally fired the gunshot that killed Burk and that his prior military service caused him to suffer from a mental disease or defect that rendered him incapable of appreciating the nature and quality or the wrongfulness of his acts."

Lockhart, 163 So. 3d at 1097-99 (footnote omitted).

### Standard of Review

Lockhart appeals the circuit court's denial of his petition for postconviction relief attacking his capital-murder conviction and sentence of death. According to Rule 32.3, Ala. R. Crim. P., Lockhart has the sole burden of pleading and proving that he is entitled to relief. Rule 32.3, Ala. R. Crim. P., provides:

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

When it reviewed Lockhart's claims on direct appeal, this Court applied a plain-error standard of review and examined every issue, regardless of whether the issue had been preserved for appellate review.



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See Rule 45A, Ala. R. App. P. However, the plain-error standard does not apply when evaluating a ruling on a postconviction petition, even when the petitioner has been sentenced to death. See Ferguson v. State, 13 So. 3d 418, 424 (Ala. Crim. App. 2008); Waldrop v. State, 987 So. 2d 1186 (Ala. Crim. App. 2007); Hall v. State, 979 So. 2d 125 (Ala. Crim. App. 2007); Gaddy v. State, 952 So. 2d 1149 (Ala. Crim. App. 2006). "The standard of review this Court uses in evaluating the rulings made by the trial court is whether the trial court abused its discretion." Hunt v. State, 940 So. 2d 1041, 1049 (Ala. Crim. App. 2005) (citing Elliott v. State, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992)). However, "[t]he sufficiency of pleadings in a Rule 32 petition is a question of law. 'The standard of review for pure questions of law in criminal cases is de novo. Ex parte Key, 890 So. 2d 1056, 1059 (Ala. 2003).'" Ex parte Beckworth, 190 So. 3d 571, 573 (Ala. 2013) (quoting Ex parte Lamb, 113 So. 3d 686, 689 (Ala. 2011)). Further, the circuit court granted Lockhart an opportunity to prove his claims. The circuit court's credibility determinations with respect to these claims are entitled to great deference:

"The resolution of ... factual issue[s] requir[s] the trial judge to weigh the credibility of the witnesses. His determination is entitled to great weight on appeal .... "When there is conflicting testimony as to a factual matter ..., the question of the credibility of the witnesses is within the sound discretion of the trier of fact. His factual determinations are entitled to great weight and will not be disturbed unless clearly contrary to the evidence." '

"Calhoun v. State, 460 So. 2d 268, 269–70 (Ala. Crim. App. 1984) (quoting State v. Klar, 400 So. 2d 610, 613 (La. 1981))."

Brooks v. State, 929 So. 2d 491, 495-96 (Ala. Crim. App. 2005). Further, "[t]his Court may affirm the judgment of the circuit court for any reason, even if not for the reason stated by the circuit court." Acra v. State, 105 So. 3d 460, 464 (Ala. Crim. App. 2012).

#### Standard for Evaluating Claims of Ineffective Assistance of Counsel

Lockhart raised in his petition several claims of ineffective assistance of counsel.

"In order to prevail on a claim of ineffective assistance of counsel, a defendant must meet the two-pronged test articulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

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

"466 U.S. at 687, 104 S. Ct. at 2064.

" '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, [514 U.S. 1024, 115 S. Ct. 1375, 131 L. Ed. 2d 230 (1995)], 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.'

"Daniels, 650 So. 2d at 552.

" 'When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'

"Strickland, 466 U.S. at 697, 104 S. Ct. at 2069, quoted in Thompson v. State, 615 So.2d 129, 132 (Ala. Cr.App. 1992), cert. denied, 510 U.S. 976, 114 S. Ct. 467, 126 L. Ed. 2d 418 (1993)."

Bui v. State, 717 So. 2d 6, 12–13 (Ala. Crim. App. 1997).

With these principles in mind, this Court reviews the claims raised by Lockhart in his brief to this Court.

I.

Lockhart argues that the circuit court erred in finding that, although trial counsel had been ineffective in investigating and presenting evidence that he suffered from combat-related post-traumatic stress disorder ("PTSD"), he was not prejudiced by trial counsel's ineffectiveness. Lockhart did not dispute at trial that he caused Burk's death. Instead, trial counsel attempted to lessen Lockhart's culpability, in part by offering evidence that Lockhart was suffering from PTSD. Because Lockhart entered a plea of not guilty by reason of mental disease or defect, trial counsel was allowed to offer evidence of PTSD in both the guilt and penalty phases of the trial.

In the guilt phase, Lockhart presented the testimony of Dr. Kimberly Ackerson, a forensic psychologist hired by trial counsel to assist in the mitigation investigation. Dr. Ackerson testified in the guilt phase that she had interviewed Lockhart as well as several family members and had

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reviewed various documents related to Lockhart's military service and medical history. According to Dr. Ackerson, Lockhart enlisted in the United States Army following high-school graduation and was eventually deployed to Iraq. Lockhart

"reported as being [in] the hot beds of activity. There [were] very frequent times when there was shelling attacks; they had to be on constant guard. They were always having to be aware of their surroundings. He described, you know, being in his bed not knowing whether the ceiling was going to fall down on top of them from an attack."

(R. 4162-63.) Lockhart described two incidents to Dr. Ackerson that were particularly traumatic. In the first incident, Lockhart was amongst a group of soldiers who were the victims of friendly fire; Lockhart was distressed by his superiors' failure to admit the mistake. The second incident was the combat death of Sergeant Neil Prince, who had been a father figure to Lockhart while Lockhart was deployed. Lockhart told Dr. Ackerson that these events left him emotionally numb. Dr. Ackerson testified that Lockhart had abused alcohol and had used marijuana upon his return from Iraq, and she shared stories from Lockhart's friends and relatives describing how he had changed as a result of his combat

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experience. Specifically, Dr. Ackerson learned that Lockhart had become withdrawn, paranoid, hyper-vigilant, and aggressive. Dr. Ackerson tested Lockhart for PTSD and concluded that, although Lockhart had reported symptoms and traits consistent with PTSD, the complexity and intensity of the symptoms were not sufficient to support a diagnosis of PTSD.

Trial counsel also presented in the guilt phase the testimony of Nicole Threatt, Lockhart's former fiancé and the mother of his child. Threatt reiterated Dr. Ackerson's testimony about the changes in Lockhart's personality upon his return from combat. Threatt testified that on several occasions she woke up at night to find Lockhart hiding in a closet, and that sometimes Lockhart woke her up because he was screaming in bed. Threatt added that in the weeks leading up to Burk's murder, Lockhart's hygiene declined and he stopped visiting her and their child.

In the penalty phase, evidence of Lockhart's suffering from symptoms of PTSD came from the testimony of Marvin Peabody, Lockhart's best friend, and Catherine Williams, Lockhart's mother. Peabody testified that he met Lockhart in high school, and that Lockhart



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was outgoing: "[H]e was that person you always wanted to be around[;] he was always funny." (Trial R. 4439.) Peabody testified that Lockhart was more reserved and distant upon returning from combat. Williams echoed Peabody's sentiment, testifying that Lockhart had become paranoid and often stayed in his room. Williams testified that she once found him lying on the floor under his bed and thought, "That's not Courtney." (Trial R. 4469.) Williams also shared a story in which she woke him for breakfast and Lockhart thrashed as though he were "fighting for his life." (Trial R. 4468.) This evidence was sufficient to garner a unanimous jury recommendation of life in prison, which was overridden by the trial court.

In his petition Lockhart asserted that trial counsel were ineffective in developing and presenting evidence that he, contrary to Dr. Ackerson's trial testimony, in fact suffered from PTSD. In support of this claim, Lockhart presented at the evidentiary hearing the testimony of his trial counsel, Jeremy Armstrong and Joel Collins, and a third member of his trial team, Sirena Saunders, as well as the testimony of Rebecca Gerome, Jeffery Pitts, Dr. Ackerson, and Dr. Stephen Xenakis. The State

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countered Lockhart's mental-health evidence with the testimony of Dr. Glen King, who had also served as the State's expert at Lockhart's trial.

Trial counsel for Lockhart stated that the defense strategy was to front-load mitigation evidence – specifically Lockhart's struggles with symptoms of PTSD – into the guilt phase at trial. Armstrong felt as though a murder conviction was a foregone conclusion but surmised that the jury's hearing from Dr. Ackerson in the guilt phase might aid Lockhart in the penalty phase, if he were convicted of capital murder. The trial court cautioned trial counsel of the time-consuming work needed to develop their theory of defense. In spite of this admonition, trial counsel did not retain Dr. Ackerson until September 2010, which was only 6 weeks before trial, yet over 18 months after funds had been approved for the purpose of retaining an expert. After interviewing Lockhart and his friends and family and reviewing the records provided to her by trial counsel, Dr. Ackerson determined that Lockhart did not suffer from PTSD. That finding aligned with the trial testimony of the State's expert, Dr. King, who testified that Lockhart did not meet the criteria for suffering from a mental disease or defect, in part because Lockhart had "never

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taken any medications for treatment of mental illness," nor had he ever "sought [or] received consultation about mental illness." (Trial R. 4228.) Dr. Ackerson acknowledged during the evidentiary hearing that she was asked by trial counsel to address the PTSD issue but stated that she understood that she was being retained only for mitigation work. She also testified that she is not an expert in PTSD, and that if she had known she was being retained for that role, she would have directed trial counsel to seek another professional.

Gerome testified that she had assisted Lockhart in his postconviction proceedings while participating in a legal clinic at her law school. According to Gerome, during an interview with Williams, Williams gave her access to what had been Lockhart's bedroom. In a stack of papers on a dresser, Gerome discovered a medical record relating to treatment Lockhart had received while stationed at Fort Sill. The document indicated that the treating physician had noted an impression of PTSD and had prescribed Paxil and Trazadone, which are commonly used for the treatment of anxiety, depression; the document had not been discovered by trial counsel and was unknown to either Dr. Ackerson or Dr. King.

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Pitts offered testimony regarding Lockhart's employment at Warr Grading. Pitts was a foreman with the company and had worked closely with Lockhart. Pitts testified that, initially, Lockhart was a great worker who was punctual. However, loud job sites, particularly those where nail guns were being used, caused Lockhart distress. Pitts described one incident in which loud noises caused Lockhart to hide behind a work truck. Lockhart's work deteriorated substantially when the company was performing work at Fort Benning, which was around the time of Burk's murder. Pitts stated that artillery exercises could be heard from the job site and that the noise adversely affected Lockhart's job performance and attendance.

Notwithstanding that Lockhart was sentenced to death, Armstrong was of the opinion that the defense strategy had worked because the jury unanimously recommended a sentence of life in prison without the possibility of parole at the conclusion of the penalty phase. Armstrong admitted that the possibility of a jury-override was a concern but stated that his focus leading up to sentencing was to prohibit the trial court's

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consideration of a string of five uncharged armed robberies against women committed by Lockhart around the time of Burk's murder.

After discussing the framework for analyzing a claim of ineffective assistance of counsel as laid out in Strickland v. Washington, the circuit court made the following findings with respect to trial counsel's handling of Dr. Ackerson:

"Armstrong's expressed strategy during trial was to 'front load' mitigation so that information that normally would not be introduced until the penalty phase would be presented to the jury during the guilt phase. While the fact that the jury elected to vote 12-0 for a life without parole sentence weighs in trial counsel's favor, this is only one part of the total representation. Trial counsel's duties remain for the entirety of the proceedings. ... As trial counsel's strategy was to rely on [Lockhart's] mental health issues and military service, this reliance was also a part of the final sentencing portions of trial. The importance of the hiring, handling, and testimony of a post-traumatic stress disorder expert or mental health evaluation cannot be overstated.

"....

"The untimely securing of Dr. Ackerson as an expert witness and use of her as an expert witness cannot be viewed as simply an issue of time management or strategy. In hearing the testimony of Mr. Collins, Ms. Saunders, and Mr. Armstrong, at the Rule 32 proceedings there is the impression of a team that was well meaning but disorganized and tasks [that] were not properly or effectively delegated. This appears

to have resulted in long delays in securing experts, not having sufficient background information, and finally in rather damning testimony being given by trial counsel's sole expert witness.

"The Court cannot view the defense team's error in the handling of Dr. Kimberly Ackerson and the mitigation preparation as reasonable decisions. First, the defense stated that their case largely rested upon the mitigation of Lockhart's actions through a presentation of evidence regarding his mental health at the time. The issue of [Lockhart's] mental health and diagnosis of PTSD were so vital to their strategy that during closing arguments Attorney Joel Collins repeatedly referenced them. He asserted to the jury that they had proven the trauma [Lockhart] suffered while in the military and the issues he faced when he returned from combat by referencing Dr. Ackerson's testimony. However, as previously noted, Dr. Ackerson did not diagnose Courtney Lockhart with post-traumatic stress disorder. ... The defense had months to prepare their case, but waited until approximately eight weeks before trial to engage the services of Dr. Ackerson, who was not fully apprised of her role in the proceedings and was not fully informed of Lockhart's background. They did not use their time prior to engaging Dr. Ackerson to fully investigate the facts of Lockhart's medical and mental health history. The testimony of Ms. Gerome only further supports the lack of background knowledge the trial team appeared to have been working with in preparation for trial.

"....

"In the Court's sentencing order dated March 11, 2011, the Court relied heavily on the information presented regarding Lockhart's mental state and how this should be

weighed as a mitigating factor. ... The Court did a careful weighing of each mitigating factor in its sentencing and considered all evidence presented. In doing so, the Court weighed heavily the testimony of the defense's only expert witness in having insight into Lockhart's mental health. The fact that Dr. Ackerson took the stand at the evidentiary hearing and essentially, for lack of a better term, recanted her testimony and stated that she was never aware of the very reason she was hired is not a matter this Court can take lightly. It results in a questioning of one of the elements in the Court's decision to override the Jury's life-without-parole verdict and sentence Courtney Lockhart to death.

"In answering the first question of Strickland, the Court finds that trial counsel's performance was ineffective."

(C. 694-98; citations omitted.)

Nonetheless, the circuit court denied Lockhart relief, finding that he had failed to carry his burden of proving that he was prejudiced by trial counsel's ineffectiveness.

"The mitigation portion of the case and its impact on the Court's findings in sentencing are at issue. Therefore, the Court itself was the factfinder. As previously noted, the Court relied heavily on Dr. Ackerson's testimony as presented by trial counsel in understanding if Lockhart was under an extreme emotional disturbance or distress. The Court found that this mitigating factor existed but did not put much weight on it as Dr. Ackerson and Dr. King assessed [Lockhart] and stated he didn't have post-traumatic stress disorder. The entire defense strategy was to mitigate Courtney Lockhart's

actions and save his life by presenting his mental health problems to the Court.

"For [Lockhart] to prevail, he would need to show that the evidence that should have been presented differs substantially from the evidence that was presented. Pike v. Gross, [936 F.3d 372, 379 (6th Cir. 2019)]. ...

"During the evidentiary proceedings, [Lockhart] called Dr. Stephen Xenakis to testify. Dr. Xenakis testified regarding his experience with combat veterans and PTSD, about his general assessments of [Lockhart], and specifically how he believes Lockhart's PTSD contributed to the abduction and murder of Lauren Burk. The Court struggles with putting very much weight on Dr. Xenakis's testimony. In 2015, well before he was contacted by [Lockhart's] Rule 32 counsel, he co-authored a USA Today opinion editorial regarding the death penalty. In this editorial, he made specific arguments about PTSD as a mitigating factor for veterans in death-penalty cases. Further, Dr. Xenakis has some history of conflict with the United States Army. Toward the end of his military career, Dr. Xenakis was involved in litigation with the Army regarding his conduct and there are questions surrounding the reason Dr. Xenakis chose to retire. Further, Dr. Xenakis has a history of testifying as a Defense expert and has some history of working with anti-death penalty organizations. Dr. Xenakis has also had his testimony dismissed in proceedings in the Southern District of New York for being 'obviously partisan and expressing opinions with little basis.' This, along with the nature of his testimony in these proceedings, leads the Court to find that Dr. Xenakis is much more an advocate than someone seeking to provide an objective mental-health assessment.



"Dr. Xenakis stated that he has spent approximately five hours with Lockhart in person. He noted that he did not do psychological testing on Lockhart as a part of his examination. Even with limited assessment, Dr. Xenakis managed to confidently frame almost all of Mr. Lockhart's behaviors within the post-traumatic stress disorder diagnosis. Even Lockhart's use of marijuana is stated to be caused by his PTSD. Dr. Xenakis asserted this even though Lockhart had used marijuana when he was a teenager and prior to his military service. He offered testimony that even the shooting of Lauren Burk and the subsequent and prior crimes were a product of PTSD. The Court struggles with giving much weight to Dr. Xenakis's testimony due to this. Dr. Xenakis, while being well qualified, did not appear to act as an objective assessor of Lockhart's mental health as needed in these proceedings.

"However, the Court cannot simply dismiss the issue of PTSD out of hand due to the nature of Dr. Xenakis's testimony. The State called Dr. Glen King as a witness during the evidentiary proceedings. As previously noted, Dr. King testified that [Lockhart] did not suffer from PTSD during the original trial proceedings. Dr. King stated that after evaluating Lockhart prior to these [Rule 32] proceedings, he diagnosed him with PTSD. When asked the difference between his prior assessment of Lockhart and his current one, Dr. King noted that the prior assessments were of limited purpose (for issues of competency and state of mind at the time of the offense). His most recent assessment took place in August 2017. Dr. King did state that there is no change in his assessment of whether Courtney Lockhart knew the difference between right and wrong when he abducted and murdered Lauren Burk or that his actions were caused by any mental disease or defect. Dr. King noted his assessments showed that while Mr. Lockhart may have a somewhat muted presentation,

he scores high on trauma indexes. During the Rule 32 proceedings, when asked by the State if [Lockhart's] actions regarding the murder of Lauren Burk and afterward were consistent with PTSD presentation, Dr. King stated, 'No, that's very inconsistent in my opinion with post-traumatic stress disorder.' The Court had already heard that Lockhart had experienced trauma during his military service and the Court concluded that while Lockhart may suffer from PTSD, it gave very little weight to this as a mitigating factor for the death penalty.

"The Court is left to weigh three different assessments of Lockhart's mental health. The first is Dr. Ackerson's original assessment from the trial, which she has essentially recanted. ... The second is that of the State's witness, Dr. King. ... Dr. King has changed his assessment of [Lockhart] from the trial to the evidentiary proceedings. While Dr. King has now diagnosed [Lockhart] with PTSD, he also stated that Courtney Lockhart's PTSD had no bearing on the abduction and murder of Lauren Burk. Finally, there is the assessment from Dr. Xenakis. As previously stated, the Court struggles to put very much weight on this assessment, and no other experts were called on this matter. The Court may only weigh the evidence that was presented during the evidentiary proceedings.

"Further, prejudice is not assessed by examining only one factor. Instead, the Court must consider the totality of the evidence. Williams v. Allen, 542 F.3d 1326, 1342 (11th Cir. 2008). In this Court's sentencing order, the issue of Courtney Lockhart's mental health was relevant. In reviewing the statutory mitigating factors, the Court notes the testimony of Dr. Ackerson multiple times regarding whether Mr. Lockhart was under extreme mental or emotional distress. Further, the Court noted Dr. King's testimony regarding [Lockhart's] capacity to appreciate the criminality of his conduct. When

weighing the factors for and against override of the jury's decision, the Court found that the only factor that weighed against override was the fact that the jury returned a strong verdict of 12-0 for life without parole. The Court took seriously then and takes seriously now the strong weight that is to be given to a jury's verdict. In weighing the factors for override, the Court found that there was no conflicting evidence regarding who committed the crime, that [Lockhart] murdered the only witness to his crime, and that there were additional facts that were not known to the jury. This final factor was the one that the Court placed a great deal of weight on and one that has never been fully addressed by the Defense at trial or during the post-conviction proceedings.

"While this order began with a lengthy recitation of the facts of this case, this Court feels it necessary to return to the actions of [Lockhart] before and after the murder of Lauren Burk. In sentencing Mr. Lockhart, the Court could not set aside its knowledge of these events. In the weeks leading up to the abduction and murder of Lauren Burk, the Defendant robbed a local convenience store (shooting his firearm at a shelf in an attempt to scare the clerk) and 'held-up' a woman in the parking lot of a Wal-Mart [discount store] at gunpoint. In the days following Lauren Burk's murder on the night of March 4, 2008, [Lockhart] not only fled from the Auburn and Lee County area, he continued to threaten and rob women in the East Alabama and West Georgia area. On March 5, 6, and 7, 2008, the Defendant robbed three separate women at gunpoint. The final victim on March 7, 2008, was a woman named Marjorie Llewellyn who [Lockhart] was in the process of abducting when a witness intervened. Ms. Llewellyn had already been struck on the back of her head and forced at gunpoint into her own car and shoved down in the passenger seat. Had there not been the intervention of an observant witness, Ms. Llewellyn may have easily met the same fate as

Lauren Burk. After the incident with Ms. Llewellyn, [Lockhart] fled back toward Alabama and eventually engaged in a high speed police chase with the Phenix City Police Department. The Court held a lengthy suppression hearing regarding these events and while they were never introduced to the jury, the Court was aware of them and weighed them and [Lockhart's] attitude toward them heavily in sentencing. The Court was further disturbed by the fact that [Lockhart] appeared to minimize his actions during the taped interviews presented during the suppression hearing. While the defense did argue that the Court should not consider these facts in sentencing, in sentencing this Court distinguished the case law regarding consideration of facts not known to the jury. Further, the Court noted that any evidence that has probative value has value at sentencing.

"In weighing the errors made by the defense and the totality of the evidence before the Court, the Court must ask if there is a reasonable probability that, absent the errors, the sentence would have been different. Williams[, 542 F.3d] at 1342. The burden of proof regarding both error and prejudice rests completely with [Lockhart]. While the Court finds trial counsel to have been in error in their handling of Dr. Ackerson's expert testimony and their errors to be unreasonable, it cannot say how much the errors were, if at all, prejudicial. As previously stated, it isn't enough that the error had some conceivable effect, but the effect must be material. Strickland[, 466 U.S. at 693, 104 S. Ct.] at 2067. While counsel was certainly not effective in their efforts with mental-health mitigation and Dr. Ackerson, the Court cannot, from the evidence presented, find this error to have been materially prejudicial to Lockhart. In reviewing the evidence presented, the arguments made, and the totality of the mitigation and aggravating evidence before it, the Court does not find that a reasonable decision maker would find against

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the override for the sentence of death in this matter. Therefore, the second 'prong' of Strickland has not been met and [Lockhart] has failed to meet the required burden of proof."

(C. 698-704; citations and footnotes omitted.)

A.

As noted, Lockhart first argues that the circuit court erred in finding that he failed to prove that he was prejudiced by trial counsel's ineffectiveness. Within this claim, Lockhart asserts that the circuit court used the wrong standard in assessing prejudice. Specifically, Lockhart asserts that the circuit court denied relief "because he had not shown that the PTSD evidence adduced at the Rule 32 hearing would cause 'a reasonable decision maker' to 'find against the override for the sentence of death in this matter.' (C. 704.)" (Lockhart's brief, at 33.) Lockhart asserts that Strickland does not impose such a high burden.

With respect to the standard applied by the circuit court, as stated earlier Strickland requires only a showing that there is a reasonable probability that the " 'sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.' "

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Bui, 717 So. 2d at 13 (quoting Strickland, 466 U.S. at 697). Lockhart, though, has plucked one sentence from the order while ignoring that the circuit court accurately set out the applicable law for reviewing claims of ineffective assistance of counsel and assessing prejudice. (C. 688-89, 698-99, 701, 703.) After reviewing the circuit court's order as a whole, this Court holds that the circuit court employed the appropriate standard.

Lockhart's more general challenge to the circuit court's findings is likewise without merit.

"Counsel's failure to either present mitigating evidence at sentencing, Williams v. Taylor, 529 U.S. [362] 394-96, 120 S. Ct. 1495 [(2000)], or discover all reasonably available mitigating evidence, Wiggins v. Smith, 539 U.S. 510, 521-24, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003), can support a finding of ineffective assistance. But 'the failure to present additional mitigating evidence that is "merely cumulative" of that already presented does not rise to the level of a constitutional violation.' Broom v. Mitchell, 441 F.3d 392, 410 (6th Cir. 2006). '[T]he new evidence that a [postconviction] petitioner presents must differ in a substantial way – in strength and subject matter – from the evidence actually presented at sentencing.' Clark v. Mitchell, 425 F.3d 270, 286 (6th Cir. 2005) (quoting Hill v. Mitchell, 400 F.3d 308, 319 (6th Cir. 2005))."

Pike v. Gross, 936 F.3d 372, 379 (6th Cir. 2019). As detailed above, the jury and the trial court heard about Lockhart's combat experience and his

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struggles coping with combat-related trauma upon his return from Iraq. Dr. Ackerson specifically testified that Lockhart reported symptoms and traits that were consistent with PTSD.

Lockhart asserts that the trial court based its decision to override the jury's recommendation on three main predicates: 1) that Lockhart's military service was entitled to little weight because his post-Iraq conduct resulted in his being dishonorably discharged; 2) that Lockhart committed several other armed robberies in the days surrounding Burk's murder, to which the trial court attached substantial weight; and 3) that Lockhart's mental state at the time of Burk's murder was entitled to little weight because Lockhart had never suffered from nor been treated for PTSD. Lockhart argues on appeal that his evidence undermined confidence in all three predicates.

With respect to the first and second points, Lockhart asserts that his post-Iraq conduct as well as his other uncharged armed robberies were all the result of his untreated PTSD, a fact which was not presented at trial because trial counsel failed to discover that he had been treated for and suffered from PTSD. This Court is left to wonder, though, from where this

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evidence should have come at trial. Lockhart bore the burden of pleading and proving the nature of the evidence trial counsel should have offered as well as the name of any expert – an expert who was willing and able to testify – needed to offer an opinion on that evidence. See Rule 32.3, Ala. R. Crim. P.; see also Brooks v. State, [Ms. CR-16-1219, July 10, 2020] \_\_\_ So. 3d \_\_\_, \_\_\_ (Ala. Crim. App. 2020) (recognizing that a petitioner must identify by name the expert witness his counsel should have hired, set out the testimony that the named expert would have given, and plead that the named expert was both willing and available to testify at trial).

It is true that Gerome testified that she discovered a medical record from Fort Sill that indicated Lockhart's treating physician had noted an impression of PTSD and had prescribed Paxil and Trazadone. Dr. Ackerson was asked at the evidentiary hearing about the difference between an impression and a diagnosis. Dr. Ackerson explained:

"Impression from my view would refer that somebody believes that there may – this particular diagnosis would need to be considered further or that it's at least a tentative opinion, where the diagnosis would lead me to believe that the person felt that the criteria for the diagnosis had been met."



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(R. 710.) Dr. Ackerson was probed on the issue but did not state that, had the medical record been provided to her, she would have changed her diagnosis. (R. 648-53.)

Dr. Xenakis diagnosed Lockhart with PTSD and attributed much of his conduct to the malady, including his actions that resulted in his dishonorable discharge, the murder of Burk, and the other armed robberies. Referring to the medical record from Fort Sill, Dr. Xenakis testified that an impression was akin to a diagnosis. Further, Dr. Xenakis testified that he would have been available and willing to testify at trial. However, the circuit court was clear that it did not find Dr. Xenakis to be credible and that it put little weight on his testimony.

Finally, Dr. King testified at the evidentiary hearing that he had assessed Lockhart for the purpose of the postconviction proceedings and that, contrary to his trial testimony, he had diagnosed Lockhart as suffering from PTSD. Dr. King added that he did not consider PTSD to be a major mental illness and that Lockhart's PTSD was highly compartmentalized. Regardless, Dr. King was offering an opinion that differed from his testimony at trial. Dr. King explained that his prior

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opinion was the result of the limited scope of his mandate from the trial court. Dr. King testified at the evidentiary hearing that, before Lockhart's trial, he had been tasked only with assessing Lockhart's mental state at the time of the offense and his competency to stand trial, assessments that do not require diagnoses. Yet, there was no explanation as to why or how the scope of Dr. King's pretrial assessments would have been different had trial counsel effectively pursued a defense based on Lockhart's suffering from PTSD. In other words, Lockhart did not prove that the actions or inactions of trial counsel would have altered Dr. King's opinion at the time of trial.

That said, the medical record discovered by Gerome did undercut the trial court's finding that "neither Lockhart nor his family sought mental health treatment on his behalf." (Trial C. 1075.) Also, Pitts's testimony undercut the trial court's finding that "Lockhart's mental state did not seem to interfere with his employment." (Trial C. 1075.) In its sentencing order the trial court found as a mitigating factor that Lockhart's capital offense was committed while he was under the influence of extreme mental or emotional disturbance. But, this factor was given little weight,

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in part based on findings that were contradicted by the testimony of Gerome and Pitts.

In assessing prejudice, the circuit court "consider[ed] the totality of the evidence." (C. 701) (citing Williams v. Allen, 542 F.3d 1326, 1342 (11th Cir. 2008)). The circuit court – apparently crediting Dr. King's finding years after trial that Lockhart suffered from PTSD – accounted for its misapprehension regarding Lockhart's mental health, but returned to the specific facts of Burk's murder and to the other violent felonies committed against women around the time of Burk's murder, which were unknown to the jury and were used by the trial court to lessen the mitigation value of the jury's recommendation of life in prison without the possibility of parole. Those other violent felonies weighed heavily on the trial court's sentencing determination, and the circuit court specifically noted that these felonies had "never been fully addressed by the defense at trial or during the post-conviction proceedings." (C. 702.) Although Dr. Xenakis attempted to give context to these other violent felonies, as the finder of fact, the circuit court was free to give whatever weight it desired to Dr. Xenakis's testimony. See Brooks, 929 So. 2d at 495-96 (quoting

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Calhoun, 460 So. 2d 268, 269-70 (Ala. Crim. App. 1984), quoting in turn State v. Klar, 400 So. 2d 610, 613 (La. 1981)). In light of the credibility determinations made by the circuit court, we find no error in the circuit court's determination that, absent trial counsel's ineffectiveness, there was no reasonable probability of a different sentencing outcome. Therefore, this issue does not entitle Lockhart to any relief.

B.

Lockhart also argues that the circuit court erred in focusing on whether Lockhart's PTSD had a provable causal connection to Burk's murder. Lockhart, citing Williams v. Taylor, 529 U.S. 362, 398 (2000), asserts that his PTSD was relevant as mitigating evidence even if it does not undermine or rebut the prosecution's death-eligibility case.

Here, Lockhart generally cites to a page in the circuit court's order (found at C. 701) without specifically identifying the language on which he has based his claim. It is not the role of an appellate court to craft legal arguments to support a party's position. Ex parte Moore, 275 So. 3d 959, 963 n.5 (Ala. 2018) (citing Dykes v. Lane Trucking, Inc., 652 So. 2d 248, 251 (Ala. 1994)). Nonetheless, on the page referenced by Lockhart,

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the circuit court repeats the testimony of Dr. King, in which he stated that Lockhart's PTSD had no bearing on the abduction and murder of Burk. This Court does not find the circuit court's brief reference to Dr. King's testimony indicates that the circuit court erroneously focused on this aspect of Dr. King's testimony. Therefore, this issues does not entitle Lockhart to any relief.

## II.

Lockhart argues that the circuit court erred as a matter of law in determining that trial counsel had a reasonable strategic basis for failing to introduce testimony from soldiers who had served with Lockhart in Iraq or from military witnesses from Fort Carson. Lockhart asserted in his petition that military witnesses could have testified to the trauma he endured as well as given context to his struggles with PTSD following his return from deployment. Lockhart supported this assertion at the evidentiary hearing with the testimony of Sergeant Jeffrey Anderson and Major Elizabeth Talarico.

Sgt. Anderson first met Lockhart when the two were stationed at Camp Hovey in South Korea. After a few months, both men were

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deployed to Camp Ramadi, a forward-operating base in Iraq; Sgt. Anderson testified that they began taking fire shortly after arriving in Iraq. Sgt. Anderson stated that his team primarily performed escort missions, during which Lockhart typically served as a gunner, and maintained security at the base. Sgt. Anderson described the deployment as being in a constant state of alert, adding that their brigade typically suffered three to four casualties per week as a result of attacks on the base. Sgt. Anderson specifically testified to the deaths of several soldiers that affected Lockhart: Lockhart was tasked with cleaning the interior of a vehicle that contained the remains of a fellow gunner killed in action; Lockhart discovered the body of an officer who was killed by a mortar round while using a bathroom; Lockhart and Sgt. Anderson saw a tank containing four or five soldiers explode when it was struck by enemy fire; and Lockhart suffered the loss of Sergeant Neil Prince, Lockhart's mentor, who was killed by an improvised explosive device. Sgt. Anderson also testified to the circumstances for which Lockhart was awarded the combat-action badge:

"PFC Lockhart was working in the [tactical-operations center] when an enemy 122 millimeter rocket impacted the office compound .... The rocket impacted the roof of an adjacent room to the one PFC Lockhart was working. The rocket destroyed the roof, everything in the room, ... injuring three soldiers within the vicinity of the blast. PFC Lockhart was within twenty to twenty-five meters of the impact and could have reasonably been injured by the engagement due to his close proximity to the rocket impact."

(R. 123.) Finally, Sgt. Anderson discussed the mental trauma of combat and the stigma attached to seeking help.

Maj. Talarico served in the Judge Advocate General's Corps and was Lockhart's counsel in his court-martial proceedings. According to Maj. Talarico, Lockhart's charges arose from an argument among a small group of soldiers in the mess hall. Lockhart left the mess hall but waited for the other soldiers outside. The argument escalated and a female non-commissioned officer ("NCO") attempted to intervene. At that point, Lockhart used threatening language and drew what appeared to witnesses to be a pistol. Lockhart was found guilty and was subsequently discharged from the military. Lockhart underwent a mental-health analysis prior to his discharge, and it was determined that Lockhart's mental health was within normal limits. Maj. Talarico was generally

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critical of these analyses, stating that the evaluations were perfunctory and lacked any real testing.

Armstrong, Lockhart's lead trial counsel, was asked about the dangers of introducing evidence related to Lockhart's time in the military:

"Again, the one thing I do recall vividly is he had a situation – again, that was an allegation, that he assaulted a female officer or a female soldier, allegedly had a weapon, a firearm. Again, that may have turned out – I am recalling they never found the firearm. He had a DUI. There was drug use; marijuana. I think after talking with the military lawyer, he ended up being discharged from the military based on – I want to say it was a disorderly conduct, something less, that the JAG assisted him with. But there was a lot of negative things, like the drug use. Here, when he spoke to investigators, talked about, I recall him sitting in his car at East Alabama Medical Center and indicating he would smoke marijuana. He would smoke it for days, and driving around, you know, high on marijuana. I believe he had smoked some that morning before coming in contact with Lauren. That afternoon, smoking in terms of when involved in the alleged other four robberies. ... I wanted to keep, obviously, out any alleged violence to another female with a weapon. ... I didn't want the State to be able to grasp onto that and – or open the door to that through some witness, and then the State able to use, oh, he used violence before with a woman – to a woman with a weapon. ... I was not going to call any witnesses that might give out that information."

(R. 456-58.)

The circuit court found as follows in denying this claim:



"The Court also finds the claims regarding the failure to call more witnesses from Lockhart's military service to be without merit. At the evidentiary hearing, the Court heard from Major Elizabeth Talarico [and] Mr. Jeffery Anderson (former Staff Sergeant), and [Lockhart] referenced a report on the treatment of post-traumatic stress disorder by the United States Army during the testimony of Dr. Stephen Xenakis. At trial, [Lockhart's] attorneys were able to introduce evidence regarding his military service through the testimony of his family members and girlfriend. During the guilt phase of the proceedings, [Lockhart's] girlfriend Nicole Threatt testified. During the penalty phase, the defense called Catherine Williams (Lockhart's mother), Curtis James (Lockhart's father), Marvin Peabody (childhood friend), and two Lee County Detention Center officers. These witnesses not only testified about his service, but also the changes in [Lockhart's] behavior after he returned from service. Mr. Lockhart's mother was able to give testimony regarding how deeply the death of a close mentor, Sgt. Prince, affected [Lockhart]. Additional witnesses, as suggested by [Lockhart], may have opened the door to extremely damaging evidence being introduced by the State. The Court was aware that [Lockhart] had been court-martialed while in the Army due to a statement Lockhart made during a recorded interview with Investigator Rodney Costello. However, this information was never available to the jury. Further, the Court was not made aware the full events of the court-martial during the original trial proceedings. [FN]

"The full details of the court-martial, if introduced, could have been extremely damaging. Mr. Armstrong was particularly worried about the injection of this information into the trial proceedings. This was a reasonable concern as the information may have only reinforced the image of [Lockhart] as being violent toward women.

"With the evidence presented by the Defense during the original proceedings, the Court was able to gain an understanding of [Lockhart's] military service. The Court considered Mr. Lockhart's military service as a non-statutory mitigating factor in sentencing; however, it gave it little weight due to what it already knew of Lockhart's conduct problems. These witnesses would not have brought forward any new information helpful to [Lockhart] and at best would have been cumulative additions to the record. Appellate courts have repeatedly held that not calling witnesses that would have been cumulative is not ineffective assistance of counsel. McNabb v. State, 991 So. 2d 313, 322 (Ala. Crim. App. 2007). The evidence presented by [Lockhart] did not support that these were anything other than strategic decisions on the part of trial counsel. After a weighing of the facts from evidence presented by [Lockhart], the Court cannot find that trial counsel was ineffective in this regard."

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[FN] "During the evidentiary proceedings, the Court was given a full picture of the events that led to Lockhart's court-martial via the testimony of Major Talarico. This incident involved Lockhart threatening a female non-commissioned officer with a firearm after an incident in the 'chow line.'"

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(C. 687-88; citation omitted).

A.

Lockhart argues that trial counsel's decision not to call military witnesses could not have been a matter of strategy because, he says, it

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was not based on a reasonably sufficient investigation. Indeed, the Supreme Court of the United States stated in Strickland that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91.

"[B]efore we can assess the reasonableness of counsel's investigatory efforts, we must first determine the nature and extent of the investigation that took place." Reeves v. State, 226 So. 3d 711, 751 (Ala. Crim. App. 2016) (citations and quotations omitted). Armstrong directed Saunders, an associate in his firm, to coordinate the mitigation investigation. Saunders testified that she worked on Lockhart's case almost exclusively in the six months leading to trial. Saunders accumulated extensive notes on Lockhart's military experience from interviews with Williams, Threatt, and Lockhart himself.<sup>1</sup> Saunders also obtained and reviewed Lockhart's

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<sup>1</sup>Notes of an interview Saunders conducted with Lockhart on October 4, 2010, were offered by the State. (C. 741-55). Lockhart's statements to Saunders do not reflect the same level of chaos and danger to which Sgt. Anderson testified at the evidentiary hearing. (C. 743.) For instance, Lockhart told Saunders that he guarded a gate and that "[h]is gate didn't have any problems, but the other gate got hit every day"; also, Lockhart

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military records, as well as documents related to the death of Lockhart's mentor, Sgt. Prince.

Lockhart raises several arguments in support of his claim that trial counsel failed to conduct a reasonable investigation. Lockhart first asserts that Sgt. Anderson was willing and available to testify but that "trial counsel failed to have even a single substantive conversation with Sergeant Anderson to explore what mitigation evidence he could offer, nor did trial counsel make any effort whatsoever to contact any other military witnesses." (Lockhart's brief, at 47.) It is true that Sgt. Anderson testified that he was available and willing to testify. Sgt. Anderson stated that he conveyed this to trial counsel when he was contacted but that he did not hear from Lockhart's defense team afterwards. This proves only, though, that trial counsel did not pursue background on Lockhart's military service from Sgt. Anderson. Lockhart does assert that trial counsel failed to make "any effort whatsoever to contact any other

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stated that he left the gated area of the base only a few times. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Strickland, 466 U.S. at 691.

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military witnesses." In support of that assertion, Lockhart cites his Rule 32 petition, which, of course, is not evidence. See Rule 32.9, Ala. R. Crim. P.

Lockhart further asserts that had trial counsel reviewed the record of Lockhart's court martial, they would have learned that "Lockhart's Battalion Commander in Iraq, Lieutenant Colonel John Fant, had provided sworn testimony during the court martial that Lockhart was a 'superb soldier' in Iraq and that Colonel Fant might be willing to provide mitigation testimony on Lockhart's behalf." (Lockhart's brief, at 47.) This is nothing more than speculation by Lockhart. Lockhart failed to prove the nature of Lt. Col. Fant's expected testimony or even whether he would have been willing and available to present it at trial. See Stallworth v. State, 171 So. 3d 53, 68 (Ala. Crim. App. 2013).

Additionally, Lockhart asserts that had "trial counsel conducted a reasonable investigation into both Lockhart's PTSD and the circumstances of Lockhart's court martial, trial counsel ... would have learned that Lockhart's behavior outside the mess hall was not a reflection of some propensity for violence against women, but rather a sudden outburst that

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was directly attributable to the PTSD from which he was suffering and for which he was receiving no treatment at Fort Carson." (Lockhart's brief, at 48.) However, there was no credible testimony presented to support Lockhart's allegation that the aforementioned incident outside the mess hall was the result of PTSD.<sup>2</sup> On the contrary, Dr. King testified that Lockhart's actions outside the mess hall did not appear to be related to PTSD. (R. 1057.)

Lockhart also asserts that a reasonable investigation would have revealed that his actions outside the mess hall were, in Maj. Talarico's opinion, on the low end of the spectrum of misconduct in the military and that Lockhart neither brandished a firearm nor made any threats specifically against the female NCO. Although it is true that Maj. Talarico attempted to minimize Lockhart's conduct, the conduct still involved armed aggression toward a female. Lockhart's claim that he did not brandish a firearm is not supported by the record – Maj. Talarico

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<sup>2</sup>Although it was Dr. Xenakis's opinion that Lockhart's behavior could be explained by PTSD, it is clear from the circuit court's order that the court did not find Dr. Xenakis's testimony to be credible.

conceded that the soldiers involved in the altercation as well as the NCO testified that Lockhart appeared to draw a pistol. (R. 219-20.) Maj. Talarico further conceded that the NCO testified that she heard Lockhart say: "[B]ack off or I will blow your head off, Bitch." (R. 220-21.)

"[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.'" Strickland, 466 U.S. at 690 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). Here, Lockhart has failed to carry his burden of demonstrating that trial counsel's investigation into his military background was unreasonable. See id.; see also Rule 32.3, Ala. R. Crim. P.<sup>3</sup> Therefore, his argument that trial counsel's decision not to call

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<sup>3</sup>Lockhart argues in his brief that Sgt. Anderson's testimony was not cumulative to the testimony provided by Dr. Ackerson and his family because none of the other witnesses "were able to paint the type of vivid picture of the battlefield environment." (Lockhart's brief, at 50.) Regardless, the circuit court found that trial counsel's decision not to call certain military witnesses was a matter of strategy, and Lockhart failed to overcome the presumption that such a strategy was based on a reasonable investigation. There was, of course, a trade-off in not calling

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military witnesses could not have been a matter of strategy because it was based on an unreasonable investigation is without merit.

B.

Lockhart argues that trial counsel's failing to call witnesses familiar with Lockhart's military background could not have been a matter of trial strategy because it was based on a mistake of law. See Hinton v. Alabama, 571 U.S. 263, 274 (2014). Specifically, Lockhart asserts that trial counsel erroneously believed that the State could introduce testimony about the mess-hall incident in the penalty phase only if the defense "opened the door."<sup>4</sup> Lockhart argues that the evidence was admissible

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Sgt. Anderson as a witness. In Armstrong's opinion, it was "imperative" that he not allow into evidence testimony that Lockhart had "threatened to blow [a female NCO's] head off." (R. 472.) Trial counsel made a strategic decision by not calling Sgt. Anderson, and this Court has recognized that "'[s]trategic decisions ... are virtually unassailable.' McGahee v. State, 885 So.2d 191, 222 (Ala. Crim. App. 2003)." Brownfield v. State, 266 So. 3d 777, 801 (Ala. Crim. App. 2017).

<sup>4</sup>To the extent Lockhart argues that the evidence was admissible at his sentencing hearing, this Court has held that § 13A-5-47, Ala. Code 1975, does not provide for the presentation of additional mitigating evidence at the sentencing hearing. See Miller v. State, 99 So. 3d 349, 424 (Ala. Crim. App. 2011) (quoting Boyd v. State, 746 So. 2d 364, 398 (Ala. Crim. App. 1999)).



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under Rule 26.6(b)(2), Ala. R. Crim. P.,<sup>5</sup> regardless of whether the defense opened the door.

Generally speaking, in the penalty phase, a trial court may accept any evidence that is probative and relevant to the sentence. See Hosch v. State, 155 So. 3d 1048, 1111 (Ala. Crim. App. 2013). Thus, as Lockhart argues, details concerning the mess-hall incident may have been admitted in the penalty phase regardless of whether trial counsel opened the door. Although Armstrong stated that he was concerned about opening the door to Lockhart's disciplinary issues while in the military (R. 457-58), this was not the extent of his concern. Armstrong's testimony indicated that he also recognized that, by merely placing witnesses such as Sgt. Anderson on the stand, he would be subjecting them to cross-examination by the State. (R. 471-72.) This danger was demonstrated at the evidentiary hearing, where Sgt. Anderson was cross-examined on Lockhart's disciplinary issues. For instance, Sgt. Anderson was questioned about Lockhart's repeatedly failing to appear for duty, his being absent without

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<sup>5</sup>The admission of evidence in the penalty phase is governed by § 13A-5-45(d), Ala. Code 1975.

leave, his being stopped for driving under the influence, his drug use, and the mess-hall incident. Sgt. Anderson conceded that Lockhart's disciplinary issues became so frequent that "most of the times [command] called me in[,] I kind of knew it was, you know, because of [Lockhart]. (R. 153.) This is exactly the type of cross-examination trial counsel sought to avoid during the penalty phase.<sup>6</sup>

Lockhart's assertion that trial counsel's decision not to call military witnesses was based on a legal error is without merit. Therefore, this issue does not entitle him to relief.

C.

Lockhart asks this Court to remand the case to the circuit court with instructions that it should consider the additional mitigation evidence regarding Lockhart's military record as part of a prejudice analysis under

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<sup>6</sup>Lockhart's argument also ignores the fact that trial counsel's strategy worked. First, the jury did not learn of the events that led to Lockhart's court martial. Second, although the trial court was aware that Lockhart had been court-martialed, the circuit court's sentencing order stated that it "was not made aware of the full events of the court-martial during the original trial proceedings. ... The full details of the court-martial, if introduced, could have been extremely damaging." (C. 687.)

Strickland. However, this Court has found no error in the circuit court's finding that trial counsel's decision not to present this evidence was based on a reasonable trial strategy. Because Lockhart failed to demonstrate that trial counsel were ineffective with respect to this issue, a further analysis of prejudice is unnecessary.

### III.

Lockhart argues that the circuit court erred in concluding that trial counsel were not ineffective for failing to retain an expert to testify about traumatic brain injury ("TBI"). According to Lockhart, trial counsel knew that he had been subjected to a mortar blast at close range, and this knowledge should have spurred trial counsel to seek an examination for TBI. Lockhart asserts that, had the examination been conducted, trial counsel would have learned of physiological brain abnormalities that may have contributed to an unintentional firing of his gun or that could have served as mitigating evidence.

At the evidentiary hearing, Lockhart offered the testimony of Dr. Benjamin Hill, an Associate Professor of Psychology at the University of South Alabama. After a battery of tests, Dr. Hill concluded that

Lockhart's brain was not functioning normally. Specifically, Dr. Hill determined that Lockhart suffered from an "unspecified neuro-cognitive disorder, [which] means that there are impairments in cognitive functioning on testing that are not consistent with a normal, healthy brain." (R. 752.) Dr. Hill testified that Lockhart's perceptual reasoning was impaired, and also that Lockhart had motor-functioning issues with his left hand and finger-agnosia issues with his right hand. Dr. Hill was uncertain whether Lockhart's neurological issues were the result of a brain injury but did surmise that Lockhart's brain has not been fully functioning since 2010.<sup>7</sup> (R. 757.) Dr. Hill concluded that it was "more likely than not [Lockhart] has a traumatic brain injury." (R. 764.)

The circuit court made the following findings with respect to this claim of ineffective assistance of counsel:

"[T]he Court does not find arguments regarding Lockhart potentially having suffered a traumatic brain injury during his time in Iraq to be especially relevant. The Court heard testimony from Dr. Benjamin Hill on December 18, 2018. He was able to theorize about an incident when Lockhart was exposed to a mortar-shell explosion that may or may not have

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<sup>7</sup>Burk was murdered in March 2008.

caused such an injury. Further, that a reading of the Magnetic Resonance Imaging (MRI) done on or about December 15, 2017, on [Lockhart] shows nothing abnormal; however, Dr. Hill concluded from his further testing that [Lockhart's] brain doesn't 'function normally.' However, he could not correlate this abnormal functioning to the mortar incident in Iraq and couldn't say that it was, in fact, a TBI. Dr. Hill was also unable to make this issue relevant to the murder of Lauren Burk. When asked directly about the murder of Lauren Burk, Dr. Hill's assessment of a potential TBI on Lockhart's actions differed little from the testimony given by Dr. Ackerson during the original trial. Dr. Hill stated that any impairments Lockhart may suffer from would have potential impacts on his mood and ability to cope with depression and anxiety, as well as contribute to impulsive behavior and difficulty with poor judgment and decision-making skills. No evidence presented by [Lockhart] showed that any brain abnormalities [Lockhart] may potentially suffer from were caused by his military service or, more importantly, relate to his actions in the abduction and murder of Lauren Burk. The testimony presented by Dr. Hill was at best inconclusive and didn't connect directly or sufficiently to the issues at hand. After an examination of the evidence presented, the Court finds that trial counsel was not ineffective by failing to call witnesses or present evidence regarding TBI during trial."

(C. 684-85; citations omitted.)

A.

Lockhart first argues that the circuit court erroneously focused on whether his physiological brain abnormality was the result of a mortar

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blast. Lockhart asserts that his brain dysfunction was relevant to his moral culpability, regardless of its cause.

Here, the cause of Lockhart's alleged TBI was relevant because Dr. Hill had no baseline by which to compare the results of Lockhart's testing. Tying the physiological brain abnormality to the mortar blast would have demonstrated that the abnormality existed at the time of Burk's murder; counsel cannot be held ineffective for failing to discover a physiological brain abnormality that did not exist at the time. Thus, the circuit court's findings on this issue of material fact were necessary and do not indicate that it disregarded the evidence merely because the cause of Lockhart's alleged TBI could not be established.

Moreover, Lockhart has fundamental issues with proof with respect to this claim of ineffectiveness. As the circuit court noted, Dr. Hill's testimony was "at best inconclusive" as to whether Lockhart, in fact, suffered a TBI. (C. 685.) Dr. Hill admitted that he had not diagnosed Lockhart with a TBI and that he was not aware of any other expert who had. (R. 791, 795.) Dr. Hill further conceded that a radiologist who had reviewed results of an MRI of Lockhart's brain found no abnormalities.

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Thus, Lockhart cannot prove that he was prejudiced by counsel's alleged ineffectiveness for failing to discover and offer evidence that he suffered from a TBI.

To the extent Lockhart is attempting to prove only that trial counsel was ineffective for failing to discover that Lockhart suffered from an unspecified neuro-cognitive disorder – as Dr. Hill testified – this claim also fails for lack of proof. Although Dr. Hill was able to testify in the Rule 32 proceedings, Dr. Hill stated that, at the time of trial, he had only recently completed his fellowship, he had never advertised his services to criminal defendants, and he had never been retained by a defendant. Lockhart's postconviction counsel clarified Dr. Hill's role:

"So, Your Honor, it – this voir dire is attempting to establish that in 2010 that the defense would not specifically have called Dr. Benjamin Hill. ... We are not putting him up to say that he would have been the testifying expert, because, as you know, some physicians that were available in 2010 may no longer be practicing, may be deceased. We are putting him up as an expert to tell Your Honor whether Mr. Lockhart has a traumatic brain injury now."

(R. 727-28.) In order to prove this claim, Lockhart had the burden of identifying, by name, an expert who could have testified at his trial and

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the content of that expert's expected testimony. See Daniel v. State, 86 So. 3d 405, 425-26 (Ala. Crim. App. 2011); Brooks, \_\_\_ So. 3d at \_\_\_ . Because Lockhart failed to offer the name of any expert who was willing and able to testify at trial that Lockhart, in fact, suffered from an unspecified neuro-cognitive disorder, he failed to meet his burden of proving that he was prejudiced by counsel's alleged ineffectiveness.<sup>8</sup>

B.

Lockhart next argues that the circuit court ignored Dr. Hill's testimony regarding the impact of his abnormal brain function on his motor skills. Dr. Hill testified that Lockhart's finger agnosia made it difficult for him to distinguish between the fingers of his right hand. Lockhart asserts that trial counsel were ineffective for failing to present this evidence at trial because this dysfunction would have created at least a residual doubt about his intent to kill.

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<sup>8</sup>Any claim that Dr. Ackerson would have discovered Lockhart's alleged unspecified neuro-cognitive disorder had she been directed by trial counsel to test for TBI is speculative and not supported by the record.



Initially, this Court disagrees with Lockhart's assessment of the circuit court's findings. The circuit court stated: "No evidence presented by [Lockhart] showed that any brain abnormalities [Lockhart] may potentially suffer from ... relate to his actions in the abduction and murder of Lauren Burk. The testimony presented by Dr. Hill was at best inconclusive and didn't connect directly or sufficiently to the issues at hand." (C. 685; emphasis added.) After all, Dr. Hill examined Lockhart years after Burk's murder, and Lockhart's currently suffering from finger agnosia does not necessarily mean that he was unable to control his fingers in 2008. Although Dr. Hill testified that Lockhart has "likely" suffered from brain dysfunction since 2010, this was mere speculation and the circuit court, as the finder of fact, was free to reject it.

Moreover, this claim shares the same failing as his previous claim. Dr. Hill provided expert testimony in the Rule 32 proceedings, but it was made clear to the circuit court that he was offered only "as an expert to tell Your Honor whether Mr. Lockhart has a traumatic brain injury now." (R. 728.) Again, Lockhart failed to offer the name of any expert who was willing and able to testify at trial that Lockhart, in fact, suffered from an

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unspecified neuro-cognitive disorder that impacted his motor skills at the time of Burk's murder. See Daniel, 86 So. 3d at 425-26; Brooks, \_\_\_ So. 3d at \_\_\_\_ . Therefore, he failed to meet his burden to prove that he was prejudiced by counsel's alleged ineffectiveness.

C.

Lockhart asks this Court to remand this case with instructions for the circuit court to consider the evidence of his TBI as part of a prejudice analysis under Strickland. However, given the evidence presented during the proceedings below, there is no prejudice to consider. Therefore, further analysis is unnecessary.

IV.

Lockhart argues that the circuit court erred by denying him an opportunity to subject the murder weapon to forensic testing. Katherine Richert, the State's firearm expert at trial, testified that the double-action trigger pull of Lockhart's pistol, a Röhm brand .38 caliber revolver, was between 12 and 15 pounds, and that the pistol's trigger pull when cocked was an average of 5 pounds. Lockhart asserted in his petition that trial

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counsel were ineffective for failing to hire an independent ballistics expert to examine the murder weapon's trigger-pull weight.

In support of this claim, Lockhart submitted the affidavit of Jay Jarvis, a ballistics and forensics specialist. (C. 249-52.) Jarvis asserted that he had reviewed the trial testimony of Richert and determined "that her work may have been imprecise and not done using best scientific practices." (C. 249.) Specifically, Jarvis asserted that Lockhart's pistol likely had five or six chambers, and that Richert, who tested only three cylinders, should have conducted a trigger-pull test on each cylinder. According to Jarvis, testing each cylinder was particularly important here because Richert testified that she had difficulty opening the cylinder. Jarvis stated that this indicated the pistol may have an alignment issue, which could affect the average weight of the pistol's trigger pull. Jarvis also stated that "Richert's method for testing trigger pull, while within the bounds of the procedural requirements for trigger pull testing at the time, was not the most accurate way to test the amount of force needed to pull the trigger." (C. 250.) Instead, Jarvis asserted, Richert should have used a digital force gauge. In Jarvis's opinion, "Richert's testing could have

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been inaccurate and was not done following best scientific practice." (C. 251.)

Lockhart, relying on the assertions of Jarvis, moved the circuit court "to possess, test and thoroughly examine" the murder weapon. (C. 127-29.) The State opposed granting access, arguing that Lockhart had failed to demonstrate good cause for discovery. The circuit court denied the motion. (C. 395.)

On appeal, Lockhart argues that the circuit court's ruling was in error and that the error effectively denied him the opportunity to provide any evidence in support of his claim that trial counsel were ineffective for failing to hire an independent ballistics expert to examine the trigger-pull weight of the murder weapon. In Jackson v. State, 910 So. 2d 797 (Ala. Crim. App. 2005), this Court stated:

"When ascertaining whether discovery is warranted in a Rule 32 proceeding, the court must first determine whether the Rule 32 petitioner has shown good cause for disclosure of the requested materials. As the Alabama Supreme Court stated in Ex parte Land, 775 So. 2d 847 (Ala. 2000):

"We agree with the Court of Criminal Appeals that "good cause" is the appropriate standard by which to judge postconviction

discovery motions. In fact, other courts have adopted a similar "good-cause" or "good-reason" standard for the postconviction discovery process. See [State v.] Marshall, [148 N.J. 89, 690 A.2d 1, cert. denied, 522 U.S. 850 (1997)]; State v. Lewis, 656 So. 2d 1248 (Fla. 1994); People ex rel. Daley v. Fitzgerald, 123 Ill. 2d 175, 121 Ill. Dec. 937, 526 N.E.2d 131 (1988). As noted by the Illinois Supreme Court, the good-cause standard guards against potential abuse of the postconviction discovery process. See Fitzgerald, supra, 123 Ill. 2d at 183, 121 Ill. Dec. 937, 526 N.E.2d at 135 ....

"'... By adopting this standard, we are only recognizing that a trial court, upon a petitioner's showing of good cause, may exercise its inherent authority to order discovery in a proceeding for postconviction relief. In addition, we caution that postconviction discovery does not provide a petitioner with a right to "fish" through official files and that it "is not a device for investigating possible claims, but a means of vindicating actual claims." People v. Gonzalez, 51 Cal. 3d 1179, 1260, 800 P.2d 1159, 1206, 275 Cal. Rptr. 729, 776 (1990), cert. denied, 502 U.S. 835, 112 S. Ct. 117, 116 L. Ed. 2d 85 (1991). Instead, in order to obtain discovery, a petitioner must allege facts that, if proved, would entitle him to relief.'

"775 So. 2d at 852.

"Though Alabama has had little opportunity to define what constitutes 'good cause,' in Ex parte Mack, 894 So. 2d 764, 768 (Ala. Crim. App. 2003), we quoted with approval an Illinois case the Alabama Supreme Court relied on in

Land-People v. Johnson, 205 Ill. 2d 381, 275 Ill. Dec. 820, 793 N.E.2d 591 (2002):

" "A trial court has inherent discretionary authority to order discovery in post-conviction proceedings. See People ex rel. Daley v. Fitzgerald, 123 Ill. 2d 175, 183, 121 Ill. Dec. 937, 526 N.E.2d 131 (1988); People v. Rose, 48 Ill. 2d 300, 302, 268 N.E.2d 700 (1971). A court must exercise this authority with caution, however, because a defendant may attempt to divert attention away from constitutional issues which escaped earlier review by requesting discovery .... Accordingly, the trial court should allow discovery only if the defendant has shown 'good cause,' considering the issues presented in the petition, the scope of the requested discovery, the length of time between the conviction and the post-conviction proceeding, the burden of discovery on the State and on any witnesses, and the availability of the evidence through other sources. Daley, 123 Ill. 2d at 183-84, 121 Ill. Dec. 937, 526 N.E.2d 131; see People v. Fair, 193 Ill. 2d 256, 264-65, 250 Ill. Dec. 284, 738 N.E.2d 500 (2000). We will reverse a trial court's denial of a post-conviction discovery request only for an abuse of discretion. Fair, 193 Ill. 2d at 265, 250 Ill. Dec. 284, 738 N.E.2d 500. A trial court does not abuse its

discretion in denying a discovery request which ranges beyond the limited scope of a post-conviction proceeding and amounts to a 'fishing expedition.' ' "

"894 So. 2d at 768-69 (quoting Johnson, 205 Ill. 2d at 408, 275 Ill. Dec. at 836-37, 793 N.E.2d at 607-08). See also State v. Lewis, 656 So. 2d 1248 (Fla. 1994).

"The New Jersey Supreme Court in State v. Marshall, 148 N.J. 89, 690 A.2d 1 (1997), a case also cited with approval by the Alabama Supreme Court in Land, stated:

" 'We anticipate that only in the unusual case will a PCR [postconviction relief] court invoke its inherent right to compel discovery. In most cases, a post-conviction petitioner will be fully informed of the documentary source of the errors that he brings to the PCR court's attention. Moreover, we note that PCR "is not a device for investigating possible claims, but a means for vindicating actual claims." People v. Gonzalez, 51 Cal. 3d 1179, 275 Cal. Rptr. 729, 776, 800 P.2d 1159, 1206 (1990), cert. denied, 502 U.S. 835, 112 S. Ct. 117, 116 L. Ed. 2d 85 (1991). The filing of a petition for PCR is not a license to obtain unlimited information from the State, but a means through which a defendant may demonstrate to a reviewing court that he was convicted or sentenced in violation of his rights ....

" 'Moreover, consistent with our prior discovery jurisprudence, any PCR discovery order should be appropriately narrow and limited. "[T]here is no postconviction right to 'fish' through

official files for belated grounds of attack on the judgment, or to confirm mere speculation or hope that a basis for collateral relief may exist." Gonzalez, supra, 275 Cal. Rptr. at 775, 800 P.2d at 1205; see Deputy v. Taylor, 19 F.3d 1485, 1493 (3d Cir.), cert. denied, 512 U.S. 1230, 114 S. Ct. 2730, 129 L. Ed. 2d 853 (1994); State v. Thomas, 236 Neb. 553, 462 N.W.2d 862, 867-68 (1990). However where a defendant presents the PCR court with good cause to order the State to supply the defendant with discovery that is relevant to the defendant's case and not privileged, the court has discretionary authority to grant relief. See Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C.A. § 2254 Rule 6(a); [State v.] Lewis, ... 656 So. 2d [1248,] 1250 [(Fla. 1994)]; [People ex rel. Daley v.] Fitzgerald, [123 Ill. 2d 175, 183,] 121 Ill. Dec. [937,] 941, 526 N.Ed.2d [131,] 135 [(1998)] (noting that "good cause" standard guards against potential abuse of PCR discovery process).'

"Marshall, 148 N.J. at 270-71, 690 A.2d at 91-92.

Jackson, 910 So. 2d at 801-03 (emphasis added in Ex parte Mack, 894 So. 2d 764, 768 (Ala. Crim. App. 2003)).

Lockhart asserts that his postconviction petition established good cause to warrant discovery of the murder weapon. This Court disagrees. Lockhart's claim was speculative and failed to provide the name of any expert who was willing and able to testify on his behalf as a firearm and



tool marks expert.<sup>9</sup> Even if Jarvis was being offered as that expert, it would still not entitle Lockhart to postconviction discovery.

First and foremost, Jarvis's affidavit was wholly speculative, asserting that Richert's work "may have been imprecise" and that her "testing could have been inaccurate." (C. 249-52.) There were other issues with Jarvis's affidavit as well. For example, Jarvis asserted that Richert should have tested each chamber of the murder weapon<sup>10</sup> because if the pistol had an alignment issue, the "alignment issue could create a trigger pull so high for one or more of the chambers tested that it would skew the average trigger-pull results." (C. 250.) Stated differently, Jarvis posited that an alignment issue – that may or may not have existed – could create an outlier in the data that artificially inflated Richert's

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<sup>9</sup>As Judge Kellum's dissent indicates, this claim was not dismissed before the evidentiary hearing; thus it appears that the circuit court granted Lockhart an evidentiary hearing on this particular claim. This Court is not holding that Lockhart's claim was insufficiently pleaded. Rather, it is reviewing the claim and its related evidentiary submission in assessing whether the circuit court abused its discretion in denying postconviction discovery.

<sup>10</sup>Although there was a picture of the murder weapon in the record, Jarvis did not know how many chambers the pistol had.

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calculation of the average trigger pull. However, Richert's testimony contradicted the notion that there was an unreported outlier in her calculations. Richert testified: "Basically, if during those three trigger pulls during our analysis, if there is more than a pound of difference, then we would calculate a range. If it is within a pound, then we take the average of those three." (Trial R. 4056.) Richert testified that the double-action trigger pull of Lockhart's pistol was between 12 and 15 pounds, and that the pistol's single-action trigger pull was an average of 5 pounds. Richert provided a range for her double-action results; thus, there was no average to skew. With respect to her single-action results, Richert provided an average, but her testimony made clear that she was providing an average only because there were no outliers in this data set. In either case, the jury was fully apprised of Richert's results. To the extent Jarvis was asserting one of the untested chambers could have "a trigger pull so high ... that it would skew the average trigger-pull results," this Court fails to see how such a finding would benefit Lockhart's argument regarding intent. Jarvis also asserted that a firearm expert could determine "if the safety mechanisms, such as the hammer blocks,

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were working properly." (C. 251.) But Richert specifically mentioned the pistol's hammer block and opined that the pistol could not fire without pulling the trigger (Trial R. 4044); Jarvis's affidavit provided no reason to question that finding. Jarvis also offered that, "if the single action was engaged, it would likely have required less force than the semiautomatics Mr. Lockhart would have likely been trained with when he was in the military." (C. 251.) Not only is this speculative – Jarvis apparently does not know with which weapons Lockhart trained while in the military – but it is also based on the pistol's being placed in single action. This would require an affirmative step by Lockhart to cock the pistol; such an admission by Lockhart would not aid his argument regarding intent. Finally, Jarvis asserted that a firearm expert could test "the trigger pull while holding the revolver in the normal shooting position." (C. 251.) Richert testified that the pistol was hanging down in her testing but that such an orientation was to give the gauge a normal angle for the trigger pull. (C. 4060-61.) Again, Jarvis's affidavit provided no reason to question Richert's method, nor did it explain how testing the pistol while

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in the "normal shooting position" would yield a result beneficial to Lockhart.

Jarvis's affidavit did not assert that Richert's testing methods were contrary to accepted forensic practices at the time her testing was conducted, that Richert's findings were in error, or that further forensic testing would have yielded a result beneficial to Lockhart. In other words, further forensic testing may have yielded the same or an even heavier trigger pull, neither of which would have aided Lockhart's argument regarding intent. The dissent cites this Court's holding in Bryant v. State, 181 So. 3d 1087, 1109-11 (Ala. Crim. App. 2011). This Court notes that the main opinion's holding in Bryant is distinguishable from the instant case. The appellant's petition in Bryant "identified the specific experts he believed counsel should have retained (even naming the specific experts who were available at the time of his first trial), alleged what he believed those experts could have discovered and testified to had they been retained, and explained how the lack of testimony from such experts prejudiced his defense." Id. at 1110. For the reasons stated herein, this Court holds that neither Lockhart's petition nor Jarvis's affidavit sufficiently set forth a claim upon which relief could be granted.

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Therefore, Lockhart failed to establish good cause to entitle him to postconviction discovery.

This Court concludes that Lockhart's motion for discovery was a "fishing expedition" and that he failed to demonstrate good cause. Consequently, the circuit court did not abuse its discretion in denying Lockhart's motion for discovery. See Jackson, 910 So. 2d at 801-03.

In the alternative, Lockhart argues that the "good cause" standard was not appropriate here because the item sought was admitted at trial. Thus, Lockhart argues, the murder weapon was in the public domain and was subject to inspection.

In Holland v. Eads, 614 So. 2d 1012 (Ala. 1993), the Alabama Supreme Court stated:

"The United States Supreme Court has recognized a common law right of public access to judicial records. Nixon v. Warner Communications, Inc., 435 U.S. 589, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978). "It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." United States v. Criden, 648 F.2d 814, 819 (3d Cir. 1981), quoting Nixon, supra, 435 U.S. at 597, 98 S. Ct. at 1312. In fact, this right of the public to inspect and copy judicial records antedates the United States Constitution. Criden, supra.

"It has long been the rule of this State to allow public inspection of judicial records. Brewer v. Watson, 61 Ala. 310, 311 (1878). More than a century ago, this Court held that '[a]n inspection of the records of judicial proceedings kept in the courts of the country, is held to be the right of any citizen.' Id. at 311; see also Ex parte Balogun, 516 So. 2d 606, 612 (Ala.1987) (holding that 'the public generally has a right of reasonable inspection of public records required by law to be kept, except where inspection is merely out of curiosity or speculation or where it unduly interferes with the public official's ability to perform his duties'); Excise Comm'n of Citronelle v. State ex rel. Skinner, 179 Ala. 654, 657, 60 So. 812, 813 (1912). The public's right to inspect court records derives from the 'universal policy underlying the judicial systems of this country [that] secrecy in the exercise of judicial power ... is not tolerable or justifiable.' Jackson v. Mobley, 157 Ala. 408, 411-12, 47 So. 590, 592 (1908).

"In addition to a common law presumption of permitting public inspection of judicial records, which has been recognized by the United States Supreme Court and by this Court, public access to court records is permitted by statute. Ala. Code 1975, § 36-12-40, grants the public the right to inspect and copy 'public writings,' which term has been interpreted to include judicial records. Ex parte Balogun, *supra*; Stone v. Consolidated Publishing Co., 404 So. 2d 678, 681 (Ala. 1981) (interpreting a 'public writing' to be 'a record as is reasonably necessary to record the business and activities required to be done or carried on by a public officer so that the status and condition of such business and activities can be known by our citizens'); State ex rel. Kernells v. Ezell, 291 Ala. 440, 442-43, 282 So. 2d 266, 268 (1973) (holding that records of the office of the probate judge are 'public writings' within the meaning of the predecessor to § 36-12-40 and are 'free for examination [by]

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all persons, whether interested in the same or not'); Excise Comm'n of Citronelle, supra; Brewer, supra."

Holland v. Eads, 614 So. 2d at 1014-15 (footnote omitted).

Relying on Holland, this Court in State v. Martin, 4 So. 3d 1196, 1202 (Ala. Crim. App. 2008), held that the petitioner "was not required to establish good cause before he was entitled to inspect the trial exhibits." However, Lockhart did not merely seek to inspect the trial exhibits. Instead, Lockhart sought "to possess, test and thoroughly examine" the murder weapon. (C. 127-29.) Such a request goes far beyond the inspection or copying of judicial records contemplated by common law and citizens' statutory rights of access to public records. Under Lockhart's theory, he seeks access to the murder weapon not as a party but as a member of the general public. Yet, by way of example, a member of the general public would not be allowed to take possession of drug evidence in a trafficking case under the guise of subjecting it to forensic testing. The same reasoning applies here. This was a matter of postconviction discovery; thus, the "good cause" standard was the appropriate standard by which to review Lockhart's discovery request. See Jackson, 910 So. 2d

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at 808 (holding that the "good cause" standard was the appropriate standard for a discovery request that sought to subject physical evidence admitted at trial to forensic testing).

To the extent Lockhart is attempting to reassert his claim that trial counsel were ineffective for failing to hire an independent ballistics expert to examine the murder weapon's trigger-pull weight, his claim is without merit. As his brief concedes, he was unable to present any evidence to support this claim. (Lockhart's brief, at 65.) As such, this issue does not entitle him to any relief.

## V.

Lockhart argues that the circuit court erred in denying his claim that trial counsel were ineffective in that they failed to support their defense theory that Lockhart lacked the intent to murder Burk. Lockhart asserted in his petition that trial counsel were ineffective for failing to support this defense with expert testimony about his suffering from PTSD, about his suffering from TBI, and about the deficient forensic examination of the murder weapon.

The circuit court made the following findings regarding this claim:



"[Lockhart] also makes claims regarding trial counsel's failure in arguing Lockhart's intent in the shooting and death of Lauren Burk. The Court, however, does not find this to be a persuasive argument. ...

"The issue of guilt (intent) was primarily only argued during the testimony of Dr. Stephen Xenakis when [Lockhart's] counsel asked how Lockhart's actions during the abduction and murder of Lauren Burk displayed the symptoms of post-traumatic stress disorder. Dr. Xenakis expressed the opinion that Lockhart's actions show him to have been in a dissociative state that could have been broken by Lauren Burk's movements to open the car door and escape. [Lockhart] argued that Lauren Burk's movements may have startled Courtney Lockhart so much that this led to an unintentional discharging of his firearm. Such a conclusion is both illusory and not reflected in the factual information presented to this Court during the trial or any other portion of the proceedings. Experts from the Alabama Department of Forensic Sciences testified that the firearm used to kill Lauren Burk required at least five pounds of force with a single action trigger pull. Furthermore, the pistol had an internal safety that would prevent firing of the weapon unless the trigger is pulled. As noted in the Court's sentencing order, Lockhart also made similar statements about the gas station robbery, and Lockhart had firearms training as part of his combat service. The Court doesn't find it credible that someone with [Lockhart's] training and experience accidentally discharged his weapon.

"Further, any arguments attempting to negate the issue of intent may have also only had the effect of further prejudicing the jury against Lockhart, rather than trial counsel's goal of saving Lockhart's life. Trial counsel did ask for instructions regarding the lesser included charge of felony

murder be given to the jury. This request was granted and the jury was given the opportunity to find the Defendant guilty of capital murder, felony murder, not guilty, or not guilty by reason of mental disease or defect. However, the jury selected guilty of capital murder. Trial counsel was able to and did pursue the issue of intent. The fact that they didn't further press the issue as described by [Lockhart's] counsel appears to have been part of reasonable trial strategy. The Court doesn't review decisions made as part of reasonable trial strategy. Strickland, at 2061. The Court finds that trial counsel was not ineffective for failing to present further evidence regarding intent during the original trial."

(C. 685-86; citations and footnote omitted.)

This claim, as the circuit court noted, relies primarily on the testimony of Dr. Xenakis, whom the circuit court did not find to be credible. Similarly, the circuit court did not credit Lockhart's evidence with respect to his claim of TBI, and Lockhart failed to present any evidence in support of his claim that trial counsel were ineffective for failing to hire an independent ballistics expert. Because Lockhart failed to prove this claim, the circuit court did not err in denying it. Therefore, this issue does not entitle Lockhart to any relief.

Accordingly, the judgment of the circuit court is affirmed.

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APPLICATION OVERRULED; OPINION OF APRIL 23, 2021,  
WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED.

McCool and Minor, JJ., concur. Kellum, J., dissents, with opinion.  
Cole, J., recuses himself.

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KELLUM, Judge, dissenting.

In his Rule 32, Ala. R. Crim. P., petition for postconviction relief, Courtney Larrell Lockhart alleged, among other things, that his trial counsel were ineffective for not hiring a ballistics expert to counter the testimony of State's ballistics expert Katherine Richert and to support his defense that his shooting of Lauren Burk was accidental. After raising the claim in his initial petition, Lockhart filed a motion to allow his ballistics expert to test the murder weapon. He then filed an amended Rule 32 petition, again raising the claim that his counsel were ineffective for not hiring a ballistics expert, to which he attached an affidavit from ballistics expert Francis T. "Jay" Jarvis. Subsequently, the State filed a motion styled as a "motion to withhold ruling" but in which it requested that the circuit court deny Lockhart's discovery motion on the ground that it would be premature to grant discovery before the State had filed its response to Lockhart's amended petition. (C. 266; capitalization omitted.) The State subsequently filed an answer to the amended petition, requesting summary dismissal of all of Lockhart's claims, and specifically

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arguing that Lockhart's claim that his trial counsel were ineffective for not hiring a ballistics expert was insufficiently pleaded.

The record indicates that the discovery issue was discussed at a hearing in December 2016, although a transcript of that hearing is not included in the record before this Court. After the hearing, Lockhart filed an affidavit from his trial counsel regarding the issue of hiring a ballistics expert, apparently at the circuit court's request. He then filed a second motion to allow his ballistics expert to test the murder weapon, and the State filed a response to the motion, arguing that Lockhart's motion should be denied because, it said: (1) Lockhart's claim that his counsel were ineffective for not hiring a ballistics expert was insufficiently pleaded and, therefore, Lockhart had failed to establish good cause for discovery of the murder weapon, and (2) it would be premature for the circuit court to grant discovery without first ruling on the State's request for dismissal of the ineffective-assistance-of-counsel claim on which the discovery request had been made. Subsequently, the circuit court denied Lockhart's discovery request on the ground that "the issues were litigated during a trial on the merits of the case." (C. 395.)

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The record indicates that the circuit court never ruled on the State's request for dismissal of Lockhart's amended petition, instead conducting an evidentiary hearing on the petition. Following the hearing, the circuit court denied the petition by written order. In doing so, the court stated, in part:

"[Lockhart] argued that Lauren Burk's movements may have startled Courtney Lockhart so much that this led to an unintentional discharging of his firearm. Such a conclusion is both illusory and not reflected in the factual information presented to this Court during the trial or any other portion of the proceedings. Experts from the Alabama Department of Forensic Sciences testified that the firearm used to kill Lauren Burk required at least five pounds of force with a single action trigger pull. Furthermore, the pistol had an internal safety that would prevent firing of the weapon unless the trigger is pulled. As noted in the Court's sentencing order, Lockhart also made similar statements about the gas station robbery, and Lockhart had firearms training as part of his combat service. The Court doesn't find it credible that someone with [Lockhart's] training and experience accidentally discharged his weapon."

(C. 686.)

In Part IV of the main opinion, the majority concludes that Lockhart failed to establish good cause for discovery of the murder weapon<sup>11</sup> and that the circuit court properly denied Lockhart's claim that his trial counsel were ineffective for not hiring a ballistics expert because Lockhart "was unable to present any evidence to support this claim." Of course, it is not surprising that Lockhart was unable to present any evidence to prove that his counsel were ineffective for not hiring a ballistics expert given that the circuit court denied Lockhart the only means by which he could do so -- testing of the murder weapon by his own ballistics expert.

"The standard for determining whether a Rule 32 petitioner is entitled to discovery is good cause. See Ex parte Land, 775 So. 2d 847, 852 (Ala. 2000) (' "[G]ood cause" is the appropriate standard by which to judge postconviction discovery motions. '), overruled on other grounds by State v. Martin, 69 So. 3d 94 (Ala. 2011). '[P]ostconviction discovery does not provide a petitioner with a right to "fish" through

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<sup>11</sup>The majority also rejects Lockhart's argument that he did not have to establish good cause for discovery of the murder weapon because, he says, it was admitted at trial and was, therefore, part of the judicial record subject to public inspection. I agree with the majority that testing of the murder weapon "goes far beyond the inspection or copying of judicial records contemplated by common law and citizens' statutory rights of access to public records," and that, therefore, Lockhart was required to establish good cause. \_\_\_ So. 3d at \_\_\_.

official files and ... it "is not a device for investigating possible claims, but a means of vindicating actual claims." ' Id. Thus, '[t]he threshold issue in a good-cause inquiry is whether the Rule 32 petitioner has presented claims that are facially meritorious.' Ex parte Turner, 2 So. 3d 806, 812 (Ala. 2008), overruled on other grounds by State v. Martin, 69 So. 3d 94 (Ala. 2011). A claim is facially meritorious 'only if the claim (1) is sufficiently pleaded in accordance with Rule 32.3 and Rule 32.6(b); (2) is not precluded by one of the provisions in Rule 32.2; and (3) contains factual allegations that, if true, would entitle the petitioner to relief.' Kuenzel v. State, 204 So. 3d 910, 914 (Ala. Crim. App. 2015). A Rule 32 petitioner is not entitled to discovery on claims that are not facially meritorious, i.e., on claims that are subject to summary dismissal. See, e.g., Morris v. State, 261 So. 3d 1181, 1202 (Ala. Crim. App. 2016) ('Morris was not entitled to discovery, because the claims for which he sought discovery were either insufficiently pleaded, procedurally barred, or meritless, and they were dismissed.'); Van Pelt v. State, 202 So. 3d 707, 720 (Ala. Crim. App. 2015) ('Because we conclude ... that Van Pelt's claims were insufficiently pleaded and that summary dismissal was appropriate, Van Pelt did not show "good cause" to be entitled to discovery on those claims.'); and Yeomans v. State, 195 So. 3d 1018, 1051 (Ala. Crim. App. 2013) ('Our opinion today affirms the summary dismissal of all claims on which Yeomans sought discovery; therefore, Yeomans did not show "good cause" to be entitled to discovery on those claims.')."

Woodward v. State, 276 So. 3d 713, 734-35 (Ala. Crim. App. 2018).

While maintaining that it "is not holding that Lockhart's claim was insufficiently pleaded," \_\_\_ So. 3d at \_\_\_ n.7, the majority states that



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Lockhart "failed to provide the name of any expert who was willing and able to testify on his behalf as a firearm and tool marks expert," \_\_\_ So. 3d at \_\_\_, and that Jarvis's affidavit is "speculative," using terms such as "may" and "could" without asserting conclusively that Richert's testing of the murder weapon was flawed or that additional testing would have reached different results that were beneficial to Lockhart. "We have held that a petitioner fails to meet the specificity requirements of Rule 32.6(b), Ala. R. Crim. P., when the petitioner fails to identify an expert by name or plead the contents of that expert's expected testimony." Smith v. State, 71 So. 3d 1, 33 (Ala. Crim. App. 2008), overruled on other grounds by Lane v. State, 286 So. 3d 53 (Ala. Crim. App. 2016), rev'd, 286 So. 3d 61 (Ala. 2018). And of course, a postconviction claim based on pure speculation is, by definition, insufficiently pleaded. The majority also concludes that "neither Lockhart's petition nor Jarvis's affidavit sufficiently set forth a claim upon which relief could be granted." \_\_\_ So. 3d at \_\_\_. The failure to state a claim upon which relief could be granted is a ground for summary dismissal under Rule 32.7(d), Ala. R. Crim. P. Whether based on pleading or another ground for summary dismissal, there is no doubt

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that the majority is holding that Lockhart failed to establish good cause for discovery of the murder weapon on the ground that Lockhart failed to meet the threshold requirement of raising a facially meritorious claim for relief.

However, the circuit court has already found that Lockhart raised a facially meritorious claim for relief. It is well settled that "[a] Rule 32 petitioner is entitled to an evidentiary hearing on a claim in a postconviction petition only if the claim is 'meritorious on its face.'" Kuenzel v. State, 204 So. 3d 910, 914 (Ala. Crim. App. 2015) (quoting Ex parte Boatwright, 471 So. 2d 1257, 1258 (Ala. 1985)). In Ex parte McCall, 30 So. 3d 400, 403-404 (Ala. 2008), the Alabama Supreme Court recognized that, because a hearing on a postconviction petition is not required unless the petitioner presents a material issue of fact or law that would entitle the petitioner to relief, i.e., a facially meritorious claim for relief, when a court conducts an evidentiary hearing on a postconviction petition, the court has made an implicit finding that the petitioner has adequately raised such a material issue, and the circuit court may not then deny the claim or claims on the ground that they were not facially

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meritorious. By conducting an evidentiary hearing, the circuit court here found that Lockhart's ineffective-assistance-of-counsel claim was facially meritorious, and I believe it is inappropriate for this Court to now conclude that Lockhart's claim was not facially meritorious to justify upholding the circuit court's denial of Lockhart's discovery request.

I also agree with the circuit court that Lockhart raised a facially meritorious claim for relief. Although both Lockhart's amended petition and Jarvis's affidavit attached to that petition included speculative language about what testimony a ballistics expert could have provided, that fact does not defeat his claim under the circumstances in this case because, absent testing of the murder weapon by Lockhart's own ballistics expert, which the circuit court did not allow, neither Lockhart nor his ballistics expert could make conclusive assertions about what further testing did show. Rather, they could only speculate as to what that testing might show. We faced a similar situation in Bryant v. State, 181 So. 3d 1087 (Ala. Crim. App. 2011). There, the petitioner alleged that his counsel were ineffective for not retaining a blood-spatter expert and a DNA expert. He alleged in his petition what he believed such experts

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"may" have testified to had they been retained by trial counsel and how such testimony could have aided his defense. We concluded that the claim was facially meritorious and entitled the petitioner to an evidentiary hearing because:

"Bryant did not merely make a bare allegation that his constitutional rights had been violated or state mere conclusions of law. He identified the specific experts he believed counsel should have retained (even naming the specific experts who were available at the time of his first trial), alleged what he believed those experts could have discovered and testified to had they been retained, and explained how the lack of testimony from such experts prejudiced his defense. In light of the nature of these claims and the circuit court's blanket denial of Bryant's discovery request, we fail to see what additional information Bryant could have possibly alleged."

181 So. 3d at 1110 (emphasis added). Similarly, here, because of the nature of the claim and the circuit court's denial of Lockhart's discovery request, I fail to see what additional information Lockhart could have alleged without actually testing the murder weapon.

In his affidavit, Jarvis averred, among other things, that, after reviewing Richert's testimony at Lockhart's trial, he believed a "strong case could have been made to discredit [her] findings and to further

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evidence that the gun was fired unintentionally." (C. 249.) According to Jarvis, Richert's testimony indicated that she had not tested each chamber in the revolver's cylinder when testing the trigger pull (she had tested only three, not the five or six the murder weapon likely has), even though doing so is the best practice to "ensure there are not variations due to misalignment or other mechanical issues." (C. 250.) Jarvis also said that Richert's testimony that she had difficulty opening the cylinder of the revolver suggests an "alignment issue [that] could create a trigger pull so high for one or more of the chambers tested that it would skew the average trigger-pull results." (C. 250.) Jarvis said that a ballistics expert could have tested each chamber of the weapon to obtain an accurate measurement of the trigger pull; determined whether the dirt Richert found on the weapon affected its performance and whether the safety mechanisms were working properly; and explained the differences between the revolver used in the crime and the semi-automatic weapons Lockhart likely used in the military, including the fact that the revolver, if single-action was engaged, likely had a trigger pull less than the semi-

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automatics with which Lockhart was familiar.<sup>12</sup> In his amended petition, Lockhart explained how the testimony of a ballistics expert refuting Richert's testimony would have aided his defense and how the lack of such testimony prejudiced him. I do not believe Lockhart was required to plead anything more. Because Lockhart's claim is sufficiently pleaded, is not precluded, and contains factual allegations that, if true, may entitle him to relief, it is, as the circuit court found, meritorious on its face.

As noted above, the circuit court denied Lockhart's request to allow his ballistics expert to test the murder weapon on the ground that "the issues were litigated during a trial on the merits of the case." (C. 395.) However, that is not the standard for postconviction discovery.

"Once a Rule 32 petitioner satisfies the threshold of raising a facially meritorious claim, the court must then determine whether there is good cause for the discovery. In determining whether there is good cause, a court should consider ' "the scope of the requested discovery, the length of time between the conviction and the post-conviction

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<sup>12</sup>As the majority points out, several statements made by Jarvis in his affidavit are contradicted by Richert's testimony at trial. However, that is the point of Lockhart's ineffective-assistance-of-counsel claim -- that his trial counsel were ineffective for not presenting evidence that would be contradictory to Richert's testimony.

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proceeding, the burden of discovery on the State and on any witnesses, and the availability of the evidence through other sources.' " Ex parte Mack, 894 So. 2d 764, 768 (Ala. 2003), overruled on other grounds by Ex parte Jenkins, 972 So. 2d 159 (Ala. 2005) (quoting People v. Johnson, 205 Ill.2d 381, 408, 275 Ill.Dec. 820, 793 N.E.2d 591, 607–08 (2002) (emphasis omitted) )."

Woodward, 276 So. 3d at 735. Here, Lockhart's discovery request was limited in scope; only five years had lapsed between Lockhart's trial and the filing of his Rule 32 petition, the burden of discovery on the State and any witnesses would have been minimal, and the evidence was obviously not available to Lockhart through any other sources. Therefore, I believe Lockhart established good cause for discovery.

After denying Lockhart's discovery request because the issues had been litigated at trial, the court then concluded in its order denying Lockhart's petition that the allegation that the weapon had fired accidentally was "not reflected in the factual information presented to this Court during the trial or any other portion of the proceedings." (C. 686.) Of course, that begs the question. The very basis of Lockhart's ineffective-assistance-of-counsel claim was that the issues were not litigated during trial, and there was no ballistics evidence presented at trial supporting his

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defense that the weapon had fired accidentally, because his trial counsel did not hire a ballistics expert. There was also no evidence presented at the Rule 32 proceedings indicating that the weapon had fired accidentally because the circuit court denied Lockhart's request to allow him to test the murder weapon. The circuit court placed Lockhart in a classic "catch-22" situation by denying him the only means by which to prove his facially meritorious claim that his trial counsel were ineffective for not hiring a ballistics expert and then denying that claim on the ground that Lockhart failed to satisfy his burden of proof. This was error, and I would remand this cause for the circuit court to grant Lockhart's request to test the murder weapon, to conduct another evidentiary hearing at which Lockhart is permitted to present the evidence obtained from that testing, and then, in light of the new evidence, to issue specific written findings of fact regarding Lockhart's claim that his trial counsel were ineffective for not hiring a ballistics experts. Therefore, I respectfully dissent.