REL: May 6, 2022

Notice: This opinion is subject to formal revision before publication in the advance sheets of **Southern Reporter**. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is published in **Southern Reporter**.

Alabama Court of Criminal Appeals

OCTOBER TERM, 2021-2022

CR-20-0372

State of Alabama

v.

Randy Lamont Lewis

Randy Lamont Lewis

v.

State of Alabama

Appeals from Jefferson Circuit Court
(CC-06-3554.60 and CC-06-3555.60)

KELLUM, Judge.

The State of Alabama appeals the Jefferson Circuit Court's partial grant of Randy Lamont Lewis's petition for postconviction relief filed

pursuant to Rule 32, Ala. R. Crim. P., attacking his capital-murder conviction and sentence of death. Lewis cross-appeals the postconviction court's partial denial of that same petition.

In 2007, Lewis was convicted of three counts of capital murder for murdering Taurus Frost by the use of a deadly weapon fired in a vehicle, see § 13A-5-40(a)(18), Ala. Code 1975; for murdering Frost during the course of kidnapping Vontricesa Davis, see § 13A-5-4(a)(1), Ala. Code 1975; and for murdering Frost during the course of robbing Davis, see § 13A-5-40(a)(2), Ala. Code 1975. Lewis was also convicted of the attempted murder of Davis, see § 13A-6-2(a)(1) and 13A-4-2, Ala. Code 1975; kidnapping Davis, see § 13A-6-43(a), Ala. Code 1975; kidnapping Timothy Barnette, see 13A-6-43(A), Ala. Code 1975; and robbing Davis, see § 13A-8-43(a)(1), Ala. Code 1975.

On direct appeal, this Court found that two of Lewis's convictions violated the Double Jeopardy Clause and directed the circuit court to set aside Lewis's convictions for kidnapping Davis and for robbing Davis. See Lewis v. State, 57 So. 3d 807 (Ala. Crim. App. 2009). We found that those convictions were included in the greater offenses of the capital-

murder convictions. The Alabama Supreme Court and the United States Supreme Court denied certiorari review. See Lewis v. Alabama, 563 U.S. 1022 (2011). This Court issued the certificate of judgment for Lewis's direct appeal on September 24, 2010.

On September 21, 2011, Lewis filed a timely petition for postconviction relief attacking his capital-murder convictions and sentences of death. Lewis filed amended petitions in June 2012 and in January 2014. Lewis then filed addendums to his second amended petition in July 2014 and in April 2018. In July 2018, eight criminal court judges in Jefferson County recused themselves from presiding over Lewis's case. (C. 108.) On July 27, 2018, pursuant to § 12-2-30, Ala. Code 1975, the Chief Justice of the Alabama Supreme Court appointed John England, circuit judge in Tuscaloosa County, to preside over Lewis's postconviction proceedings. (C. 110.)

An 11-day evidentiary hearing was held in October and November 2018. In January 2021, the postconviction court issued a lengthy order denying relief on the issues raised concerning the guilt phase of Lewis's trial. The postconviction court further ordered that Lewis's sentences of

death be vacated because, it held, Lewis had been deprived of the effective assistance of counsel at the penalty phase of his capital-murder trial. (C. 173-239.) The State appealed the postconviction court's ruling granting in part Lewis's postconviction petition and setting aside Lewis's sentences of death. Lewis then cross-appealed the postconviction court's ruling denying relief on his claims involving the guilt-phase of his trial.

In the circuit court's order sentencing Lewis to death, the court set out the following facts surrounding Lewis's convictions:

> "On the evening of March 27, 2006, around 5:00 p.m., Taurus Frost and his girlfriend Vontricesa Davis went to Chantacleer Day Care and picked up two toddlers. Vontricesa was driving her Chevy Impala; Taurus was sitting in the car's front passenger seat. After the toddlers were picked up, they were seated in the backseat. One child was two-year-old Timothy Barnette, who was Vontricesa's son. The other child was three-year-old Corlaeja Davis, who was the daughter of Corliss Davis, Vontricesa's sister. Next, they went to Piggly Wiggly in north Birmingham to pay Vontricesa's mom's phone bill. Afterwards, they went to L & N City, which is in the Birmingham Division of Jefferson County, so Taurus could talk to the defendant, Randy Lewis. As they drove up the street, Randy Lewis was walking toward their car. Vontricesa stopped the car. Randy Lewis walked up to it, opened the back door of the passenger side,[1] placed a gun to the back of Taurus' head, and shot Taurus point blank, killing him instantly. Taurus fell to his left onto the middle of the console

[1]Lewis apparently entered the vehicle before shooting Frost.

and blood was everywhere. Vontricesa was hollering and the toddlers were crying and screaming. [Lewis] then got out of the car and made Vontricesa get into the backseat of another four-door car with two other guys in it. Vontricesa was seated in the back seat behind the driver. [Lewis] then got back into Vontricesa's Chevy Impala, but this time he was seated on the driver's side. Vontricesa tried to get out of the car she was in, but [Lewis] pulled up and said, 'You better not get out.' Then the front seat passenger side occupant of the car she was in threatened her, by saying, 'if my face come up in something, I'm gonna do something to you.' He got into the backseat with her holding a gun as the driver drove them down the street. She then jumped out of the car, near a busy intersection. [Lewis,] who was driving behind the car she jumped out of, deliberately swerved toward her, ran over her, and then drove off at a high rate of speed, running a red light while doing so. Ms. Davis's car was found the next day behind an abandoned house with the body of Taurus Frost still in the front seat slumped over the console. His pockets appeared to be pulled out a little bit. The two toddlers were found alive in the backseat with the victim's blood on them. It is noted that the car was locked with the windows rolled up at the time it initially was discovered by the police. The toddlers were removed from the car, cleaned up a bit, given some food and water and then taken to safety by several Birmingham Police officers. Ms. Davis testified at trial, that after being run over she remembers blanking out. She further testified that she was in the hospital for about a month, which included being in ICU for over a week. She received multiple injuries which included bruises and a damaged lung. She also underwent several surgeries. While she was in the hospital, Detective Armstrong showed Ms. Davis a photographic line-up, consisting of 3 six packs. In the first set of six packs, Vontricesa identified Randy Lewis and said, 'He is the one who shot Taurus Frost.' Randy Lewis was arrested three days after Ms. Davis identified him."

(Trial C. 33-34.)

Standard of Review

According to Rule 32.3, Ala. R. Crim. P.:

> "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."

"The standard of review on appeal in a postconviction proceeding [after an evidentiary hearing] is whether the trial judge abused his discretion when he denied the petition." Elliott v. State, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992). "[W]hen the facts are undisputed, and an appellate court is presented with pure questions of law, that court's review in a Rule 32 proceeding is de novo." Ex parte White, 792 So. 2d 1097, 1098 (Ala. 2001). When this Court reviews a lower court's ruling on a postconviction petition "where there are disputed facts in a postconviction proceeding and the circuit court resolves those disputed facts, '[t]he standard of review on appeal ... is whether the trial judge abused his discretion when he denied the petition.'" Boyd v. State, 913

So. 2d 1113, 1122 (Ala. Crim. App. 2003), quoting, in part Elliott v. State, 601 So. 2d at 1119. See also Mashburn v. State, 148 So. 3d 1094, 1104 (Ala. Crim. App. 2013). "We will reverse a circuit court's findings only if they are 'clearly erroneous.'" Barbour v. State, 903 So. 2d 858, 861 (Ala. Crim. App. 2004).

Many of the claims raised in Lewis's petition and addendums concern claims that his counsel was ineffective in representing him in his capital-murder trial. To prevail on a claim of ineffective assistance of counsel the petitioner must show: (1) that counsel's performance was deficient and (2) that the petitioner was prejudiced by the deficient performance. See Strickland v. Washington, 466 U.S. 668 (1984).

> "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.

> "[T]he purpose of ineffectiveness review is not to grade counsel's performance. See Strickland [v. Washington], [466 U.S. 668,] 104 S.Ct. [2052] at 2065 [(1984)]; see also White v. Singletary, 972 F.2d 1218, 1221 (11th Cir. 1992) ('We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.'). We recognize that '[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.' Strickland, 104 S.Ct. at 2067. Different lawyers have different gifts; this fact, as well as differing circumstances from case to case, means the range of what might be a reasonable approach at trial must be broad. To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But the issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.' Burger v. Kemp, 483 U.S. 776, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987)."

Chandler v. United States, 218 F.3d 1305, 1313–14 (11th Cir. 2000) (footnotes omitted). "An appellant is not entitled to 'perfect representation.'" Washington v. State, 95 So. 3d 26, 40 (Ala. Crim. App. 2012), quoting, in part Denton v. State, 945 S.W.2d 793, 796 (Tenn. Crim.

App. 1996). "[I]n considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.'" Burger v. Kemp, 483 U.S. 776, 794 (1987).

Here, Lewis was represented at his capital-murder trial by attorneys Linda Hall and Erskine Mathis. Both attorneys testified at the postconviction evidentiary hearing on Lewis's Rule 32 petition. (R. 99-134; R-203-384; and R-670-819.)

Because Lewis's cross-appeal concerns the guilt-phase issues raised in Lewis's petition, we will first consider those issues.

Lewis's Cross-Appeal

Guilt-Phase Issues

I.

Lewis first argues that the postconviction court erred in denying his claim that his trial counsel was ineffective for failing to present the testimony of Michael Towns, a person he claims was an eyewitness to Frost's shooting.

In Lewis's amended petition, he pleaded that counsel failed to interview and present Towns's testimony. He said that Towns told police

that he was "walking down the street when the car that Mr. Frost's body was found in pulled up behind him." (C. 1146.) Lewis pleaded: "Towns explicitly stated that he does know Ray and Randy Lewis and that he did not see either of them on the street at the time of the incident." (C. 1147.)

The postconviction court made the following findings, on this claim:

> "After considering the pleadings and the testimony at the evidentiary hearing, this Court finds that Towns never saw the man who shot Taurus Frost. ... Towns was quite clear that he could not see the person who was actually in the car shooting Taurus Frost. ... Towns testified that he saw other people outside another car when the shot was fired, and that Randy Lewis wasn't with them. Lewis erroneously uses this testimony to argue that trial counsel could have used Mr. Towns's testimony to prove that Randy Lewis was not at the scene when Mr. Towns testified.
>
> "However, this Court finds that it is more probable that the jury would have concluded that there was a simple explanation for why Mr. Towns didn't see Randy Lewis outside the car when Taurus Frost was killed. At the time, and as Vontricesa Davis testified, Randy Lewis was inside the car shooting Taurus Frost in the back of the head. ... Before the shot was fired, Mr. Towns was looking in another direction, only looking back when 'I heard a shot.' He made no attempt to identify the shooter or otherwise find out what happened. ... Finally, after extensive testimony, Mr. Towns made it clear that his testimony could not have excluded Mr. Lewis as the shooter. ... On this point, Mr. Towns was absolutely unequivocal: he could not have contradicted Ms. Davis's testimony that Randy Lewis was the man that Towns didn't see, i.e., the man who entered the car and shot Mr.

> Frost. This Court finds that Mr. Towns's testimony was credible and established that he could not have eliminated Randy Lewis as the shooter.
>
> "Because of this, this Court finds that Mr. Towns's testimony would have merely bolstered the credibility of the State's version of events. His testimony about the location, the timing, the cars involved, and the number of shots fired were in all ways consistent with Ms. Davis's version of events. Thus, contrary to Lewis's claim, there is a clear reason why trial counsel would not have wanted to call Mr. Towns: his testimony would not have exculpated Mr. Lewis. Trial counsel certainly could have reasonably declined to call Mr. Towns on that basis. Indeed, trial counsel agreed that he would not have wanted to put on a witness who could have corroborated the victim's version of events. ... In sum, this Court finds that Mr. Towns would not have been a favorable defense witness had he been called. Consequently, Lewis failed to establish either that trial counsel rendered deficient performance by sending Mr. Towns home or that the absence of Mr. Towns's testimony actually prejudiced Mr. Lewis. For these reasons, this Court denies relief on this claim."

(C. 189-193.) The postconviction court's findings are supported by the record.

Towns testified at the evidentiary hearing that he was living in Birmingham in 2006 and that on the evening of March 27, 2006, he was walking his dog in the L & N City area when he heard a gunshot. Police interviewed him eight days later and Towns said that he observed a light-colored Chevrolet with tinted windows, that he saw someone jump into

that car, that two men were standing by that car, and that he could not see who got into the car. He did not see Lewis around the car, he said, and he knew Lewis. Towns said repeatedly that he did not see who jumped into the car. (R. 159-203.) The record also shows that Towns was subpoenaed for Lewis's trial. Towns testified that he was at the courthouse and was sent home after he was told that he would not be needed.

Erskine Mathis testified that he had been practicing law for 37 years and had been cocounsel in Lewis's case. He said that in his career he had represented many defendants who had been charged with capital murders.[2] Mathis said that he had no independent recollection of what occurred regarding Towns's testimony:

> "If I told him to go home, it was -- there was a reason for it. I didn't want him on that witness stand if I told him to go home because he had told me something that was going to hurt us. That would be the reason I would tell him to go home. I have done it a bunch of times. ... If they tell me something I don't want to hear and the State hasn't subpoenaed them, I tell them go on home, get out of here, I don't want you up there."

---

[2]"In judging the reasonableness of an attorney's investigation and of the strategic decisions that followed from that investigation, one factor to be considered is the experience of the attorney." Spaziano v. Singletary, 36 F.3d 1028, 1040 (11th Cir. 1994).

(R. 117.) Linda Hall testified that since 10 years had passed, she could not remember why Towns did not testify. (R. 726.)

"'[A] trial counsel's choice of whether to call witnesses is generally accorded a presumption of deliberate trial strategy and cannot be subject to second-guessing in a claim of ineffective assistance of counsel.' Saylor v. Commonwealth, 357 S.W.3d 567, 571 (Ky. Ct. App. 2012)." Stallworth v. State, 171 So. 3d 53, 73 (Ala. Crim. App. 2013). "A decision not to call witnesses to testify as a matter of trial strategy is virtually unchallengeable. State v. Ash, 840 S.W.2d 304, 306 (Mo. Ct. App. 1992). Unless Defendant proves otherwise, the decision not to call a witness is presumed to be a matter of trial strategy. [State v.] Walden, 861 S.W.2d [182] at 186 [(Mo. Ct. App. 1993)]." State v. Clark, 925 S.W.2d 872, 878 (Mo. Ct. App. 1996).

Lewis failed to establish that the decision not to call Towns to testify was not strategic based on the manner in which the trial was unfolding. We agree with the postconviction court that Lewis failed to establish either deficient performance or that he suffered any prejudice as a result of that performance. Thus, he failed to satisfy the

requirements of Strickland. For these reasons, Lewis is due no relief on this claim.

II.

Lewis next argues that the postconviction court erred in denying him relief on his claim that his trial counsel was ineffective in its method of handling the testimony of Melissa Hasbury, a television reporter. In his pleadings, Lewis asserted that Davis told Hasbury that she did not know who killed Frost.

In denying relief on this claim, the postconviction court stated:

> "Lewis also claims that trial counsel rendered IAC [ineffective assistance of counsel] with regard to the testimony of Melissa Hasbury, a television reporter who presented a story on a remembrance of Taurus Frost's life. According to Lewis, during a television interview, Ms. Davis stated that she did not know 'who killed Taurus Frost.' Lewis is not entitled to any relief on this claim because he failed to establish either that trial counsel's performance was deficient or that Lewis was actually prejudiced.
>
> "As an initial matter, Lewis criticizes trial counsel for not attempting to impeach Ms. Hasbury with testimony from [Hasbury's] attorney... who allegedly was present on a previous occasion when Ms. Hasbury said that Ms. Davis had said that she did not know who shot Mr. Frost. This allegation is readily dispensed with, because this Court has before it no evidence regarding what [Hasbury's attorney] would have testified to had he been called as a witness. Thus, to the

extent that Lewis claims that trial counsel was ineffective for not calling the attorney, Lewis abandoned this claim by failing to call [Hasbury's attorney] as a witness. Hooks v. State, 21 So. 3d 772, 792 (Ala. Crim. App. 208) ('[T]his claim was abandoned because Hooks did not present any evidence at the hearing in support of this claim.'). Similarly, Lewis failed to offer any proof that the news broadcast videotape would have been admissible to impeach either Ms. Hasbury or Ms. Davis. As Lewis points out, the transcript of that segment merely says that Ms. Davis 'does not know the man accused of killing her boyfriend.' Ms. Davis's trial testimony is entirely consistent with that statement:

> "Q [Prosecutor]: All right. Now, do you know Randy Lewis?
>
> "A [Davis]: No, I don't know him, but I have seen him before, talking to Taurus before.

"(Trial Tr. 363.) As trial counsel testified, he could not have used the videotape to impeach Ms. Davis because the two statements were not inconsistent.

"Nor did Lewis prove deficient performance with regard to this claim. Trial counsel reasonably investigated Ms. Hasbury's potential as a witness. As Lewis concedes, trial counsel interviewed her in the presence of the news station's attorney and had a reasonable basis to believe that she had helpful testimony to offer. Nor should Ms. Davis's testimony regarding a male reporter have caused reasonable counsel to 'verify' the testimony they had already verified by interviewing Ms. Hasbury. Indeed, the whole value of Ms. Hasbury's anticipated testimony was that it could be used to impeach Ms. Davis. Consequently, inconsistencies between what Ms. Davis testified to and what Ms. Hasbury told trial counsel during their interview with her were to be expected.

As Mr. Mathis testified, he does not expect his own witnesses to change their story on the stand. Based on the evidence in this case, Lewis has failed to show that trial counsel was unreasonable when he relief on Ms. Hasbury to be consistent with her earlier statement.

"Finally, this Court finds that Lewis's bare claim of 'obvious' prejudice is meritless. As found above, Ms. Davis's supposed statement to the media was not inconsistent with her trial testimony. Moreover, Lewis failed to establish a reasonable probability that the result of his trial would have been different without the testimony of Ms. Hasbury, which was at most tangentially corroborative of Ms. Davis's testimony. Strickland [v. Washington], 466 U.S. [668] at 694 [(1984)]."

(C. 193-96 (footnote omitted).)

The record of Lewis's trial shows that Hasbury testified that she had not personally interviewed or spoken to Hasbury. After this testimony, the following occurred:

"[Mathis]: I would like to put on the record that I interviewed Miss Hasbury as late as Friday, and she told me she had personally interviewed this woman [Davis] and that the woman had denied knowing who her killer was, who the killer of Frost was, that I have talked to her lawyer three or four different times, and the story has always been the same until she got on the witness stand a few moments ago ... and was put under oath, and then she said that she had sent a photographer out there. And they never bothered to tell me who the photographer was or [if] the photographer asked the questions. It was always her asking the questions."

(Trial R. 431.) At the conclusion of this discussion, counsel asked that it be allowed to try and locate the photographer. After a break, Mathis stated that he had spoken to the photographer and was told that he did not remember asking Davis any questions about the murder.

Also, on direct appeal, appellate counsel argued that Lewis's trial attorneys were ineffective for failing to investigate Hasbury's statements regarding Davis. In addressing this claim, this Court stated:

> "The record before this court does not support Lewis's assertion that his attorneys did not properly investigate the statements of the witnesses. Rather, it appears that the defense interviewed Hasbury with her counsel present and that, based on that interview, both the defense and Hasbury's counsel believed that Hasbury had personally interviewed Vontricesa [Davis]. Further, the record does not support Lewis's assertion that the fact that he did not discover the existence of the cameraman until the end of his testimony 'result [ed] in the failure of the cameraman being subpoenaed to authenticate the tape for the purpose of the impeachment of' Vontricesa. (Lewis's brief at p. 53.) Rather, it indicates that defense counsel did not call the cameraman as a witness because the cameraman told him that he did not recall talking to Vontricesa about the murder and that he knew 'Melissa Hasbury would not have put that on the air, had [he] not given her that information, but [he could not] get on the witness stand to testify to that.' (R. 437.) Therefore, the record does not affirmatively show that his trial attorneys' performance was deficient and that he was prejudiced by their allegedly deficient performance. Accordingly, we do not find that there was any plain error in this regard."

Lewis, 57 So. 3d at 825.

The record of Lewis's trial and the postconviction proceedings show that counsel did investigate Hasbury's statements; however, counsel had no indication until the middle of trial that Hasbury's pretrial statements to him would be in direct conflict with her trial testimony. For these reasons, Lewis failed to satisfy the requirements of Strickland and is due no relief on this claim.

III.

Lewis next argues that his trial counsel's performance was ineffective in closing arguments because, he says, his two attorneys made inconsistent arguments to the jury.[3]

When denying relief, the postconviction court made the following findings:

> "Lewis's two trial counsel both gave closing arguments during the guilt phase. Lewis argues that trial counsel's arguments are inconsistent on some points. This claim is denied for two reasons.

[3]Lewis's pleadings on this issue are confusing. It is unclear what portions of the closing argument Lewis specifically challenged in his petition. (C. 1235-36.)

"First, Lewis offered very little evidence on the question of deficient performance. It is well-established that 'to overcome the strong presumption of effectiveness, a Rule 32 petitioner must, at his evidentiary hearing, question trial counsel regarding his or her actions and reasoning.' Stallworth v. State, 171 So. 3d 53, 92 (Ala. Crim. App. 2013). ... Yet, on direct examination, Lewis failed to meaningfully examine Erskine Mathis regarding whether there was any reason for the decision that both counsel would present arguments. Lewis did not do follow-up examination to try to determine whether trial counsel had a strategic reason for conducting joint arguments or to explore the supposedly 'conflicting' nature of the arguments. Similarly, Lewis's examination of Linda Hall did nothing to meet their burden of overcoming the presumption that trial counsel's actions were reasonable, and instead only perfunctorily asked Ms. Hall about unexplained 'contradictions' between the two arguments. ... Because Lewis failed to offer evidence that actually demonstrated any 'contradiction' or otherwise shed light on the question of why trial counsel presented their arguments in the way they did, this Court finds that he failed to meet his burden of proving deficient performance, and this claim is denied. Rule 32.3, Ala. R. Crim. P.

"Second, Lewis failed to meet his burden of proving that he was actually prejudiced by the manner in which closing arguments were presented. As shown above and below, Lewis has failed to prove any reasonable basis upon which trial counsel could have prevented the guilty verdict. At trial, the State presented strong eyewitness testimony from one of Lewis's surviving victims, Vontricesa Davis. Trial counsel reasonably sought to bring that testimony into question by trying to show inconsistency between Ms. Davis's testimony and her statement to the police. Lewis failed to ask trial counsel any questions about what alternative arguments they could have made and failed to present any evidence to show

> how alternative arguments could have changed the result of the trial. Consequently, this Court finds that Lewis failed to prove prejudice pursuant to Strickland and this claim is denied. Ala. R. Crim. P., 32.3."

(C. 196-98.)

A review of the closing arguments made by Lewis's two attorneys shows that they were not inconsistent. Hall first argued that a witness who testified, Stanley Atkins, gave a different description of the driver of the car that ran over Davis than what Davis had testified to in court. She pointed out that Lewis's fingerprints were not found inside the vehicle, and she discussed Davis's inconsistent statements to police. (Trial R. 453-459.) Mathis argued that he did not believe that Davis was a liar but that she had been mistaken about what had happened and who had committed the offense. He also argued that Atkins gave a different description of the driver of the vehicle than what Davis testified to at trial. He pointed out the inconsistent statements that Davis had made, i.e., that she told someone at the scene that Randy had her kids but said that she did know Randy. Mathis ended by arguing that Randy has a

brother and that they looked like twins.[4] Clearly, counsel's statements were not inconsistent or contradictory but were both focused on attacking Davis's credibility.

Moreover, the record of the evidentiary hearing shows that Mathis and Hall could not remember why they made the closing arguments that they did. Mathis was asked:

> "[Postconviction counsel]: Do you recall that both you and Linda Hall made conflicting arguments?
>
> "[Mathis]: I do not, but I won't question you about it. I don't doubt it.
>
> "[Postconviction counsel]: The record will speak on that.
>
> "[Mathis]: Yes. I don't remember it."

(R. 245.) During Hall's testimony, the following occurred:

> "[Postconviction counsel]: Do you have any recollection that you in your closing argument argued one theory and the defense argued a contradicted theory -- that you contradicted each other in your closings? Do you realize that?
>
> "[Hall]: Are you saying that me and Mr. Mathis?

---

[4]Defense counsel presented the testimony of Nancy Lewis, Lewis's aunt. She testified that Lewis has an older brother named Ray Lewis and that at the time of the shooting both brothers looked like twins. (Trial R. 429.)

> "[Postconviction counsel]: Yes.
>
> "[Hall]: No, I wasn't aware of it. I don't remember what was stated then."

(R. 734.)

Furthermore, even if the closing arguments were inconsistent, numerous courts have held that it does not rise to the level of ineffective assistance of counsel for an attorney to argue inconsistent theories of the case.

> "'[I]t is not uncommon for lawyers to argue inconsistent defenses.' [State v.] Westmoreland, 2008 WI App 15, ¶ 21, 307 Wis. 2d [429] at 440, 744 N.W.2d [919] at 925 [(2008)]. See also State v. McDonald, 144 Wis. 2d 531, 533, 424 N.W.2d 411, 412 (1988) (Defendant 'entered pleas of not guilty and not guilty by reason of mental disease or defect,' contending that he did not kill the victim but was not responsible if he did.); State v. Nelis, 2007 WI 58, ¶ 20, 300 Wis. 2d 415, 424, 733 N.W.2d 619, 623 ('Nelis argued at trial that the evidence did not show that he and Diane S. had sexual intercourse on the night at issue. He further argued that, even if they did have sexual intercourse that night, it was consensual.'); Brown v. Dixon, 891 F.2d 490, 494–495 (4th Cir. 1989) (Inconsistent defenses 'that Brown either did not commit the murders or did so while drunk' was not ineffective assistance of counsel.).
>
> "....
>
> "In light of the not uncommon practice of lawyers to argue inconsistent theories, we cannot say that the decision of Dekoria Marks's trial lawyer to argue them here deprived

> her of the right to constitutionally effective assistance, irrespective of whether we or the trial court view that strategy as the best. As we noted in Westmoreland, 2008 WI App 15, ¶ 21, 307 Wis.2d at 440, 744 N.W.2d at 925: 'As Strickland reminds us, there is a "wide range of professionally competent assistance," id., 466 U.S. at 690, 104 S.Ct. 2052, and the bar is not very high, see Yarborough v. Gentry, 540 U.S. 1, 11, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003) (lawyer need not be a Clarence Darrow to survive an ineffectiveness contention).'"

State v. Marks, 330 Wis. 2d 693, 706-08, 794 N.W. 2d 547, 554-55 (Wis. Ct. App. 2010).

Lewis failed to satisfy the requirements of Strickland concerning this claim -- he failed to show deficient performance or prejudice. Therefore, Lewis is due no relief on this claim.

IV.

Lewis next argues that his trial counsel was ineffective for failing to fulfill promises that, he says, counsel made in opening statements. Specifically, Lewis argues that counsel promised the jury that it would hear evidence that Taurus Frost and Lewis were drug dealers who drove around with children in their cars and no such evidence was presented.[5]

---

[5]Another claim was raised in Lewis's petition regarding alleged promises made by counsel in opening statement; however, that claim is not raised on appeal. This Court does not apply a plain-error standard

The postconviction court made the following findings:

> "It is well-established that 'to overcome the strong presumption of effectiveness, a Rule 32 petitioner must at his evidentiary hearing, question trial counsel regarding his or her actions and reasoning.' Stallworth [v. State], 171 So. 3d [53] at 92 [(Ala. Crim. App. 2013)]. Despite this, Lewis did not ask Ms. Hall a single question about drugs, drug dealers, or her decision to mention those subjects during her opening statement. Further, on the face of the record, it is clear that trial counsel did establish that there were drugs in Ms. Davis's car, that Taurus Frost was a drug dealer, that Ms. Davis knew he was, and that Ms. Davis drove Mr. Frost around with her children in the car while Mr. Frost was armed and engaged in the drug trade. These facts were certainly sufficient for the jury to have inferred that Ms. Davis was also involved in the drug trade. Thus, trial counsel did not fail to deliver on her 'promise' that the jury would hear evidence to that effect. Because Lewis entirely failed to carry his burden of presenting either evidence of deficient performance or prejudice, this claim is denied. Rule 32.3, Ala. R. Crim. P."

(C. 199-200.)

The trial record shows that Officer Pat Johnson of the Birmingham Police Department testified that he conducted a search of Davis's vehicle. He testified that a loaded Glock brand 9-mm gun with 16 bullets and 1

---

of review when reviewing a postconviction petition on a death penalty case. See Ray v. State, 80 So. 3d 965, 971 (Ala. Crim. App. 2011). Thus, this aspect of this claim will not be addressed.

bullet in the magazine was discovered between the front seats of Davis's vehicle. (Trial R. 303.) Officer Johnson also found a plastic bag of a "green plant material" in the passenger-side door pocket. (Trial R. 303.) Also, Davis testified that she knew that Frost sold marijuana. (Trial R. 383.) Davis further testified that the day Frost was killed her young niece and her young son were in the car with her and Frost and that they were going to meet Randy Lewis. Counsel's statements in opening were clearly inferences that could have been drawn from the evidence that would be presented.

Moreover, numerous courts have held that counsel's failure to keep a promise made in opening statements rarely constitutes ineffective assistance of counsel. See Hampton v. Leibach, 290 F. Supp. 2d 905, 928 (N.D. Ill. 2001) ("An attorney's failure to fulfil promises made in opening statement is not often a successful basis for an ineffective assistance claim. The decision to change strategy during trial is often forced upon defense counsel by the vagaries of the courtroom arena."); United States ex rel. Johnson v. Johnson, 531 F.2d 169, 177 n. 19 (3d Cir. 1976) ("We do not intimate ... that a lawyer of normal competence could not promise

to produce evidence in this opening statement and then change his mind during the course of the trial and not produce the promised evidence."). See also Fayemi v. Ruskin, 966 F.3d 591, 594 (7th Cir. 2020) ("[T]he Supreme Court has never hinted at a per se rule that defense lawyers must keep all promises made in opening statement, even if a mid-trial change in circumstances alters the defense strategy.").

The record shows that counsel did not fail to keep the promise that was made in opening. We agree with the postconviction court that this claim was not supported by the record. Accordingly, Lewis is not entitled to relief on this claim.

V.

Lewis next argues that the postconviction court erred in denying him relief on his claim that his counsel was ineffective for failing to have latent fingerprints tested that had been recovered from the rear door and rear window of Davis's vehicle.

The postconviction court made the following findings:

> "Lewis claimed that trial counsel rendered ineffective assistance by failing to test a set of latent prints taken from the exterior of Ms. Davis's car. Because these prints did not belong to Lewis, he contends that he is entitled to a new trial.

However, he is not entitled to relief because he has failed to establish either deficient performance or prejudice.

"First, despite Lewis's arguments, declining to conduct testing on the fingerprints was a decision that a reasonable attorney could have made. Trial counsel knew that the State had not tested the fingerprints and that he would be able to argue that there was no fingerprint evidence linking his client to the crime. Thus, trial counsel made a strategic decision not to conduct further testing so that he 'could argue that they had no fingerprints connecting this man to that crime. ...' As this Court recognized, criticizing the State for not testing for fingerprints (or in this case for not testing fingerprints they took) is a 'fairly routine defense tactic. ...' Trial counsel explained that, in this case, he couldn't be certain that the prints would not match his client. While, as this Court recognized, Mr. Mathis could have had the prints tested ex parte, he was also concerned that testing the prints would alert the State to their potential significance. ... Mr. Mathis was in precisely the same predicament here. Though he could test the evidence and even 'chunk' the results, he could not rule out the possibility that the State would be alerted to conduct their own testing. And, of course, until he had them tested, trial counsel could not be certain that the prints did not belong to his client. For these reasons, counsel reasonably concluded that discretion was the better part of valor and chose not to test the prints but instead to use the State's failure to test the prints against it. This Court finds that counsel's decision was within the wide range of reasonable professional assistance guaranteed by the Constitution and was not deficient performance. Consequently, Lewis's claim is denied. Bryant [v. State], 181 So. 3d [1087] at 1154 [(Ala. Crim. App. 2011)]; Rule 32.3, Ala. R. Crim. P.

"Second, Lewis has failed to demonstrate a reasonable probability that the result of his trial would have been

different had the prints been tested and had trial counsel proven that they were not Lewis's prints. Likely recognizing that trial counsel might pursue the 'fairly routine defense tactic' of criticizing them for not testing the prints found on the car, the district attorney adduced testimony explaining the obvious fact that the prints were not material because they could have been left by anybody at any time. ...The district attorney recognized that the presence of a different person's fingerprints on the exterior of the car would not exclude Lewis as the perpetrator. ... Certainly, that evidence would have been no more useful than was trial counsel's ability to argue that the State failed to sufficiently investigate the fingerprint issue. Because this Court finds that testing the fingerprints would not have led to a reasonable probability of a different outcome, Lewis has failed to demonstrate prejudice and his claim is denied. Rule 32.3, Ala. R. Crim. P.; Arnold [v. State], 601 So. 2d [145] at 151 [(Ala. Crim. App. 1992)]."

(C. 200-205.)

During the postconviction hearing, Mathis was asked about the fingerprints:

"[Postconviction counsel]: If there is evidence that showed that fingerprints at the scene of the crime don't match the defendant's, why wouldn't that be evidence that he wasn't there? For purpose of the defense.

"[Mathis]: Why would I then -- Since that is the case, why would I then want to ask them to look a little harder?

"[Postconviction counsel]: Okay.

"[Mathis]: I would rather not have them do anything. Leave

it alone. I am where I need to be. I don't have anything showing that [Lewis] is there. There are no fingerprints attaching it to him.

"[Postconviction counsel]: Okay. So, your theory behind that is by pointing that out, you might cause the State to look further?

"[Mathis]: They might look further, and they might find something?

"....

"The Court: In terms of -- are you saying that was a strategic choice that you made?

"[Mathis]: Yes.

"[Postconviction counsel]: So I take it then that in terms of a strategic choice you made, you made the determination that offering evidence that indicated at the trial, now -- not at the time when any further investigation could be done -- but at the trial that you made that determination that letting the jury know that there was no evidence -- no fingerprint evidence that would connect the defendant to the crime present, you made the choice that that was not something that the jury should know?

"[Mathis]: I made the choice that I could argue that they had no fingerprints connecting this man to that crime because there was no testimony to that effect."

(R. 216-18.)

Mathis testified that he made a strategic decision not to have the

latent fingerprints tested because of the possibility that those prints might be identified as Lewis's.

> "Ineffective assistance of counsel will not lie when the conduct 'involves the attorney's use or reasonable discretion in a matter of trial strategy.' State v. Heslop, 842 S.W.2d 72, 77 (Mo. banc 1992). 'It is only the exceptional case where a court will hold a strategic choice unsound.' Id. 'Where trial counsel decides as a matter of trial strategy to pursue one evidentiary course to the exclusion of another, trial counsel's informed, strategic decisions not to offer certain evidence is not ineffective assistance.' State v. Simmons, 944 S.W.2d 165, 181 (Mo. banc 1997)."

Johnson v. State, 333 S.W.3d 459, 467 (Mo. banc 2011).

This Court has held that an attorney's decision not to have certain evidence tested is reasonable if the test results would negatively impact the defendant's defense.

> "'[C]ounsel may reasonably avoid presenting evidence or defenses for a number of sound reasons that lead him to conclude that the evidence or defense may do more harm than good.' Moore v. State, 659 So. 2d 205, 209 (Ala. Crim. App. 1994). Bryant failed to present any evidence indicating that counsel's decision in this regard was not reasonably strategic. In his brief on return to remand, Bryant argues that counsel could have had the condoms tested ex parte, thereby removing any risk that the State would have learned of the test results had those results been detrimental to Bryant. However, this argument fails to recognize that the condoms were in the State's possession. Although counsel could have, and in fact did, move for funds for DNA testing ex parte, because the

> condoms were in possession of the State it would have been impossible to have had the condoms transferred from the State's possession to an outside laboratory for testing without the State's knowledge. Once the State was aware of the defense's testing, the State could have requested discovery of the test results or could have conducted its own DNA testing on the condoms. In either case, if the DNA-test results were harmful, it would have provided the State with more evidence against Bryant. Counsel's decision not to take that risk was reasonable."

Bryant v. State, 181 So. 3d 1087, 1153-54 (Ala. Crim. App. 2011).

Based on Mathis's testimony it is clear that a strategic decision was made not to test the fingerprints. "Counsel cannot be deemed ineffective merely because postconviction counsel disagrees with trial counsel's strategic decisions." Hannon v. State, 941 So. 2d 1109, 1119 (Fla. 2006). For these reasons, Lewis failed to show that counsel's performance was deficient. Lewis is due no relief on this claim.

VI.

Lewis next argues that the postconviction court erred in denying him relief on his claim that his counsel was ineffective for failing to retain the services of an eyewitness expert, Dr. Jeffrey Neuschatz, to challenge Davis's testimony that Lewis was the shooter.

The postconviction court made the following findings on this claim:

"First, Lewis failed to demonstrate that 'no reasonable counsel' would have failed to retain Dr. [Jeffrey] Neuschatz. As an initially matter, Erskine Mathis was an extremely well-qualified and experienced criminal defense attorney. This Court notes that the [Alabama Court of Criminal Appeals] has held that '[w]hen courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger.' Marshall [v. State], 182 So. 3d [573] at 582-83 [(Ala. Crim. App. 2014)]. Despite this, Lewis failed to ask Mathis a single question about either Dr. Neuschatz in particular or eyewitness experts in general. Moreover, on cross, Mathis testified that he has only retained an 'eyewitness expert' once in 37 years of defense work. Mathis's opinion, as an extremely experienced attorney, is that eyewitness 'experts' are more useful in cases where the identification is tenuous, and the witness is uncertain. Id. at 259-260. In this case, the eyewitness identification was neither. Because Lewis failed to ask any follow-up questions, or to otherwise explore Mathis's professional judgment, he cannot cite any evidence that Mathis acted unreasonably.

"....

"Lewis also failed to prove that the admission of Dr. Neuschatz's testimony would have created 'substantial' likelihood of a different result. ... First, Dr. Neuschatz testified quite clearly that he did not, and could not, opine about the accuracy of Ms. Davis's identification of Lewis. So, trial counsel could not have offered evidence that Ms. Davis's identification was actually inaccurate. Second, Dr. Neuschatz's testimony regarding the manner in which the photo lineups amounted to nothing more than speculation. He did not interview either Ms. Davis or Detective Armstrong, who administered the photo lineups. As Dr. Neuschatz admitted on cross-examination, Detective Armstrong administered all three photo lineups in the same manner, and

in all three cases she did not tell the interviewee that there was a suspect in any of the photographs. Third, the State would have been able to adduce testimony from Dr. Neuschatz that would actually strengthen the State's case, such as his opinion that identifications within the same race (in this case African American) tend to be more reliable. Dr. Neuschatz also acknowledged that identifications that occur shortly after a crime are more reliable and that Ms. Davis identified the perpetrator as 'Randy' immediately after the crime occurred. Similarly, he acknowledged that Ms. Davis saw the perpetrator in good lighting conditions, another factor that makes identification more reliable. Fourth, to the extent Dr. Neuschatz's testified about stress as detrimental to making good observations, he acknowledged that Ms. Davis testimony was that she first saw Lewis walking up to her car it was not a stressful situation. Consequently, this Court finds that the effect of testimony about 'factors that may touch on reliability of eyewitness testimony' would not be sufficient to create a 'substantial' probability that the result of Lewis's trial would have been different if it had been presented. Consequently, Lewis has failed to prove prejudice and this claim is denied. Rule 32.3, Ala. R. Crim. P."

(C. 205-208.)

At the evidentiary hearing, the following occurred during the cross-examination of Mathis:

"[Assistant Attorney General]: And let me ask you quickly about there has been an allegation that you were ineffective because you didn't hire an eyewitness expert. Do you use an eyewitness expert in every case that involves eyewitness testimony?

"[Mathis]: I have only called an eyewitness expert one time in

37 years.

"[Assistant Attorney General]: In your professional judgment, are eyewitness experts more useful in a case where a witness is unsure or tentative about their ID?

"[Mathis]: Absolutely. Yes.

"[Assistant Attorney General]: Ms. Davis was not unsure or tentative about her ID of Mr. Lewis?

"[Mathis]: No. She was absolutely positive.

"[Assistant Attorney General]: In fact, the evidence showed that she at least partially identified him by name immediately after the crime; isn't that true?

"[Mathis]: Yes, sir."

(R. 259-60.)

The trial record shows that defense counsel cross-examined Davis concerning her identification of Frost's killer. Counsel started by asking Davis why she said immediately after the shooting that she did not know the name of the man who shot Frost. Davis responded that she meant that she did not know the man's full name and that his name was either "Ray Ray" or "Randy." (Trial R. 385.) Counsel confronted her with a copy of her statement to police in which she said she could not name the man who shot Frost. Mathis also questioned Davis about the fact that she

had told police that the shooter had a twin brother, that she had spoken to a television reporter at a celebration of life ceremony for Frost and she had told that reporter that she did know who killed Frost. This Court has held that it does not rise to the level of ineffective assistance of counsel for counsel to fail to retain the services of an eyewitness expert. "'[T]he failure to call an expert and instead rely on cross-examination does not constitute ineffective assistance of counsel."' State v. Hartman, 93 Ohio St. 3d 274, 299, 754 N.E.2d 1150, 1177 (2001), quoting State v. Nicholas, 66 Ohio St.3d 431, 436, 613 N.E.2d 225, 230 (1993)." Davis v. State, 44 So. 3d 1118, 1136 (Ala. Crim. App. 2009).

Other states have likewise found that counsel's performance was not ineffective for failing to present the testimony of an eyewitness expert.

> "Had an expert been called, the defendant argues, the jury would have heard evidence on the variables that affect eyewitness identifications and would have had 'further reason to doubt the reliability of Perez's identification.' ....
>
> "The decision to call, or not to call, an expert witness fits squarely within the realm of strategic or tactical decisions. See, e.g., Commonwealth v. Facella, 478 Mass. 393, 413, 85 N.E.3d 665 (2017) (decision not to call psychiatric expert reasonable strategic decision); Commonwealth v. Hensley,

> 454 Mass. 721, 739, 913 N.E.2d 339 (2009) (decision not to call expert strategic). Accordingly, we evaluate whether the decision was 'manifestly unreasonable' at the time it was made. [Commonwealth v.] Holland, 476 Mass. [801] at 812, 73 N.E.3d 276. p 217, ¶ 15, 359 P.3d 659 [(2017)]."

Commonwealth v. Ayala, 481 Mass. 46, 63, 112 N.E.3d 239, 253 (2018)(footnote omitted).

> "The Utah Supreme Court has noted that expert testimony about the deficiencies of eyewitness identification can be helpful to juries and should therefore routinely be admitted. [State v. Clopten, 223 P.3d 1103 [(Utah 2009)] ¶¶ 16, 49. However, such expert testimony does not always benefit the defendant. When the factors that impact the reliability of eyewitness testimony – 'such as the amount of time the culprit was in view, lighting conditions, use of a disguise, distinctiveness of the culprit's appearance, and the presence of a weapon or other distractions' -- weigh in favor of a reliable identification, 'expert testimony actually makes jurors more likely to convict.' See id. ¶¶ 15, 20. As a result, when an eyewitness-identification expert's testimony is likely to reinforce the credibility of identifications made by eyewitnesses, declining to bring the expert to the witness stand may be sound trial strategy. Consequently, trial counsel's failure to call such an expert as a witness does not necessarily translate into a finding of deficient performance."

State v. King, 392 P.3d 997, 1002 (Utah Ct. App. 2017).

In fact, the United States Court of Appeals for the Fourth Circuit in Moore v. Hardee, 723 F.3d 488 (4th Cir. 2013), set aside a district court's ruling finding that trial counsel was ineffective for failing to

secure and present the testimony of an eyewitness expert. The Court of Appeals stated:

> "[T]he district court also concluded that no reasonable strategy could explain counsel's failure to call an expert in eyewitness identification. Yet, regardless of how counsel determined the course of Moore's defense, '[r]are are the situations in which "the wide latitude counsel must have in making tactical decisions" will be limited to any one technique or approach.' [Harrington v.] Richter, [562 U.S. 86,] 131 S.Ct. [770] at 789 [2011)] (quoting Strickland, 466 U.S. at 689, 104 S.Ct. 2052). While '[o]f course [ ] we would not regard as tactical a decision by counsel if it made no sense or was unreasonable "under prevailing professional norms" ... that is not the case here.' Vinson v. True, 436 F.3d 412, 419 (4th Cir. 2005) (quoting Wiggins v. Smith, 539 U.S. 510, 521–24, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)). Counsel cross-examined both victim-eyewitnesses, attempted to establish an alibi for Moore, and showed that the admitted physical evidence could not be connected to Moore or the assault. The fact that counsel's cross-examination could have been presented along with expert testimony on eyewitness identification must not be analyzed 'through the distorting effects of hindsight.' Winston [v. Kelly], 592 F.3d [535] at 544 [(4th Cir. 2010)] (citation omitted) (explaining that '[d]efense counsel's strategy of attacking [witness] credibility' through 'undeniably focused and aggressive' cross-examination 'falls within the wide range of reasonable professional assistance').
>
> "Moreover, we decline to deem counsel's classic method of cross-examination ineffective assistance, as '[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.' Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). Because 'deficiencies or inconsistencies in an

> eyewitness's testimony can be brought out with skillful cross-examination,' [United States v.] Harris, 995 F.2d [532] at 535 [(4th Cir. 1993)], we cannot say there is no reasonable argument that counsel's use of cross-examination to challenge the Overton's credibility constituted ineffective assistance, even considering the unique factual circumstances of Moore's case.
>
> "Although the cases cited by Moore and the district court support a conclusion that an expert in eyewitness identification might have provided helpful evidence for the defense, they do not go so far as to foreclose disagreement over whether failure to provide such a witness constitutes ineffective assistance. As holding otherwise contravenes the AEDPA's [Antiterrorism and Effective Death Penalty Act of 1996] deferential standard, we reverse the district court's judgment granting Moore's writ."

723 F.3d at 498-500.

We agree with the postconviction-court that counsel was not ineffective for failing to retain the services of an eyewitness expert. Certainly, this was a strategic decision based on Mathis's experience trying capital cases. Lewis failed to satisfy the requirements of Strickland; thus, he is due no relief on this claim.

VII.

Lewis next argues that the postconviction court erred in denying him relief on this claim that his counsel was ineffective for failing to

communicate with Lewis. Specifically, Lewis argues that, because of Mathis's total lack of communication with him he was "constructive[ly] denied counsel" as recognized in United States v. Cronic, 466 U.S. 648, 658-59 (1984), and that, therefore, any prejudice to him was presumed.

The postconviction court made the following findings as to this claim:

> "Lewis contends that 'Ms. Hall was uninvolved in the case, and Mr. Mathis never had a substantive conversation with Mr. Lewis.' Lewis's lead counsel, Erskine Mathis, admittedly had a single, bad meeting with Lewis before his trial. However, Mr. Mathis also explained that Ms. Hall was having meetings with Lewis and communicating that information to him. Thus, Mr. Mathis was not deprived of any useful information that Lewis might have had to convey. Unfortunately, Mr. Mathis's notes of those conversations were lost in the intervening years. However, Lewis's bald assertion that Lewis was 'functionally denied counsel' by the lack of meetings with Mathis is meritless. With regard to prejudice, it is easy to see why Lewis argues for presumed prejudice, because there is no actual prejudice. Lewis offered no evidence, whatsoever, of what helpful information that he could have provided to trial counsel had Mathis met with him directly. Because this Court finds that prejudice cannot be presumed on this record, Lewis's claim is denied."

(C. 209-10.)

The United States Supreme Court in Cronic held that prejudice is presumed when a defendant "is denied counsel at a critical stage of his

trial." 466 U.S. at 659. However, this exception has been narrowly applied.

> "[T]he Cronic exception is exceedingly narrow, see Florida v. Nixon, 543 U.S. 175, 190, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004), and applies where the defendant has demonstrated that 'the attorney's failure [was] complete,' Bell v. Cone, 535 U.S. 685, 696-97, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002). In other words, 'the circumstances leading to counsel's ineffectiveness [must be] so egregious that the defendant was in effect denied any meaningful assistance at all.' United States v. Griffin, 324 F.3d 330, 364 (5th Cir. 2003) (citation omitted).
>
> "The Cronic exception has been applied in cases where counsel slept as evidence was being introduced against the defendant, Burdine v. Johnson, 262 F.3d 336, 338 (5th Cir. 2001) (en banc), where counsel adopted and acted upon a belief that his client should be convicted, Osborn v. Shillinger, 861 F.2d 612, 625 (10th Cir. 1988), and where counsel sat silently throughout the entire trial, see Harding v. Davis, 878 F.2d 1341, 1345 (11th Cir. 1989). But it has been held inapplicable to cases involving 'bad lawyering, regardless of how bad.' Scarpa [v. Dubois], 38 F.3d [1] at 13 [(1st Cir. 1994)] (citation omitted). 'Attorney error, even when egregious, ... almost always require[s] analysis under Strickland's prejudice prong.' Id. at 14."

United States v. Theodore, 468 F.3d 52, 56 (1st Cir. 2006).

Mathis testified that he met with Lewis at the Jefferson County jail after he was appointed.

> "I went up, told him who I was, gave him a card, told

> him I had been appointed by Judge Watkins to represent him in this case and I needed to talk to him. He was kind of ugly. He said, 'I'm not talking to you, my lawyer is a black lady.' And I tried to explain to him who I was. We didn't get anywhere."

(R. 103.) Mathis was determined to help Lewis, he said, but did not meet with Lewis again except in court because of Lewis's animosity toward him. However, Mathis testified: "I know [Hall] talked to [Lewis] on numerous occasions because she spoke to me about that." (R. 106.) There is no law that requires that every attorney who represents a defendant have oral communications with that defendant. Mathis and Hall both testified that Hall was meeting regularly with Lewis. Mathis also said that Lewis made it clear that he did not want to cooperate with Mathis but that he would speak to Hall.

This is not a situation where both of Lewis's attorneys had no communication with Lewis. The facts here do not support application of the narrow exception recognized in Cronic. See United State v. Theodore. Therefore, Lewis was required to show that he was prejudiced by counsel's actions. We agree with the postconviction court that Lewis failed to meet that burden. Lewis is due no relief on this claim.

VIII.

Lewis next argues that the postconviction court erred in denying him relief on this claim that his counsel was ineffective for failing to move for a continuance so that counsel could conduct a complete investigation of the offense. (C. 1159-63.)

The postconviction court made the following findings regarding this claim:

> "When asked if there was a reason why he had declined to move for a continuance, Mathis testified: 'I don't remember.' Lewis failed to ask Mathis any follow-up questions, failed to attempt to refresh his recollection, and simply abandoned the line of questioning. In his brief, Lewis mistakes where the burden of proof lies by arguing that because Mathis does not remember if there was a reason, then 'it was not a strategic decision.' But this ignores Strickland's strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. A petitioner bears the burden of overcoming the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' Strickland, 466 U.S. at 689. Further, when counsel is, like Mathis, highly experienced, 'the presumption that his conduct was reasonable is even stronger.' Marshall [v. State], 182 So. 3d [573] at 582-83 [(Ala. Crim. App. 2014)]. Because Lewis abandoned this line of questioning and failed to offer any evidence that trial counsel's decision was not a strategic one, this Court finds that he failed to meet his burden of proof pursuant to

> Strickland and Alabama law and this claim is denied. Rule 32.3, Ala. R. Crim. P."

(C. 212.)

Contrary to Lewis's argument, the fact that Mathis had no memory of the reasons for not requesting a continuance Lewis fails to satisfy Strickland's requirement that the decision was not a strategic one. Indeed, this Court has held that even the death of an attorney does not "relieve postconviction counsel of satisfying the Strickland test when raising a claim of ineffective assistance of counsel." Walker v State, 194 So. 3d 253, 297 (Ala. Crim. App. 2015). Thus, counsel's lack of memory regarding her choice not to pursue a continuance did not lessen Lewis's burden in satisfying the Strickland requirements.

Also, Lewis failed to show that counsel's failure to request a continuance altered the outcome of the guilt phase. As an appellate court in our neighboring State of Georgia has stated:

> "Hartley further claims that his trial counsel should have obtained a continuance, but he does not show how a continuance, in and of itself, would have aided in his defense, apart from allowing time for his trial counsel to secure Carswell and Watkins as witnesses. ... Hartley cannot show that his trial counsel's failure to move for a continuance affected the outcome of the trial."

Hartley v. State, 283 Ga. App. 388, 391, 641 S.E. 2d 607, 610 (2007).

The record shows that counsel moved for funds to hire a private investigator and that that motion was granted. (Trial R. 16; 99-100.) An investigator was hired. Nothing in the record suggests that counsel was not prepared for the guilt phase. Also, during the postconviction hearing Mathis was asked what he thought of his representation of Lewis and said: "I represented [Lewis] to the very best of my ability. I did all I possibly could to get him out of this mess. And that is bore out by the cross-examination of all the witnesses and by the things we tried to do." (R. 380.)

Lewis failed to establish either that counsel's performance was deficient or that he was prejudiced by the deficient performance. Thus, Lewis is entitled to no relief on this claim.

IX.

Lewis next argues that the postconviction court erred in finding that his remaining claims concerning counsel's performance at the guilt phase were abandoned. The issues that Lewis claims were improperly deemed abandoned were merely listed in a footnote in Lewis's brief to

this Court.[6] Lewis argues that these claims were supported by the record, that he had no obligation to present evidence to support them, and that no further work on his part was needed.

In addressing these claims, the postconviction court stated:

> "Lewis next presents a laundry list of claims with no argument, record support, or caselaw support. ...Because Lewis failed to offer evidence to support these claims or to question trial counsel about them, this Court finds that they were abandoned at the evidentiary hearing and are consequently denied. Rule 32.3, Ala. R. Crim. P."

(C. 212.)

The State asserts that this Court should not consider this issue because, it argues, Lewis failed to comply with the briefing requirements of Rule 28(a)(10), Ala. R. App. P., when addressing this claim. We agree that this claim is difficult to review because the issues were not clearly

[6]Lewis's footnotes reads: "Claims I.I.2 (C. 119201205) (failure to object to evidence of possession of firearm); I.I.3 (C. 1205-11) (failure to object to mental state testimony); I.I.4 (C. 1211-15) (failure to object on Confrontation Clause grounds); I.I.5 (C. 1215-19) (failure to object to tool mark evidence); I.I. 6 (C. 1219-22) (failure to object to lack of personal knowledge); I.I.7 (C. 1222-24) (failure to object to guilt-phase victim impact evidence); I.K. (C. 1237-44) (failure to object to jury instructions); I.L. (C. 1244-45) (prejudice from accumulation of errors)." (Lewis's brief at p. 53 n. 45.) This represents the entire discussion of the specific argument regarding this claim.

identified and no specific arguments were made on these issues.

As we stated in Franklin v. State, 23 So. 3d 694 (Ala. Crim. App. 2008):

> "It is well settled that '[r]ecitation of allegations without citation to any legal authority and without adequate recitation of the facts relied upon has been deemed a waiver of the arguments listed.' Hamm v. State, 913 So. 2d 460, 486 (Ala. Crim. App. 2002). 'An appellate court will consider only those issues properly delineated as such and will not search out errors which have not been properly preserved or assigned. This standard has been specifically applied to briefs containing general propositions devoid of delineation and support from authority or argument.' Ex parte Riley, 464 So. 2d 92, 94 (Ala. 1985) (citations omitted). 'When an appellant fails to cite any authority for an argument on a particular issue, this Court may affirm the judgment as to that issue, for it is neither this Court's duty nor its function to perform an appellant's legal research.' City of Birmingham v. Business Realty Inv. Co., 722 So. 2d 747, 752 (Ala. 1998). Therefore, this claim is deemed waived. ..."

23 So. 3d at 703.

Moreover, this Court has held that a claim of ineffective-assistance-of-counsel may be deemed abandoned when no evidence was presented at the evidentiary hearing in support of the claim. "Because it appears that Payne did not present evidence at the evidentiary hearing with regard to claims 2, 3, 4.a, 4.b, 4.c, and 4.d, we conclude that he has

abandoned these claims and we will not review them." Payne v. State, 791 So. 2d 383, 399 (Ala. Crim. App. 1999).

Furthermore, the claims of ineffective assistance of counsel cited in Lewis's footnote are claims that his counsel's performance was ineffective for failing to object to testimony or evidence.

> "An ineffectiveness of counsel claim does not lend itself to a search of the record to pick the instances in which an objection could have been made. Stringfellow v. State, 485 So. 2d 1238 (Ala. Cr. App. 1986). An attorney looking at a trial transcript can always find places where objections could have been made. Hindsight is not always 20/20, but hindsight is always ineffective in evaluating performance of trial counsel."

State v. Tarver, 629 So. 2d 14, 19 (Ala. Crim. App. 1993). For the foregoing reasons, Lewis is due no relief on this claim.

State's Appeal

Penalty-Phase Issues

As previously discussed, the State appeals the postconviction court's ruling setting aside Lewis's sentence of death after finding that Lewis had been deprived of the effective assistance of counsel at the penalty-phase of his capital-murder trial.

Standard of Review

The Alabama Supreme Court in Ex parte Gissendanner, 288 So. 3d 1011 (Ala. 2019), recognized that, when a circuit court grants relief on a postconviction petition, we afford the court's findings of fact deference on appeal. In relying on the Supreme Court's holding in Gissendanner, this Court has stated:

> "'The credibility of witnesses is for the trier of fact, whose finding is conclusive on appeal. This Court cannot pass judgment on the truthfulness or falsity of testimony or on the credibility of witnesses.' Hope v. State, 521 So. 2d 1383, 1387 (Ala. Crim. App. 1988). Indeed, it is well settled that, in order to be entitled to relief, a postconviction 'petitioner must convince the trial judge of the truth of his allegation and the judge must "believe" the testimony.' Summers v. State, 366 So. 2d 336, 343 (Ala. Crim. App. 1978). Thus, we afford the circuit court's findings great deference on appeal. Ex parte Gissendanner, 288 So. 3d [1011] at 1029 [(Ala. 2019)]."

State v. Petric, [Ms. CR-17-0505, August 14, 2020] ___ So. 3d ___, ___ (Ala. Crim. App. 2020).

> "[W]e apply a mixed standard of review because both the performance and the prejudice prongs of the Strickland test present mixed questions of law and fact. See id. at 698, 104 S.Ct. 2052 ('Ineffectiveness is ... a mixed question of law and fact.'); Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999). We defer to the circuit court's factual findings, but we review de novo the circuit court's legal conclusions. ... [U]nder this standard, the Court conducts an independent review of the

> trial court's legal conclusions, while giving deference to the trial court's factual findings.') (citation omitted)."

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

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

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

With these principles in mind, we review the claims raised by the State on appeal.

X.

The State first challenges various portions of the postconviction court's order finding that Lewis was deprived of the effective assistance of counsel for failing to investigate and present mitigation evidence in the penalty phase. To properly review these claims we quote, in part, the

order issued by that court:

> "The evidence presented in the hearing was that Randy Lewis was a loving, caring boy living in a nightmarish childhood. He suffered years of physical and emotional abuse at the hands of his stepfather. When DHR [Department of Human Resources] finally intervened, he was bounced around from place to place and not given the love and stability he needed. Mr. Lewis's family exposed him to guns, drugs, and gangs, yet DHR kept returning him to this environment. Mr. Lewis felt a strong pull to care for his mother and would do anything to get back to her. Mr. Lewis did not have a chance -- every opportunity for stability and a normal life was ripped away by DHR and his dysfunctional family. Mr. Lewis's story is heartbreaking, but the jury never heard it because counsel failed to conduct a comprehensive mitigation investigation.
>
> "....
>
> "The testimony presented at the evidentiary hearing established that Ms. Hall did nothing to prepare for the penalty-phase of this trial. Mr. Mathis believed that Ms. Hall was 'handling the penalty phase' but 'as things got further along ... [he] found out she had not.' Once he realized there was no mitigation investigation, Mr. Mathis hired one expert, Dr. Kimberly Ackerson. He spent a total of five hours preparing for the penalty phase. He did not attempt to contact any people who knew Randy Lewis, even though he knew it was necessary in a capital case. He did not obtain records from DHR, even though he was told that Mr. Lewis spent time in foster care. It is not certain that Ms. Hall even knew that Mr. Lewis spent time in foster care. Trial counsel also did not request school, medical, or other crucial records.
>
> "Dr. Ackerson testified that she could not recall the scope of her employment in this case, specifically whether she

was hired only to conduct an intellectual-disability evaluation, or 'called at the last minute and was told to do what [she] could as far as preparing for mitigation.' The defense hired Dr. Ackerson five weeks before the trial started. Dr. Ackerson testified at the evidentiary hearing that this would not have been enough time to conduct an intellectual disability evaluation between being hired and trial, and the six hours she worked 'would have not been sufficient.' Mr. Mathis's retainer letter to Dr. Ackerson -- sent April 6, 2007, five weeks before trial -- makes the last minute 'best she could do' option the most likely.

"It is ultimately the attorney's responsibility to know the standards for death-penalty mitigation and ensure that a comprehensive mitigation investigation was completed. They could have hired a mitigation specialist to assist with this; in fact, they could have contacted Dr. Ackerson earlier, as she was familiar with the standards and experienced in performing mitigation investigations in Jefferson County. Dr. Ackerson also testified that those mitigation standards were followed by Ms. Dawn Jenkins, the postconviction mitigation specialist who testified with a limited scope at the evidentiary hearing. The failure to conduct a comprehensive mitigation investigation was not ultimately the fault of Dr. Ackerson, but rather trial counsel was responsible for ensuring compliance with Sixth Amendments standards for mitigation investigation.

"The ABA [American Bar Association] Guidelines 'are guides to determining what is reasonable.' Strickland, 466 U.S. at 688. Objectively reasonable counsel conducting a mitigation investigation for a capital-murder trial in 2006/2007 would have, at a minimum, interviewed 'witnesses familiar with aspects of the client's life history' and gathered 'medical history,' 'family and social history,' 'educational history,' and 'prior juvenile and adult correctional experience.'

(ABA Guidelines at 1019, 1023.) Dr. Ackerson concurred that these were the relevant standards at the time of Mr. Lewis's trial.

"....

"The Supreme Court has confirmed that the ABA Guidelines represent prevailing professional norms. ... Mr. Lewis presented additional proof that these standards represented prevailing professional norms in Alabama at the time of his trial. ...

"This Court finds that counsel did not conduct a mitigation investigation in accordance with these standards. The defense team failed to conduct social-history interviews of Lewis and his family members, including Junell Lewis, Jacqueline McClellan, John Gooden, Anquinetta Lewis, Cheryl McClellan, Torlandra Floyd, and Deborah Floyd. They failed to interview 'people from outside of the family' such as Barry Swope, Dawn Tucker, Ronald Tucker, Geniece Dancy, and Katrina Coleman. No records were gathered, and no one conducted a 'thorough record review of ... school records, medical records, and, most importantly, the DHR records.' Both attorneys admitted that they did not conduct this type of investigation.

"Dr. Ackerson agreed that these standards were not satisfied through her work on this case, and that she did not conduct 'a comprehensive evaluation.' Dr. Ackerson's conclusion is bolstered by her trial testimony, which covered only seven and half transcript pages. Her trial testimony was that she performed an IQ test (Lewis scored an 84) and that Lewis was socially immature. Since she did not have access to the DHR records, Dr. Ackerson incorrectly testified about the severity and frequency of childhood abuse, his number of foster placements, his response to these placements, and that

Lewis was ultimately returned to his mother (he never was).

"....

"Lewis's counsel called only two, brief witnesses during the penalty phase: Dr. Ackerson and Jacqueline McClellan. As discussed above, because of trial counsel's failures, Dr. Ackerson did not conduct a comprehensive mitigation investigation (nor was she asked to do so) and therefore knew very little about Lewis's tumultuous childhood or his success when he was in a stable environment. She was only able to testify that there was 'some abuse,' which, as shown at the evidentiary hearing and through the extensive DHR records, dramatically downplayed the horrific circumstances of Lewis's childhood. Lacking Lewis's DHR, school, or medical records, Dr. Ackerson incorrectly testified about Lewis's history in foster care. She was only able to say, very generally, that he 'did well' in his foster placements. ...

"Counsel also called Jacqueline McClellan, Lewis's cousin, but only because she happened to be attending the trial to support Lewis that day. Counsel did not give her 'instructions about what to talk about,' nor prepare her in any way. They did not discuss her testimony beforehand; instead, they just 'asked [her] would [she] beg for them not to put [Randy] on the death penalty.' Ms. McClellan was not asked about Lewis's childhood, and as a result, she was only able to testify that Lewis was 'real silly' and that he babysat her children. She said she did not want Lewis to die 'because he maybe didn't do it, may be somebody else.' Ms. McClellan's only reference to Lewis's childhood or time in foster care was a single statement that, when she got out of prison and found out Lewis was in foster care, she went and got him. Her testimony covered fewer than five transcript pages.

"Postconviction counsel presented significant records

and testimony at the evidentiary hearing, all of which would have been available at the time of Lewis's trial.

"....

"During the evidentiary hearing, witness after witness took the stand to tell Lewis's life story. All of them expressed their love and compassion for Lewis, and each told this Court what they would have told the jury had they been given the opportunity. They begged for Lewis's life and told this Court what Lewis meant to them. They demonstrated that his life still has value. ...

"Each of these witnesses testified that they were not contacted, let alone interviewed, by trial counsel, and that, had counsel done so, they would have testified on Lewis's behalf. ...

"For Lewis to get relief on this claim, he only needed to demonstrate a reasonable probability that the foregoing mitigation evidence would have altered the penalty phase verdict. Strickland [v. Washington], 466 U.S. [668] at 693 [(1984)] … There is more than a reasonable probability that the evidence presented at the Rule 32 hearing would have impacted the jury's weighing of the aggravating and mitigating circumstances. The entire point of mitigation is to 'humanize [the defendant and] allow [the jury] to accurately gauge his moral culpability.' Porter [v. McCollum], 558 U.S. [30] at 41 [(2009)]. These witnesses would have provided a wealth of this type of compelling mitigation. This Court saw what a jury would have seen had counsel conducted a comprehensive mitigation investigation: a collection of friends and family who genuinely love and care about Mr. Lewis. 'Had [Mr. Lewis's] counsel been effective, the judge and jury would have learned of the 'kind of troubled history [the Supreme Court has] declared relevant to assessing a

> defendant's moral culpability.' Id. (quoting Wiggins [v. Smith], 539 U.S. [510] at 535 [(2003)].
>
> "The prejudice in this case is similar to the prejudice in Williams [v. Taylor, 529 U.S. 362 (2000),] Wiggins, and Porter, but is greater because the jury verdict for death was not unanimous. Two jurors voted for life. The 10-2 jury verdict means that, even without hearing the details of Mr. Lewis's turbulent childhood and the positive impact he had on those around him, two jurors were already convinced that the mitigating circumstances outweighed any aggravating circumstances; thus, the balance was close. Under Alabama law, the jury could not have returned a recommendation for death if one additional juror had voted for life. ...
>
> "'[T]here exists too much mitigating evidence that was not presented to now be ignored.' Porter, 558 U.S. at 44 (internal quotations omitted). The Court finds that Mr. Lewis's trial counsel were deficient in their investigation and presentation of mitigation evidence in this case and that there is a reasonable probability that, had that evidence been presented, the result of the penalty phase of Mr. Lewis's trial would have been different."

(C. 212-39.)

A.

First, the State argues that the postconviction court erred in adopting, in part, Lewis's proposed order granting relief on this claim. It relies on the Alabama Supreme Court's decision in Ex parte Ingram, 51 So. 3d 1119 (Ala. 2010), to support its argument.

Lewis argues that this claim is not properly before this Court because, he says, the State did not object to the order on the grounds that it now raises on appeal. In its reply brief, the "State concedes that it did not object to the Rule 32 court's partial adoption of Lewis's proposed order." (State's reply brief at p. 40.) "The general rules of preservation apply to Rule 32 proceedings." Boyd v. State, 913 So. 2d 1113, 1123 (Ala. Crim. App. 2003). This issue was not raised by the State in the circuit court; thus, it is not properly before this Court for review. See Slaton v. State, 902 So. 2d 102, 107 (Ala. Crim. App. 2003).

Moreover, even if the issue had been properly preserved, the State would be due no relief on this claim. In Ingram, the Alabama Supreme Court reversed the circuit court's adoption, in toto, of the State's proposed order denying a postconviction petition.

> "[T]he Alabama Supreme Court has admonished that 'appellate courts must be careful to evaluate a claim that a prepared order drafted by the prevailing party and adopted by the trial court verbatim does not reflect the independent and impartial findings and conclusions of the trial court.' Ex parte Ingram, 51 So. 3d 1119, 1124 (Ala. 2010).
>
> "In Ingram, the Supreme Court held that the circuit court's adoption of the State's proposed order denying postconviction relief was erroneous because, it said, the order

> stated that it was based in part on the personal knowledge and observations of the trial judge when the judge who actually signed the order denying the postconviction petition was not the same judge who had presided over Ingram's capital-murder trial. '[T]he patently erroneous nature of the statements regarding the trial judge's "personal knowledge" and observations of Ingram's capital-murder trial undermines any confidence that the trial court's findings of fact and conclusions of law are the product of the trial judge's independent judgment....' Ingram, 51 So. 3d at 1125."

Ray v. State, 80 So. 3d 965, 971-72 (Ala. Crim. App. 2011).

A year later, the Supreme Court reconsidered Ingram in Ex parte Scott. In Scott, the Supreme Court reversed the court's judgment because the court adopted the State's answer to Scott's postconviction petition as its final order denying relief.

In 2012, the Supreme Court addressed this issue again in Ex parte Jenkins, 105 So. 3d 1250 (Ala. 2012), and clarified its earlier holdings. In upholding the circuit court's adoption of the State's proposed order, the Alabama Supreme Court stated:

> "The circumstances of this case differ from the circumstances presented in Ex parte Ingram and Ex parte Scott. In both of those cases it was clear from evidence before this Court that the orders signed by the trial court were not the product of the trial court's independent judgment. In Ingram, that fact was clear from the statements contained in the order regarding the trial judge's 'personal knowledge' and

> observations of Ingram's capital-murder trial when the trial judge signing the proposed Rule 32 order did not preside over Ingram's capital-murder trial. In Ex parte Scott, that fact was clear from the materials before this Court, which contained the State's responsive pleading adopted by the trial court as its order. In this case, however, there is nothing definitive in the record or on the face of the order that indicates that the order is not the product of the trial court's independent judgment.
>
> "....
>
> "This Court's decision today should not be read as entitling a petitioner to relief in only those factual scenarios similar to those presented in Ex parte Ingram and Ex parte Scott. A Rule 32 petitioner would be entitled to relief in any factual scenario when the record before this Court clearly establishes that the order signed by the trial court denying postconviction relief is not the product of the trial court's independent judgment. See Ex parte Ingram."

Ex parte Jenkins, 105 So. 3d at 1260. "Alabama courts have consistently held that even when a trial court adopts verbatim a party's proposed order, the findings of fact and conclusions of law are those of the trial court and they may be reversed only if they are clearly erroneous." McGahee v. State, 885 So. 2d 191, 229–30 (Ala. Crim. App. 2003).

The order in this case suffered from none of the defects present in the above-cited cases. The order did not contain references to the author's personal observations when, in fact, the postconviction judge

was not the judge who presided over the trial. Nor was the order adopted from pleadings made by either party. In a similar case upholding the lower court's adoption of a proposed order, this Court stated:

> "Here, the fact situation is distinguishable from the fact situations in both Ex parte Ingram and Ex parte Scott. In this case, the circuit judge who denied McWhorter's postconviction petition did not preside at McWhorter's trial; however, in the order denying McWhorter's postconviction petition the court did not profess to have personal knowledge of the performance of McWhorter's trial counsel. Further, the circuit court in this case did not base its order denying McWhorter's postconviction petition upon the State's initial answer to the postconviction petition. Instead, after numerous pleadings, and after the postconviction evidentiary hearing on McWhorter's Rule 32 claims, the court allowed submission of briefs. Both the State and McWhorter submitted proposed orders, and McWhorter submitted a post-hearing brief. McWhorter did not object in his post-hearing brief to the possibility of the circuit court's adopting the State's proposed order. The circuit court did not issue its final order until several weeks after both the State and McWhorter had submitted their proposed orders and McWhorter had filed his post-hearing brief."

McWhorter v. State, 142 So. 3d 1195, 1229 (Ala. Crim. App. 2011).

The same is true in this case. For the above reasons, we find no error in the postconviction-court's adoption, in part, of Lewis's proposed order granting relief in the penalty phase. The State is due no relief on this claim.

B.

The State next argues that the adoption of Lewis's proposed order was erroneous because, it says, the order relies too heavily on the ABA Guidelines for counsel's performance in a death-penalty case, which, it says, resulted in a "mechanistic approach to [the] Strickland analysis." (State's brief at p. 27.) It further argues: "Though the ABA Guidelines may serve as guides for evaluating attorney performance, they are not proper measures of constitutionally adequate performance." (State's brief at p. 27.) It relies on the United States Supreme Court's decision in Bobby v. Van Hook, 558 U.S. 4 (2009), to support its argument.

The Van Hook Court, when reversing the lower's court's decision granting habeas corpus relief found that the lower court had improperly relied on the American Bars Association ("ABA") Guidelines when reviewing counsel's performance at the penalty phase of a capital-murder trial.

> "Judging counsel's conduct in the 1980's on the basis of these 2003 Guidelines -- without even pausing to consider whether they reflected the prevailing professional practice at the time of the trial -- was error.
>
> "To make matters worse, the Court of Appeals (following

> Circuit precedent) treated the ABA's 2003 Guidelines not merely as evidence of what reasonably diligent attorneys would do, but as inexorable commands with which all capital defense counsel 'must fully comply.' [Van Hook v. Anderson,] 560 F.3d, [523] at 526 [(6th Cir. 2009)] (quoting Dickerson v. Bagley, 453 F.3d 690, 693 (C.A.6 2006)). Strickland stressed, however, that 'American Bar Association standards and the like' are 'only guides' to what reasonableness means, not its definition. 466 U.S., at 688, 104 S.Ct. 2052. We have since regarded them as such. See Wiggins v. Smith, 539 U.S. 510, 524, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). What we have said of state requirements is a fortiori true of standards set by private organizations: '[W]hile States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices.' Roe v. Flores–Ortega, 528 U.S. 470, 479, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000)."

Van Hook, 558 U.S. at 8-9.

In discussing the ABA Guidelines, the United States Court of Appeals for the Eleventh Circuit has stated:

> "The ABA Guidelines do not establish independent standards for counsel; rather, they are merely guides to be considered in determining whether an attorney's conduct was reasonable. Strickland, 466 U.S. at 688, 104 S.Ct. at 2065 ('Prevailing norms as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable, but they are only guides.'); see also Bobby v. Van Hook, 558 U.S. 4, 8–9, 130 S.Ct. 13, 17, 175 L.Ed.2d 255 (2009) (rejecting the treatment of ABA Guidelines as 'inexorable commands with which all capital defense counsel must fully

> comply' (internal quotation marks omitted)). The ABA Guidelines 'can be useful as "guides" to what reasonableness entails, but only to the extent that they describe the professional norms prevailing when the representation took place.' Van Hook, 558 U.S. at 7, 130 S.Ct. at 16."

Anderson v. Secretary, Fla. Dep't of Corr., 752 F.3d 881, 904 (11th Cir. 2014). Federal courts have relied on the standards set forth in the ABA Guidelines to assess whether counsel's investigation was reasonable.

> "When assessing the reasonableness of an attorney's performance, the Supreme Court has looked to standards promulgated by the American Bar Association (ABA) as appropriate guides. See Wiggins [v. Smith], 539 U.S. [510] at 524, 123 S.Ct. [2527] at 2536–37 [(2003)]; see also [Bobby v.] Van Hook, 558 U.S. [4] at 7–8, 130 S.Ct. [13] at 17 [(2009)] (recognizing that in 1985, the ABA standards -- which we can look to as 'guides' -- provided that '[i]nformation concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant [to a mitigation investigation], as will mitigating circumstances surrounding the commission of the offense itself' (alteration in original)); Rompilla [v. Beard], 545 U.S. [374] at 387, 125 S.Ct. [2456] at 2465–66 [(2005)]; Williams [v. Taylor], 529 U.S. [362] at 396, 120 S.Ct. [1495] at 1514–15 [(2000)]."

Daniel v. Commissioner, Alabama Dep't of Corr., 822 F.3d 1248, 1262-63 (11th Cir. 2016) (footnote omitted). As stated above, Van Hook addressed an attorney's performance at the penalty phase of a capital-murder trial

that took place in 1985. Prevailing standards of what constitutes a reasonable investigation for mitigation in a capital-murder case have evolved since and are currently more in keeping with the ABA Guidelines as noted in the above cases.

This Court finds that the postconviction court's references in its order to the ABA Guidelines did not limit the review to which a defendant is entitled under Strickland. Clearly, the postconviction court was aware of, and applied, the appropriate law. Therefore, the State is due no relief on this claim.

C.

The State further argues that the postconviction court's order was erroneous because, it says, the order contained material and factual errors. The State asserts that, based on language in Ex parte Ingram, the Alabama Supreme Court has found that "patently erroneous" statements in an adopted order may constitute reversible error.

As stated above, the Alabama Supreme Court in Ingram reversed the circuit court's adoption of a proposed order based, in part, on the nature of the erroneous statements in that order. Specifically, in Ingram

the circuit court made statements that "based on his personal knowledge" when, in fact, the judge presiding over the postconviction proceedings was not the same judge who had presided over Ingram's trial.

1.

First, the State asserts that the postconviction court erroneously found that counsel's preparation for the penalty phase was unreasonable based, in part, on the fact that Dr. Kimberly Ackerson could not recall the scope of her "employment in the case," when, in fact, the court ignored her trial testimony. Dr. Ackerson testified at Lewis's trial that she had been retained to "do an interview and assessment of the defendant, in particular looking at his background history, his life history and also to assess his mental status and cognitive status." (Trial R. 573.)

At the evidentiary hearing, Dr. Ackerson testified that she is a forensic psychologist and that her records reflected that she met with Lewis on April 12, 2007. The following occurred:

> "[Petitioner's counsel]: Do your notes reflect the purpose of why you were hired?
>
> "[Dr. Ackerson]: They do not.
>
> "[Petitioner's counsel]: Do you have any recollection of why

> you were hired in this case?
>
> "[Dr. Ackerson]: No definitive recollection.
>
> "[Petitioner's counsel]: Can you give us your best answer based upon the review of your records and the time that you spent?
>
> "[Dr. Ackerson]: From the information I have in front of me, it would have been one of two things. One, it would have been at this time I was often called by some defense attorneys in capital cases to do intellectual evaluations and supplemental interviews to discern whether there might be an Atkins [v. Virginia, 536 U.S. 304 (2002),] issue that was relevant or some issue regarding IQ. That might become important for the issue of mitigation. Or I was asked to complete as much of a mitigation evaluation that I could within the time that I had.
>
> "....
>
> "[Dr. Ackerson]: Your Honor, it is very possible, based on a review of everything and especially after provided information about my billing, that I may have been called at the last minute and was told to do what I could as far as preparing for mitigation."

(R. 1356-58.) Dr. Ackerson also said that her notes reflected that she had not conducted a "full blown mitigation" investigation. (R. 1360.) She testified that she did not review any DHR files, that she did not review any medical records, and that she billed for only five hours of her out-of-court work on the case -- three hours conducting the evaluation of Lewis,

one hour scoring the test results, and one hour conducting collateral interviews. (R. 223.)

The trial record shows that counsel moved for funds for a mitigation expert on February 26, 2007 and that that motion was granted on February 28, 2007. Lewis's case was set for trial on May 14, 2007. Dr. Ackerson testified that her first work on the case was when she evaluated Lewis on April 12, 2007. (R. 1359.)

Regardless of the language used by the postconviction court, it is clear from Dr. Ackerson's testimony that her late involvement in the case prevented her from conducting a "full blown" mitigation investigation and that she did not receive any files from counsel that would have assisted in her investigation. Thus, we cannot say that the postconviction court's characterization of Dr. Ackerson's work was clearly erroneous. For this reason, the State is due no relief on this claim.

2.

Second, the State attacks the following statement from the postconviction court's order because, it says, it mischaracterized the role of Hall in the penalty phase. "The testimony presented at the evidentiary

hearing established that Ms. Hall did nothing to prepare for the penalty-phase of this trial." (C. 213.) It asserts that the record showed that Hall did talk with Lewis's mother.

The postconviction court's statement is supported by the record. Mathis testified that Hall was in charge of the penalty phase. Postconviction counsel questioned Hall, in depth, about what she did in preparation for the penalty phase. Hall testified that she only spoke to Lewis's mother and that his mother refused to testify. She did not talk to any of his school teachers or other family members, nor did she obtain any medical or DHR records. (R. 736.) Mathis testified: "[Hall] was originally going to handle the penalty phase and as things got further along and I got to asking, I found out she had not." (R. 106.) The postconviction court questioned Mathis regarding when he realized nothing had been done for the penalty phase. Mathis said: "Up to that point I was under the impression that cocounsel was doing the mitigation aspect of this thing. When I realized that nothing had been done, I felt like I needed to go ahead and do something now." (R. 224.) The postconviction court credited the testimony of Mathis. This credibility

decision is entitled to great deference on appeal. See Gissendanner, supra.

Therefore, the postconviction court's characterization of Hall's actions as they related to the penalty phase was not clearly erroneous. Thus, the State is due no relief on this claim.

3.

Third, the State argues that the postconviction court erred in admitting the testimony of Dawn Jenkins, a mitigation expert, when it was clear that Jenkins could not have testified in Lewis's trial. It relies on the case of Horsley v. Alabama, 45 F.3d 1486 (11th Cir. 1995), to support its argument.

In Horsley, the United States Court of Appeals for the Eleventh Circuit held:

> "To determine whether Horsley has met this burden we look to all the circumstances of the case and consider all the evidence presented. See Strickland, 466 U.S. at 695-97, 104 S.Ct. at 2069. Based on a review of the record, we conclude that Horsley has made no showing that it was reasonably probable that an ordinary, reasonable lawyer given the constraints of time and money Horsley's counsel faced and using reasonable diligence would have discovered mental health experts who would have testified as did Dr. Phillips and Dr. Lyman. That experts were found who would testify

> favorably almost twenty years later is irrelevant. The record in this case simply does not demonstrate that either of Horsley's experts would have come to Monroe County, Alabama to testify in 1977. The record also does not show that other experts who would testify favorably to the plaintiff would have been available at that time. The record fails to demonstrate what kind and how much investigation a reasonable lawyer would have made in the circumstances of this case. As in Elledge [v. Dugger, 823 F.2d 1439 (11th Cir. 1987),] we make no comment on whether similar experts were reasonably discoverable or whether a source of funds would have made their testimony possible. We merely hold that the record reveals too little to demonstrate the likelihood of such an occurrence. Accordingly, Horsley has failed to demonstrate that he was prejudiced by counsels' alleged failure to investigate his mental condition and failure to produce a favorable expert witness."

45 F.3d at 1495.[7]

Although Jenkins did testify at the evidentiary hearing, it is clear that the postconviction court did not rely on her testimony when granting relief. In fact, the only reference to Jenkins in the court's order was that Jenkins testified "with a limited scope at the evidentiary hearing." (C. 215.) The order clearly shows that the postconviction court did not rely

[7]We note that Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987), cited in the above quote, was modified on application for rehearing and one issue was withdrawn from that opinion. See Elledge v. Dugger, 833 F. 2d 250 (11th Cir. 1987).

on Jenkins's testimony when granting relief; therefore, the State cannot show how it was harmed by her testimony. For these reasons, the State is due no relief on this claim.

XI.

The State next argues that the postconviction court erred in finding that Lewis's counsel's investigation for the penalty phase and its presentation of mitigation constituted ineffective assistance of counsel.

When examining whether an attorney's performance was ineffective regarding the presentation of mitigation evidence, we must first consider what evidence was, in fact, presented in mitigation.

The record of Lewis's trial shows that only two witnesses testified in mitigation at sentencing: Dr. Kimberley Ackerson, a forensic psychologist, and Jacqueline McClellan, Lewis's cousin. Indeed, the entire mitigation testimony presented by Lewis's counsel consisted of only 13 pages of the record. (Trial R. 573-86.)

Dr. Ackerson testified that she was hired to interview and assess the defendant, look into his background, and his mental status, and his cognitive status. (Trial R. 573.) She testified:

> "I interviewed Mr. Lewis and also some family members. Early on Mr. Lewis was raised in a home in which there was some abuse. He personally was abused by a stepfather, and as a result of his mother failing to address that issue, the Department of Human Resources eventually came in and removed Randy and his three other siblings from the home. Mr. Lewis, at that time, was about 11 years of age. In talking with him -- and that was confirmed by the family -- over a period of about the next seven years, he was placed in about nine different placement areas, homes, facilities, and during that course of time reportedly he did well. There was nothing to indicate that he had any difficulty within these placements or facilities. In speaking with his mother, she indicated that she did not receive any report from the Department of Human Resources of any problem with Mr. Lewis during that time. During that time, because of the placement changes, of course, he had to go to a number of different schools, although he stated that he handled that pretty well and actually did fairly well in school. The results of the assessment that I did reveal that Mr. Lewis does not have any type of serious mental illness."

(Trial R. 573-74.) Dr. Ackerson's direct testimony consisted of less than four pages. (R. 573-76.)

McClellan testified that when she was released from prison, she discovered that Lewis was in a foster home, and she took him to her house. She said that he was a good person, that he helped her with her kids, and that he did a lot of odd jobs to help her around the house.

In sharp contrast, at the postconviction hearing, counsel presented

numerous witnesses who testified about Lewis's difficult upbringing and his abusive stepfather and the impact of that abuse on Lewis. The following relatives testified: Junell Lewis, Lewis's younger sister; Jacqueline McClellan, Lewis's cousin; Anquinetta Lewis, Lewis's younger sister; Cheryl McClellan, Lewis's maternal aunt; Torlandra Floyd, Lewis's cousin; and Deborah Floyd, Lewis's paternal aunt. Others testified in mitigation: Dawn Tucker, Lewis's sixth grade teacher; Geniece Dancy, a foster parent of Lewis's; Barry Swope, a counselor; John Gooden, a longtime friend of Lewis's; Katrina Coleman-McLeod, a longtime friend of Lewis's mother.

Junell Lewis, Lewis's cousin, testified that she and Lewis had the same father, that their father was never around because he was in and out of prison and was frequently on drugs, that they lived in a housing project in Collegeville that was full of drugs and gangs, that they moved out of their grandmother's house when their mother started dating George Dial, that Dial drank a lot and was abusive to Lewis and her mother, that Lewis witnessed his mother being beaten by Dial, that when her mother was pregnant Dial kicked her, that Dial was abusive to Lewis,

that he beat Lewis with a belt buckle, that in one instance he put a pillow over Lewis's face, that Dial told Lewis that he had to beat them because they were demons and worshiped the devil, that DHR finally got involved, that as a result of the abuse Lewis suffered he had a lot of anger, that they frequently went hungry, and that their electricity was frequently shut off.

Jacqueline McClellan, Lewis's cousin, testified that Dial was abusive to Lewis's mother, that one time she witnessed Dial knock Lewis's mother to the ground while she was pregnant and stomp on her, that as the abuse continued she saw that Lewis became angry, that her mother got custody of Lewis in 1997, that there were 10 people living in an apartment in the projects when Lewis lived there with her family, that her mother took Lewis and his siblings "back to DHR," and that Lewis was around 11 at that time. (R. 593.)

John Gooden, Lewis's longtime friend, testified that Lewis told him about the abuse that he suffered at the hands of his stepfather. He said that Dial would put Lewis in a room and not feed him.

Anquinetta Lewis, Lewis's half-sister, testified that Dial would beat

Lewis and his sister but would not beat her because she was Dial's biological child. She said that if Dial came into the house and Lewis was there, Dial would make her go over to Lewis and hit him. He told Lewis, "If you hit her back, I am going to beat you." (R. 655.) She testified:

> "[Dial] just used to beat on [Lewis and his sister]. Like, if they didn't do what he told them to do or what not, he'll hit them. Like if he says take the trash out and they will take the trash probably out an hour or two hours later, he will beat them for not taking the trash out right then and there."

(R. 656.)

Cheryl McClellan, Lewis's maternal aunt, testified that Lewis told her that Dial was abusing him and his siblings, that he would beat them and not touch his own child, that she noticed that Lewis changed after Dial came into their life, that after her sister's children were removed from the home they lived with her for a time, and that Lewis was around 15 years old when he lived with her.

Torlandra Floyd, Lewis's cousin, testified that she was close to Lewis when they were growing up, that they lived in Collegeville, that it was not a safe place to grow up, that Lewis had been exposed to drugs, guns, and gangs, that Lewis told her that Dial was violent and was not a

good person, that Dial let Lewis's younger sister hit and mistreat them, and that as a result of this life Lewis "shut down as far as not talking as much, acting out, being a little aggressive." (R. 1056.) She said that she lost track of Lewis because he had been "switched around from foster home to foster home." (R. 1060.)

Deborah Floyd, Lewis's paternal aunt, testified that her brother was Lewis's father, that when Lewis was a child his father was in prison, that her brother was on and off drugs when Lewis was a child, that Lewis never lived with his father, that Lewis changed after Dial came into his life, that Lewis told her that Dial had been beating him, that Lewis showed her the bruises that he told her had been caused by Dial, that Lewis and his siblings were removed from the home, and that at one time Lewis lived with her.

Barry Swope, a professional counselor, testified that he was Lewis's counselor in 1997, that he worked with Lewis through the Alliance Center Project, that the Project was created to assist in placing children with their siblings, that when Lewis and his brother came into their custody they were placed with "therapeutic foster parents," that Lewis

was placed with the group because his brother Ray had been diagnosed with a mental illness. (R. 823-24.) Swope testified:

> "[T]heir mother was not able to take care of them at the time. They had been physically abused in the past by their father figure, whoever that man was. ... There was a male abuser involved. So, a good bit of physical violence that they witnessed. That I remembered the most is their neighborhood was Collegeville, which at the time -- I don't know what it is now, but it was just notoriously difficult place to live."

(R. 831.)

Dawn Tucker, Lewis's sixth grade school teacher, testified that Lewis was behind when he came to her class, that they worked on catching him up, that she spent time with Lewis outside the classroom, that he started going to church with her family, that Lewis lived in a trailer with his aunt, and that she kept track of Lewis after he left her class.

Geniece Dancy, one of Lewis's foster mothers, testified that Lewis was placed in her home when he was 11 or 12 year old, that he was in her home the first time for 1 year, that he stayed in her home the second time for just a few months, that she was informed that Lewis and his brother had been taken from his home because of an abusive father, that

the brothers were concerned for their mother because they were not at home to protect her from their stepfather, that she had a bond with Lewis and had considered adopting him, and that she had not been contacted by counsel before Lewis's trial.

Katrina Coleman-McLeod, a longtime friend of Lewis's mother, testified that she had known Lewis's mother since they were in school, that she knew George Dial, that Lewis's mother was upset when her children were taken from her custody, that for her to get custody of her children she would have to "get George out of her life," that Lewis was a good child with good manners, that she had maintained contact with Lewis since he had been in prison, and that she had not been contacted to testify at Lewis's trial. (R. 960.)

Numerous DHR records and other exhibits were presented at the postconviction hearing. These records showed that Dial's abuse was reported to DHR in 1991, but no further action was taken by that agency. In 1997, Lewis's cousin reported the abuse and after an investigation Lewis was removed from the home when he was 11 years of age. Lewis lived in more than 10 foster homes until DHR removed him from foster

care when he was 15 years of age. An evaluation conducted on Lewis in December 1998, when he was 12 years of age, reflects that, when he was examined by a psychiatric consultant, that consultant wrote: "there were a number of bruises all over his body to indicate the tendency towards abuse." (C. 3381.)

> "In Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), the United States Supreme Court addressed a claim that counsel was ineffective for failing to adequately investigate and present mitigation evidence. The Wiggins Court found that counsel's performance was ineffective because counsel failed to investigate and present evidence that Wiggins had a dysfunctional and bleak upbringing, that he suffered from substantial physical and sexual abuse, and that he had mental deficiencies."

McWhorter v. State, 142 So. 3d 1195, 1231 (Ala. Crim. App. 2011).

> "Whether trial counsel were ineffective for not adequately investigating and presenting mitigating evidence '"turns upon various factors, including the reasonableness of counsel's investigation, the mitigation evidence that was actually presented, and the mitigation evidence that could have been presented."' McMillan v. State, 258 So. 3d 1154, 1168 (Ala. Crim. App. 2017) (quoting Commonwealth v. Simpson, 620 Pa. 60, 100, 66 A.3d 253, 277 (2013))."

Woodward v. State, 276 So. 3d 713, 773-74 (Ala. Crim. App. 2018).

> "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 695.

Mathis testified that he did hire a mitigation expert, Dr. Ackerson,[8] however, it is clear that this expert was hired too late to conduct an extensive mitigation investigation or to uncover the mitigation that was presented at the postconviction court evidentiary hearing. In fact, Dr. Ackerson testified that she was not hired until five weeks before trial, that counsel had furnished her with no DHR records, no school records, and no medical records. Indeed, Dr. Ackerson billed for only five hours work on preparing the case and said that she had not conducted a "full blown" mitigation investigation. Only a perfunctory investigation of mitigation evidence was performed and only a meager portion of mitigation evidence was presented at sentencing.

Giving the postconviction court's findings the deference that we

---

[8]"[T]rial counsel is not ineffective for delegating the responsibility of investigating mitigation evidence to subordinates." Marshall v. State, 182 So. 3d 573, 601 (Ala. Crim. App. 2014).

must, we cannot say that the court's findings are clearly erroneous. See Gissendanner, supra. Accordingly, we affirm the postconviction court's grant of Lewis's petition as it relates to the penalty phase of his capital-murder trial. For these reasons, the State is due no relief on this claim.

XII.

The State next argues that the postconviction-court erred in finding that Lewis's counsel was ineffective for failing to present the testimony of a neuropsychologist, Dr. Robert Shaffer. Lewis argues that this claim is not properly before this Court because, he says, the postconviction court did not issue a ruling on this claim.

A review of the record shows that Dr. Shaffer's name is not mentioned in the order granting relief and there is no indication that the postconviction court considered that issue. Thus, "no adverse ruling exists from which appellant may appeal." Trawick v. State, 431 So. 2d 574, 578 (Ala. Crim. App. 1983). We agree that there is nothing for this Court to review because the lower court did not issue a ruling on this claim.

For the foregoing reasons, we affirm the postconviction court's order

denying relief as to the claims relating to the guilt-phase of Lewis's capital-murder trial and affirm that portion of the order granting Lewis relief as it relates the penalty phase of Lewis's capital-murder trial.

APPEAL -- AFFIRMED.

CROSS-APPEAL -- AFFIRMED.

Windom, P.J., and McCool and Minor, JJ., concur. Cole, J., recuses himself.