REL: 06/14/2013

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2012-2013

CR-05-1805

ToForest Onesha Johnson

v.

State of Alabama

Appeal from Jefferson Circuit Court
(CC-96-386.60)

On Return to Remand

JOINER, Judge.[1]

ToForest Onesha Johnson, an inmate on death row at Holman Correctional Facility, appeals the circuit court's dismissal of his petition for postconviction relief filed pursuant to

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[1]This case was originally assigned to another member of this Court; it was reassigned to Judge Joiner on March 1, 2011.

Rule 32, Ala. R. Crim. P.

In August 1998, Johnson was convicted of murdering Jefferson County Deputy Sheriff William G. Hardy, while Deputy Hardy was on duty or "because of some official or job-related act or performance." § 13A-5-40(a)(5), Ala. Code 1975. The jury, by a vote of 10 to 2, recommended that Johnson be sentenced to death. The circuit court followed the jury's recommendation and sentenced Johnson to death. Johnson's conviction and sentence were affirmed on direct appeal. See Johnson v. State, 823 So. 2d 1 (Ala. Crim. App.), cert. denied, 823 So. 2d 57 (Ala. 2001). This Court issued the certificate of judgment, making the case final, on December 14, 2001. See Rule 41, Ala. R. App. P.

In April 2003, Johnson filed a timely postconviction petition in the Jefferson Circuit Court attacking his conviction and sentence.[2] Johnson filed amended petitions in July 2003 and July 2004. The circuit court summarily dismissed Johnson's third amended postconviction petition, and Johnson appealed to this Court. On September 28, 2007, this

[2]Effective August 1, 2002, the statute of limitations to file a postconviction petition was shortened from two years to to one year. Rule 32.2(c), Ala. R. Crim. P.

Court affirmed, in large part, the circuit court's dismissal but remanded the case for that court to conduct an evidentiary hearing on 14 claims of ineffective assistance of counsel and for that court to address 5 claims that were not specifically addressed in the court's order dismissing Johnson's petition. See Johnson v. State, [Ms. CR-05-1805, Sept. 28, 2007] ___ So. 3d ___ (Ala. Crim. App. 2007). The circuit court has filed its return to remand with this Court, and new briefs have been submitted on behalf of Johnson and the State. We address only those issues raised in Johnson's brief on return to remand.

The evidence supporting Johnson's conviction was thoroughly detailed in this Court's opinions on direct appeal and in our opinion on appeal from the dismissal of his Rule 32 petition; therefore, we will give only a brief synopsis of the facts. The State's evidence tended to show the following. In July 1995 Deputy Hardy was "moonlighting" as a security guard at a Birmingham hotel and was working the night of July 18-19, 1995. At around 12:30 a.m. on July 19 the manager of the hotel heard two "popping noises" and attempted to contact Deputy Hardy by radio. When he was unable to reach Deputy

Hardy, he walked around the building and found Deputy Hardy's body lying in the rear parking lot. The medical examiner testified that Deputy Hardy died from multiple gunshot wounds to his forehead and jaw. Johnson was stopped by police in the parking lot of a motel in Homewood at approximately 4:00 a.m. on the morning of July 19, 1995, in a vehicle matching the general description of a vehicle seen leaving the hotel after Deputy Hardy was shot. Johnson was with Ardragus Ford, Latanya Henderson, and Yolanda Chambers. Henderson testified that she went with Johnson, Ford, and Chambers to eat at around 2:00 a.m. that morning, that Johnson had a gun with him, and that Johnson hid the gun under the dashboard when police approached his vehicle.

Testimony also showed that while incarcerated at the Jefferson County jail Johnson made several telephone calls. State witness Violet Ellison testified that in August 1995 her daughter received telephone calls from the Jefferson County jail and her daughter would forward those calls to a third party and lay the telephone down and walk away. Ellison said that she listened in on one of those conversations and heard Johnson admit to a girl named Daisy that he shot Deputy Hardy

in the head.

Standard of Review

Johnson initiated this postconviction proceeding pursuant to Rule 32, Ala. R. Crim. P. Rule 32.3, Ala. R. Crim. P., provides:

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

"The standard of review this Court uses in evaluating the rulings made by the trial court [in a postconviction proceeding] is whether the trial court abused its discretion." Hunt v. State, 940 So. 2d 1041, 1049 (Ala. Crim. App. 2005). "[W]e may affirm a circuit court's ruling on a postconviction petition if it is correct for any reason." Smith v. State, [Ms. CR-08-0638, Sept. 30, 2011] ___ So. 3d ___, ___ (Ala. Crim. App. 2011).

In Johnson's direct appeal, this Court applied the plain-error standard of review and reviewed the claims Johnson raised regardless of whether the issues had been properly preserved for appellate review. See Rule 45A, Ala. R. App. P.

The plain-error standard, however, does not apply to the review of the denial of a postconviction petition challenging a death sentence. See James v. State, 61 So. 3d 357 (Ala. Crim. App. 2010). Accordingly, this Court will not consider Johnson's claims that have not been properly preserved for appellate review.

With these principles in mind, we review the claims Johnson raises in his brief on return to remand.

I.

Johnson first argues that the circuit court denied him a full and fair postconviction evidentiary hearing by denying certain motions he filed after this case was remanded. He raises several grounds in support of this contention.

A.

First, Johnson argues that the circuit court erred in denying his motion for discovery. In November 2007, Johnson filed a 25-page discovery motion requesting records from the Alabama Department of Human Resources related to Johnson and to his immediate family members; all jail records and records from the Department of Corrections related to Johnson; all mental-health records related to Johnson and his family

members; all records related to Johnson from the Alabama Board of Pardons and Paroles; all records related to Johnson and his brother from the Alabama Department of Youth Services; all files from the Jefferson County juvenile court related to Johnson; all law-enforcement records related to Johnson and his family members; all prosecution files related to Quintez Wilson and Omar Berry;[3] and all records from the Department of Corrections and from the Jefferson County coroner related to Investigator Steve Saxon.[4] (Return to Remand, C. 112-36.) Johnson also moved for discovery of the institutional files of Fred Carter.[5] The circuit court granted the motion for discovery of Carter's files but denied the motion in all other respects. (Return to Remand, C. 211-12; 214-15.)

When this Court remanded this case to the lower court we directed that court to hold an evidentiary hearing and to file its findings of fact within 70 days. We stated: "On remand,

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[3]Wilson and Berry were two of Johnson's codefendants.

[4]Trial counsel retained Saxon to assist in investigating Johnson's case.

[5]In the postconviction proceeding, Johnson alleged that Carter was an inmate at the Jefferson County jail at the same time as Johnson and was known to impersonate other inmates on the telephone.

the trial court shall conduct an evidentiary hearing on those claims and enter specific written findings." This Court did not direct the circuit court to restart the proceedings or to allow discovery. By finding that Johnson was entitled to an evidentiary hearing on certain claims of ineffective assistance of counsel, we determined that Johnson had met his burden of pleading those claims. Allowing discovery, at this late juncture, would have exceeded the scope of this Court's remand directions. "[A]ny act by a trial court beyond the scope of an appellate court's remand order is void for lack of jurisdiction." Anderson v. State, 796 So. 2d 1151, 1156 (Ala. Crim. App. 2000).

Moreover, regarding the standard for discovery in postconviction proceedings, the Alabama Supreme Court stated in Ex parte Land, 775 So. 2d 847 (Ala. 2000):

> "We agree with the Court of Criminal Appeals that 'good cause' is the appropriate standard by which to judge postconviction discovery motions. In fact, other courts have adopted a similar 'good-cause' or 'good-reason' standard for the postconviction discovery process. See [State v.] Marshall, [148 N.J. 89, 690 A.2d 1 (1997)]; State v. Lewis, 656 So. 2d 1248 (Fla. 1994); People ex rel. Daley v. Fitzgerald, 123 Ill. 2d 175, 121 Ill. Dec. 937, 526 N.E.2d 131 (1988). As noted by the Illinois Supreme Court, the good-cause standard guards against potential abuse of the postconviction

discovery process. See Fitzgerald, supra, 123 Ill. 2d at 183, 121 Ill. Dec. 937, 526 N.E.2d at 135. We also agree that New Jersey's Marshall case provides a good working framework for reviewing discovery motions and orders in capital cases. In addition, we are bound by our own rule that 'an evidentiary hearing must be held on a [petition for postconviction relief] which is meritorious on its face, i.e., one which contains matters and allegations (such as ineffective assistance of counsel) which, if true, entitle the petitioner to relief.' Ex parte Boatwright, 471 So. 2d 1257, 1258 (Ala. 1985).

"We emphasize that this holding -- that postconviction discovery motions are to be judged by a good-cause standard -- does not automatically allow discovery under Rule 32, Ala. R. Crim. P., and that it does not expand the discovery procedures within Rule 32.4. Accord Lewis, supra, 656 So. 2d at 1250, wherein the Florida Supreme Court stated that the good-cause standard did not affect Florida's rules relating to postconviction procedure, which are similar to ours. By adopting this standard, we are only recognizing that a trial court, upon a petitioner's showing of good cause, may exercise its inherent authority to order discovery in a proceeding for postconviction relief. In addition, we caution that postconviction discovery does not provide a petitioner with a right to 'fish' through official files and that it 'is not a device for investigating possible claims, but a means of vindicating actual claims.' People v. Gonzalez, 51 Cal. 3d 1179, 1260, 800 P.2d 1159, 1206, 275 Cal. Rptr. 729, 776 (1990), cert. denied, 502 U.S. 835, 112 S. Ct. 117, 116 L. Ed. 2d 85 (1991). Instead, in order to obtain discovery, a petitioner must allege facts that, if proved, would entitle him to relief. Cf. Porter v. Wainwright, 805 F.2d 930, 933 (11th Cir. 1986) ('a hearing [on a habeas corpus petition] is not required unless the petitioner alleges facts which, if proved, would entitle him to federal

habeas relief'), cert. denied, 482 U.S. 918, 919, 107 S. Ct. 3195, 96 L. Ed. 2d 682 (1987). Furthermore, a petitioner seeking postconviction discovery also must meet the requirements of Rule 32.6(b), Ala. R. Crim. P., which states:

> "'The petition must contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings.'"

775 So. 2d at 852-53 (footnote omitted), overruled on other grounds, State v. Martin, 69 So. 3d 94 (Ala. 2011).

As the Illinois Supreme Court aptly stated in People v. Williams, 209 Ill. 2d 227, 282 Ill. Dec. 824, 807 N.E.2d 448 (2004):

> "[T]he circuit court has the inherent discretionary authority to order discovery in postconviction proceedings. [People v.] Fair, 193 Ill. 2d [256] at 264, 250 Ill. Dec. 284, 738 N.E.2d 500 [(2000)]. This authority must be exercised with caution, because of the potential for abuse of the discovery process and because of the limited scope of postconviction proceedings. Fair, 193 Ill. 2d at 264, 250 Ill. Dec. 284, 738 N.E.2d 500. Thus, discovery should be allowed only after the moving party demonstrates good cause for the request. Fair, 193 Ill. 2d at 264-65, 250 Ill. Dec. 284, 738 N.E.2d 500, citing [People ex rel.] Daley [v. Fitzgerald], 123 Ill. 2d [175] at 183, 121 Ill. Dec. 937, 526 N.E.2d 131 [1988)]."

209 Ill. 2d at 236, 282 Ill. Dec. at 830, 807 N.E.2d at 454.

On appeal, Johnson first asserts that he was entitled to the social-history records, which he does not specifically identify, related to himself and his family members. In regard to discovery of social-history records that are not a defendant's, this Court has stated:

> "The Alabama Supreme Court in [Ex parte] Land, [775 So. 2d 847 (Ala. 2000),] did not address discovery as it relates to confidential files on individuals other than the petitioner. However, this Court has noted that Alabama law protects the confidentiality of DYS [Department of Youth Services] and DHR [Department of Human Resources] records. See §§ 12-15-100 and 12-15-101, and § 38-2-1, Ala. Code 1975. Because these records are confidential, the most a party is entitled to, upon a showing of good cause, is an in camera inspection of the documents by a circuit court. See Gibson v. State, 677 So. 2d 233 (Ala. Crim. App. 1994). A party is not entitled to unfettered access to records that are not related to him and that are maintained by state agencies specifically charged with guarding the confidentiality of those records. See Jackson [v. State, 910 So. 2d 797 (Ala. Crim. App. 2005)]."

Ex parte Perkins, 920 So. 2d 599, 605 (Ala. Crim. App. 2005). Johnson was not entitled to the social-history records of his family members.

Second, Johnson asserts that he was entitled to the personnel files from the Alabama Department of Corrections and

the Jefferson County coroner's office related to Investigator Saxon. This Court in State v. Turner, 976 So. 2d 508 (Ala. Crim. App. 2007), considered whether a petitioner was entitled to discover the personnel files of a law-enforcement officer. In Turner, we adopted the prevailing view and held that, absent a showing of good cause, a petitioner is not entitled to discovery of the personnel files of a law-enforcement officer.

More importantly, in this Court's opinion remanding Johnson's case we held that the circuit court correctly found that the claims related to Saxon were procedurally barred. A petitioner is not entitled to discovery related to a claim that is procedurally barred. See State v. Martin, 4 So. 3d 1196 (Ala. Crim. App. 2008). Thus, Johnson was not entitled to the requested discovery.

Third, Johnson asserts that he was entitled to the prosecution records and police files related to two of his codefendants -- Quintez Wilson and Omar Berry. He argues that he was entitled to these documents because, he says, they would show that the cases against Wilson and Berry had been dismissed because they both had alibis. We disagree.

"A postconviction petitioner fails to show good cause supporting grant of discovery motion when the information is available through less intrusive sources." Dunaway v. State, [Ms. CR-06-0996, Dec. 18, 2009] ___ So. 3d ___, ___ (Ala. Crim. App. 2009). The outcome of Johnson's codefendants' cases was available through less intrusive means than by forcing the State to disclose its entire prosecution and police files.[6] Johnson failed to establish good cause for the grant of discovery of this material because it was available through other means. See Jackson v. State, 910 So. 2d 797 (Ala. Crim. App. 2005).

For the foregoing reasons, we find no error in regard to this claim.

B.

Johnson next argues that the circuit court erred in denying his motion for funds to hire a social worker, Dr. Elizabeth Beck, and a clinical psychologist, Dr. Karen Salekin, and to allow them to testify at the postconviction evidentiary hearing.

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[6]For example, the two attorneys who represented codefendant Ardragus Ford executed affidavits; these affidavits discussed, in depth, the outcome of Ford's case.

In December 2007 after this case was remanded to the circuit court, Johnson moved that the postconviction court approve the expenditure of $5,000 to secure the services of Dr. Beck. (C. 138-49.) Johnson filed a second motion seeking the approval of $5,000 to hire Dr. Salekin. The circuit court denied both motions. (C. 214.)

In this Court's opinion remanding this case to the lower court we held: "Because the law is clear that Rule 32 petitioners are not entitled to funds to hire experts to assist in postconviction litigation, ex parte or otherwise, the trial court did not err in denying the motion. Boyd v. State, 913 So. 2d 1113 (Ala. Crim. App. 2003)." Johnson, ___ So. 3d at ___. The issue of the appointment of experts in this postconviction proceeding was addressed in our original opinion and "[o]n remand, the issues decided by the appellate court become law of the case." Ellis v. State, 705 So. 2d 843, 847 (Ala. Crim. App. 1996).

Moreover,

> "[s]ince a post-conviction petitioner does not have a constitutional right to appointed counsel (People v. Porter, 122 Ill. 2d 64, 73-75, 118 Ill. Dec. 465, 521 N.E.2d 1158 (1988)), there is no constitutional obligation to provide post-conviction counsel with investigative resources. See People v.

> Wright, 149 Ill. 2d 36, 58-62, 171 Ill. Dec. 424, 594 N.E.2d 276(1992). Where no constitutional right is implicated, the decision to appoint an expert, or to authorize funds to hire an expert, rests within the sound discretion of the circuit court. See People v. Hall, 157 Ill. 2d 324, 339-40, 193 Ill. Dec. 98, 626 N.E.2d 131 (1993); Wright, 149 Ill. 2d at 54-58,171 Ill. Dec. 424, 594 N.E.2d 276."

People v. Richardson, 189 Ill. 2d 401, 422, 245 Ill. Dec. 109, 122, 727 N.E.2d 362, 375 (2000). See also State v. Dean, 149 Ohio App. 3d 93, 96-97, 776 N.E.2d 116, 118 (2002) ("A petitioner in a postconviction proceeding is not entitled to the appointment of either an attorney or an expert witness to assist in discovery.").

For the above reasons, the circuit court did not abuse its discretion in denying Johnson's motion for approval of funds to hire a social worker and a clinical psychologist.

C.

Johnson next argues that the postconviction court erred in denying his request to present evidence concerning Investigator Saxon at the evidentiary hearing.

In this Court's opinion remanding this case, we held that the claim that counsel was ineffective for entrusting the investigation of Johnson's case to a "brain-damaged, suicidal, racist, alcoholic homeless man was procedurally barred because

... the claim had been raised and addressed on direct appeal " Johnson, ___ So. 3d at ___. This Court affirmed the circuit court's dismissal of the claims related to this issue. Accordingly, the circuit court acted in compliance with this Court's remand instructions by not allowing the admission of evidence concerning this claim. Thus, we find no error.

D.

Next, Johnson argues that the postconviction court made several erroneous rulings at the postconviction evidentiary hearing that, he says, violated his constitutional rights.

"The Alabama Rules of Evidence apply to Rule 32 proceedings." See Hunt v. State, 940 So. 2d 1041, 1051 (Ala. Crim. App. 2005). As the Illinois Court of Appeals has stated:

> "The rules of evidence are not abandoned during an evidentiary hearing on a postconviction petition. Whether or not evidence is admitted during any hearing is within the sound discretion of the trial court. Such rulings are not reversed unless there is a clear showing of abuse of discretion by the trial court."

People v. Jones, 360 Ill. Dec. 672, 686, 969 N.E.2d 482, 496 (2012).

With these principles in mind, we review Johnson's

claims.

1.

Johnson first argues that the circuit court erred in excluding the transcripts of his audiotaped statements to police because, he says, the statements were "relevant to Claim XIX(F)(3)." In Claim XIX(F)(3) in his petition, Johnson alleged that counsel was ineffective for failing to call alibi witnesses who were named in Johnson's statements to police.

At the postconviction evidentiary hearing, Johnson questioned one of his trial attorneys, Erskine Mathis, about a statement Johnson had made to police. The following occurred:

> "[Postconviction counsel]: Your Honor, I would like to move Exhibit No. 29 into evidence.
>
> "[Assistant attorney general]: For what purpose, Your Honor? I object to it as being immaterial and not relevant. I think Your Honor, that at trial Mr. Mathis and Mr. Bender tried to get these statements admitted into evidence under some argument of completion and Your Honor wouldn't allow it. And I think it went up on appeal and it was affirmed. What is the purpose? [How] is this material?
>
> "The Court: What is the purpose here?
>
> "[Postconviction counsel]: It is relevant to what Mr. Bender and Mr. Mathis knew about what their client had said to the police, information that their client had provided to the police about who

> his alibi witnesses were, where he was that night. It was information that they certainly had at the time of trial.
>
> "The Court: I will sustain the objection as to that statement. You can ask Mr. Mathis whatever you need to ask him.
>
> "[Postconviction counsel]: I'm sorry. As to which statement? The whole statement can't come in.
>
> "The Court: Right. I am sustaining the objection as to that exhibit."

(Return to remand R. 172-73.) At the conclusion of Mathis's testimony, postconviction counsel again moved that the transcript of Johnson's statements be admitted. The circuit court again denied this motion. (Return to remand, Suppl. R. 190-01.)

This Court will not reverse a judgment based on the unlawful admission or exclusion of evidence "unless ... the error complained of has probably injuriously affected substantial rights of the parties." See Rule 45, Ala. R. App. P. Johnson suffered no prejudice as a result of the court's ruling because the court allowed postconviction counsel to question Mathis about the entire contents of the transcripts. Also, at Johnson's trial his attorneys attempted to introduce the contents of Johnson's statement but were unsuccessful.

Attorney Darryl Bender, one of Johnson's trial attorneys, testified that he and Mathis talked to many people who had seen Johnson at a nightclub the night of the murder. It was abundantly clear that counsel was aware of the contents of Johnson's statements to police.

Furthermore, the transcript of Johnson's statement was correctly excluded because Johnson did not lay a proper foundation for its admission. "A typewritten transcript of a recorded conversation is admissible where the officer who listened to the conversation at the time of the recording testifies that the transcript accurately reflected the conversation." Hawkins v. State, 443 So. 2d 1312, 1315 (Ala. Crim. App. 1983). "[T]he general rule is that the typewritten transcripts have been held admissible in evidence if their accuracy and reliability is clearly established." 443 So. 2d at 1315. Johnson failed to present testimony to satisfy the foundation requirements in regard to this evidence.

The circuit court did not abuse its discretion in excluding this evidence.

2.

Johnson next argues that the circuit court erred in not

allowing Fred Carter's entire file from the Department of Corrections ("DOC") to be admitted into evidence at the postconviction evidentiary hearing. Johnson pleaded that Carter was an inmate at the Jefferson County jail at the same time as Johnson, that he was known to impersonate other inmates on the telephone, and that counsel was ineffective for failing to present evidence indicating that Carter could have impersonated Johnson in the telephone conversation that Violet Ellison overheard and as to which she testified.

The record shows that during Mathis's testimony, Johnson offered Carter's entire DOC file into evidence. The State objected and the following occurred:

> "[Assistant attorney general]: Mr. Bender testified extensively, Your Honor, concerning Mr. Carter and the fact that Mr. Carter, in Mr. Bender's opinion, was not a bad witness for Mr. Johnson; as a matter of fact, he felt he was helpful.
>
> "I wouldn't object to the -- there are two reports. Again, these are not incident reports. These are reports from the St. Clair County Correctional Facility which would have been part of the Department of Corrections record.
>
> "The Court: Dated when?
>
> "[Assistant attorney general]: One is dated February 6, 1997, and one is dated December 7, 1996, which are the only two that [Johnson's counsel] has

> referred to in these entire records, indicating basically that Mr. Carter lied to a corrections officer on those two occasions. I don't have a problem with those two going in.
>
> "What I am trying to prevent, Your Honor -- and apparently not doing a very good job of it -- is to keep a record from getting voluminous, which every time I try to do that, it never does a lot of good. But I still keep trying. I will leave it to Your Honor.
>
> "The Court: What is the response by the defense?
>
> "[Postconviction counsel]: If the two incident reports are admitted as well as what is also contained in his correctional record -- or authenticated copies -- of that he was convicted for rape, robbery, sodomy, and burglary -- and the rest is excluded, that is fine.
>
> "....
>
> "The Court: This is what I will do. With regard to 39 -- and we are trying to narrow down the pertinent part of that exhibit that the defense wishes to make part of the record. And in an effort to help keep the voluminous record not so voluminous, I will make a photocopy of these reports and other documents, including the affidavit verifying through Ms. [Kim] Thomas that this is a true and correct part of the Department of Corrections records; and we will make it as Defendant's exhibit 39A and admit 39A in this case. I will give these back to you so that you can maintain them for your file."

(Return to remand, R. 303-06 (emphasis added).)

The above quote shows that an agreement was reached pursuant to which the circuit court would admit the reports in

Carter's DOC file that were filed against Carter as a result of his lying to correctional officers. Johnson's counsel agreed with the court's method of handling this voluminous exhibit. Thus, Johnson has no adverse ruling from which to appeal. "[A]n adverse ruling is a prerequisite to appellate review. ..." Roberts v. State, 579 So. 2d 62, 65 (Ala. Crim. App. 1991).

Moreover, even if the entire contents of Carter's DOC file were relevant, Rule 403, Ala. R. Evid., specifically provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Carter's entire DOC file was properly excluded pursuant to Rule 403, Ala. R. Evid. The circuit court did not abuse its discretion in excluding this evidence.

3.

Johnson next argues that the circuit court erred in denying his motion to admit into evidence Violet Ellison's financial records. Although these exhibits were not admitted,

they were marked and made a part of the record, and we have examined them. These exhibits comprise approximately 300 pages and consist of copies of bankruptcy court filings and other civil court filings for recovery of moneys from a Theodore Ellison and a Violet Ellison. The cases range in age from a 1977 civil action against Theodore Ellison to a 1996 action against Theodore Ellison. Only 3 of the 23 cases were dated after 1990 and half of the cases do not name Violet Ellison but name Theodore Ellison. Johnson was tried in 1998. The one exhibit that named Violet Ellison that was filed after 1990 shows that the case against her was dismissed.

The following occurred at the conclusion of the postconviction evidentiary hearing:

> "The Court: All of these exhibits relate to the financial condition of [Violet Ellison]?
>
> "[Postconviction counsel]: Yes.
>
> "The Court: What numbers are you offering?
>
> "[Postconviction counsel]: I am offering Number 5, I am offering Number 6, which is the matter of Theodore Ellison and Violet Ellison. They are husband and wife.
>
> "I am offering number 7. The debtor is Theodore Ellison, who is married to Violet Ellison at the time. Violet Ellison is not named as an official debtor on Number 7.

> "And then 8 through 27 are all cases involving Ms. Ellison.
>
> "[Assistant attorney general]: Again, I object to anything that hasn't got Ms. Ellison's name on it to start with.
>
> "As far as 7 through 27 -- or 8 through 27 -- I will have to go through them line by line, Judge, very quickly because some of the exhibits I got had absolutely nothing to do with Ms. Ellison. It may have had something to do with her husband, which there is no evidence that Theo is her husband. I am going to argue that today.
>
> "The Court: There is no need for you to go through. I am going to deny the request for admitting Defendant's exhibits 5 through 27.
>
> "[Assistant attorney general]: Yes, sir."

(Return to remand, R. 306-09.)

"'The admissibility of evidence, which has been challenged as irrelevant and remote, is within the sound discretion of the trial judge. A trial judge's decision to admit or exclude such evidence will not be overturned on the appeal absent an abuse of his discretion.'" Harvey v. State, 579 So. 2d 22, 26 (Ala. Crim. App. 1990) (quoting Primm v. State, 473 So. 2d 1149, 1157 (Ala. Crim. App. 1985)).

Many of the exhibits are not certified copies and some are illegible. Johnson did not show that the exhibits involved the same Violet Ellison who testified at Johnson's

case. There was nothing presented at the postconviction hearing that showed that Ellison had a financial motive to testify at Johnson's trial. These exhibits were not admissible because no proper foundation had been established and because they were irrelevant and remote. For these reasons, we find that the circuit court did not abuse its discretion in excluding these documents.

4.

Johnson argues that the circuit court erred in denying his motion to admit an affidavit executed by Mathis. During Mathis's testimony, Johnson attempted to introduce an affidavit that had been executed by Mathis before the evidentiary hearing. The State objected and argued that it had no notice of the affidavit and that it questioned its purpose given that Mathis was currently testifying. The circuit court sustained the State's objection and did not allow the affidavit to be admitted into evidence. (Return to remand, R. 168-69.)

Rule 32.9(a), Ala. R. Crim. P., states, in pertinent part: "The court in its discretion may take evidence by affidavits ... in lieu of an evidentiary hearing...." When

addressing the scope of this Rule, this Court has stated:

> "Rule 32.9(a), Ala. R. Crim. P., is discretionary, not mandatory and leaves the question of the admission of evidence by affidavits to the discretion of the trial court. This Court has upheld a circuit court's exclusion of affidavits when those affidavits were introduced for the first time at the Rule 32 evidentiary hearing."

Hunt v. State, 940 So. 2d 1041, 1050 (Ala. Crim. App. 2005). The circuit court did not err in excluding the affidavit because the State had not been served with a copy of the affidavit. See Hunt, supra.

Moreover, in his brief on return to remand, Johnson argues for the first time that the affidavit was admissible under Rule 801(D)(1)(a), Ala. R. Evid., because, he says, it was a prior inconsistent statement. Johnson did not make an offer of proof concerning this affidavit. "The appellant failed to make an offer of proof. Thus, this issue is not preserved for our review." Knight v. State, 710 So. 2d 511, 518 (Ala. Crim. App. 1997).[7]

For these reasons, we find no error in the circuit

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[7]In his brief on return to remand, Johnson attaches a copy of the affidavit. However, "attachments to briefs are not considered part of the record and therefore cannot be considered on appeal." Huff v. State, 596 So. 2d 16, 19 (Ala. Crim. App. 1991).

court's ruling excluding Mathis's affidavit.

5.

Johnson next argues that the circuit court erred in denying his motion to admit the transcript of Ardragus Ford's second trial. Johnson argues, in one paragraph in his brief to this Court, that this transcript was relevant to his claim that counsel was ineffective for failing to argue the State's inconsistent theories in Ford's and Johnson's trials.

Other evidence in the record detailed the inconsistent State theories at both trials. For example, the record includes affidavits from Richard Jaffe and J. Derek Drennan, the attorneys who represented Ford in his two trials. Both affidavits detail the State's inconsistent theories in Ford's and Johnson's cases. Also, it appears that the contents of a great deal of Ford's second trial were attached to various affidavits and the transcript of Ford's first trial was admitted into evidence. This Court can find no error that harmed Johnson. "The Alabama Supreme Court has held that the exclusion of admissible evidence 'does not constitute reversible error' if the evidence 'would have been merely cumulative of other evidence of the same nature, which was

admitted.' Ex parte Lawson, 476 So. 2d 122 (Ala. 1985)." Craft v. State, 90 So. 3d 197, 221 (Ala. Crim. App. 2011). Thus, we find no error in the circuit court's ruling excluding the transcript of Ford's second trial from the postconviction proceedings.

E.

Johnson next argues that the circuit court denied him due process by not allowing him to respond to the State's answer to his submission of 26 affidavits. He further asserts that the circuit court erred by adopting, in its order denying relief, portions of the State's answer.

The record shows that in March 2008, Johnson moved that he be allowed to proceed in the postconviction proceedings by the use of affidavits and that he had 20 witnesses whom he expected to execute affidavits. The State objected. Johnson then modified his request and stated that he intended to call Johnson's two trial attorneys to testify at the postconviction evidentiary hearing. The circuit court allowed Johnson to proceed by the use of affidavits concerning the claims related to the alibi witnesses and the claims related to inmate Fred Carter. (C. 242.) Johnson then filed a notice stating that

he intended to present additional affidavits than those that the court stated it would consider. In all, Johnson submitted 26 affidavits. (C. 534-891.) Many of the affidavits had extensive attachments that included portions of Johnson's trial records and the trial records of one of his codefendants, Ardragus Ford. The circuit court specifically denied Johnson's motion to include the transcript of Ford's second trial. The circuit court stated that after Johnson filed his affidavits the State would be allowed to file any response it deemed necessary.

In his brief on return to remand, Johnson cites no caselaw in support of this due-process argument. In Johnson's reply brief, however, he relies on the case of Ex parte Fountain, 842 So. 2d 726 (Ala. 2001). In Fountain, the Alabama Supreme Court held that Fountain was denied procedural due process because on appeal from the circuit court's ruling denying his postconviction petition the State failed to serve him with a copy of the State's brief. In reaching this conclusion, the Supreme Court stated:

> "Rule 31, Ala. R. App. P., requiring that each party's brief or briefs be served on each other party, is formulated to achieve precisely the goal of fundamental fairness that is the essence of due

> process. An appeal is a debate between the parties to the appeal. That debate is hardly fair if either party presents that party's arguments ex parte, so that the opponent cannot know what to answer, and if the appellate court considers those ex parte arguments and decides the appeal without affording the opponent a fair opportunity to respond. Rather, each party is due 'information as to the claims of the opposing party, with reasonable opportunity to controvert them,' Ex parte Weeks, [611 So. 2d 259 (Ala. 1992)], as Rule 31 provides. The requirement for appellate due process in the serving of briefs transcends the merits of the appeal."

842 So. 2d at 730. Compare Yeomans v. State, [Ms. CR-10-0095, March 29, 2013] ___ So. 3d ___ (Ala. Crim. App. 2013) (holding that Yeomans was denied the opportunity to file affidavits or otherwise respond to the State's affidavit supporting Yeoman's claim of juror misconduct).

The situation in this case is not analogous to that presented to the Alabama Supreme Court in Fountain. Here, the State filed a post-evidentiary response to Johnson's presentation of 26 affidavits -- some of which were beyond the scope of what the circuit court stated it would consider. The circuit court stated that it would consider affidavits only in relation to two claims -- the alibi-witnesses claim and the claim related to inmate Carter. Johnson then filed a notice informing the court that he intended to present affidavits

related to other issues. Johnson concedes that, unlike the situation in Fountain, he was given notice of the State's response. Johnson had previously filed three different postconviction petitions and the State had filed responses to the first two petitions. This case was not in the circuit court on original submission of Johnson's postconviction petition but was on remand with explicit instructions from this Court. The State did not file any affidavits in response to Johnson's 26 affidavits but again, as it had on two previous occasions, argued why Johnson was due no relief. The circuit court was limited to complying with our instructions by making findings of fact. Johnson had an opportunity to object to the circuit court's findings when he filed a motion objecting to the circuit court's order. For these reasons, we find no error in regard to this claim.

In this section of Johnson's brief, Johnson also argues that the circuit court erred by adopting portions of the State's response to the affidavits in its order denying relief on remand.

After the circuit court issued its order, Johnson objected to the order. (Return to Remand, C. 925-30.)

Johnson argued that the order adopted, in part, a portion of the State's response and that doing so was error.

In Johnson's brief on return to remand, Johnson fails to identify the portion or portions of the circuit court's order he specifically challenges on appeal. This issue fails to comply with the briefing requirements of Rule 28(a)(10), Ala. R. App. P. Rule 28(a)(10) states, in part, that the brief shall include:

> "An argument containing the contentions of the appellant/petitioner with respect to the issues presented, and the reasons therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on."

"Failure to comply with Rule 28(a)(10) has been deemed a waiver of the issue presented." C.B.D. v. State, 90 So. 3d 227, 239 (Ala. Crim. App. 2011). Thus, Johnson has waived this issue.

Moreover, the only portion of the circuit court's order that is similar to the State's response is contained in the issue that counsel was ineffective for failing to call witnesses who would have testified that Fred Carter impersonated other inmates. Two small paragraphs in this section of the court's order are similar to the State's

response to the affidavits. The circuit court, however, also wrote two additional pages of findings on this issue. Thus, we find no error in regard to this claim.

II.

Johnson next argues that the circuit court erred in denying his claims of ineffective assistance of trial counsel.

To prevail on a claim of ineffective assistance of counsel a petitioner must satisfy the two-prong test articulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). The petitioner must establish: (1) that counsel's performance was deficient; and (2) that the petitioner was prejudiced by counsel's deficient performance. As the United States Supreme Court in Strickland stated:

> "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. Cf. Engle v. Isaac, 456 U.S. 107, 133-34 (1982). 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.' See Michel v. Louisiana, [350 U.S. 91], at 101[, 76 S. Ct. 158, 100 L. Ed. 83 (1955)]. 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 v. Washington, 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).
>
> "....
>
> "Because the reasonableness of counsel's acts (including what investigations are reasonable)

> depends 'critically' upon 'information supplied by the [petitioner]' or 'the [petitioner]'s own statements or actions,' evidence of a petitioner's statements and acts in dealing with counsel is highly relevant to ineffective assistance claims. Strickland, 104 S. Ct. at 2066. '[An] inquiry into counsel's conversations with the [petitioner] may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.' Id. ('[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.')."

Chandler v. United States, 218 F.3d 1305, 1313-19 (11th Cir. 2000) (footnotes omitted).

Here, attorneys Darryl Bender and Erskine Mathis represented Johnson at trial. Both attorneys testified at the postconviction evidentiary hearing. Bender testified that he was appointed to represent Johnson before Johnson's first trial, which ended in a mistrial after the jury was unable to reach a verdict. Mathis testified that he was appointed in 1997 after one of Johnson's attorneys passed away. Bender represented Johnson in both of his trials.

A.

First, Johnson argues that his counsel was ineffective because, he says, counsel failed to object to the State's

presentation of inconsistent theories in Johnson's trials and the trials of his codefendant Ford. At Johnson's trials, the State's theory was that Johnson shot Deputy Hardy. At Ford's trials the State presented evidence that Ford shot Deputy Hardy and that Johnson was present when Deputy Hardy was shot.

Johnson argued in his third amended petition that his trial counsel was ineffective because

> "[c]ounsel did attempt to argue to the jury that the State was relying on inconsistent theories of prosecution in its cases against Mr. Johnson and Mr. Ford, R. 947-49, but unreasonably failed to present any evidence of the inconsistent prosecution theories (to the extent it existed at the time), such as transcripts and pleadings from previous trials, and unreasonably failed to file a motion to dismiss the case on that ground. Had counsel raised this claim, there is a reasonable probability that the result of the proceedings would have been different, because the State would have been precluded from proceeding on inconsistent theories."

(C. 1328.)

This Court has taken judicial notice of the record of Johnson's direct appeal. See Nettles v. State, 731 So. 2d 626, 629 (Ala. Crim. App. 1998). Counsel did move for a transcript of the trials of Johnson's codefendants, Omar Berry and Ardragus Ford. A notation on the front of this motion states that the motion was granted as to the witnesses who

were to be identified by Johnson's counsel. (Trial record, C. 60.) Also, Mathis testified that he was present at Ford's trial for 1 or 2 days.

In its order denying relief, the circuit court noted that this claim had been addressed on direct appeal and that it had no merit. The circuit court stated:

> "[E]ven if the prosecution argued different theories concerning the killing of Deputy [William] Hardy, such theories do not amount to a violation of due process. 'Given the uncertainty of the evidence, it was proper for the prosecutors in the other co-defendant's cases to argue alternate theories as to the facts of the murder. The issue of whether the particular defendant on trial physically committed the murder was an appropriate question for each of the co-defendants' juries.' Parker v. Singletary, 974 F.2d 1562[, 1578 (11th Cir. 1992)]."

(Return to remand, C. 911.)

Many courts have recognized that the government may argue inconsistent theories in cases involving multiple defendants. In addressing this issue, federal courts have upheld the State's presentation of inconsistent evidence in codefendants' trials. The United States Court of Appeals for the Fifth Circuit has stated:

> "[The defendant] argues that his constitutional due process rights were violated when the government presented inconsistent theories at two criminal trials -- namely, at Cooper's [codefendants'] trial

> the government argued that Cooper shot Marshall, and at [the defendant's] trial, the government argued that [the defendant] shot Marshall. We have held, though, 'a prosecutor can make inconsistent arguments at the separate trials of codefendants violating the due process clause.' Beathard v. Johnson, 177 F.3d 340, 348 (5th Cir. 1999); see also Nichols v. Scott, 69 F.3d 1255, 1272 (5th Cir. 1995) ('Two things, however, may be said about the rather amorphous doctrine of judicial estoppel. First, there is no indication in the authorities that it is constitutionally mandated. Second, it has apparently never been applied against the government in a criminal case.'). In any event, the inconsistencies were immaterial to the conviction since [the defendant] could have been convicted for the same offense, carjacking resulting in death and aiding and abetting the same, under both theories. See United States v. Paul, 217 F.3d 989, 998-99 (8th Cir. 2000) ('When it cannot be determined which of two defendants' guns caused a fatal wound and either defendant could have been convicted under either theory, the prosecution's argument at both trials that the defendant on trial pulled the trigger is not factually inconsistent.'); cf. Bradshaw v. Stumpf, 545 U.S. 175, 187, 125 S. Ct. 2398, 162 L. Ed. 2d 143 (2005) (upholding a guilty plea where the defendant's assertions of inconsistency related entirely to which individual shot the victim but where 'the precise identity of the triggerman was immaterial to [defendant]'s conviction for aggravated murder.')."

United State v. Frye, 489 F.3d 201, 214 (5th Cir. 2007).

> "Courts presented with situations where there are genuine evidentiary disputes as to who was responsible for a crime among various defendants have shown greater willingness to permit a prosecutor to argue inconsistent theories in separate trials. See Beathard v. Johnson, 177 F.3d 340, 348 (5th Cir. 1999) ('The record does not

> support such a claim. Price had two live eyewitnesses to the crime, both charged with capital murder and both accusing the other of being the most culpable. ... Price, as well as every juror involved, knew that both of the stories could not have been true.'); Parker v. Singletary, 974 F.2d 1562, 1578 (11th Cir. 1992) ('But no due process violation occurred, because there was no necessary contradiction between the state's positions in the trials of the three co-defendants. Given the uncertainty of the evidence, it was proper for the prosecutors in the other co-defendants' cases to argue alternate theories as to the facts of the murder.')"

United State v. Ganadonegro, 854 F. Supp. 2d 1088, 1098 (D.N.M. 2012).

Other state courts addressing this issue have reached the same conclusion.

> "[W]e are in accord with the courts that hold that a due process violation will only be found when the demonstrated inconsistency exists at the core of the State's case. Discrepancies based on rational inferences from ambiguous evidence will not support a due process violation provided the two theories are supported by consistent underlying facts. We recognize that the evidence presented at multiple trials is going to change to an extent based on relevancy to the particular defendant and other practical matters. The underlying core facts, however, should not change. The few courts that have found due process violations did so in cases where the inconsistencies were inherent to the State's whole theory of the case or where the varying material facts were irreconcilable. It is this type of inconsistency that renders the conviction fundamentally unfair, thus violating due process."

Sifrit v. State, 383 Md. 77, 106, 857 A.2d 65, 82 (2004).

> "Courts have ... found no due process violation stemming from inconsistent arguments as to who was the killer in the relatively common circumstance where each defendant can be held equally guilty as an aider and abettor upon the same inconclusive evidence."

State v. Poe, 284 Neb. 750, 768, 822 N.W.2d 831, 845 (2012).

There is no due-process violation when the State argues at one trial that one codefendant shot the victim and at the codefendant's trial argues that that codefendant shot the victim.

> "When it cannot be determined which of two defendants' guns caused a fatal wound and either defendant could have been convicted under either theory, the prosecutor's argument at both trials that the defendant on trial pulled the trigger is not factually inconsistent. Thus, because there was evidence that supported both theories, and since [the defendant] could have been convicted of aiding and abetting under either theory, we find no error."

United States v. Paul, 217 F.3d 989, 998-99 (8th Cir. 2000).

Thus, because there is no merit to the legal theory underlying this claim of ineffective assistance, the claim was properly dismissed. See, e.g., Lee v. State, 44 So. 3d 1145, 1173 (Ala. Crim. App. 2009) (counsel cannot be ineffective for failing to raise a claim that has no merit).

B.

Second, Johnson argues that his trial counsel was ineffective for failing to investigate, discover, and present more alibi witnesses.

The circuit court made the following findings on this claim:

> "These ... claims were addressed in this Court's previous order on Rule 32 wherein this Court held: '[Johnson's] allegation that trial counsel unreasonably failed to call Kimberly Colvin,' 'to testify at [Johnson's] second trial' is an incorrect statement. The subpoena audit list for [Johnson's] second trial set August 17, 1998, which was printed June 1, 1998, and is part of the court file, clearly shows trial counsel requested that subpoenas be issued to Kimberly Colvin, Barbetta Hunt, and Velonique Sanders, among others. The record is silent as to whether or not these individuals even responded to their respective subpoenas. If, in fact, the witnesses were present at trial and ready to testify, and trial counsel elected not to call them to the witness stand, it would be construed as trial strategy. Trial counsel presented two (2) alibi witnesses, Montrice Dunning and Christi Farris, who testified to seeing [Johnson] at a club called Tee's Place at the time Deputy William Hardy was murdered. No reasonable purpose would have been served by presenting redundant testimony of three (3) additional witnesses. Trial counsel may have felt that witnesses Montrice Dunning and Christi Farris were more credible and convincing than Kimberly Colvin, Barbetta Hunt, and Velonique Sanders. Either way, [Johnson] has failed to meet his burden of proof relative to this claim.
>
> "[Johnson] alleges that trial counsel was ineffective during the guilt phase of the trial by failing to call alibi witnesses who were never

> contacted by investigator Steve Saxon or trial counsel, including but not limited to Mona Abercrombie, Diedre Carter, Kenyarra Hubbard, Charles Jordan, Stanley Chandler, Katrina Davis, Tina Parker, David Battle, Randall Betts and Armenia Gosha. [Johnson's] claim fails to meet the specificity requirements of Rule 32.6(b), Alabama Rules of Criminal Procedure; and [Johnson's] speculations and conjecture do not rise to meet the standard established by Strickland v. Washington, [466 U.S. 668 (1984)]. Additionally, [Johnson] has failed to rebut the presumption that counsel's actions were sound trial strategy pursuant to Ex parte Womack, 541 So. 2d 47, 66 (Ala. 1988). [Johnson's] claim is without merit and he has failed to meet the required burden of proof relative to this claim.
>
> "Also, the issue of failure to call certain alibi witnesses was addressed on appeal wherein the Alabama Court of Criminal Appeal is quoted as follows: 'Johnson maintains that this trial counsel were ineffective for not calling the three witnesses to testify in order to support his alibi defense.' ...
>
> "After considering the testimony offered at the hearing in this cause there has been nothing to rebut the presumption that the decision by Johnson's trial counsel to call certain alibi witnesses, rather than other witnesses of whom they were aware, was nothing more than sound trial strategy pursuant to Ex parte Womack, supra."

(Return to remand, C. 913-15.)

The record supports the circuit court's findings. Bender testified that they did not call the three alibi witnesses who testified at Johnson's first trial because one of them had

been convicted of "something" after Johnson's first trial and one had an inconsistent version of the events that occurred on the evening of the murder. Two different alibi witnesses testified at Johnson's second trial. During the cross-examination of Bender, the following exchange occurred:

> "[Assistant attorney general]: Do you recall telling me, Mr. Bender, that you didn't think it would have been beneficial to Mr. Johnson to parade a dozen or a dozen and a half witnesses from Tee's Place, that you tried to collect your best alibi witnesses?
>
> "[Bender]: Right. It wouldn't have been. We talked to a bunch of people, some of them who claimed they had some knowledge: Oh, yeah, I saw him across the street at the car wash, yadda-yadda.
>
> "We sort of pared it down to those witnesses who we believed best offered us the consistent testimony that sort of fit our theory. It would have been a mistake to march that many people in here with inconsistent sort of versions of what they saw and what happened. We just didn't think it was the right thing to do, and so we didn't."

(Return to remand, Suppl. R. 282-83.)

"[I]n the context of an ineffective assistance claim, 'a decision regarding what witnesses to call is a matter of trial strategy which an appellate court will not second-guess." Curtis v. State, 905 N.E.2d 410, 415 (Ind. Ct. App. 2009). "[T]he decision of which witnesses to call is quintessentially

a matter of strategy for the trial attorney." Boyle v. McKune, 544 F.3d 1132, 1139 (10th Cir. 2008). "Whether to call a particular witness is a tactical decision and, thus, a 'matter of discretion' for trial counsel." United States v. Miller, 643 F.2d 713, 714 (10th Cir. 1981). "[W]e do not substitute our judgment for that of trial counsel as to whether other alibi witnesses, if available, would have been helpful." State v. Lowery, 318 N.C. 54, 69, 347 S.E.2d 729, 739 (1986).

> "The question is whether some reasonable lawyer at the trial could have acted as defense counsel acted in the trial at issue and not what 'most good lawyers' would have done. Conklin v. Schofield, 366 F.3d 1191, 1204 (11th Cir. 2004) (internal citations omitted). Even if counsel's decision appears to have been unwise in retrospect, the decision will be held to have been ineffective assistance only if it was 'so patently unreasonable that no competent attorney would have chosen it.' Adams v. Wainwright, 709 F.2d 1443, 1445 (11th Cir. 1983.)"

Dingle v. Secretary for Dep't of Corr., 480 F.3d 1092, 1099 (11th Cir. 2007).[8]

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[8]Johnson challenges the circuit court's application of a procedural bar to this claim. Although the postconviction court said that the claim was procedurally barred because it had been addressed on direct appeal, the court also addressed and considered the merits of this claim. This Court has long held that we may affirm a judgment entered by a postconviction court if the ruling is correct for any reason. "If the

Johnson failed to meet his burden of establishing that counsel's actions were unreasonable or that he was prejudiced by their performance. The circuit court correctly denied relief on this claim.

C.

Johnson next argues that counsel was ineffective for allegedly failing to prepare the two alibi witnesses who testified at Johnson's second trial.

Concerning this claim, the circuit court stated:

> "After considering the testimony offered at the hearing from Johnson's trial attorneys this Court does not find that said trial attorneys were ineffective in the preparation of the alibi witnesses or the selection of the alibi witnesses. Said trial attorneys appeared to have done a very good job in preparing for and presenting a defense to the state's claims. Johnson has failed to meet his burden of proof pursuant to Strickland v. Washington, 466 U.S. 668 (1984)."

(Return to remand, C. 915.)

The record shows that neither Mathis nor Bender were asked any questions concerning their preparation of the two alibi witnesses who testified at Johnson's second trial.

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circuit court is correct for any reason, even though it may not be the stated reason, we will not reverse its denial of the petition." Acra v. State, 105 So. 3d 460, 464 (Ala. Crim. App. 2012).

> "When the record is silent as to counsel's reasons for his conduct, finding counsel ineffective would call for speculation by the appellate court. See Gamble v. State, 916 S.W.2d 92, 93 (Tex. App. - Houston) [1st Dist.] 1996, no pet.) (citing Jackson v. State, 877 S.W.2d [768] at 771 [(Tex. Crim. App. 1994)]). An appellate court will not speculate about the reasons underlying defense counsel's decisions."

Stults v. State, 23 S.W.3d 198, 208 (Tex. App. 2000). See also Rylander v. State, 101 S.W.3d 107, 110-11 (Tex. Crim. App. 2003).

Johnson failed to meet his burden of proof in regard to this claim; thus, relief was correctly denied.

D.

Johnson next argues that his trial counsel was ineffective for presenting inconsistent and mutually exclusive defenses. At Johnson's second trial, counsel presented two alibi witnesses and the testimony of Yolanda Chambers. The alibi witnesses testified that they saw Johnson at a nightclub on the night of the murder. Chambers testified that she was with Johnson and Ford on the night of the murder and that Ford shot Deputy Hardy.

The circuit court made the following findings of fact on this claim:

> "Testimony presented at the hearing on the Rule 32 petition reflect that trial counsel was aware of the inconsistency of the theories of defense that were presented but strategically chose to do so. Trial counsel wanted to show that Johnson became a suspect because of the statements from Ms. Chambers and that she had offered many inconsistent statements. Trial counsel apparently sought to establish that the more reasonable explanation was that Johnson was at Tee's Place [a nightclub] and could not have killed Deputy Hardy."

(Return to remand, C. 915.)

The Iowa Supreme Court in addressing the presentation of mutually exclusive defenses as it relates to a claim of ineffective assistance of counsel has stated:

> "The general rule is that a criminal defendant may present diverse theories of defense, even those as 'inconsistent' as insanity and alibi. See 22 C.J.S. Criminal Law § 54, at 192-93 (1961) ('[T]he fact that one defense is on the theory that accused did not commit the offense, as where he relies on alibi, does not deprive him of the right to avail himself of other defenses, although based on the theory of justification or excuse.'); see also 21 Am. Jur. 2d Criminal Law § 183, at 337-38 (1981) ('It is the right of an accused to utilize any and all defenses in his behalf, and to present as many defenses as he has or thinks he has.').
>
> "We have given at least tacit approval of the concept of inconsistent defenses in passing on a claim of ineffective assistance of counsel."

State v. Broughton, 425 N.W.2d 48, 50 (Iowa 1988).

> "After a certain course has proven unsuccessful, it is easy to say some other one should have been tried

> instead. This is unfair to counsel, who must make a choice between existing alternatives before the fact. We have refused to assume the role of Monday morning quarterback in condemning counsel's judgment in choosing between what are frequently equally hazardous options available to him."

State v. Newman, 326 N.W.2d 788, 795 (Iowa 1982). See also State v. Dickert, 268 P.3d 515, 520 (N.M. Ct. App. 2011) ("As a general rule, 'inconsistent defenses may be interposed in a criminal case.' 21 Am. Jur. 2d Criminal Law § 183 (2008). '[A] defendant may raise the alternative defenses of intoxication and noninvolvement in the offense ....'"); State v. Westmoreland, 307 Wis. 2d 429, 440, 744 N.W.2d 919, 925 (App. 2007) ("[I]t is not uncommon for lawyers to argue inconsistent defenses."); People v. Elliott, 8 Misc. 3d 1020, 803 N.Y.S.2d 20 (2005) (not reported) ("While inconsistent defenses are permitted in New York and may constitute effective assistance of counsel, it is reasonable for a defense counsel to refuse to submit to a trier of fact inconsistent defenses."); Gluzman v. United States, 124 F. Supp. 2d 171, 174 (S.D.N.Y. 2000) ("Among the 'virtually unchallengeable' tactical decisions left to the judgment of trial counsel are determinations regarding the defense strategy adopted at trial."); Brown v. Dixon, 891 F.2d 490,

495 (4th Cir. 1989) ("Filtering from our analysis the 'distorting effects of hindsight' and recognizing the 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,' we agree that the use of inconsistent defenses was objectively reasonable 'under prevailing professional norms.'"); Hunt v. Nuth, 57 F.3d 1327, 1332 n.2 (4th Cir. 1995) ("This Court has held ... that the presentation of inconsistent defenses does not necessarily constitute ineffective assistance.").

Bender represented Johnson in one trial that ended in a mistrial after the jury was deadlocked. Counsel made a strategic decision to present the two defenses in Johnson's second trial. Based on the facts in this case, we cannot say that counsel was ineffective for presenting the two defenses. Johnson failed to meet his burden of establishing that counsel's actions were unreasonable. Thus, relief was correctly denied on this claim.

E.

Johnson argues that his trial attorneys were ineffective for failing to establish how widely publicized the reward offer was and whether Violet Ellison was aware of the reward.

The circuit court made the following findings on this claim:

> "There was no evidence presented that the reward motivated Ms. Ellison to call the police or that it affected her testimony in any way. There certainly was no showing that Johnson was prejudiced in failing to cross-examine Ms. Ellison about any potential reward. Johnson's claim is without merit and he has failed to meet the required burden of proof relative to this claim."

(Return to remand, C. 916.)

Bender testified that he had no reason to question Ellison about the reward because he had no information that she was aware of, or that she had inquired about, the reward. Bender said:

> "There was nothing to indicate to me that [Ellison] was connected, associated with, looking for, going to receive a reward in any way; so there was no reason for me to pry into this lady's financial affairs. There just wasn't."

(Return to remand, Suppl. R. 258.) At the postconviction hearing, Johnson presented no evidence indicating that Ellison knew about the reward, that she attempted to get the reward, or that she received any reward for her testimony at Johnson's trial.[9] We agree with the circuit court that Johnson failed

[9]Postconviction counsel did present evidence, by way of affidavit, that Yolanda Chambers sought the reward money and

to satisfy the Strickland test in regard to this claim.

F.

Johnson next argues that counsel was ineffective for calling Yolanda Chambers as a witness, knowing, he says, that her testimony would contradict Johnson's alibi defense.[10]

The circuit court made the following findings concerning this claim:

> "[Johnson's] claim fails to meet the specificity requirements of Rule 32.6(b), Alabama Rules of Criminal Procedure. [Johnson's] speculations and conjecture do not rise to meet the standard established by Strickland v. Washington, [466 U.S. 668 (1984)]. Additionally, [Johnson] has failed to rebut the presumption that counsel's actions were sound trial strategy pursuant to Ex parte Womack, 541 So. 2d 47, 66 (Ala. 1988). Testimony revealed that trial counsel called Chambers in order to explain to the jury and this Court why Johnson had been identified as a suspect in Deputy Hardy's murder and to undermine the basis of the State's case."

(Return to remand, C. 916.)

The record of the postconviction hearing shows that both attorneys were questioned as to why they called Chambers to testify in Johnson's second trial. Bender testified to the

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hired an attorney for that purpose.

[10]This claim is intertwined with Johnson's allegation that counsel was ineffective for presenting inconsistent defenses, which we addressed in Part II.D. of this opinion.

following:

> "Well, based on what I remember today, I believe that Ms. Chambers was called because she basically was the witness who put my client and the other -- there were initially four defendants, and eventually it got down to two, my client and Mr. Ford.
>
> "She was the individual who put them at the scene. And over the course of this litigation, from the beginning to the end, she told just a variation of stories and versions of the story.
>
> "And based on what I can remember -- and I am guessing, because I don't have my file and this happened thirteen years ago -- I think we wanted or hoped this jury would see that the State's case was based or built on the testimony of this particular witness, with all of her inconsistencies and all of her versions of this story, is why I believe today we called her as a witness back in [1997], I guess, ... when the second trial was."

(Return to remand, Suppl. R. 207.)

Johnson cites Freeman v. Class, 95 F.3d 639 (8th Cir. 1996), and Commonwealth v. Tippens, 409 Pa. Super. 536, 598 A.2d 553 (1991). In Freeman, defense counsel offered into evidence a report that contained a hearsay statement that Freeman was guilty of stealing a car. In Tippens, defense counsel presented the testimony of an eyewitness who identified Tippens as the shooter. In both cases, the courts found counsel ineffective for presenting evidence that was detrimental to their clients.

Here, the State presented evidence indicating that Johnson had been overheard on the telephone saying that he shot Deputy Hardy in the head. To counter this, Johnson presented the testimony of Chambers, who testified that Ford shot Deputy Hardy. "The standard we apply in assessing the first prong [of Strickland] is that of a reasonable attorney, not a paragon of the bar." Dill v. Allen, 488 F.3d 1344, 1354 (11th Cir. 2007). "Competency is measured against what an objectively reasonable attorney would have done under the circumstances existing at the time of the representation." Savino v. Murray, 82 F.3d 593, 599 (4th Cir. 1996). "Which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess." Waters v. Thomas, 46 F.3d 1506, 1512 (11th Cir. 1995). "The decisions of what witnesses to call and what evidence to present are generally unassailable matters of trial strategy that cannot form the basis of a claim of ineffective assistance of counsel." People v. Ward, 371 Ill. App. 3d 382, 433, 308 Ill. Dec. 899, 946, 862 N.E.2d 1102, 1149 (2007). "[T]he decision whether to call a defense witness is a strategic decision. We must

afford such decisions 'enormous deference.'" United States v. Kozinski, 16 F.3d 795, 813 (7th Cir. 1994).

We cannot say that no reasonable attorney would have chosen to ignore Chambers's testimony. We agree with the circuit court that Johnson failed to satisfy the Strickland standard in regard to this claim.

G.

Johnson next argues that counsel was ineffective for failing to call attorney Richard Jaffe at Johnson's second trial after he had testified at Johnson's first trial. At Johnson's first trial, Jaffe, Ford's attorney, testified that during Ford's trial Ellison sat with the victim's wife.

The circuit court made the following findings on this claim:

> "The State responds that during her cross-examination, trial counsel had Ms. Ellison admit that she knew Deputy Hardy and his wife. Ellison testified that she would see the Hardys at the race track and that Ms. Hardy was a teller at the bank where Ellison did her banking. Johnson failed to argue or explain how he was prejudiced because his trial counsel did not present testimony that Ellison may have offered sympathy to Deputy Hardy's grieving widow or to members of his family during Ford's trial. See Brooks v. State, 695 So. 2d 176, 182 (Ala. Crim. App. 1996) (holding that 'Prejudice cannot merely be alleged; it must be affirmatively proved.')

"....

> "Considering the testimony offered in connection with this claim there has been no showing of prejudice. Trial counsel was able to present testimony that Ms. Ellison knew the Hardy family as set out in the State's response. Johnson has not met his burden of proof relative to this claim and has not shown that his counsel was ineffective."

(Return to remand, C. 916-17.)

The record shows that at Johnson's first trial, counsel called Jaffe to testify. Jaffe testified that Ellison sat next to the victim's family during Ford's trial. However, counsel did not call Jaffe to testify at Johnson's second trial. The record of Johnson's second trial shows that counsel cross-examined Ellison about her relationship with the victim. Ellison testified that she had known the victim's wife, Patricia Hardy, for 10 or 12 years, that Patricia was a teller at the bank where Ellison banked, that she had met the victim through his wife about 5 years before the trial, and that Patricia was not a close friend of hers. (Record of trial, R. 705-06.) Also, in closing argument counsel argued that Ellison's testimony should be ignored because she knew the victim's wife.

Mathis testified that he could not remember why counsel

did not call Jaffe to testify at Johnson's second trial. (Return to remand, Suppl. R. 1630-31.) Bender testified as follows:

> "[Postconviction counsel]: Mr. Jaffe testified at Mr. Johnson's first trial that Patricia Hardy and Violet Ellison were hugging and that Ms. Ellison was also comforting Ms. Hardy. Why didn't you put that evidence on at the second trial?
>
> "[Bender]: I guess you are asking me why didn't we call Richard Jaffe as a witness again?
>
> "[Postconviction counsel]: Yes.
>
> "[Bender]: I can't tell you why. I don't know why. I am certain there is a reason why we didn't; I just don't remember what it was.
>
> "[Postconviction counsel]: But you would have every reason to want to call Ms. Ellison's veracity and credibility into question; right?
>
> "[Bender]: It depends on the circumstances.
>
> "[Postconviction counsel]: Well, her sitting and comforting the victim's wife would not be something that calls into question her veracity or credibility?
>
> "....
>
> "[Postconviction counsel]: Why not call him the second time?
>
> "[Bender]: I don't know specifically why. I don't have the record, so I can't tell you why. But I am sure -- I am sure -- that was for a strategic reason that we didn't. I don't know why for certain because I don't have my file, I don't have the

> record. But there was a reason for it. I just can't tell you twelve years later or eleven years later why it was."

(Return to remand, Suppl. R. 267-69.)

> "Time inevitably fogs the memory of busy attorneys. That inevitability does not reverse the Strickland [v. Washington, 466 U.S. 668 (1984),] presumption of effective performance. Without evidence establishing that counsel's strategy arose from the vagaries of 'ignorance, inattention or ineptitude,' Cox [v. Donnelly, 387 F.3d 193 (2nd Cir. 2004)], Strickland's strong presumption must stand."

Greiner v. Wells, 417 F.3d 305, 326 (2d Cir. 2005). "[I]t is permissible for a court to rely on habit evidence of a lawyer's usual practice in reconstructing events." Carrion v. Smith, 549 F.3d 583, 585 (2nd Cir. 2008).

Bender stated that he was confident that the decision to not call Jaffe at the second trial was a strategic decision. Johnson failed to establish that counsel was ineffective for failing to call Jaffe to testify at his second trial. Moreover, any testimony from Jaffe as to the relationship between Ellison and Patricia Hardy would have been largely cumulative of Ellison's own testimony. See, e.g., Daniel v. State, 86 So. 3d 405, 430 (Ala. Crim. App. 2011) ("'This Court has previously refused to allow the omission of cumulative testimony to amount to ineffective assistance of counsel.'

United States v. Harris, 408 F.3d 186, 191 (5th Cir. 2005). '... [E]ven if alternate witnesses could provide more detailed testimony, trial counsel is not ineffective for failing to present cumulative evidence.' Darling v. State, 966 So. 2d 366, 377 (Fla. 2007)."). Thus, relief was correctly denied on this claim.

H.

Johnson next argues that trial counsel was ineffective for failing to object to the State's introduction of the program from the victim's funeral.

The circuit court made the following findings concerning this claim:

> "This Court previously held that Deputy William Hardy's funeral program was introduced through the direct testimony of Sheriff Jim Woodard; and was obviously introduced as further proof to the jury that the victim was, in fact, deceased. As pointed out by the State in its response to [Johnson's] claim, while [Johnson] alleges that the funeral program had no probative value and only served to prejudice the jury against him, he fails to state in what manner he was prejudiced or harmed by the introduction of the said program. [Johnson's] claim fails due to lack of specificity when applied to Rule 32.6(b), Alabama Rules of Criminal Procedure, and he has failed to meet his required burden of proof relative to this claim."

(Return to remand, C. 917.) We agree that Johnson failed to

plead how he was prejudiced by the introduction of the victim's funeral program.

Moreover, Mathis testified that he could not remember why he did not object to the State's introduction of the victim's funeral program. Bender was not asked why he did not object to the introduction of the funeral program. As stated above, "Time inevitably fogs the memory of busy attorneys. That inevitability does not reverse the Strickland [v. Washington, 466 U.S. 668 (1984),] presumption of effective performance." Greiner, 417 F.3d at 326. "[T]he failure to object to error, alone, is not enough to sustain a claim of ineffective assistance of counsel." State v. Hale, 119 Ohio St. 3d 118, 892 N.E.2d 864 (2008). As this Court has stated:

> "'[E]ffectiveness of counsel does not lend itself to measurement by picking through the transcript and counting the places where objections might be made. Effectiveness of counsel is not measured by whether counsel objected to every question and moved to strike every answer.'
>
> "Brooks v. State, 456 So. 2d 1142, 1145 (Ala. Crim. App. 1984). As we further stated in Moore v. State, 659 So. 2d 205, 209 (Ala. Crim. App. 1994):
>
> > "'Objections are a matter of trial strategy, and an appellant must overcome the presumption that "counsel's conduct falls within the wide range of reasonable

> professional assistance," that is, the presumption that the challenged action "might be considered sound trial strategy." Strickland [v. Washington], 466 U.S. [668] at 687-88, 104 S. Ct. [2052] at 2064, 80 L. Ed. 2d [674] at 693 (1984). Again, the appellant has not shown how she was prejudiced by trial counsel's failure to make objections.'"

Robitaille v. State, 971 So. 2d 43, 70 (Ala. Crim. App. 2005).

Johnson failed to satisfy the Strickland test in regard to this claim; therefore, the circuit court correctly denied relief.

I.

Johnson next argues that counsel was ineffective for failing to call witnesses to testify that Fred Carter could have impersonated Johnson and made the telephone call that Ellison overheard from the Jefferson County jail.

The circuit court made the following findings concerning this claim:

> "The State responds that Violet Ellison testified that on August 4 she overheard Johnson speaking to a woman named 'Daisy.' Trial counsel called Daisy Williams to testify for the defense. Williams testified that she had known Johnson from when they lived in Pratt City. Williams also testified about a telephone conversation she had with Johnson in August. Williams's recall of the conversation was in stark contrast to what Ellison reported. Trial counsel's strategy was to attack

what Ellison claimed she overhead Johnson say to Williams. Johnson now claims that trial counsel should have discovered and presented an alternative defense -- that what Ellison overheard could have been Fred Carter impersonating Johnson on the telephone.

"In Hunt v. State, 940 So. 2d 1041, 1067 (Ala. Crim. App. 2005), the Alabama Court of Criminal Appeals held:

> "'"[T]he mere existence of a potential alternative defense theory is not enough to establish ineffective assistance based on counsel's failure to present that theory." Rosario-Domingquez v. United States, 353 F. Supp. 2d [500] at 513 [(S.D.N.Y. 2005)].'

"Trial counsel's strategy to impeach Ellison's testimony with the testimony of Daisy Williams was entirely reasonable. All of the affidavits submitted by Johnson to support this claim, with one exception, were executed by individuals that are currently in the custody of the Alabama Department of Corrections. Further, no affiant, not even Fred Carter, stated on the dates Violet Ellison said she overheard Johnson, that they heard Fred Carter impersonate Johnson.

"Attorney Darryl Bender testified that he was aware of Fred Carter and that Fred Carter established for the State that Johnson made the phone calls. Mr. Carter attempted to explain to the jury that Johnson was explaining what he was accused of not what he did. Attorney Bender felt that this helped the defense. Testimony further indicated that the trial attorneys were not aware of any alleged impersonations and there was no reason to challenge that the calls were made by Johnson. All of the evidence indicated that Johnson did make the calls. Said attorney testified that he considered all of the possibilities that were reasonable and

attempted to explain away the phone calls by an impersonation was not reasonable. Attorney Bender also testified that he did talk to people at the jail about the contents of the phone calls but that he could not remember specifically.

"In Strickland v. Washington, [466 U.S. 668 (1984),] the Supreme Court established that a petitioner must show that counsel's performance was deficient and that he was prejudiced by the said deficient performance. The Supreme Court found that '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 the same way.' Strickland v. Washington,[supra]. Additionally, this Court would point out that 'effective representation does not entitle the defendant to an error-free trial, and showing that counsel made a mistake unfavorable to the defendant is not sufficient to establish inadequate representation.' Saffold v. State, 570 So. 2d 727, 731 (Ala. Crim. App. 1990).

> "Johnson has not met his burden of proof in showing that his attorneys were ineffective."

(Return to remand, C. 918-21.)

Bender testified that Carter's testimony at Johnson's trial did not hurt Johnson's case but helped his case. Bender said:

> "[Carter] basically told the jury that our client was telling him what he was accused of -- not what he actually did, but what he was accused of. And that was our argument relative to that telephone conversation.
>
> "Our argument was that Ms. Ellison picked the phone up in the middle of the conversation; she heard certain things; she interpreted that as him saying he did, in fact, when, in fact, he was saying to the young lady that he was talking to, this is what they say I, did -- not what I actually did, but this is what they say I did -- as I remember it now."

(Return to remand, Suppl. R. 238-39.) Bender said that the defense theory was that Ellison did not overhear the entire conversation but that she heard only a portion of the conversation. Consistent with that theory, Bender and Mathis presented the testimony of Daisy Williams. Williams testified that in August 1995 her cousin, Fred Carter, telephoned her from the county jail, that she talked to Carter for a few minutes, and that Johnson then got on the telephone. She

testified that she asked Johnson what he was in jail for and that he responded but he did not tell her that he had shot Deputy Hardy. Ellison testified that the first phone call she overheard was between a person named Johnson and a person named Daisy; it was in this conversation, Ellison said, that Johnson told Daisy that he had shot Deputy Hardy.

"Impeachment strategy is a matter of trial tactics, and tactical decisions are not ineffective assistance of counsel simply because in retrospect better tactics may have been available. Johnson v. Hofbauer, 159 F. Supp. 2d 582, 607 (E.D. Mich. 2001)." Dell v. Straub, 194 F. Supp. 2d 629, 651 (E.D. Mich. 2002). Counsel's action in calling Williams to rebut Ellison's testimony was not unreasonable.

Furthermore, on direct appeal, this Court stated the following concerning counsel's strategy:

> "[T]he State introduced the telephone records to show that telephone calls were, in fact, placed from the Jefferson County jail to the home of Violet Ellison. The records showed that calls were placed from a number assigned to the 9th Floor, Block B, of the Jefferson County jail (where Johnson was housed) to the telephone of Violet and Katrina Ellison. The records corroborate Violet and Katrina Ellison's testimony regarding the dates and times of the calls from Johnson. As the State correctly points out in its brief to this Court, because Johnson was clearly unable to deny the existence of the telephone calls,

> his trial counsel obviously adopted a strategy of denying the content of the those calls, i.e., that Johnson admitted that he had shot Deputy Hardy. Johnson has failed to show that this was not sound trial strategy, especially given the overwhelming evidence presented by the State proving the existence of the calls."

823 So. 2d at 50.

Johnson failed to meet his burden of showing that counsel's performance was deficient and/or that he was prejudiced by counsel's performance.

III.

Johnson next argues that the circuit court erred in denying relief on his claims that had not been specifically addressed by the circuit court in its original order dismissing Johnson's postconviction petition.

A.

Johnson first argues that the circuit court erred in denying relief on his claim that counsel was ineffective for failing to present testimony that two of Johnson's codefendants -- Quintez Wilson and Omar Berry -- were innocent. The circuit court made the following findings on this claim:

> "[T]he Court finds that [Johnson's] claim is insufficiently specific pursuant to Rule 32.6(b),

> Alabama Rules of Criminal Procedure, in that he fails to set forth anywhere in the record that it was conclusively established that Quintez Wilson was at some other location at the time of the murder and failed to state exactly what evidence trial counsel should have introduced to prove that Quintez Wilson was at a friend's house during the time that Deputy William Hardy was murdered."

(Return to remand, C. 906.)

"It is axiomatic that trial counsel cannot be deemed ineffective for failing to introduce nonexistent evidence." Greene v. State, 295 Ga. App. 803, 806, 673 S.E.2d 292, 296 (2009). Johnson pleaded that counsel should have presented evidence that Wilson and Berry were innocent but failed to plead the contents of that evidence or the person or person who could testify to Wilson or Berry's innocence. Thus, Johnson failed to plead sufficient facts. As this Court has stated:

> "'Rule 32.6(b) requires that the petition itself disclose the facts relied upon in seeking relief.' Boyd v. State, 746 So. 2d 364, 406 (Ala. Crim. App. 1999). In other words, it is not the pleading of a conclusion 'which, if true, entitle[s] the petitioner to relief.' Lancaster v. State, 638 So. 2d 1370, 1373 (Ala. Crim. App. 1993). It is the allegation of facts in pleading which, if true, entitle a petitioner to relief. After facts are pleaded, which, if true, entitle the petitioner to relief, the petitioner is then entitled to an opportunity, as provided in Rule 32.9, Ala. R. Crim. P., to present evidence proving those alleged

facts."

Boyd v. State, 913 So. 2d 1113, 1125 (Ala. Crim. App. 2003).

Johnson failed to meet his burden of pleading sufficient facts in regard to this claim; thus, the circuit court correctly found that Rule 32.6(b), Ala. R. Crim. P., barred relief.

B.

Johnson next argues that the circuit court erred in finding that his claim that counsel was ineffective for failing to introduce his audiotaped statement to police was procedurally barred. Specifically, Johnson asserts that his exculpatory statement to police was admissible to rebut Ellison's testimony and show that Ellison could and may have exaggerated what she heard.

Although the circuit court found this claim to be procedurally barred, this Court may affirm a circuit court's ruling if it is correct for any reason. Johnson's self-serving statements to police were not admissible.

> "'"As a general rule, one charged with crime can not make evidence for himself, by proof of his own declarations."' Williams v. State, 536 So. 2d 169, 170 (Ala. Crim. App. 1988), quoting Stewart v. State, 63 Ala. 199, 200 (1879).

> "'A "self-serving declaration" is a statement made out of Court which is favorable to the interest of the declarant. Jarrell v. State, 35 Ala. App. 256, 50 So. 2d 767 (1950), rev'd on other grounds, 255 Ala. 128, 50 So. 2d 774, aff'd, 255 Ala. 209, 50 So. 2d 776 (1951). Of course, most statements made by rational people are self-serving. In Chisolm v. State, 409 So. 2d 930 (Ala. Crim. App. 1981), this court noted:
>
> > "'"The law is well settled in this State that such self-serving declarations of an accused, made before or after the offense are not admissible for him unless they are part of the res gestae." (Emphasis added.)
>
> "'The statement in the present case was not part of the res gestae....
>
> "'Moreover, "[t]he prime objection to this character of proof is that it does violence to the hearsay rule. Further, it opens the door to the introduction of untrustworthy declarations and permits a party to manufacture his own evidence." Jarrell, supra. "If a self-serving declaration is inadmissible as tending to prove the truth of the matter asserted, the inadmissibility results from the hearsay rule." C. Gamble, McElroy's Alabama Evidence, § 242.02 (3d ed. 1977).'
>
> "Kennedy v. State, 469 So. 2d 1333, 1334 (Ala. Crim. App. 1985)."

Ray v. State, 80 So. 3d 965, 990-91 (Ala. Crim. App. 2011).

Johnson's self-serving statements were not admissible.

For these reasons, Johnson was due no relief on this claim.

C.

Next, Johnson argues that the circuit court erred in finding that his claim that appellate counsel was ineffective for failing to challenge this Court's proportionality review of his death sentence was not sufficiently pleaded.

Johnson's entire argument in brief on this claim consists of the following: "Because these claims are in fact specifically pled, Mr. Johnson is entitled to a hearing on them, and this Court should remand for such a hearing." (Johnson's brief, p. 108.) This section of Johnson's brief fails to comply with the provisions of Rule 28(a)(10), Ala. R. App. P. This rule states that an argument section in an appellate brief shall contain: "An argument containing the contentions of the appellant/petitioner with respect to the issues presented, and the reasons therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on." "Failure to comply with Rule 28(a)(10) has been deemed a waiver of the issue presented." C.B.D., 90 So. 3d at 239. Thus, Johnson has waived review of this claim on appeal.

D.

Johnson next argues that the circuit court erred in not allowing him to present evidence at the postconviction evidentiary hearing concerning his claim that counsel was ineffective for failing to call Marshall Cummings as a witness at Johnson's second trial. Cummings was a guest at the hotel at the time of the shooting and testified in Johnson's first trial as to what he observed that night. Specifically, Johnson asserts that this Court directed the circuit court to hold a hearing on this claim and that the circuit court, by finding that this claim was procedurally barred, failed to comply with our instructions.

The State concedes in its brief on return to remand that this case should be remanded for the circuit court to hold an evidentiary hearing on this claim. Consistent with our original opinion, this case is due to be remanded for the circuit court to comply with our instructions and to hold an evidentiary hearing on this claim.

E.

Johnson further argues that the circuit court erred in holding that his claim that counsel was ineffective at the

penalty phase was procedurally barred, because, he says, counsel failed to investigate and to present mitigation evidence. Johnson asserts that this Court specifically directed the circuit court to hold a hearing on this claim and that the circuit court could

not sua sponte apply a procedural bar to this claim because to do so violates Ex parte Clemons, 55 So. 3d 348 (Ala. 2007).[11]

In its original brief, the State conceded that Johnson was due an evidentiary hearing on his claim that counsel was ineffective for failing to present mitigation evidence. (State's original brief, p. 100.) In accordance with the State's concession, this Court, in our opinion remanding this case, specifically directed the circuit court to hold an evidentiary hearing on this claim. ___ So. 3d at ___. For the circuit court to apply this procedural bar at this juncture, after the State had waived that bar, violates Clemons and this Court's explicit instructions in our opinion remanding this case.

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[11]The Alabama Supreme Court in Clemons held that the State waives application of a procedural bar in Rule 32.2(a), Ala. R. Crim. P., if it fails to assert that bar. Here, the State not only failed to assert this procedural bar but specifically requested that this case be remanded on that claim of ineffective assistance of counsel.

For the reasons set out in Parts III.D and E of this opinion, this case is hereby remanded to the circuit court for that court to hold an evidentiary hearing on the claim that Johnson's counsel was ineffective for failing to present the testimony of Marshall Cummings and the claim that counsel was ineffective for failing to investigate and present mitigation evidence.

Due return should be filed in this Court within 120 days from the date of this opinion.

REMANDED WITH INSTRUCTIONS.

Windom, P.J., and Welch, Kellum, and Burke, JJ., concur.