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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2014-2015

CR-05-1805

ToForest Onesha Johnson

v.

State of Alabama

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

On Return to Second Remand

JOINER, Judge.

ToForest Onesha Johnson appeals the circuit court's dismissal of his petition for postconviction relief filed pursuant to Rule 32, Ala. R. Crim. P.

In 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." Johnson was sentenced to death. On direct appeal, this Court affirmed Johnson's capital-murder conviction and sentence of death. See Johnson v. State, 823 So. 2d 1 (Ala. Crim. App. 2001). The Alabama Supreme Court and the United States Supreme Court denied certiorari review. See Ex parte Johnson, 823 So. 2d 57 (Ala. 2001), and Johnson v. Alabama, 535 U.S. 1085 (2002).

In 2003, Johnson filed a postconviction petition attacking his conviction and sentence. In 2006, the circuit court summarily dismissed Johnson's petition. Johnson appealed to this Court. In 2007, this Court affirmed the dismissal of Johnson's petition in part and remanded the case for the circuit court to hold an evidentiary hearing on 14 of Johnson's claims of ineffective assistance of counsel and on 5 claims that were not specifically addressed in the circuit court's order of dismissal. See Johnson v. State, [Ms. CR-05-1805, September 28, 2007] ___ So. 3d ___ (Ala. Crim. App. 2007). On return to remand, this Court again remanded the case for the circuit court to hold an evidentiary hearing on Johnson's claims that trial counsel were ineffective for

failing to call two witnesses[1] to testify at his second trial and for failing to investigate and to present mitigation evidence at his sentencing hearing. See Johnson v. State, [Ms. CR-05-1805, June 14, 2013] ___ So. 3d ___ (Ala. Crim. App. 2013) (opinion on return to remand). This case is now before this Court on return to second remand.[2]

The facts surrounding Johnson's conviction have been set out in this Court's previous opinions; therefore, we will give only a brief account of the facts surrounding Deputy Hardy's murder. In July 1995, Deputy Hardy was "moonlighting" at the Crown Sterling hotel in Birmingham and working the early morning hours of July 19, 1995. The manager of the hotel

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[1]In our opinion on return to remand, we instructed the circuit court "to hold an evidentiary hearing on the claim that Johnson's counsel was ineffective for failing to present the testimony of Marshall Cummings." Our opinion did not specifically reference Sgt. Anthony Richardson; the claim related to Cummings, however, also alleged that counsel were ineffective for failing to call Sgt. Richardson to testify at the second trial. Evidence was presented as to both witnesses on return to second remand, and we now address the claim as to both witnesses.

[2]The circuit court held an evidentiary hearing on June 24-25, 2014, and entered an order on December 8, 2014, denying Johnson's claims. After the case was resubmitted to this Court on December 11, 2014, this Court granted Johnson's motion for leave to file a brief on return to remand. Briefing on return to remand was completed in July 2015.

testified that at around 12:30 a.m. he heard two "popping noises" and was unable to reach Deputy Hardy by radio. He walked around the building and discovered Deputy Hardy lying in the rear parking lot. Deputy Hardy had been shot multiple times in his head. Johnson was stopped at a nearby motel in Homewood at around 4:00 a.m. When stopped, he was with Ardragus Ford, Latanya Henderson, and Yolanda Chambers. Henderson testified that Johnson had a gun and that he hid the gun as police approached the vehicle. Testimony also showed that Violet Ellison overheard a telephone conversation between Johnson and a girl named Daisy while Johnson was incarcerated. Ellison testified that during that conversation Johnson told Daisy that he had shot Deputy Hardy in the head.

At trial, Johnson presented both an alibi defense 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 his codefendant Ford on the night of the murder and that Ford shot Deputy Hardy.[3]

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[3]In this Court's opinion on return to remand, we held that counsel were not ineffective for presenting inconsistent defenses. See Johnson v. State, ___ So. 3d at ___ (opinion on return to remand).

At the postconviction evidentiary hearing, Johnson's trial attorneys, Darryl Bender and Erskine Mathis, both testified. Bender represented Johnson at his first trial, which resulted in a mistrial. Bender and Mathis represented Johnson at his second trial, which resulted in a conviction.

Standard of Review

"[W]hen reviewing a circuit court's rulings made in a postconviction petition, [the Court of Criminal Appeals] may affirm a ruling if it is correct for any reason." Bush v. State, 92 So. 3d 121, 134 (Ala. Crim. App. 2009). "If the circuit court is correct for any reason, even though it may not be the stated reason, we will not reverse its denial of the [postconviction] petition." Reed v. State, 748 So. 2d 231, 233 (Ala. Crim. App. 1999).

> "We will reverse a circuit court's findings only if they are 'clearly erroneous.' Barbour v. State, 903 So. 2d 858, 861 (Ala. Crim. App. 2004).
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> > "'"'[A] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L.Ed. 746 (1948) .... If the district court's account of the evidence is plausible in light of the record viewed in

> its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. United States v. Yellow Cab Co., 338 U.S. 338, 342, 70 S. Ct. 177, 179, 94 L. Ed. 150 (1949); see also Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 102 S. Ct. 2182, 72 L. Ed. 2d 606 (1982)." [Anderson v. City of Bessemer City, N.C.], 470 U.S. [564] at 573-74, 105 S. Ct. [1504] at 1511 [(1985)].'
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> "Morrison v. State, 551 So. 2d 435, 436-37 (Ala. Crim. App. 1989); see also Barbour v. State, 903 So. 2d at 862."

Jackson v. State, 963 So. 2d 150, 154-55 (Ala. Crim. App. 2006).

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, 164, 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, 466 U.S. at 689.

As the United States Supreme Court further stated:

> "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for

> reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."

Strickland, 466 U.S. at 690-91. The "'test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial.'" Waters v. Thomas, 46 F.3d 1506, 1512 (11th Cir. 1995) (quoting White v. Singletary, 972 F.2d 1218, 1220-21 (11th Cir. 1992)).

> "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] at 201 [(2d Cir. 2004)], Strickland's strong presumption must stand."

Greiner v. Wells, 417 F.3d 305, 326 (2d Cir. 2005).

With these principles in mind, we review the two claims that were the subject of the remand proceedings.

I.

Johnson argues that the circuit court erred in denying relief on his claim that his trial counsel were ineffective for failing to call Marshall Cummings and Sgt. Anthony Richardson to testify at Johnson's second trial after both had

testified at Johnson's first trial, which had resulted in a mistrial.

At the postconviction evidentiary hearing, Johnson presented affidavits executed by Cummings and Sgt. Richardson and copies of the transcript of their testimony from Johnson's first trial. Cummings testified that he was staying at the Crown Sterling hotel at the time of the murder and that he was awakened by people talking in the parking lot at around midnight. He said that about 15 minutes later he heard two gunshots and that he looked out the window of his hotel room. He testified that he saw an individual walking casually toward a car that was parked next to the hotel. The car was light-colored tan or copper-colored and was probably an Oldsmobile Cutlass or a Chevrolet. (This description did not match the car that Johnson was riding in on the night of the murder.) The person took his time to get in the car and drove away from the hotel. After the car drove away, Cummings saw Deputy Hardy's body on the ground.

Sgt. Richardson testified that when Johnson was arrested he was with Ardragus Ford, Yolanda Chambers, and Latanya Henderson in Ford's automobile and that the driver's side door

of Ford's car would not open.

The circuit court made the following findings concerning this claim:

> "At the evidentiary hearing, Mr. Mathis testified he could not remember specifically why he and Mr. Bender did not call Mr. Cummings or Sgt. Richardson to testify at Johnson's second trial.
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> "Mr. Bender, in contrast, testified that he did recall why Mr. Cummings and Sgt. Richardson were not called. Mr. Bender testified that he spoke to all of the jurors from Johnson's first trial. Mr. Bender testified that these jurors told him that he and Mr. Mathis appeared desperate in suggesting that the individual Mr. Cummings saw was the person that murdered Deputy Hardy. Mr. Bender explained:
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>> "'[The jurors] told me, what man would shoot a deputy sheriff between the eyes and leisurely walk away? Who would shoot a deputy sheriff between the eyes, get in his car in a leisurely sort of pace and just cruise out of the parking lot? Okay. And in talking to them and thinking about that, it made sense.'
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> "(H.R. 473)
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> "Mr. Bender also expressed his opinion concerning Mr. Cummings's testimony that voices in the parking lot of the hotel woke him up. Mr. Bender explained:
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>> "'So the conversation that Marshall Cummings heard was just like conversation you and I are having. It wasn't loud. ... He testified that the conversation he heard was just people just talking at a normal sort of level, if these people were talking

at a normal sort of level and they were in the parking lot where Bill Hardy got killed, Mr. Cummings wouldn't have heard it. They wouldn't have woke him up.'

"(H.R. 475-76)

"Based on what jurors had told him, as well as his own opinion about Mr. Cummings's testimony that voices in the parking lot had woken him up, Mr. Bender concluded that 'Marshall Cummings didn't offer anything, thus I didn't call him again.'

"....

"While the affidavits presented by Johnson, concerning jurors' memories of who they spoke to after the first trial, when asked by [Johnson] some 17 years later, may conflict with Mr. Bender's testimony of when and where or if he spoke to jurors following his first trial, the affidavits do not refute Mr. Bender's explicit testimony concerning his memory about how those jurors characterized the impact of Mr. Cummings's testimony -- that Mr. Cummings's testimony made the defense look desperate. Further, Mr. Bender's opinion that Mr. Cummings's testimony that voices from the parking lot woke him up was not plausible was an additional reason for Bender's decision not to call him at Johnson's second trial. Mr. Bender testified that he agreed with the jurors' assessment, that Mr. Cummings had not witnessed the person who was the shooter in this case. The Court also notes that the State had already called witness Larry Osborne to testify in the case-in-chief, who was also a guest at the hotel. His testimony at the second trial was very similar to that of Mr. Cummings; however, he described the car moving away with lights off after the shooting as a 'light green or yellow' GM model car. Cummings's testimony would have been cumulative to Osborne's testimony.

"Moreover, in addition to two alibi witnesses, this Court notes that at Johnson's second trial, one of the alternative defenses Mr. Bender and Mr. Mathis presented was based on the testimony of Yolanda Chambers. Violet Ellison had been called by the State to give very damaging testimony from three-way jail calls, wherein Johnson was attributed to talking about the circumstances of the shooting and admitted to 'I shot the f___ in the head and saw his head go back. He shouldn't have been messing in my s___.' Because of this testimony Ms. Chambers was called to testify by the defense in rebuttal. Ms. Chambers had not been called in the first trial, when Cummings and Sgt. Richardson were called by [Johnson]. She testified that, although Johnson was with her, 20 feet from where Deputy Hardy was shot, it was the codefendant Ardragus Ford, who shot the deputy for no reason. Chambers testified that although Johnson was present at the Crown Sterling [hotel] when Deputy Hardy was shot, Johnson was not involved in the shooting and he did not know the shooting was going to take place. See Johnson v. State, 823 So. 2d 1, 12 (Ala. Crim. App. 2001). In fact, in light of [Johnson's] eliciting this testimony from Ms. Chambers, after the testimony of Violet Ellison in the State's case, the testimony of both Mr. Cummings and Sgt. Richardson was not necessary or relevant in the second trial, and even contradictory to Ms. Chambers's testimony and [Johnson's] theory of the case. Cummings's testimony was also cumulative to that of State's witness, Larry Osborne. This Court finds counsel's decision not to call either of these two witnesses at the second trial to be a reasonable one. Additionally, having determined that Mr. Cummings's testimony was not helpful, this Court further finds that Mr. Bender and Mr. Mathis were not ineffective for failing to call Sgt. Richardson to testify that the driver-side door of the car Johnson was in the morning he was arrested did not open, as Ms. Chambers testified to the condition of the driver's door of the same car that Ardragus Ford was driving,

> occupied by her and Johnson at the crime scene, in [Johnson's] case.
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> "....
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> "This Court finds that Johnson has not proven counsel either ineffective or unreasonable in not calling witnesses Cummings and Sgt. Richardson in the second trial. This Court further finds that based on the testimony in the second trial of Ms. Violet Ellison and Larry Osborne called by the State, and Ms. Chambers, and two alibi witnesses called by [Johnson], and based upon the testimony of Mr. Bender at the evidentiary hearing, the decision not to call these witnesses was one of sound trial strategy at the time. There has been no evidence presented to even suggest that calling these witnesses would have resulted in a different outcome according to the requirements set forth in Strickland [v. Washington, 466 U.S. 668 (1984)]. To show prejudice, a petitioner must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, [466 U.S.] at 694. This Court, therefore, finds that Johnson failed to prove that Mr. Bender and Mr. Mathis were ineffective for not calling either Mr. Cummings or Sgt. Richardson to testify at his second trial."

(Return to Second Remand, Second Suppl. C. 28-32.)

Initially, we note that "[t]he decision not to call a particular witness is usually a tactical decision not constituting ineffective assistance of counsel." Oliver v. State, 435 So. 2d 207, 208-09 (Ala. Crim. App. 1983).

> "'Trial counsel's decisions regarding what theory of the case to pursue represent the epitome of trial strategy.' Flowers v. State, 2010 Ark.

> 364, 370 S.W.3d 228, 232 (2010). 'What defense to carry to the jury, what witnesses to call, and what method of presentation to use is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess.' State v. Miller, 194 W. Va. 3, 16, 459 S.E.2d 114, 127 (1995)."

Clark v. State, [Ms. CR-12-1965, March 13, 2015] ___ So. 3d ___, ___ (Ala. Crim. App. 2015).

Mathis testified that he could not remember why he and Bender did not call Cummings to testify at Johnson's second trial. Bender testified that he represented Johnson in his first trial and that he talked to the 12 jurors and the 2 alternates after the first trial. He said:

> "One of the things that they told me was that we appeared desperate in trying to suggest that this guy that Marshall Cummings saw was the shooter when they said it was clear to them that he wasn't. They told me, what man would shoot a deputy sheriff between the eyes and leisurely walk away? Who would shoot a deputy sheriff between the eyes, get in his car in a leisurely sort of pace and just cruise out of the parking lot? Okay. And in talking to them and thinking about that, it made sense."

(Return to Second Remand, R. 472-73.)

Counsel made a strategic decision not to call Cummings at Johnson's second trial based on counsel's conversations with the jurors from Johnson's first trial. "[S]trategic decisions do not constitute ineffective assistance of counsel if

alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000). "[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).

Johnson argues that Bender's postconviction testimony conflicts with the affidavits of four jurors from Johnson's first trial who stated that they did not talk to counsel; therefore, Johnson argues, counsel could not have made a strategic decision.[4] However,

> "'[w]hen conflicting evidence is presented ... a presumption of correctness is applied to the court's factual determinations.' State v. Hamlet, 913 So. 2d 493, 497 (Ala. Crim. App. 2005). This is true 'whether the dispute is based entirely upon oral testimony or upon a combination of oral testimony and documentary evidence.' Parker Towing Co. v. Triangle Aggregates, Inc., 143 So. 3d 159, 166 (Ala. 2013) (citations omitted). 'The credibility of witnesses is for the trier of fact, whose finding is conclusive on appeal. This Court cannot pass

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[4]During the postconviction proceedings, Johnson presented affidavits from four jurors on Johnson's case and four individuals working on the postconviction proceedings who had spoken to other jurors. Because no juror testified at the postconviction proceedings, none was subject to cross-examination.

> judgment on the truthfulness or falsity of testimony or on the credibility of witnesses.' Hope v. State, 521 So. 2d 1383, 1387 (Ala. Crim. App. 1988). Indeed, it is well settled that, in order to be entitled to relief, a postconviction 'petitioner must convince the trial judge of the truth of his allegation and the judge must "believe" the testimony.' Summers v. State, 366 So. 2d 336, 343 (Ala. Crim. App. 1978). See also Seibert v. State, 343 So. 2d 788, 790 (Ala. 1977)."

Clark v. State, [Ms. CR-12-1965, March 13, 2015] ___ So. 3d ___, ___ (Ala. Crim. App. 2015). We must give deference to the circuit court's findings of fact on this claim.

Moreover, at Johnson's trial, Larry Osborne, also a guest at the Crown Sterling hotel, testified that at around 12:30 a.m. on July 19, 1995, he was awakened by what he thought were gunshots and that he walked to his window and observed a vehicle parked directly below his window. He said that the vehicle was a 1980s model Buick or Pontiac that looked greenish or grayish. On that evening, when Johnson was stopped by police he was in a 1982 black Chevrolet Monte Carlo automobile. Also, the last witness called by the State at Johnson's trial was Officer James Evans, the officer who stopped Johnson on the evening of the murder. Defense counsel asked the following question:

> "[W]e've had eyewitness testimony that the car that

> left the scene was an early '80s model greenish or grayish automobile, 4-door, early '80s. We had one policeman testify that he put out a BOLO for a white Caprice, late model, but neither of them knew anything about a 1982 black Monte Carlo. What I'm getting at is do you have any idea what the source of this information was?"

(Trial R. 588.) Counsel clearly showed that vehicles other than the vehicle Johnson was in when he was arrested were observed near the scene of the murder at the time of the murder. Indeed, the murder occurred in the parking lot of a hotel.

Also, on direct appeal, Johnson argued that his trial counsel were ineffective for failing to present the testimony of three witnesses who allegedly saw a vehicle leave the hotel parking lot shortly after the murder. In finding that counsel were not ineffective in this regard, this Court stated:

> "[T]he mere fact that the descriptions of the vehicle these witnesses saw leaving the scene did not match the vehicle in which Johnson was later found does not support Johnson's alibi defense. During trial, the State presented evidence that the police had received several different descriptions of vehicles allegedly seen leaving the rear parking lot of the hotel on the night of Deputy Hardy's murder and that the police had issued numerous BOLOs for those different vehicles. Only one of these numerous BOLOs matched the vehicle in which Johnson was found the next morning, the BOLO for a black vehicle. Testimony from three additional witnesses regarding three additional descriptions of vehicles

> that did not match the vehicle in which Johnson was later found would have been cumulative and would have added nothing to Johnson's defense.
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> "... [Johnson] further maintains that his counsel should have stressed, as part of their trial strategy, the numerous and varying descriptions of vehicles from witnesses. The record reflects, however, that trial counsel did, in fact, stress the differing descriptions of vehicles that were given by witnesses at the scene during opening statements and during cross-examination of several witnesses."

Johnson, 823 So. 2d at 49-50.

The primary evidence presented by the State against Johnson at his second trial that had not been presented at his first trial was the testimony of Violet Ellison. Ellison testified that she overheard a telephone conversation between Johnson and a person named Daisy and that, during the conversation, Johnson confessed to shooting Deputy Hardy in the head. At Johnson's second trial, counsel presented the testimony of Yolanda Chambers. Chambers testified that she was with Johnson and Ford on the evening of the murder and that Ardragus Ford--not Johnson--shot Officer Hardy. Based on the evidence that was presented at Johnson's second trial, we cannot say that the failure to call Cummings to testify at Johnson's retrial resulted in any prejudice to him.

Neither was Johnson prejudiced by trial counsel's failure

to call Sgt. Richardson as a witness at Johnson's second trial. Chambers testified that the driver's door of Ford's vehicle did open. (Trial Record, R. 756.) Although Bender did testify at the postconviction hearing that the testimony that would have been elicited from Sgt. Richardson was elicited from Chambers, it is not necessary for this Court to reach the question whether counsel were, in fact, ineffective when we can resolve the issue by determining whether Johnson was prejudiced. "[T]here is no reason for a court deciding an ineffective assistance claim to ... address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697. Sgt. Richardson's testimony about the car door would have discredited Chambers's testimony. Based on the evidence in this case, we cannot say that the failure to call Sgt. Richardson at Johnson's retrial resulted in prejudice to Johnson. Johnson failed to satisfy the Strickland test and is due no relief on this claim.

II.

Johnson next argues that the circuit court erred in denying his claim that his trial counsel were ineffective for failing to conduct further investigation and to present more

mitigation evidence at the penalty phase of his capital-murder trial.

We quote extensively from the circuit court's findings of fact on this claim:

> "In addition to Mr. [Darryl] Bender and Mr. [Erskine] Mathis, Johnson called 11 witnesses at the [postconviction] evidentiary hearing. ... Johnson's first witness on the mitigation issue on remand was his paternal uncle, Elmer Johnson. Elmer testified that he and Johnson's father, Ron Sr., and their other siblings grew up in poverty. There were times that they did not have enough food. Their father was a miner and also made moonshine. Their father was also physically abusive toward the children and sometimes would take the children to a shot house where he bought and drank liquor. Elmer said his father was mean when he had been drinking and that his mother and father sometimes fought. He remembers seeing bruises on his mother's face. He testified that his mother shot his father, leaving a scar on his jaw and that his parents eventually were divorced.
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> "Elmer testified that Johnson's father started drinking at a young age, and was drunk everyday. Johnson's father took Johnson to a shot house and Johnson saw his father drunk often. Elmer testified that he witnessed Ron Sr. whip Johnson and on one occasion saw Johnson's father shoot at him. He testified that he 'mostly used to whip them when he was drunk.'
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> "Elmer described Johnson's mother Donna Johnson's parenting as 'unconcerned,' often leaving Johnson alone with his brother, Ron Jr., whom he cared for. Elmer also testified that when Johnson's aunt, Celia Green, was reported missing that Johnson was very hurt, as she had been like a mother to him.

Johnson often cried about the disappearance of 'Mom' and said he really needed her.' This witness served in the Army and had no criminal record that was presented as a part of the evidence.

"Johnson also called another paternal uncle and his father's twin brother, Donald Johnson. Donald testified about growing up with Ron Sr. and their other siblings. They grew up in a coal miner community often scavenging for coal at a dump for fuel to heat their home. His father would get drunk on the weekends and his parents would fight. According to this witness, Johnson's father observed his father swing a hammer at his mother and [break] her arm. Donald also testified about the kids being home one night when his mother shot his father in the jaw. His brother, [Johnson's] father, never graduated from high school, could not read or write, and worked on a garbage truck. Johnson stayed with this witness Donald and his wife Rosa on weekends and in the summer. Johnson had to abide by his rules and fulfill duties around the house. He would have allowed Johnson to live with his family full time, but did not want to split Johnson up from his brother. This witness has been employed all his adult life and will retire from [the University of Alabama at Birmingham] this year. He graduated from high school and no evidence was presented of a criminal record.

"Johnson's mother, Donna Johnson, testified that she got pregnant with Johnson at age 17. After she got pregnant, she and Ron Sr. married. Donna testified that Ron Sr. drank every day. She also testified that they separated because of Ron Sr.'s infidelity. At some point Donna moved with her family to the Tuxedo Housing Project, also known as the Brickyard. Donna testified that there was significant crime at the Brickyard. Donna worked night shifts, 8 p.m. to 8 a.m. Her boyfriend, Jesse Stephens, used and sold drugs from her home.

"Donna testified that growing up, her step-father, Drake Burks, drank heavily and treated Donna and her siblings different than his own children. According to this witness he abused her sexually. She also said that Burks would fight with Donna's mother when he drank. Donna testified that she was too young to be a mother and that Johnson's Aunt Celia 'raised my baby.' She testified that she went to Mr. Bender's office to meet with him before testifying at the trial. Johnson's mother has a history of unemployment. There was no evidence of a criminal record of this witness introduced at the hearing.

"Johnson's maternal aunt, Cornell Brown, testified she and Donna were raised in a house with 14 children and they were poor. Ms. Brown also stated that Drake Burks made sexual advances toward her and Donna. After Donna became pregnant, she dropped out of high school. She also testified about Ron Sr. cheating on Donna. Ms. Brown testified that after Donna and Ron Sr. separated, Donna moved with her boys to the Brickyard. She also lived there too for part of the time. Ms. Brown stated that the Brickyard was a high crime area and she often heard guns being fired. She also testified that Donna's boyfriend, Jesse Stephens, sold and used drugs. She would help Donna and her nephews out financially.

"Ronald Johnson, Jr., Johnson's younger brother by six years, testified about growing up in Pratt City. Ron Jr. testified that his father drank daily and sometimes took him and Johnson to a shot house. Ron Jr. testified that after his mother and father separated that [his mother], he, and Johnson, moved to the Brickyard. Ron Jr. saw drugs being sold in the Brickyard and also heard gunshots. Jesse smoked crack in the house with him and Johnson and was violent toward his mother Donna. Ron Jr. also testified that friends of his and Johnson's were victims of homicide. Ron Jr. also gave testimony of

how the disappearance of their Aunt Celia Green had hurt Johnson. The witness is on probation for selling drugs.

"Vicky Thomas, Johnson's cousin, testified that she and Johnson were close growing up. She attended college on a full scholarship and has her own tax office. She has been employed for 17 years with AT&T. She had also witnessed Johnson's father drunk. She testified that Johnson would come over and stay at her house on the weekends, and no one ever 'came after him.' He followed the rules of her household. Ms. Thomas expressed her opinion about the Brickyard and stated that Johnson had lost friends to homicide. She was away at college during the trial. This witness has no criminal record.

"Latrice Taylor, a friend and former neighbor from the Brickyard, testified that Donna was 'treated bad' by Jesse Stephens. She also testified that Donna sometimes left Johnson and Ron Jr. with Jesse and that Johnson took care of his brother alone. Ms. Taylor said there was a lot of crime and violence at the Brickyard. She said that she and Johnson witnessed a man killed near their homes, and that Johnson had been shot himself. The witness graduated from high school and is on disability. No criminal record of this witness was introduced at the hearing.

"Johnson called his cousin Antonio Green. Mr. Green testified about his observations of Ron Sr.'s drinking. Mr. Green also testified that he had seen Ron Sr. verbally and physically abuse Johnson as well as Donna. He heard Johnson's father call Johnson worthless and said he wished he (Johnson) had never been born. Mr. Green stated that his mother, Celia, and Johnson had a mother-son type relationship. Celia disappeared on October 12, 1990, when Johnson was 16 or 17 years old. According to Mr. Green, Johnson showed a lot of grief when Celia disappeared and he did not see as much of him thereafter. He testified that after his

mother Celia's disappearance he would see Johnson drunk and that he smoked marijuana. This witness graduated from high school and has been employed for over 16 years at the railroad. He testified in the second trial in the penalty phase. This witness had no criminal record introduced at the hearing.

"Johnson presented Ms. Lori James-Townes, a licensed clinical social worker, currently working in the Maryland Public Defender's office. Ms. James-Townes listened to the testimony of witnesses and expressed her opinions as to certain 'risk' factors she found present in Johnson's background. The risk factors she testified to included a history of family violence, alcohol and drug usage, poverty, community violence, school failure, unresolved grief due to the loss of his Aunt Celia, dysfunctional family, and abandonment issues. According to Ms. James-Townes, these factors adversely affected Johnson's development, and he was susceptible to repeating behavior or being damaged in all areas of risk. She testified that 'love' in Johnson's family did not buffer or remove him from the risks his family suffered. In Johnson's case the risks outweighed the love in the family and for Johnson, and created a dysfunctional family.

"....

"Mr. Bender testified that at the time of Johnson's second trial he had handled 6 or 7 capital murder cases. Mr. Bender assumed the primary responsibility for the investigation and development of the mitigation in this case although Mr. Mathis presented the evidence at the sentencing. Mr. Mathis has very little memory of his participation in working on mitigation in this case. Mr. Bender's testimony, as well as his time sheets, clearly establish that he investigated numerous aspects of Johnson's background for potential mitigation evidence. Mr. Bender contacted numerous members of Johnson's family, neighbors, and friends as well as staff members at Jefferson County Youth Detention

Center to learn about Johnson's behavior and attitude while he was incarcerated. He also contacted pastors and members of Johnson's church, St. John's Baptist Church of Pratt City. Mr. Bender testified he grew up in the Pratt City area himself. Mr. Bender investigated aspects of Johnson's school background as well as had a number of meetings with Johnson's mother, Donna. He also consulted with defense attorney Joe Morgan for ideas on mitigation. Mr. Bender's time sheets establish that he spent a minimum of 98.8 hours investigating potential mitigation. Mr. Bender testified that the time list was not reflective of all the time he spent preparing for the mitigation presentation in this case. He testified that the way he prepared for a capital case he would have presented all the mitigation at the penalty phase in front of the jury, not holding anything back to present to Judge [Alfred] Bahakel. Therefore, all the evidence he had developed for mitigation purposes was presented at trial and was heard by Judge Bahakel.

"....

"... While this Court finds the lay and the expert mitigation witnesses called at the evidentiary hearing credible and their testimony compelling, given the findings of the jury and the trial judge of the two aggravating circumstances, this Court finds that such evidence would have had minimal, if any, additional mitigation value in the judge's weighing process. It is apparent to this Court, given the facts of this case, that the murder of Deputy Hardy cannot be explained or mitigated based upon the risk factors testified to by Johnson's mitigation expert that had affected Johnson's development. This murder was not the culmination of Johnson having been subjected to physical abuse, poor parenting, poverty, alcohol or drug abuse or any combination of any of these events or conditions in his childhood or adolescence. Except for a drug case, [Johnson] had not had any other contact with law enforcement and had never

gotten into trouble, according to his mother's testimony at the sentencing hearing at the penalty phase of the trial. She testified that he had never hurt anyone. He was described by Tony Green as a well mannered and decent person growing up, 'the good guy all around.' There was certainly no evidence presented to the jury or judge that [Johnson] had ever been violent, or suffered in any way from violence against him in childhood. The deputy in uniform in this case was shot twice in the forehead at close range according to the coroner. Violet Ellison had testified at trial that Johnson said in a three-way jail conversation 'I shot the f___ in the head and saw his head go back. He shouldn't have been messing in my s___.' Even if the judge had heard all the mitigation evidence presented at the evidentiary hearing and had considered it in total to be a nonstatutory mitigator, given the horrific, cold-blooded facts of this case, the jury's recommendation for death, and the two aggravating circumstances found by the judge, this Court finds it not 'reasonably probable' that Judge Bahakel would have weighed the aggravating factors and mitigating factors, and come to any different result. Additionally, this Court finds that although Mr. Bender and Mr. Mathis or any lawyer in hindsight could have presented more detail and called additional witnesses such as in the evidentiary hearing, it could have posed as much harm as good. For instance, a number of Johnson's family members and friends were exposed to poverty, alcoholism, violence, and abuse during their youth and adulthood; however, they did not find themselves in the same position as Johnson and achieved jobs and education without criminal records.

"....

"At Johnson's trial the State proved beyond a reasonable doubt that two statutory aggravating circumstances existed: (1) that Johnson murdered Deputy Hardy while Johnson was under a sentence of imprisonment; and (2) that Johnson murdered Deputy

> Hardy to disrupt or to hinder the lawful exercise of a governmental function or the enforcement of laws. While Johnson's age at the time of the offense, 22 years, was considered by the trial court as a statutory mitigating circumstance, this court finds that it was not a strong one when weighing it against the aggravators proven by the State. Following an extensive mitigation investigation by Mr. Bender, he and Mr. Mathis strategically chose to present evidence from the witnesses they called at the penalty phase in an attempt to humanize Johnson and to rely on a plea for mercy. Additional friends and family, or even a mitigation expert, while perhaps available to testify during the second trial, would have been subject to a much more rigorous cross-examination than they were at the evidentiary, and possibly rebutted by the State. ...
>
> "This Court finds that even if the evidence presented at the evidentiary hearing had been presented during the judicial sentencing hearing, it would not have altered the balance of the aggravating and mitigating circumstances and would have had no impact on the final sentence imposed.[[5]] This Court finds that Johnson failed to prove by a preponderance of the evidence that Mr. Bender and Mr. Mathis were ineffective for failing to present additional mitigation evidence via records or witness testimony related to his background at the judicial sentencing hearing."

(Return to Second Remand, Second Suppl. C. 34-47.)

At the postconviction evidentiary hearing, Johnson presented the testimony of seven relatives: Johnson's mother, Donna Johnson; his brother, Ronald Johnson; three uncles,

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[5]The judge presiding over the postconviction proceeding was not the same judge who sentenced Johnson to death.

Elmer Johnson, Cornell Brown, and Donald Johnson; and two cousins, Vicky Thomas and Antonio Green.

Elmer Johnson, Johnson's paternal uncle, testified that Johnson's father frequently drank and would get angry and that Johnson's father would "whip [Johnson and his brother] ... when he was drunk." Antonio Green, Johnson's cousin, testified that Johnson's father is an alcoholic, that when he drinks in excess he would be verbally and physically abusive to Johnson. Ronald Johnson, Johnson's younger brother, testified that his father drank a lot and would frequently take him and Johnson to a shot house in the neighborhood, that when his mother and father separated he moved with his mother and Johnson to Ensley to a project called the Brickyard, that his mother's boyfriend, Jesse Stephens, moved in with them, and that Stephens drank and would become violent toward him and his mother. Johnson's other four relatives did not testify concerning any physical abuse that took place during Johnson's childhood.

Bender, at the postconviction evidentiary hearing, testified that he could not remember whether he was told by Johnson or his mother about physical abuse in the Johnson

household.[6] The following occurred:

> "[Assistant attorney general]: And concerning his background and his upbringing -- ToForest's upbringing -- you spoke several times to his mother, Donna; correct?
>
> "[Bender]: Spoke often to his mother.
>
> "[Assistant attorney general]: And to your client, ToForest; correct?
>
> "[Bender]: Yes.
>
> "[Assistant attorney general]: And the purpose of that for mitigation, you were trying to find out information? Whether to use it or not, you still wanted to know concerning --
>
> "[Bender]: His history.
>
> "[Assistant attorney general]: -- how the family unit and how the upbringing occurred; right?
>
> "[Bender]: Correct.
>
> "[Assistant attorney general]: Were you told that there was domestic violence in the family?
>
> "[Bender]: I don't remember that. It could have been, but I don't remember that. I don't remember her saying -- let me -- I'll answer it this way. I don't remember the specifics of any conversation that I had with her. But what I gathered from it all was that she was strong, that she did a heck of a job with what she had."

(Return to Second Remand, R. 489-90.)

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[6]Bender testified that he had had six boxes of files related to Johnson's case but was not in possession of those files because he had given them to appellate counsel.

Nothing in the record indicates that counsel had been told by Johnson or his mother about physical abuse in the Johnson household. A review of the record of Johnson's trial shows that the presentence report states that Johnson had a good relationship with his father and that his mother was the "parent that unders[tood] him." (Trial Record, R. 88.)

> "'A defense attorney is not required to investigate all leads, however, and "there is no per se rule that evidence of a criminal defendant's troubled childhood must always be presented as mitigating evidence in the penalty phase of a capital case."' Bolender [v. Singletary], 16 F.3d [1547,] at 1557 [(11th Cir. 1994)] (footnote omitted) (quoting Devier v. Zant, 3 F.3d 1445, 1453 (11th Cir. 1993), cert. denied, 513 U.S. 1161, 115 S. Ct. 1125, 130 L. Ed. 2d 1087 (1995)). 'Indeed, "[c]ounsel has no absolute duty to present mitigating character evidence at all, and trial counsel's failure to present mitigating evidence is not per se ineffective assistance of counsel."' Bolender, 16 F.3d at 1557 (citations omitted)."

Marek v. Singletary, 62 F.3d 1295, 1300 (11th Cir. 1995).

> "'In evaluating the reasonableness of a defense attorney's investigation, we weigh heavily the information provided by the defendant.' Newland v. Hall, 527 F.3d 1162, 1202 (11th Cir. 2008), cert. denied, 555 U.S. 1183, 129 S. Ct. 1336, 173 L. Ed. 2d 607 (2009). Indeed, a defense attorney 'does not render ineffective assistance by failing to discover and develop evidence of childhood abuse that his client does not mention to him.' Id. Here, there is no evidence that [the appellant] mentioned to his trial or appellate counsel or to any mental health experts (before trial or even afterward) that he had any family history of mental illness or that there

> was significant internal strife or dysfunction in his family."

DeYoung v. Schofield, 609 F.3d 1260, 1288 (11th Cir. 2010). "The Constitution imposes no burden on counsel to scour a defendant's background for potential abuse given the defendant's contrary representations or failure to mention the abuse." Stewart v. Secretary, Dep't of Corr., 476 F.3d 1193, 1211 (11th Cir. 2007).

More importantly, it is clear from a review of the record that this is not a case where trial counsel conducted no investigation into mitigation evidence or where counsel were ignorant as to what evidence constituted mitigating evidence. The State submitted Bender's attorney-fee declarations for Johnson's first trial that ended in a mistrial and his second trial that ended in his conviction and sentence of death. Bender's attorney declarations show that, in Johnson's first trial, Bender spent 111 hours in out-of-court preparation on the case--57 of those hours were used to investigate mitigation.[7] This itemization shows that Bender spoke to Johnson's mother on multiple occasions, that he contacted the

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[7]Bender's attorney-fee declaration specified that he spent 57 hours investigating possible mitigating evidence.

Birmingham Board of Education to obtain Johnson's school records, that he talked to the principal of Johnson's high school, that he spoke to members of Johnson's family on multiple occasions, that he spoke to Johnson's aunt who lived in Detroit, Michigan, that he spoke to numerous possible mitigation witnesses, that he talked with the staff at the Jefferson County Youth Detention Center, and that he spoke to Johnson's pastor. For the second trial, Bender billed for 81 hours for his out-of-court time spent on the case; 41 of those hours were spent in investigating mitigation. This itemization shows that Bender went to Pratt City, where Johnson was raised, to speak with various people, and that he spoke to Johnson's mother on multiple occasions.

When considering whether a postconviction petitioner alleging ineffectiveness of counsel can establish prejudice in the penalty phase of a capital-murder trial, we may "reweigh the evidence in aggravation against the totality of available mitigating evidence." Wiggins v. Smith, 539 U.S. 510, 534 (2003).

At the penalty phase, counsel presented the testimony of Donna Johnson, Johnson's mother; Bessie Burts, Johnson's maternal grandmother; and Antonio Green, Johnson's cousin.

Johnson's mother testified that Johnson is the older of her two children; that Johnson has a younger brother; that she raised the two children by herself; that Johnson was living with her at the time of the murder; that Johnson attended, but did not graduate from, high school; that he got a job at a Shoney's restaurant after he left high school; that Johnson has many aunts, uncles, and cousins; that Johnson has five children; that Johnson had never been in trouble for hurting anyone but had only been involved with drugs; that she loved her son; and that she hoped the jury would spare Johnson's life. She further testified that she and Johnson's father had been separated for 19 years and that approximately 1 year before trial Johnson's father got hit by a motor vehicle and was rendered blind as a result of the accident.

Bessie Burts testified that she has a close relationship with Johnson, that she has 15 grandchildren, that she had never known Johnson to hurt anyone, that she loved her grandson, and that she prayed that the jury would spare Johnson's life.

Antonio Green testified that he is Johnson's first cousin; that Johnson's mother had a difficult time raising Johnson and there was no father around for Johnson; that

Johnson was a decent person "growing up"; that his grandfather tried to help Johnson's mother, but he was old; and that he hoped the jury would spare Johnson's life.

It is true that no testimony was elicited that Johnson's father had been physically abusive to Johnson when he drank. However,

> "[e]vidence of childhood abuse has been described as a double-edged sword. See Johnson v. Cockrell, 306 F.3d 249, 253 (5th Cir. 2002) (evidence of brain injury, abusive childhood, and drug and alcohol abuse was 'double edged' because it would support a finding of future dangerousness). See also Miniel v. Cockrell, 339 F.3d 331 (5th Cir. 2003); Harris v. Cockrell, 313 F.3d 238 (5th Cir. 2002)."

Davis v. State, 9 So. 3d 539, 566 (Ala. Crim. App. 2008). Two statutory aggravating circumstances were proven by the State: that Johnson committed the murder while under a sentence of imprisonment and that Johnson murdered Deputy Hardy to disrupt or to hinder a governmental function or the enforcement of laws. Johnson was 22 years of age at the time of the murder. The postconviction court found that the omitted mitigation evidence would not have resulted in a different sentence. After reweighing all the mitigating circumstances, including the omitted mitigation, against the aggravating circumstances, we agree with the circuit court that the omitted mitigation

would not have changed Johnson's sentence. Johnson failed to satisfy the Strickland standard in regard to this claim and is due no relief.

For the foregoing reasons, we affirm the circuit court's denial of Johnson's postconviction petition.

AFFIRMED.

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