EXHIBIT "A"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-10714-F

MICHAEL KENNEDY,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Michael Kennedy is a Florida prisoner serving a 20-year sentence after a jury found him guilty of aggravated assault and shooting deadly missiles. Kennedy filed a *pro se* 28 U.S.C. § 2254 federal habeas corpus petition, raising eight grounds. After conceding certain grounds, the remaining claims were as follows:

> (3) Ineffective assistance of counsel ("IAC") because his counsel did not investigate and present witnesses to establish that his waiver of his *Miranda v. Arizona*, 384 U.S. 436 (1966), rights and his consent to search his vehicle were involuntary due to intoxication;
>
> (4) His counsel was ineffective for conceding his guilt without his consent;
> (5) His counsel was ineffective for failing to move for a mistrial when the trial court prohibited him from arguing that the victim was not in fear; and
>
> (8) His counsel was ineffective for failing to investigate and present a defense that Kennedy did not shoot at, within, or into, the victim's vehicle.

The district court denied the petition and a certificate of appealability ("COA"). Kennedy now moves this Court for a COA and leave to proceed *in forma pauperis* ("IFP").

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court." *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999); 28 U.S.C. § 2254(b)(1). If a claim is unexhausted then it is subject to procedural default in federal court. *Bailey v. Nagle*, 172 F.3d 1299, 1302-03 (11th Cir. 1999). Ineffective assistance of counsel during collateral proceedings may establish cause for such procedural default. *Martinez v. Ryan*, 566 U.S. 1, 9, 13 (2012). In such instances, the petitioner "must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the [petitioner] must demonstrate that the claim has some merit." *Id.* at 14. If a state court has adjudicated a claim on the merits, a federal court may grant habeas relief only if the decision of the state court (1) was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or (2) was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(1), (2).

To make a successful IAC claim, a defendant must show both that (1) his counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Failure to preserve a claim for appellate review is, by itself, insufficient to demonstrate prejudice. *Purvis v. Crosby*, 451 F.3d 734, 739 (11th Cir. 2006).

A strategic decision by counsel "will be held to have been ineffective assistance only if it was so patently unreasonable that no competent attorney would have chosen it." *Dingle v. Sec'y for Dep't of Corr.*, 480 F.3d 1092, 1099 (11th Cir. 2007) (quotation marks omitted). Which "witnesses, if any, to call . . . is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess." *Conklin v. Schofield*, 366 F.3d 1191, 1204 (11th Cir. 2004). Mere speculation that a missing witness would be helpful is insufficient to establish a *Strickland* violation. *Johnson v. Alabama*, 256 F.3d 1156, 1187 (11th Cir. 2001).

Here, the state post-conviction court did not unreasonably apply *Strickland* to Kennedy's Claims 1, 2, and 4. *See* 28 U.S.C. § 2254(d)(1). As to Claim 1, Kennedy merely speculated that certain witnesses would have been helpful, which is insufficient to establish a *Strickland* violation. *See Johnson*, 256 F.3d at 1187. As to Claim 2, his counsel's decision to concede that he may have committed some form of wrongdoing was not a strategic decision that was so patently unreasonable that no competent attorney would have chosen it. *See Dingle*, 480 F.3d at 1099. As to Claim 4, Kennedy's argument is premised on his counsel's failure to preserve an appellate issue, and such an argument is simply insufficient for IAC purposes. *See Purvis*, 451 F.3d at 739. As to Claim 8, reasonable jurists would not debate the district court's determination that Claim 8 was procedurally defaulted. *See Slack*, 529 U.S. at 484; *Bailey*, 172 F.3d at 1302-03. The court also correctly determined that Kennedy failed to establish that this claim was substantial for purposes of excusing his procedural default. *See Martinez*, 566 U.S. at 14. Accordingly, Kennedy's motion for a COA is DENIED and his motion for leave to proceed IFP is DENIED AS MOOT.

UNITED STATES CIRCUIT JUDGE

EXHIBIT "B"

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FOR THE ELEVENTH CIRCUIT

No. 21-10714-F

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versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

Before: JILL PRYOR and LAGOA, Circuit Judges.

BY THE COURT:

Michael Kennedy has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated February 8, 2022, denying his motion for a certificate of appealability and denying as moot his motion for leave to proceed *in forma pauperis* on appeal, following the district court's denial of his *pro se* 28 U.S.C. § 2254 federal habeas corpus petition. Because Kennedy has offered no new evidence or arguments of merit to warrant relief, his motion for reconsideration is DENIED.